CENTRAL ASSOCIATION OF AGRICULTURAL VALUERS

Secretary and Adviser

Scottish Law Commission,
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By e-mail to - info@scotlawcom.gsi.gov.uk

Dear Sirs,

Consultation on Reform of the Compulsory Purchase Regime in Scotland
Response by the Central Association of Agricultural Valuers (CAAV and the Scottish Agricultural Arbiters and Valuers Association (SAAVA)

1. Introduction

I write on behalf of the Central Association of Agricultural Valuers (CAAV) and the Scottish Agricultural Arbiters and Valuers Association (SAAVA) in response to the consultation paper produced by the Scottish Law Commission on reform of the Compulsory Purchase Regime in Scotland.

The CAAV is the national professional association for those advising and acting for agricultural and rural businesses. It represents, briefs and qualifies some 2,700 members (some 1,600 Fellows) who advise and act on the very varied matters affecting rural and agricultural businesses and property throughout Great Britain and has now agreed the affiliation of the Northern Irish Rural Valuers Association. Instructed by a wide range of clients, including farmers, owners, lenders, public authorities, conservation bodies, utility providers, government agencies and others, this work requires an understanding of practical issues, bringing together a wide range of skills with an emphasis on appraisal and practical judgment.

In Scotland, the Scottish Agricultural Arbiters and Valuers Association is affiliated to the CAAV and represents the Borders Valuers, the South West Valuers Association and the North East Valuers Association.

The CAAV does not exist to lobby on behalf of any particular interest but rather, knowing its members will be called on to act or advise both Government and private interests under developing policies, aims to ensure that they are designed in as practical a way as possible, taking account of circumstances.

Compulsory purchase is a major area of work for many members as much of this activity either consists of inter-urban works necessarily crossing the countryside (like roads, railways, or arterial works for utilities) or works for which a rural location is logical (such as bypasses, reservoirs, power lines from rural renewable energy sources). While there has been more recent experience of substantial road and railway schemes (such as the 40 mile Aberdeen Western Peripheral Road) , there is much day-to-day experience of compulsory purchase and compensation work with utilities works from water pipes to the large Beauly/Denny high voltage power line.

In preparing this response we have consulted our membership generally and our technical Valuation, Compensation and Taxation (VCT) and Scottish Committees in particular.

We start this response by offering some overall comments and then consider the consultation questions as posed.

2. General Comments

a) Compulsory Purchase

Powers of compulsory purchase are a remarkable privilege granted by statute to enable an entity (in practice, the state or a state-sanctioned corporation) to use the force of law to enforce the taking of private property, whether someone's home, business or other land.

Enhancing and broadening the state's powers to take private property beyond the narrow areas where it can clearly be warranted is harmful to the principles of the liberal market economy that support growth and endeavour. Affected property, often people's homes or the places where they make their livelihood and their largest single purchase, requires long term stability as does the investment market in property. Jeopardising that can intrude seriously on the affected people and more widely have adverse consequences for the economy in future. It is important on both these grounds that there be certainty in the process – powers should be defined and subject to time limits. Most affected parties are individuals and families for whom the procedures of compulsory purchase from original concept to final implementation can take a significant part of a life.

That properly lays an onus on the body with that privilege to use it with care for those from whom it is taking their property. Ideally, much should be achieved by negotiation. Due process should always be followed.

b) The Process

Under the present CPO regime a landowner 'sells' his property to a third party not knowing the price he will be paid for the property or even when he may receive such monies. He will receive no interest on any sums due from the time he is dispossessed until the time his claim may eventually be resolved. He is not entitled to any payment for the stress or inconvenience this may cause him or his family.

We are not aware of any other situation where a landowner would willingly enter into such an agreement.

c) Other CPO Issues

We note that the Law Commission does not propose to deal with: -

i. Blight

Blight was a key issue identified in the 2001 Scottish Executive Central Research Unit Paper *Review of Compulsory Purchase and Law Compensation.*

There is a general acceptance that the promotion of, or indeed the threat of compulsory purchase, tends to act as a blighting effect on the marketability of property and associated value. This blight in practice arises as soon as a CPO corridor is announced. The timescales involved in the CPO process are long and this tends to exacerbate the effect of blight. It can prove extremely difficult for property owners to dispose of their properties in the vicinity of any CPO scheme.

Blight notices are currently restricted to owner-occupiers and are subject to a limitation by rateable value for non-residential properties. Yet, the blighting effect of a scheme does not discriminate between different property types, interests and values.

There are a number of strict criteria that have to be met prior to any Blight Notice being valid in current legislation. The default position of acquiring authorities on receipt of a Blight Notice is to reject that Notice on the basis that at least one criterion has not been met – and thus the Notice fails. The effect of not being able to dispose of one's principal asset or alternatively being left in limbo for a considerable time prior to compulsory acquisition is manifestly unjust. We urge that the circumstances within which a Blight Notice can be served should be considerably widened.

The requirement that reasonable efforts must have been made to dispose of a property on the open market before it is possible to serve a Blight Notice should also be removed. This is especially so nowadays with regard to residential properties in Scotland as a consequence of the introduction in 2009 of the Home Report. Whilst such a Report tends to focus on the state of repair/condition of the property relevant factors, such as the threat of compulsory purchase, will also be taken into account and will undoubtedly affect marketability and value. It is common practice for potential purchasers of the property to view the Home Report on-line prior to undertaking any physical viewing of the property. The bare mention of even a threat of compulsory purchase tends to destroy market interest in a property while the residential property owner will have incurred a cost in instructing the preparation of a Home Report.

ii. Injurious Affection Where No Land is Taken

Statute has, on the one hand, recognised that blight does not stop at the boundaries of a scheme but, on the other hand, has limited the amount of compensation that can be paid in such circumstances. Compensation can only be paid for the loss in value caused by the seven physical factors as stated in the Act and from no other cause arising from the scheme (such as a loss of a view, privacy or amenity) only because of the simple chance that no land has been taken from that property owner.

Reform is also required in respect of these provisions.

Compensation should be on the basis of full loss.

For any CPO, the acquiring authority should be under a duty to consider the effect of the scheme on such properties and therefore be under a statutory obligation to reduce the effects of its public work by providing sound insulation and other mitigating works as relevant in the circumstances.

iii. Part 1 and Part 2 Claims

We note that the consultation document does not address the topic of Part 1 claims. Our members report that acquiring authorities are taking an increasingly defensive stance on Part 1 claims, even though there is evidence that properties are genuinely permanently adversely affected by new public works. The problem is that the current Tribunal system does not allow a "quick fix" hearing for these sorts of claims if the acquiring authority will not agree to a simplified procedure and so the complex and costly dispute resolution procedure can discourage claimants from pursuing a legitimate claim. One member reported that a number of Part 1 claims brought against Network Rail in the Midlands recently suffered exactly this fate. Whilst the Tribunal rules do allow for a pre-hearing costs award to cap fees for the applicant, this process itself can be costly and time consuming.

We have real concerns that homeowners with genuine claims will not have access to justice unless there is an initial automatic referral to a simplified procedure in cases where points of law are not in dispute.

Further, the omission of significant discussion of the **powers and procedures of the utilities** that form such a major part of compulsory purchase work is striking

All these issues are parts of the whole CPO regime and should also be addressed as part of this reform. Excluding consideration of them is a serious omission.

d) Design and Build

Current CPO legislation is more appropriate to the age where the acquiring authority itself, usually a public body, designed, promoted and then built the scheme.

However, most major projects are not now carried out by an acquiring authority but by private companies acting on their behalf. This means that a third party, which is not the acquirer is in reality the prime actor and has the simple motivation of minimising its costs at every turn, so paying the affected party as little as possible and avoiding extra expenses (whether directly or in staff time), at least as much motivated by its simple commercial interests as the proper delivery of public service. Any revised legislation must address the current practice and ensure that any agents for the acquiring authority have a clear responsibility in the CPO process.

The traditional approach for construction projects consists of the appointment of a designer on one side, and the appointment of a contractor on the other side; the acquiring authority remaining in full control of the project and the land. The development of the design and build procurement route in recent years changes this:-

- The acquiring authority engages agents to design the scheme in general terms but after the CPO the project is put out to tender. For example, the design and promotion of the AWPR was carried out by

Jacobs (who are also instructed in respect of the A96 improvements). It is they who carried out the actual design of the scheme and the requisite EIA's in accordance with the Design Manual for Roads and Bridges (DMRB) on behalf of Transport Scotland. It is they who are providing advice to the District Valuer in respect of disputes.

- Once a scheme has been successfully promoted, it is now usual to put the work out to tender and for the scheme to be delivered on a design and build basis.
- Prospective contractors tender a price to complete design and perform construction. The tendering is usually competitive and the best "overall submission" should win (assessed on price, design, programme etc)
- The winning contractor carries out detailed design and construction through employed design consultants and sub-contractors
- In reality, it is then the contractor more than the acquirer who ha practical and effective control of acquired land for the construction period and then thereafter for maintenance periods of up 30 years.
- The successful contractor is responsible for the delivery of the scheme and its maintenance

The thinking behind the design and build process is that the successful tender will give savings by tailoring their detailed design of the scheme using their particular experience and skill set. It may answer an acquiring authority's wish for a single point of responsibility in an attempt to reduce risks and overall costs but, from the point of view of affected parties, it allows the acquiring authority to attempt to abrogate its responsibility of the scheme to the contractor.

This adds a new element to the traditional operation of compulsory purchase as the contractor, now in reality the prime actor but with whom the affected parties have no legal relationship, solely has the duty of delivering the contract on a commercial basis with no necessary wider public obligations.

The main issues of this process in relation to the current CPO regime are:-

- The acquiring authority relinquishes control over design and implementation. This frequently gives rise to quality issues.

- Adversarial attitudes between the contractor and the acquiring authority remain; these are perhaps worse than traditional contractor routes because of the large tender sums involved and the drive of the successful tenderer to save on costs.

- The acquiring authority is, in our experience, reluctant to agree any variation to the scheme after the contract is let because of the nature of the contract with the contractor.

- The acquiring authority attempts to abrogate any responsibility regarding issues during construction to the contractor. The contractor as a private company (whose only direct relationship in this is with the acquirer) tends to ignore the landowners affected by the scheme.

This leaves the affected landowners in such schemes in an unenviable position adding to their costs in dealing with issues arising during the process.

e) Time Taken in the CPO Process

We appreciate the aim of the proposals is to make the compulsory process clearer, fairer and faster. In so doing the process must also balance private property rights and public interest.

Timeliness is frequently a problem in compulsory purchase. This is not only a concern to those promoting schemes but also an issue for affected landowners. This may be due, for example, to undue delays in the planning or appeals process leading up to confirmation of a CPO, or conversely acquirers finding themselves short of time and so take undue haste in taking entry. During the period between the announcement of a scheme and its implementation, property in the vicinity of the proposed works (and any alternatives) is effectively blighted. The practical impact of this period for affected parties has been extended by the much greater early activity of intrusive surveys when assessing possible routes and developing schemes.

There are then considerable delays in the assessment and payment of compensation. Members report long delays in responses to submissions – a case just noted has not had a reply in over a year. The claimant has no effective means to accelerate this, beyond taking it to the LTS (as has already happened with a number of AWPR claims).

f) Claimant's Costs Incurred Before Confirmation of a CPO

The long procurement process and the tendency to consult on options, however desirable, leads to uncertainty for those property owners along the corridor of any scheme that is mooted. Such 'blight' on alternative corridors remains until the actual route is finalised but then still remains in respect of the scheme route until the vesting date.

In the case of the AWPR, the uncertainty remained from the date of the announcement of the alternative route in 2006 until the vesting date in 2013. The 'roadshow' for improvements to the A96 has already 'blighted' properties along the route options. This will continue until the scheme is delivered.

Any revised legislation should contain clear duties on an acquiring authority towards affected parties during the design, promotion and implementation of any CPO scheme.

g) Taxation

There are a number of aspects of the interaction of the compulsory purchase regime with the taxation of property which can cause hardship to claimants and which could be ameliorated by Government intervention. In particular, the conversion of a property asset which might qualify for valuable reliefs from capital taxes into a sum of cash which would be fully taxable (as, for example, on death) can be especially problematic in the rural property sector.

While there is an alternative CGT roll-over relief regime for assessed gains made on CPO disposals (which may of course be nominal gains rather than real), this has at least two deficiencies in practice:

- the time limits are absolute without the HMRC discretion available for the main form of roll-over relief
- it is understood that, while gains can be rolled over into buying a new building, they cannot be rolled over into building a new building on retained land.

The limited availability of convenient land for purchase in the rural market makes both these points difficult.

PART 1: INTRODUCTORY AND GENERAL

Chapter 1 Introduction

1. The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.

(Paragraph 1.14)

Comments on Question 1

Yes. The current legislation set out in various statutes and amending statutes over the 170 years since 1845 is cumbersome for all concerned. Consolidation is desirable as is a review in the light of contemporary circumstances.

We agree that there should be a single standard procedure. This procedure should entail: -

a) Promotion of draft CPO

b) Time for objections

c) Hearing or Inquiry

d) Procedure for confirmation/modification/rejection of draft CPO

e) Vesting (include a requirement to provide broad details of any claim)

f) Date for declaring formal completion of the scheme.

Chapter 2 General issues

2. For the purposes of compulsory purchase, is the current definition of “land”, set out in the 2010 Act, satisfactory?

(Paragraph 2.56)

Comments on Question 2

Yes. However, any doubt as to its comprehensiveness of the interests that may be acquired should be resolved by broadening it.

3. Should the general power to acquire land compulsorily include power to create new rights or interests in or over land?

(Paragraph 2.70)

Comments on Question 3

Yes – with compensation for losses arising from that creation.

New legislation should provide that any CPO should be proportionate to the need and seek only the means that are least intrusive on those who could be affected.

We endorse the comment that acquiring authorities attempt to impose conditions as part of servitudes, understanding the need for such rights (such as building over electrical cables etc).

4. What comments do consultees have on the relationship between the compulsory acquisition of new rights or interests in or over land and general property law?

(Paragraph 2.70)

Comments on Question 4

Members report that electricity undertakers, for example, frequently seek CPO rights for cables (e.g. for offshore windfarms) where less intrusive powers exist (necessary wayleave procedure). The CPO route is sought by cable operators in preference to necessary wayleaves as they can then sell on any rights they acquire for monetary gain.

If the general power to acquire new rights or interests in or over land are to be included, there should be a general duty on an acquiring authority to use the least intrusive mechanism available, in effect enshrining in law the comment at paragraph 3.4.2.

5. Would a general power to take temporary possession, as described in paragraphs 2.71 to 2.73, be useful for acquiring authorities, and, if so, what features should it have?

(Paragraph 2.73)

Comments on Question 5

While we understand the need, especially by contractors working on a project, for such temporary possession, we believe that this should be a matter for commercial negotiation, not compulsion.

As part of due process, a CPO should be certain as to:

- the area to be taken
- the purpose for which it is taken

- and, in this case, the period for which it is to be taken.

Given that the need for such facilities as compounds is often pragmatic, we are concerned that these key definitions of what is to be taken cannot be satisfactorily made the subject of a CPO.

There should not be an power to take whatever land is desired at the time for as long as is wanted and for any purpose

We have seen specific issues with HS2 where the railway is to be laid in a tunnel constructed by cut and cover means. HS2 is only seeking temporary possession of the land but proposes only to pay rent for it without recognising the larger impact on the farm accounts of losing a significant fraction of its area for the time involved while the farm's overheads are unchanged.

If powers are to be given to take land temporarily, then the CPO must be clear as to the state in which the land is to be returned to the landowner as well as the timing as these can be relevant when assessing compensation.

Chapter 3 Human rights

6. The right to compensation as a result of compulsory purchase in Scots law should be expressly provided for in the proposed new statute.

(Paragraph 3.51)

Comments on Question 6

We agree that this should be expressly stated.

We also note the statement at 10.4 that compensation has always been paid in the UK where a Public Authority acquires the property of an individual. However and unfortunately, that is not the case in Scotland. By contrast to England and Wales – and also the Isle of Man - when Scottish Water acquires rights to lay pipelines through land it pays no compensation for the presence of the pipe in the land, merely the disturbance arising from installation – however great the resulting diminution in value.

The point can be put simply: of two identical fields, one has a sewer across it and one does not. Which field would a purchaser with free choice choose to buy? While some of the resulting difference will lie in injurious affection the loss of that tunnel of land is not paid for.

We are further concerned by Scottish Water's refusal to accept liability for damage caused by bursts in sewage pipes installed under compulsory powers.

7. Do consultees agree with our view that the current statutory provisions applicable to compulsory purchase in Scotland are compatible with the Convention?

(Paragraph 3.87)

Comments on Question 7

We broadly agree with this save for:

- the curious anomaly just mentioned regarding the lack of compensation for land taken by water pipes and sewers in Scotland
- the absence of any acknowledgement of the stress caused to individuals affected by a compulsory purchase order in the present compensation provisions.

PART 2: OBTAINING AND IMPLEMENTING A CPO; THE MINING CODE

Chapter 5 Procedure for obtaining a CPO

8. Compulsory purchase by local authorities under local Acts should be carried out by means of the standard procedure.

(Paragraph 5.5)

Comments on Question 8

Yes.

9. Is there any reason why the procedures to be set out in the proposed new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B?

(Paragraph 5.18)

Comments on Question 9

We see no reason why this should not be the case.

10. Is there any relevant legislation missing from that list?

(Paragraph 5.18)

Comments on Question 10

We have not seen any omissions form the list of legislation in Appendix B to the paper.

11. Do the powers to survey land, contained in section 83 of the 1845 Act, operate satisfactorily in practice? If not, what alterations should be made?

(Paragraph 5.20)

Comments on Question 11

The use of powers to survey land has grown in recent years with the increased requirement for topographical, sub-soil, contamination, environmental, archaeological and other surveys in route selection generally – and now also with the adoption of design and build procedures. Owners and occupiers may be expected to provide extensive information to assist this process

We are concerned by members' reports of acquiring authorities (particularly Transport Scotland) citing their statutory powers to carry out such surveys – which can be disruptive - but then fail to point out rights to compensation.

We accept that it is necessary for acquiring authorities to have powers of prior entry for survey purposes but it is also disruptive and expensive for those affected.

However, we do not agree that a warrant for such access should be given on "emergency" grounds. If access is urgently needed for survey purposes and that access is refused, a warrant can be sought on grounds of refusal. We do not consider it proportionate to allow a warrant to be sought on any other grounds for survey purposes.

All powers of entry should have a corresponding obligation to keep any damage to a minimum and to make good all damage It should be a condition of any such access that any loss or damage should be paid for by the acquiring authority and no landowner or occupier should be left worse off following exercise of such rights.

An authority can go onto land with not less than 3 and not more than 14 days' notice. The issue here is the practice of statutory authorities in respect of this right. Although such works may have been planned for some time, notice seems often to be given to the landowner or tenant at the last minute (often citing the minimum notice provisions set out in the legislation). This is especially relevant around harvest time or silaging when a prior consultation and delay of a few days might make the job easier for both sides.

Intrusive survey works, such as the digging of trial pits and boreholes, have a significantly greater impact on the occupier of the land than non-intrusive works. We therefore suggest that if a notice period of less than 28 days is adopted for non-intrusive surveys, a 28 day minimum period should apply for intrusive works where the surface of the land is disturbed.

We consider that a notice period of 28 days would be more reasonable than the current provisions. Such survey work is likely to be planned some time in advance and a 28 day notice period should not unduly inconvenience acquirers in most circumstances. We consider that 14 days is the absolute minimum notice period for non-intrusive survey works and that any shorter period would be unreasonable.

It is stressed that this does not mean that surveys cannot be undertaken on shorter notice, simply that that has to be agreed with the person affected.

Compensation must also include an obligation to reimburse the time of the affected person and any professional fees incurred. Acquiring authorities exercising such powers should be under a duty to inform affected parties of their rights to compensation.

This compensation should be statutory under the general provisions of the compulsory purchase legislation.

12. Is the current list of statutory objectors satisfactory and, if not, what changes should be made, and why?

(Paragraph 5.24)

Comments on Question 12

It appears that acquirers may omit giving agricultural tenants their formal statutory notice (there are examples from the AWPR).

As an operational matter, there is frequently difficulty in knowing what constitutes a 'local newspaper' for this purpose, with (for example) certain notifications regarding planning appearing only in certain papers with limited circulation.

13. Should there be any further restrictions on the circumstances in which a statutory objector can insist upon a hearing or inquiry?

(Paragraph 5.25)

Comments on Question 13

While it may appear undesirable for one minor and difficult landowner to hold up a massive infrastructure project with its attendant cost implications and the uncertainty caused to affected parties, we cannot see how restricting the right to have objections heard might operate so as not to infringe the rights of individuals. There should not be restrictions on this.

14. Should the proposed new statute provide that Scottish Ministers must refer cases to the DPEA within a specified time limit and, if so, within what time limit?

(Paragraph 5.26)

Comments on Question 14

We can see that planned timescales could bring benefits but believe they should be introduced on a non-statutory basis, giving inspectors the discretion to extend the timescale if circumstances demanded it in a particular case. Inspectors should be under a duty to explain their reasons for extending the timescale at the time when that decision is taken.

We note that timescales can be unhelpful in a Town and Country planning context, having anecdotal evidence that under-resourced planning officers rushed into making decisions will sometimes refuse an application early in the process rather than spend time dealing with it and risk breaching the deadline. We are anxious to avoid the risk of anything similar happening in the compulsory purchase appeal context.

15. Should the DPEA have discretion over the process for determining objections to a CPO similar to that which they have in relation to planning matters?

(Paragraph 5.30)

Comments on Question 15

We consider that the DPEA should not have such discretion.

If such discretion is given, it should be subject to a duty of care for the interests of those affected.

16. The timescales for the process of securing CPOs should continue to be set out in subordinate legislation.

(Paragraph 5.32)

Comments on Question 16

These should not be in primary legislation and there should be room for discretion tom allow for circumstances.

17. Should all CPOs made by local authorities and statutory undertakers require to be confirmed by Scottish Ministers and, if not, in what circumstances should acquiring authorities be able to confirm their own CPOs?

(Paragraph 5.41)

Comments on Question 17

Since nobody should be judge and jury in their own cause when exercising such compulsory powers, we start from the position that no acquiring body should be able to approve its own CPO. It would then be normal for such approval to lie with Scottish Ministers. An exception might be for schemes which had no remaining objectors.

However, the problem arises that many CPOs, especially those for larger schemes, are effectively promoted by Scottish Ministers, as where a CPO for a Transport Scotland scheme comes to Scottish Ministers for confirmation.

The procedure for confirmation of such CPOs by Scottish Ministers has given rise to issues recently with such examples as:

- The AWPR for which the Public Inquiry was presented with two alternative routes. The Reporter recommended that the Scottish Ministers consider carefully the compensation payable in respect of the AWPR preferred route, as against an alternative put forward by affected landowners. From evidence led at the subsequent Lands Tribunal hearing in *Strang Steel v Scottish Ministers*, it appears that this recommendation was not followed.

- the M74 extension for which the Reporter's recommendation to reject the public works and associated CPO was rejected by Scottish Ministers.

If Scottish Ministers are to be in this delicate position, it is essential that their procedure, reasoning and decisions in such circumstances must be transparent and public if they are to

be proper, compatible with good government and better prepared against challenge.

It is thus important that the compulsory purchase statute expressly imposes an obligation on the confirming authority to act independently and judicially in order to put it on a reputable footing and so less vulnerable to being seen by those losing property and being adversely affected as a routine fait accompli. The procedure for approving compulsory purchase, a key subject of this consultation, has to be seen to be reputable not simply a decorative, if expensive, exercise.

18. Are the current requirements for advertisement and notification of the making or confirming of a CPO satisfactory and, if not, what changes should be made, and why?

(Paragraph 5.42)

Comments on Question 18

There should be a more comprehensive notification procedure. This may involve publishing details on an appropriate website and also e-mails to individuals, agents, or organisations who register.

It should be possible for all these parties to register for receipt of notification by e-mail but, especially with the difficulties of rural broadband in some areas, that should not be the only means of notification.

19. An acquiring authority should be able to revoke a CPO.

(Paragraph 5.46)

Comments on Question 19

Yes, but if this occurs it would be reasonable for the acquiring authority to recompense any affected party for their costs and time not only in respect of loss arising out of the CPO but also those in opposing the Order.

The net effect of the revocation is that the affected people have been put to trouble, effort and cost, usually for years, for something that did not happen. A responsible body revoking an Order would recognise that outcome but proper treatment of such cases needs to be clear in law.

20. Should any conditions be attached to a revocation, so that the acquiring authority cannot initiate the same proposal within a certain period, or without specific consent of the Scottish Ministers?

(Paragraph 5.46)

Comments on Question 20

The act of withdrawing a scheme (say, for a road improvement) does not remove the

potential blight if it is perceived that the scheme might yet be revived (as often happens with road schemes). We propose that the default regime be that there is a specified time limit (say 10 years) in which a *substantially similar* scheme cannot be introduced (that qualification is needed to avoid the use of minor changes that would technically allow a scheme to be reintroduced within any time limit). Recognising that circumstances may mean that it could still be desirable and in the public interest for such a scheme to come forward, it could then only do so subject to stronger costs provisions, covering affected owners' costs in responding to the proposals and objecting to any CPO as well as a proportionate supplement on compensation payments if compulsory purchase is approved.

21. Any person directly affected by the revocation of a CPO should be able to recover reasonable out-of-pocket expenses.

(Paragraph 5.47)

Comments on Question 21

In such a case, such directly affected people should be able to recover their reasonable expenses incurred as a direct result of the compulsory purchase process, with no other qualification or limitation than that those expenses be reasonable. The use here of "'out of pocket" expenses suggests that only nominal expenses are being considered. One owner's costs in opposing one junction on the AWPR are understood to have amounted to £750,000. The scale of payment does not affect the point of principle here.

As argued above, this proposal should be broadened to include any objection to a CPO. It would otherwise be unreasonable for an acquiring authority to put landowners to considerable expense and trouble by bringing forward a proposal to exercise compulsory powers, only to withdraw it.

22. Acquiring authorities should be required to register CPOs and revocations of CPOs.

(Paragraph 5.50)

Comments on Proposal 22

Revocation should be advertised and published in the same way as the CPO itself.

23. Should there be a new Register of CPOs, or should an entry be made in the Land Register?

(Paragraph 5.50)

Comments on Question 23

We agree that a register should be established. That could be supplemented by entries in the Land Register.

24. Is the current three year validity period of a confirmed CPO reasonable?

(Paragraph 5.59)

Comments on Question 24

We believe that it is reasonable but would propose that time should not run until any challenge is exhausted.

25. Should there be a precondition that a CPO will only be confirmed where there is clear evidence that the project is reasonably likely to proceed?

(Paragraph 5.59)

Comments on Question 25

It should be a condition of any draft order that it can only be issued if the project is reasonably likely to proceed and the acquiring authority is able to demonstrate that finance is in place. There simply should not be speculative CPOs – ordinarily, that would be an abuse of the system and the remarkable powers given to acquiring authorities.

26. Where the acquiring authority offer to replace a public right of way which will be affected by a proposed development, should the right to insist upon an inquiry be removed?

(Paragraph 5.64)

Comments on Question 26

No, because there may be issues regarding the suitability of the proposed replacement route as a right of way for its users and its effects on property owners and occupiers.

27. Where there is to be an inquiry into the loss of a public right of way, should any such inquiry be combined with any inquiry into the making of the related CPO?

(Paragraph 5.64)

Comments on Question 27

Yes. There is no point in duplicating processes, especially for inter-related proposals.

28. Are there any other aspects of the process for making or confirming a CPO upon which consultees wish to comment?

(Paragraph 5.65)

Comments on Question 28

A balance is required between speed and the property/human rights of affected parties.

Any new legislation should contain an express duty on any acquiring authority (and its agents and contractors) to have regard to the rights of affected parties, not only during the promotion of the scheme but also during its implementation. That duty of care should also extend to their contractors to reflect the design and build nature of many projects. Many problems arise from the implementation of works by the acquirer's contractors with whom the affected parties have no legal relationship yet the acquirer, the contractors and sub-contractors all shuffle responsibility between them over issues that can include carelessness with livestock, damage to field drains and other property, or poor restoration of land for return to farming use.

We consider the express imposition of this duty of care is necessary to ensure that the acquiring authority properly considers alternative options prior to any scheme being eventually promoted. This would potentially reduce or negate the need for costly or lengthy Public Inquiries such as seem to have arisen from the failure of Transport Scotland to properly consider alternatives to their proposals for the AWPR. Such a duty would also avoid the conflicts encountered between affected parties and contractors in design and build schemes.

Chapter 6 Challenging a (confirmed) CPO

29. Should the proposed new statute make it clear that objections to a CPO, on the basis of allegations of bad faith on the part of those preparing the Order, are not competent under whatever provision will replace paragraph 15 of Schedule 1 to the 1947 Act?

(Paragraph 6.38)

Comments on Proposal 29

We are concerned at such a proposal.

No moral status is conferred by being an acquiring authority, rather the need is to understand throughout that the powers available to it should only be wielded properly, not capriciously. Insulating acquiring authorities from well-founded accusations of bad faith will not help them behave better.

There should be a clear duty of care set out in any new legislation for acquiring authorities in designing and implementing a scheme which could lead to a CPO, in part to ensure that they do not do so on the basis of poorly researched and justified schemes. That treats all affected parties badly, whether they cannot afford an objection or whether they can and it leads to time being taken at Public Inquiry in respect of such matters.

Further, proper procedure is not only a protection for affected parties who stand to lose their property, whether land, home or business, but also a protection for the taxpayer. Not only is

it part of good government but allowing ill-founded schemes to proceed is likely to lead to a poor use of public money. Whatever the mix of economic, social and environmental goals, spending on infrastructure warranting compulsory purchase should go where it has the greatest public benefit.

An obligation on acquiring authorities to properly consider alternatives in designing and promoting CPO schemes is likely to go a long way towards mitigating issues at Public Inquiry and the LTS.

30. Should the proposed new statute make it clear that applicants claiming that there has been bad faith in the preparation of a CPO have a right to claim damages from those allegedly responsible?

(Paragraph 6.38)

Comments on Question 30

There should be a clear duty on any acquiring authority to carry out its Environmental Impact Assessment and other scrutiny with due care and diligence and if this is not done then there should be a clear right to claim damages. EU regulation and public policy has not required these to be merely a routine but to identify whether there are genuine issues that can then be weighed as part of the process. Failing to do this properly demeans the whole process and sees the acquirer shirking its duties.

The knowledge that there is an ability to claim damages against a confirming authority where this has not been done might encourage it to ensure proper scrutiny during this process.

31. Do paragraphs 15 and 16 of Schedule 1 to the 1947 Act operate satisfactorily?

(Paragraph 6.39)

Comments on Question 31

Members increasingly express their concerns from experience as to whether correct procedures are followed in the process of arriving at a scheme and the consideration of alternatives.

32. Should any challenge to a CPO, on the ground that it is incompatible with the property owner's rights under the Convention, be required to be made during the six-week period for general challenges to a CPO?

(Paragraph 6.44)

Comments on Question 32

This would seem sensible and consistent with the wider law.

33. Are there circumstances in which such a challenge should be permitted to be made at a later stage?

(Paragraph 6.45)

Comments on Question 33

The courts should have discretion if the circumstances are shown to their satisfaction that such a claim out of normal time should be made. The underlying interests of certainty require that this be a high hurdle to cross but it might be the only answer if evidence of, say, fraud could only have become evident later.

34. Where an applicant has been substantially prejudiced by a procedural failure, should the court have a discretion to grant some remedy less than the quashing of the CPO, either in whole or in part?

(Paragraph 6.48)

Comments on Question 34

Yes, judicial discretion needs to be free to be exercised as is appropriate.

35. Should the time period of validity of a confirmed CPO be expressly extended, pending the resolution of any court challenge to the CPO?

(Paragraph 6.51)

Comments on Question 35

While there has been discussion about objections 'stopping the clock' because of the situation that arose in the AWPR, we consider this to be unreasonable given the uncertainty that would result for affected landowners and occupiers.

Situations such as arose in the AWPR should not arise were there clear duties of care on acquiring authorities in coming forward with a CPO scheme.

Chapter 7 Implementation of a CPO

36. Any restatement of the law relating to compulsory acquisition should include provision along the lines of sections 6 to 9 of the 1845 Act.

(Paragraph 7.9)

Comments on Question 36

We support this.

37. Should the proposed new statute list all the interests in respect of which a notice to treat should be served?

(Paragraph 7.15)

Comments on Question 37

We consider there should be a single standard CPO process for all affected rights and interests with no need to identify those that qualify.

38. It should be made clear that a person claiming to be the holder of an interest in land, and who has not been served with a notice to treat, has the right to raise proceedings to determine (a) that the interest attracts compensation and (b) the amount of that compensation.

(Paragraph 7.19)

Comments on Question 38

Yes.

39. Should there be a time limit within which such proceedings must be raised?

(Paragraph 7.19)

Comments on Question 39

Consistent with the wider law, any time limit should run for a period of 6 years from the completion of the project for claims based on rights acquired by peaceable occupation.

There should be a duty on an acquiring authority to specify such a completion date and advertise this appropriately (i.e. in the same way as the original CPO).

40. Should a notice to treat be accompanied by information as to how compensation may be claimed?

(Paragraph 7.25)

Comments on Question 40

Yes. By no means is every claimant professionally advised at all stages of the process and

so the acquirer should as part of a duty of care to those on whom it is imposing its scheme ensure that they are aware of their entitlements.

This proposal should be extended to cover any taking of entry (e.g. in respect of ground investigation works also).

Such information should be agreed with stakeholders and include details on rights to serve 90 day notices etc as well as entitlement to professional advice.

41. Does paragraph 7 of Schedule 2 to the 1947 Act operate satisfactorily in practice?

(Paragraph 7.29)

Comments on Question 41

We note that the notice to treat procedure is now rarely used. This suggests it is considered not to operate satisfactorily or is no longer relevant.

42. When fixing interests in land, should any action taken or alterations made before service of a notice to treat, be considered differently from any action taken or alterations made after such service?

(Paragraph 7.29)

Comments on Question 42

There should not be any power to unwind changes in interests before the service of a notice to treat.

43. Does the three-year time limit on the validity of the notice to treat work satisfactorily in practice?

(Paragraph 7.40)

Comments on Question 43

It is needed for certainty for all involved.

44. Should it be competent for an acquiring authority to withdraw a notice to treat and, if so, within what period?

(Paragraph 7.51)

Comments on Question 44

Whilst the comments above should be noted, we do not consider there to be a difficulty here for any acquiring authority. Any EIA for the CPO should have identified the potential for development and therefore the level of compensation payable.

45. Should there be any circumstances which would entitle an acquiring authority to withdraw a notice to treat after they have entered on to the land?

(Paragraph 7.51)

Comments on Question 45

Such circumstances seem possible and withdrawing the notice to treat would then be a way of showing that the affected owner or occupier was no more adversely affected than need be – in effect, pre-empting any need to consider Crichel Down. However, such an action should see the acquiring authority liable not only for any losses but also any costs incurred in objecting to the proposed – and now abortive - scheme.

46. Should the period after which entry can proceed, following a notice of entry, be extended to, say, 28 days?

(Paragraph 7.67)

Comments on Question 46

14 days is too short but we prefer proposal 47.

47. Alternatively, should it be competent for a landowner to serve a counter-notice within a set time limit following service of a notice of entry, whether or not the acquiring authority have entered on to the land?

(Paragraph 7.67)

Comments on Proposal 47

We prefer this proposal, subject to a reasonable time limit such as three months and available for all types of property.

48. For how long should a notice of entry remain valid?

(Paragraph 7.73)

Comments on Question 48

We note that the commentary at paragraph 7.78 to the effect that an acquiring authority does not need to serve a GVD notice in relation to a short tenancy – which is defined as a tenancy for a year, or from year to year or any lesser interest.

That raises particular issues for agricultural units as the standard form for tenancies, whether under the Agricultural Holdings Act 1991 or also progressively under the Agricultural Holdings Act 2003 is for the form of the tenancy to be for a period and then from year to year – even though those Acts (especially the 1991 Act) operate to give much more robust immunity from termination.

Yet, it might be that the law does not require them to be served notice for a GVD which is perverse.

49. Should the acquiring authority be required to serve notice of their intention to make a GVD on holders of a short tenancy or a long tenancy with less than one year to run?

(Paragraph 7.78)

Comments on Question 49

Yes – especially in the light of the position of agricultural tenancies just described. There is no reason to exclude short tenancies.

50. Where a GVD applies to part only of a house, factory, park or garden, do the current provisions adequately safeguard the interests of the acquiring authority and the landowner and, if not, what alterations should be made?

(Paragraph 7.86)

Comments on Question 50

The 28 day notice period for severance is a tight limit in these circumstances. In replying to Question 47 we suggested three months.

51. Should a GVD be available in all circumstances?

(Paragraph 7.89)

Comments on Question 51

Yes, as we suggest adopting a single system for implementing compulsory purchase along

the lines of a GVD.

52. Are the time limits for implementing a GVD satisfactory?

(Paragraph 7.89)

Comments on Question 52

Yes.

53. Compensation should be assessed as at the date when the property vests in the acquiring authority, and interest should run on the compensation from that date.

(Paragraph 7.97)

Comments on Question 53

We accept the basis of this proposal subject to concerns about losses incurred prior to this date as a consequence of delays between any draft order and the GVD.

In respect of the AWPR six years elapsed between the draft order and the vesting date. During that time any planning application for land required along the route could not be determined. In *Strang Steel –v- Scottish Ministers* issues arose about the probability of planning at the relevant dates. The LTS found that "*there was no reason to doubt that the Council would have granted planning* [for a retail store and petrol filling station]…*in the no scheme world*" and that "*on the balance of probability* [planning consent] *would have been granted on or before 2009*". Had this been the case the landowner would have purified the missives for a sale of the site to Sainsburys for £10.25M. In the event he was awarded only £1.7M. Had the scheme not affected Field 52, the landowner would have sold the site for the highest figure. It is difficult to escape the injustice of this situation which arises out of the working of the current legislation.

The basis for payment of interest is wholly inadequate whether as a reflection of reality or as discipline on the acquirer who could see delay as a cheap means of easing the financing the project. That inadequacy lies in:

- The statutory rate being set at 0.5% below the Bank of England base rate which, since March 2009, means that the statutory rate is 0% when borrowing costs that affected parties may incur are several per cent above base (with other bank charges) and Government prescribes 8 per cent over base for late payment.

- Interest being paid on a simple and not, as everywhere else, on a compound basis.

54. Where the acquiring authority enter on to the land before it has vested in them, compensation should be assessed as at, and interest on compensation should run from, the date of entry.

(Paragraph 7.98)

Comments on Question 54

Yes.

Where taken compulsorily, compensation for temporary occupation (together with interest) should run from the date of that occupation.

55. In a situation falling within section 12(5) of the 1963 Act, the date upon which compensation should be assessed, and the date from which interest on the compensation should run, should be the date upon which reinstatement of the building on another site could reasonably be expected to begin.

(Paragraph 7.99)

Comments on Question 55

No. This becomes problematic when there is a scheme with long timescales (as experienced with the AWPR and even more with the High Speed Rail schemes) when the date could be much earlier than any GVD.

In respect of an equivalent reinstatement claim on the AWPR, reinstatement commenced in autumn 2010 and was completed in 2012. In respect of the Aberdeen International School building commenced in 2006 and completed in 2010. The GVD was 2013

56. Should the proposed new statute confer upon the LTS a discretion to fix the valuation date at a date different from any of those mentioned above, where it appears to the LTS to be in the interests of justice?

(Paragraph 7.101)

Comments on Question 56

While reluctant to fetter allowing discretion in the interests of justice, we are cautious about how this might work in practice. Presumably, it would in the first instance at least only apply to claims lodged before the LTS requesting a different date, rather than all claims.

57. Where an acquiring authority are in genuine doubt as to whether or not they own a particular part of a parcel of land which they intend to acquire, where title is in the Register of Sasines, they should be able to:

(a) use a GVD in relation to the whole of the land, and

(b) register the GVD in the Land Register.

(Paragraph 7.106)

Comments on Question 57

Yes.

58. The provisions of sections 84 to 86 of the 1845 Act should be repealed and not replaced.

(Paragraph 7.114)

Comments on Question 58

Yes.

59. What, if any, alterations should be made to the time limits for the various steps involved in the implementation of a CPO?

(Paragraph 7.115)

Comments on Question 59

Time limits must be short enough to keep the process moving but long enough to allow for reasonable advice and consideration, given that people can be ill and on holiday.

60. Would a new method of implementation of a CPO, along the lines described in paragraph 7.119, be preferable to continuing with the current two methods of implementation?

(Paragraph 7.120)

Comments on Question 60

Yes - a single implementation procedure is desirable.

61. If so, what features should it have in addition to, or in place of, those mentioned above?

(Paragraph 7.120)

Comments on Question 61

See our comments in respect of Question 1.

Chapter 8 Conveyancing procedures

62. Where there has been a confirmed CPO the land can be transferred to the acquiring authority by means of an ordinary disposition registered in the Land Register.

(Paragraph 8.39)

Comments on Question 62

Yes.

63. Do consultees agree that, if the GVD procedure is retained, the current rules on transfer of the land should continue, namely that:

(a) title to the land will vest in the acquiring authority at the end of the period specified in the GVD allowing the authority to take entry to the land, and
(b) registration in the Land Register will be required for the acquiring authority to obtain the real right of ownership?

(Paragraph 8.40)

Comments on Question 63

Yes.

64. The existing methods of transferring the land following a notice to treat should be replaced with a unitary method, to be known provisionally as a Compulsory Purchase Notice of Title. This would be executed by the acquiring authority.

(Paragraph 8.42)

Comments on Question 64

Yes

65. Do consultees agree that, if the notice to treat and GVD procedures are replaced by a unitary procedure, there should be a single statutory method of transferring the land to the acquiring authority?

(Paragraph 8.43)

Comments on Question 65

Yes.

66. The acquiring authority should always obtain a valid title where they have used a method of transfer specified in the new legislation.

(Paragraph 8.45)

Comments on Question 66

Yes. The Order should ensure certainty as to the purchase, whatever may be the weaknesses in the title of the affected party.

67. Should the Keeper be required to add a note on the Land Register stating that the title has been acquired by compulsory purchase?

(Paragraph 8.46)

Comments on Question 67

That seems likely to be helpful with any subsequent conveyancing.

Identifying the fact that the acquisition was compulsory would imply that burdens would have been extinguished which might not have happened in a 'normal' transaction. Thus someone checking would be in a better position to know the position regarding the extent of Title.

68. The acquiring authority may serve a notice to treat on any tenant and extinguish the tenant's right under the lease in return for compensation.

(Paragraph 8.54)

Comments on Question 68

No. We support a single CPO system.

69. The acquiring authority may serve a notice to treat on any liferenter and bring the liferent to an end in return for compensation.

(Paragraph 8.57)

Comments on Question 69

Yes. The regime should cover all affected interests which must then be eligible for compensation.

70. It should be made clear that, on the acquiring authority becoming owner of the land, any subsisting securities would be extinguished.

(Paragraph 8.65)

Comments on Question 70

Yes.

71. Do the 1997 Act section 194 and the 2003 Act sections 106 and 107 require reform or consolidation?

(Paragraph 8.75)

Comments on Question 71

Both should be retained.

72. It should be competent to acquire new rights subordinate to ownership by means of a CPNT or GVD or equivalent.

(Paragraph 8.81)

Comments on Question 72

Please note our response to Question 3.

Chapter 9 The Mining Code

73. Should provision along the lines of the Code be included in the proposed new statute and, if so, should any additions or deletions be made?

(Paragraph 9.26)

Comments on Question 73

Yes, to be incorporated into a single CPO process.

PART 3: COMPENSATION

The principle that no landowner should be disadvantaged by a CPO is not achieved by the legislation. As someone who did not mean to sell, he receives the open market value that assumes he was a willing seller. He is put to protracted trouble, effort, cost and inconvenience over his land, home or business which is to be taken in whole or part through no choice of his own at no time of his choosing. The present regime calculus of loss does not really recognise this.

Many, particularly larger, CPO schemes take a very long time from first inception to vesting and construction. During this time, owners, occupiers and properties are affected, well before there is any right to compensation.

In such cases properties and land can be almost impossible to sell, let alone at their true value – which willing buyer is going to put themselves in such a position? Businesses cannot plan development or expansion.

This pre-Scheme blight may not be a bare few months but can easily last for decades and does not only affect homeowners but also businesses. The HS2 rail project is simply an extreme example of these points already illustrated in Scotland by the AWPR or now the A96 proposals.

If an affected person has to dispose of land or buildings for reasons that may range from meeting financial calls or funding relocation to retirement, owners have no choice but to sell and CPO leaves them in an invidious and highly unfair position. Its effect on the collateral value of land also limits the use of the property to the owner.

It is only rational for affected parties to resist CPO schemes with their impact on the homes, assets and businesses that bulk so large in most of their lives.

Yet, for the great majority of schemes, land acquisition is a small element of the cost involved, while delays in acquiring land can be very costly to the project. Allowing an acquiring authority to take an overall view of the matter would offer it a useful degree of freedom in the interests of the public purse. Where an attractive offer is made to a landowner, the acquisition process is likely to be quicker and less contentious than if compulsory powers were used. This is likely to have a beneficial impact on schemes, allowing them to proceed more quickly and offering consequential cost savings as a result. Spending a little more money at the start of the scheme might save significant sums overall, as the Chancellor of the Exchequer observed in January to the Royal Economics Society:

> "*We should change our outdated compulsory purchase regime. Both the LSE Growth Commission and Chambers of Commerce have had the bright idea that, in some cases, if you pay people a little more you'd get planning a little quicker and the whole process could cost you less*."

Taking this argument forward, there is a case to be made for a statutory uplift to market value to be applied to cases of compulsory acquisition, returning the situation to that which in practice existed before 1919, when it was customary to allow a 10 per cent uplift in the value of the land taken, in recognition of the fact that the seller is unwilling. This model continues to be upheld in some cognate jurisdictions, such as the Isle of Man where the Acquisition of Land Act 1984 states that the value of land is:

> *"…the amount which the land if sold in the open market by a willing seller might be expected to realise, with an addition of 10 per cent on account of the acquisition being compulsory"*

Recent conversations at meetings in this consultation process have seen acquirers appear open to an uplift of 30 per cent if it saved them weeks at Inquiry with the costs, delay and uncertainty that follows.

Chapter 11 Valuation of land to be acquired – basic position

74. The concept of "value to the seller" should continue to reflect any factors which might limit the price which the seller might expect to receive on a voluntary sale.

(Paragraph 11.30)

Comments on Question 74

The basis of assessing the value of property acquired should continue to start from the basis of the well-understood and longstanding concept of market value with which the valuation world is familiar with conventional definitions in both European Valuation Standards (EVS) and International Valuation Standards (IVS - as adopted by the RICS). Thus, EVS1 defines Market Value as:

> "The estimated amount for which the asset should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion."

The nature of compulsory purchase then requires additional or varied assumptions which should still be applied as a consistent basis for compulsory purchase compensation. The principal ones are:

- the assumption of a no scheme world
- the exclusion of any blight arising from the scheme
- the recognition of any value (special value) arising from the existence of any special purchasers.

The basis and principles of this valuation approach should be expressly stated on the face of the legislation to ensure certainty and in a way that allows reference to the accumulated body of case law on these points.

The uplift we have proposed above would be applied to the assessment made under these principles

75. Should depreciation of the value of the acquired land, caused by its severance from the retained land, be taken into account when assessing its value?

(Paragraph 11.34)

Comments on Question 75

We are concerned about the way in which this proposal is expressed as it appears to risk confusion with the issues of injurious affection, severance and disturbance and so the assessment of the acquired land with effect of the compulsory purchase on retained land.

The framework of the law should support careful analysis of the issues in case, avoiding both double counting and omission of items of claim while, with the variety of properties and

circumstances that are met, leaving the valuers involved with the discretion to adopt the approach most suitable to each case in hand.

It would be conventional to value the land taken on a market value basis and then separately assess any diminution in the value of the retained land (injurious affection) and the effects of retained land being severed (severance) and the costs imposed (disturbance).

An alternative approach within Rule 2 (market value) is to undertake a "before and after" valuation of the whole property, taking acquired and retained land together, with the "before" valuation being on the no scheme world assumption and the "after" valuation being on the basis of the "blighted" value.

The new law should leave the professional valuer with the necessary discretion to address each case in its own circumstances, able to adopt either approach.

76. Does the current law take account of negative equity satisfactorily and, if not, what changes should be made?

(Paragraph 11.42)

Comments on Question 76

No.

The assumption of a willing seller is perhaps more than ordinarily unrealistic where negative equity exists, as it fails to recognise that an owner subject to a CPO is unlikely to sell in such circumstances but is being forced to do so.

However, rather than change the common assumptions for assessing compensation (and the distortions that might result from doing so) practical discussion of the issue here generally concludes that measures to make the relevant mortgages transferrable is the way forward. The affected party can take his negative equity elsewhere. This has most recently been canvased in the March 2015 Treasury/DCLG consultation paper on compulsory purchase in England.

77. Provision along the lines of rules 2, 4 and 5 should be included in the proposed new statute.

(Paragraph 11.53)

Comments on Question 77

Yes. Again, these have the merit and sanction of long practical experience in responding to the varied circumstances that can be found.

Equivalent reinstatement is a necessary, if occasional, option to do justice to some affected parties in special positions though increasingly demanding building regulations and licensing requirements may make it a little more common in future. We understand that it

was needed twice for particular situation affected by the AWPR.

In England, the long run in to the HS2 project has brought sharply into focus the problem faced by many claimants who intend to replace buildings or premises which will be acquired for the scheme. Farmers, in particular, will often have suitable land on which they could site replacement buildings to allow the business to continue, but they face costs and delays when the local planning authority resists an application for planning consent. It would be helpful if planning guidance was issued which highlighted this problem and advised planning officers to take a positive approach to assisting those affected in re-locating buildings to a suitable site.

A practical problem with equivalent reinstatement is that case law indicates that where the premises are too large for the particular purpose, reinstatement is based on something more suitable but does not provide for the alternative position where they can be shown to be too small.

78. Should a test along the lines of the "devoted to a purpose" test be retained?

(Paragraph 11.55)

Comments on Question 78

Yes.

79. In cases of equivalent reinstatement, should there be an onus on the claimant to show that compensation assessed on the basis of market value (and disturbance, where appropriate) would be insufficient for the activity to be resumed on another site?

(Paragraph 11.58)

Comments on Question 79

Yes – the onus should, in principle, be on the claimant to demonstrate that Rule 5 should be applied.

The practical issue in that is that acquirers should consider premises likely to merit Rule 5 as part of the design of the scheme, especially where they are high value ones, since redesign or accommodation works may prove the more sensible answer.

We agree that (as said in paragraph 11.60) claimants for equivalent reinstatement should not be required to

'*demonstrate that the cost of equivalent reinstatement would not be unreasonably disproportionate to the public or social value of the building in question and the activity carried out therein*'

as this seems to be an overly harsh test.

Once proven, this approach should not be subject to any reduction by the amount by which

the value of the property might be improved by the reinstatement. That would be contrary to the purpose of Rule 5 while the owners might not be in a position to pay that sum and might not have needed a new building but for the scheme. Were it not for the scheme, reinstatement would be unnecessary.

80. Should the LTS be entitled to impose conditions on the payment of equivalent reinstatement compensation in order to ensure that such compensation is properly used for the reinstatement in question?

(Paragraph 11.66)

Comments on Question 80

Yes.

Chapter 12 Valuation of land to be acquired – rule 3 and the "no-scheme" world

81. How should the "scheme" be defined?

(Paragraph 12.78)

Comments on Question 81

Accumulating case law on the difficulties thrown up in practice by the present legislation suggests that reform is overdue.

We simply suggest that the scheme should be defined by the relevant Compulsory Purchase Order (or where there are several connected Orders assembling land, all those Orders).

82. Should an increase in the value of the land being acquired as a result of the scheme be taken into account for the purpose of assessing compensation?

(Paragraph 12.78)

Comments on Question 82

Betterment is a more problematic concept in practice than it sounds.

Disregarding betterment arising from the scheme seems the correlative of disregarding blight arising from the scheme.

A further issue is the equitable treatment of affected persons who have land taken when bettered may be offset against other comedian but it is not withdrawn from those who gain from the scheme but do not lose land. They might be competing with neighbours, ye the

affected landowner bears a disproportionate cost of the scheme's implementation.

It is a cause of concern that acquirers, naturally arguing their corner, can put undue stress on betterment in seeking to reduce liabilities when there be no real case for that.

83. To what extent should an increase in the value of the land being acquired, as a result of the effect of the scheme on other land being acquired, be disregarded?

(Paragraph 12.78)

Comments on Question 83

Completely.

If it is to be recognised, there should be some threshold for that.

84. Should any such disregard be limited by reference to the time elapsed since the adoption of the scheme or, if not, on what alternative basis should or might it be limited?

(Paragraph 12.78)

Comments on Question 84

All assessments should be of the prospects as perceived as at the date of entry.

Chapter 13 Valuation of land to be acquired – establishing development value

85. Should the statutory planning assumptions apply to land other than the land which is compulsorily acquired?

(Paragraph 13.14)

Comments on Question 85

The statutory planning assumptions should be applied to other land where it is retained by an affected party.

86. Any existing planning permission should continue to be taken into account in assessing the value of the land to be acquired.

(Paragraph 13.19)

Comments on Question 86

Yes. This is a necessary part of the equitable treatment of an affected party.

87. What should be the relevant date for determining whether there is existing planning permission over land to be compulsorily acquired?

(Paragraph 13.22)

Comments on Question 87

The nature of the planning restrictions that accompany many developing schemes mean this is in practice linked to the issue of Certificates of Appropriate Alternative Development. (CAAD)

Thus, there should be latitude as to the relevant date, whether the date of the draft order or of the notice of entry.

The very existence of a proposed scheme may involve an element of protection in respect of any planning application on the affected land. For example, the route for the AWPR was protected meaning that any planning application could not be determined as would have been the case in a no scheme world. This a further limitation on property rights in such corridors – but with no means of seeking compensation for any losses arising until the CPO is implemented.

This serves to freeze affected parties' lives and businesses in the cause of a scheme that has not crystallised. The new legislation should provide that a landowner is free to act on his land as he sees fit until the CPO is implemented. If safeguarding is an issue in the refusal of any planning consent then a landowner should be able to require the authority promoting the scheme to purchase the property at market value (ignoring the effect on the value of the scheme).

If a planning restriction is placed over affected land to protect land which might be subject to a CPO, that should trigger the possibility of compensation from the promoting authority.

88. Should there continue to be a statutory assumption that planning permission would have been granted for the acquiring authority's proposals if it were not for the compulsory purchase?

(Paragraph 13.30)

Comments on Question 88

Yes. This assumption should be retained.

89. If so, should this continue to be limited (a) to planning permission which might reasonably be expected to be granted to the public and, (b) by the *Pointe Gourde* principle?

(Paragraph 13.30)

Comments on Question 89

Yes, subject to the existence and detail of the CAAD process.

90. The statutory assumption of planning permission for development in terms of paragraph 1 of Schedule 11 to the 1997 Act should be repealed.

(Paragraph 13.34)

Comments on Question 90

Yes.

91. Should the statutory assumption of planning permission for development in terms of paragraph 2 of Schedule 11 to the 1997 Act be repealed?

(Paragraph 13.36)

Comments on Question 91

Yes. The equivalent English provision was removed in 2011.

92. In terms of special assumptions in respect of certain land comprised in development plans, what should be the relevant date for referring to the applicable development plan?

(Paragraph 13.40)

Comments on Question 92

The relevant date should be on the GVD or the date of any positive CAAD.

93. The underlying "scheme" should be deemed to be cancelled, for the purposes of considering statutory planning assumptions, at the time when the CPO is first published.

(Paragraph 13.59)

Comments on Question 93

Yes.

94. The scope of the underlying "scheme" to be deemed to be cancelled for the purposes of considering statutory planning assumptions, should be the entire scheme and not simply the intention to acquire the relevant land.

(Paragraph 13.61)

Comments on Question 94

Yes.

95. Provision along the lines of section 14 of the 1961 Act, as amended, should be included in the proposed new statute.

(Paragraph 13.68)

Comments on Question 95

Yes.

96. Should the provisions of Part V of the 1963 Act, relating to compensation where there is permission for additional development after the compulsory acquisition, be repealed and not re-enacted?

(Paragraph 13.76)

Comments on Question 96

The commercial model could suggest some clawback provision, as might apply under Crichel Down.

97. If not, should the period for considering subsequent planning permission remain as 10 years?

(Paragraph 13.76)

Comments on Question 97

10 years (in effect, two local plan periods) is reasonable

Chapter 14 Valuation of land to be acquired - CAADs

Compensation for the value of land taken is generally based on the planning position that would have been relevant without the scheme. CAADs are an important tool in assessing value.

There are practical difficulties where planning consent is speculative. The CPO process does not readily accommodate the voluntary and customary commercial routes open to a landowner in such a case:

- selling at or not far above existing use value with a clawback in the event of a more valuable planning consent being obtained (often within a specified time span).

- entering into an option agreement with a developer.

98. Should there be a time limit for applying for a CAAD following the making of the CPO and, if so, what should that limit be?

(Paragraph 14.6)

Comments on Question 98

There should be no time limit for the making of a CAAD and the effective date should be the date of any positive CAAD or the GVD whichever is the earlier.

99. Do CAADs currently provide sufficient information and, if not, what further information should they provide?

(Paragraph 14.12)

Comments on Question 99

Planning authorities have limited experience of CAADs which can create difficulties. We understand that Aberdeenshire Council had not dealt with a CAAD for over 50 years prior to an application for a CAAD in respect of land affected by a pipeline in 2008. As a consequence of the AWPR they have had a further four CAADs; most on the AWPR.

The current provisions appear workable but better guidance is needed to assist local planning authorities since is the CAAD that they issue that is relevant for compensation purposes.

CAAD applications should not be considered to be a full planning application.

100. Provision along the lines of section 30(2) of the 1963 Act should be included in the proposed new statute and should apply to statutory planning assumptions as well as to CAADs.

(Paragraph 14.19)

Comments on Question 100

No. A landowner should be free to deal with his property interest as he sees fit up to the valuation date. If the scheme limits that use he should be free to require any promoting authority to acquire his interests at that point.

This is one illustration of why blight notice provisions should be considered in any new legislation as an integral part of the compulsory purchase regime.

101. When an acquiring authority are considering a CAAD, the proposal to acquire the relevant land, and the underlying scheme, should be assumed to be cancelled at the time when the CPO is first published, with no assumption to be made about what may or may not have happened before that date.

(Paragraph 14.30)

Comments on Question 101

Yes.

102. The cancellation assumptions in relation to CAADs should be set out expressly in the proposed new statute.

(Paragraph 14.30)

Comments on Question 102

Yes. A clear statement is necessary.

103. The same cancellation assumptions should apply to consideration of all potential planning consents, including CAADs.

(Paragraph 14.30)

Comments on Question 103

Yes.

104. Should the relevant date for determining a CAAD be linked to the date for cancellation of the scheme for the valuation of planning assumptions?

(Paragraph 14.31)

Comments on Question 104

No. These are separate processes.

105. Should the parties continue to be entitled to insist upon a public inquiry when appealing against a CAAD decision?

(Paragraph 14.33)

Comments on Question 105

Yes. The CAAD process is the simulacrum of a planning application and should have all the

provisions, including appeals, that would be possible for a planning application.

106. Should there be any change in the current (one month) time limit for appealing against a CAAD?
(Paragraph 14.36)

Comments on Question 106

The period for appeals should be three months as for an appeal following refusal of a planning application. One month is too tight.

107. Should an appeal against a CAAD be made to the LTS rather than to the Scottish Ministers?
(Paragraph 14.53)

Comments on Question 107

Where the scheme is promoted by Scottish Ministers that should certainly be the case as they cannot be seen to be disinterested in a scheme promoted by themselves or their agencies.

As a CAAD is to be in line with the planning process, there is no reason for an acquiring authority (whose only direct interest as such is financial) to have such a right of appeal in respect of a CAAD when it would not in respect of a planning application.

108. If so, should the inquiry procedure before a DPEA reporter be retained, with the reporter reporting to the LTS rather than to the Scottish Ministers?
(Paragraph 14.53)

Comments on Question 108

Yes. That maintains the integrity of the planning process, subject to the point just considered.

109. Should planning permission, which could reasonably have been expected to be granted as at the relevant valuation date, be assumed to have been granted?
(Paragraph 14.64)

Comments on Question 109

Yes. This would also follow the 2011 amendment to the English CPO legislation.

110. Where none of the statutory assumptions apply should such planning permission be reflected, for the purposes of valuation, in hope value only?

(Paragraph 14.64)

Comments on Question 110

There is no justification for the higher test imposed by section 25.

111. In any event, should the same criteria be applied in relation to all relevant planning assumptions?

(Paragraph 14.64)

Comments on Question 111

Yes.

Chapter 15 Consequential loss – retained land

112. The statutory definition of retained land should continue to be based on the effect of the acquisition on that land and not merely on the physical proximity of the retained land to the acquired land.

(Paragraph 15.18)

Comments on Question 112

Yes.

113. The proposed new statute should provide that the assessment of compensation for severance or injurious affection should be carried out on a "before and after" basis.

(Paragraph 15.25)

Comments on Question 113

We are concerned about the drafting of such a provision.

While the payment for acquired land should be on open market basis (i.e. ignoring the circumstances of the claimant), the principle of equivalence suggests that the circumstances of the actual claimant must form part of the assessment of a claim for severance and injurious affection as well as disturbance.

The drafting of the provisions here should allow the valuers the opportunity to take the appropriate approach to each case, whether that is an assessment of capital values or of lost profits or on some other basis. Injurious affection losses can sometimes be best considered by a Discounted Cash Flow (DCF) type approach to profits expected to be lost

on retained land as a consequence of a CPO scheme.

114. Claims for injurious affection should be assessed as at the date of severance.

(Paragraph 15.37)

Comments on Question 114

Yes, taking into account the factors known or foreseeable at that date.

115. Compensation for injurious affection, properly so called, should be limited to damage caused to the market value of the retained land.

(Paragraph 15.44)

Comments on Question 115

Claims for injurious affection are, like severance, relatively common in agricultural situations and it is not necessarily always best addressed by a market value assessment.

We consider that careful drafting will be required here so that the basis is wide enough to do justice to the range of cases, including those involving high value income streams from renewable energy projects, that may be found.

116. The proposed new statute should confer a discretion on an acquiring authority to carry out accommodation works.

(Paragraph 15.49)

Comments on Question 116

Yes.

Agricultural cases commonly see the need for accommodation works such as new accesses, water troughs, fences and revised drainage arrangements.

In practice, with the use of design and build for most large projects and as accommodation works are on retained land over which the contractor has no access, claimants are paid for accommodation works. This can lead to major problems with contractors over delivering agreed accommodation works - including the provision of adequate watering facilities for the livestock. No one then accepts responsibility as when the issue is raised with the acquiring authority, the claimant is referred to the developer (with whom he has no contractual relationship) who is simply trying to do the job as cheaply as possible and may have sub-contractors in the way.

117. Is the current rule, that set-off for betterment applies to land which is “contiguous with or adjacent to the relevant land”, satisfactory?

(Paragraph 15.59)

Comments on Question 117

No- for reasons set out above.

118. The provisions which require any betterment to the retained land to be set off against any compensation paid to the landowner in respect of the acquired land should be repealed and not re-enacted.

(Paragraph 15.70)

Comments on Question 118

Yes.

Members' reports that some acquiring authorities do not accept the onus of proof here but simply assert betterment without adequate justification.

Currently, where neighbouring landowners who do not have land taken benefit from the scheme with no set-off, those who have land acquired bear a greater burden of funding that scheme.

Chapter 16 Consequential loss - disturbance

119. The assessment of compensation for disturbance should be carried out separately from the assessment of the market value of the property.

(Paragraph 16.30)

Comments on Question 119

Yes – provided care is taken to avoid double counting.

120. There should be an express statutory provision for disturbance compensation.

(Paragraph 16.34)

Comments on Question 120

Yes – and this should be for both "disturbance and other matters" to avoid the development of specific arguments over the technical definitions here. The real issue is the causation of the loss. A review of exiting problems may prompt clarification to minimise future issues but this should not serve to exclude potential items where there causation of the loss can be shown.

In specific terms, we raise two issues – pre-CPO surveys and professional fees incurred by

claimants.

Pre-CPO Surveys – As we have advised above these are now a significant feature of the CPO process, both in considering a range of possible routes for works and in the design of the final scheme. They can be disruptive and costly for owners and occupiers. There should be stronger provision for compensation and this seems most naturally considered as disturbance.

Professional Fees Incurred by Claimants - Case law suggests that professional fees reasonably incurred in the matter by an affected party are among "other matters". Our view is that it is better to have an effective catch-all expression than anything resembling a list. We accept that it is subject to an obligation to mitigate losses.

Members repeatedly report difficulties with the payment of fees, some of which are documented in an annual survey we undertake

While the claimant's professional representation is commonly seen as a direct charge on the acquirer, this is a mis-description. It is the claimant who instructs the professional support he properly needs and is liable for that cost. Where that cost flows reasonably from the acquisition, the claimant can recover that from the acquirer.

This position has then been complicated by the history of the previous state-sponsored Ryde's Scale for fees on compulsory purchase. This was last reviewed in 1996 and has since not only been formally abandoned but is seen as contrary to EU competition law as expressed in the UK in the Competition Act and the Enterprise Act. However, acquirers seek to impose scale fees, whether Ryde's, Ryde's augmented by a percentage (now often between 20 and 50 per cent) or one they have devised. In all these cases, these can have not greater force in law than an acquirer's initial offer, not something to enforce – yet they often tend to approach it as something they can impose.

We see the English case law, as set out in *Matthews v Environment Agency* and more recently in *Poole v South West Water*, as persuasive for the position in Scotland – that the claimant is entitled to the reimbursement of his reasonable costs in being represented in the matter. As *Poole* shows that can quite properly be on the time and expenses basis that is often apt for professional work on what can often be an open-ended instruction where the time spent can achieve benefits in accommodation works rather than compensation. South West Water had sought to impose Ryde's Scale plus 20 per cent but the Tribunal followed the analysis of case law and upheld repayment on the hourly basis agreed between the claimant and his valuer – in that case, £120/hour in 2007/8). As the Office of the Deputy Prime Minister said when announcing the abandonment of Ryde's Scale:

"… Surveyors should be reimbursed in full in line with all other professional advisers. We do not therefore intend to commission any further reviews of the non-statutory Ryde's Scale, and expect that fees will normally be assessed henceforth on a reasonable basis agreed between the parties."

The position should be exactly the same as for any other professional work on this or other matters, whether by a solicitor or an accountant or, indeed, other work by the valuer.

It is for the professional to agree terms with the claimant, whether on time and expenses or some other basis. Where this is on an hourly rate acquiring authorities can dispute these in assessing compensation potentially leaving an affected party out of pocket, unless willing to appeal. That approach is unjust and revised legislation should set out the basis for reimbursement of any professional fees incurred by affected parties as a consequence of a CPO scheme, clarifying the application of Rule 6 of s.5 of the 1961 Act in the way that has been followed by the courts since *Tobin v London County Council* and in Scotland by *South Lanark Council v McGee and Thomson*.

121. Should the principle of causation in relation to disturbance compensation be set out in the proposed new statute?

(Paragraph 16.38)

Comments on Question 121

Yes. Again, this should be on a general and indicative basis as in the decision in *Shun Feng.*

122. The proposed new statute should make it clear that compensation for disturbance is payable from the date of publication of notice of the making of the CPO.

(Paragraph 16.44)

Comments on Question 122

We are not clear as to the exact proposals here but the liability to recompense for disturbance and other matters should arise wherever and whenever the loss can be shown to be caused by the Compulsory Purchase Order.

We have argued above that the disturbance caused by surveys should be recognised in this – they are a compulsory imposition on the owners and occupiers of affected property.

123. The proposed new statute should make it clear that compensation is payable in respect of costs incurred in relation to a compulsory acquisition which does not ultimately proceed.

(Paragraph 16.45)

Comments on Question 123

Yes.

124. If compensation for disturbance is to be payable from before the confirmation of the CPO, should it include losses caused as a result of lost development potential?

(Paragraph 16.47)

Comments on Question 124

Yes. That is the point of a full and fair assessment of the no scheme world, including the CAAD process. The scheme is one option as to the use of the land and should recognise the cost of the realistic alternative options that it precludes.

The no scheme assumption should see losses arising from the prospect of the scheme taken into account.

125. Should the proposed new statute enable investment owners to claim a wider range of disturbance compensation?

(Paragraph 16.50)

Comments on Question 125

Yes – there is no reason for excluding them from the justice of the approach taken.

126. Do the current rules of compensation for disturbance work satisfactorily where there are issues of corporate structuring involved?

(Paragraph 16.57)

Comments on Question 126

No.

There are many reasons for restructuring a company and it can be costly in respects unrelated to the compulsory purchase to unwind them.

There are also related points which particularly arise in an agricultural context.

We have reports of acquiring authorities taking a very careful view of precise ownership as part of a strict approach to injurious affection claims - in practice following the Northern Irish decision in *Cooper*.

In the rural world of individual and joint ownerships within families, it can be a matter of

historic chance as to who owns the land taken but its effect on other land used by the same business may be ignored. An example from a road widening scheme saw a father and son own the strip taken but as the father alone owns the farmhouse immediately adjoining that strip (but with no land taken) was denied injurious affection, and only had a Part 1 claim. A similar pattern is reported with SSE on the Beauly-Denny line also rejecting claims for injurious affection claims for related property which is clearly connected to the property on which the land take has occurred, but is owned under separate title.

127. Should the proposed new statute remove the impecuniosity rule as it has been established at common law?

(Paragraph 16.69)

Comments on Question 127

Yes.

128. Should claimants' personal circumstances be taken into account when considering the assessment of disturbance compensation?

(Paragraph 16.77)

Comments on Question 128

Yes. Disturbance and other matters flow naturally from the "personal circumstances" of the claimant and so should be taken into account since it is his circumstances that define the impact of the scheme on him and his options at the valuation date, including his taxation position. Ignoring them (and somehow creating a hypothetical claimant) would depart from the principle that he does not lose from the purchase.

129. Claimants should be under a duty to mitigate loss in terms of compensation for disturbance from the date of publication of notice of the making of the CPO.

(Paragraph 16.78)

Comments on Question 129

Yes as a matter of principle.

However, it can need tempering in practice. The recent introduction of the CAP's new Basic Payment Scheme with its narrow definition of *force majeure* (excluding much compulsory purchase) has seen issues for compulsory purchase negotiations in which a strict approach to mitigation would often require disproportionate effort. In practice, most landowners are

reluctant to spend money to maintain buildings which are to be compulsorily acquired but can then find that this leads to an argument over their value at the vesting date because of that failure to spend monies.

A balance is required, perhaps struck by imposing the duty to mitigate from the date for entitlement to claim.

130. It should be made clear that relocation compensation may be available even where this exceeds the total value of the business.

(Paragraph 16.88)

Comments on Question 130

Yes.

131. Should the rules regarding disturbance compensation for the displacement of a business be set out in the proposed new statute and, if so, what, if any, modifications should be made to them?

(Paragraph 16.92)

Comments on Question 131

Yes. There should be a very strong presumption here that disturbance arising from the scheme will be paid, rather than see the business treated as extinguished. Relocation can mean that final assessment of costs will often be delayed.

132. Should the valuation date for disturbance compensation be different from the valuation date in relation to the compulsorily acquired land, in particular where GVD procedure is used?

(Paragraph 16.99)

Comments on Question 132

While the valuation date should generally be the vesting date this should not preclude valid claims for earlier disturbance subject to causation being shown.

133. Should it be made clear, in the proposed new statute, that a claim for disturbance compensation on the basis of relocation of a business will only be determined when sufficient time has elapsed following the relocation to enable the extent of the loss to be quantified?

(Paragraph 16.99)

Comments on Question 133

Yes, as it may take time for the full consequences of a CPO for a business to become clear.

The important larger point here is to maintain a flexible approach to assessment of loss.

More narrowly, if "only be determined" here simply means the conclusion of the process of assessment (without changing basic principles) then this seems appropriate. In practice, parties tend to make/accept part payments from the point at which a claim was due with the extent of loss over an extended period being used to assess and agree the full extent.

134. Section 38 of the 1963 Act should be repealed and not re-enacted.

(Paragraph 16.101)

Comments on Question 134

Yes.

135. Should disturbance payments along the lines of those currently provided for by sections 34 and 35 of the 1973 Act be retained?

(Paragraph 16.104)

Comments on Question 135

Yes.

136. Should the LTS have jurisdiction in relation to any question arising with regard to disturbance payments, whether mandatory or discretionary?

(Paragraph 16.104)

Comments on Question 136

Yes.

Chapter 17 Non-financial loss

137. Should the minimum period of residence necessary in order to qualify for a mandatory home loss payment be increased and, if so, by how much?

(Paragraph 17.14)

Comments on Question 137

No.

If anything, we see an argument for the minimum period to be removed to retain vitality in the market and so help owners and occupiers adjust more readily, in effect by transferring their present entitlement tone parties who are willing to step into their shoes. That also accommodates such issues as inheritance.

138. Should the current system, of calculating home loss payments as a prescribed percentage of market value, be retained?

(Paragraph 17.21)

Comments on Question 138

Yes. A figure of at least 10 per cent appears a general means of recognising the issues here without requiring further assessment.

However, Scotland has left the ceiling on home loss payments at a much lower level than elsewhere in the United Kingdom. In England, the maximum payment has been regularly revised and is now £50,000. In Scotland, it has been left at £15,000.

There should not be a maximum.

139. If so, should primary legislation provide for the periodic review of the relevant maxima and minima or for an automatic increase (or reduction) to reflect inflation?

(Paragraph 17.21)

Comments on Question 139

If a maximum is imposed, primary legislation should first make a substantial increase in the figure and then provide for its annual indexation. That should anyway apply to the minimum.

140. As an alternative, should a system, either of a flat rate payment, or of a payment individually assessed in each case, be introduced?

(Paragraph 17.21)

Comments on Question 140

A flat rate payment would be too crude a way to recognise the problems here.

An individually assessed payment would require a statement of principles as to the basis of claim which would then promise significant disputes.

The present percentage payment basis is a pragmatic answer that would be improved by removing the maximum.

141. Should the provisions relating to farm loss payments be amended so as to be more flexible and less onerous on the agricultural landowner?

(Paragraph 17.28)

Comments on Question 141

There are significant issues regarding assessment of farm loss payments:-

- Farm loss payments are assessed on the basis of average annual profit from the use of the land for agricultural purposes. This reduces payments where there are a few poor years but the disruption may be no less.
- That basis ignores significant non-agricultural income for diversification for which location may be more significant and harder to replace.
- An imputed rent figure is deducted, irrespective of real circumstances. Again problematic.
- If the land acquired is worth more than that given up, the farm loss payment will be reduced by that amount. This seems unreasonable.

We consider that the nature of farmland market, including the extreme difficulty in finding replacement land to rent warrants a farm loss system but the present system needs review. A simple approach could use a percentage of the market value of the acquired land - whether it is tenanted or not as the business disruption will be similar.

142. The proposed new statute should provide for two supplementary loss payments, one for home loss, and one for farm loss, which would, in each case, compensate for all aspects of non-financial loss arising from compulsory purchase.

(Paragraph 17.33)

Comments on Question 142

Yes.

We propose that (as in England since 2003) business loss should also be a head of claim.

PART 4: RESOLUTION OF DISPUTES; THE CRICHEL DOWN RULES; MISCELLANEOUS MATTERS

Chapter 18 Process for determining compensation

143. Sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted.

(Paragraph 18.4)

Comments on Question 143

Yes.

144. What evidence can consultees provide of shortcomings in the current LTS procedures for determining disputed compensation claims, and what changes should be made?

(Paragraph 18.17)

Comments on Question 144

The essential principle here is that if access to dispute resolution is feasible then there may actually be fewer disputes as that knowledge will encourage better behaviour and earlier settlement.

The concerns are:

- the time taken
- the potential costs
- the extent to which the formalities require high level legal representation for what may be straightforward valuation issues

Seeing the LTS as the most appropriate general forum we urge a substantial liberalisation and diversification of its processes to answer these points.

With the wide variety of claims and the increased volume of infrastructure work, the LTS needs to be open to the use of a varied suite of suitable procedures including simplified and informal ones as well as written-only representations alongside the more formal hearings required for major cases or where evidence is more seriously at issue.

Where acquiring authorities resist written-only submissions in favour of a full hearing, this significantly increases costs and delay, deterring claimants and so obstructing a fair settlement of compensation. The time taken by disputed cases extends the effect of the scheme on the individuals affected taking more time out of their lives and businesses.

If such a liberalised regime of procedures can be developed, the LTS should be given flexibility in deciding the appropriate method for determining a dispute while ADR options from arbitration to mediation should be available for smaller claims.

We consider that application of commercial rates of interest coupled with a limiting of the power to award costs against a claimant in CPO cases would also go a long way towards addressing any delays in the system.

145. Where land is compulsorily purchased which is subject to a tenancy of under one year, disputes about compensation relating to the tenancy should be referred to the LTS rather than the sheriff court.

(Paragraph 18.19)

Comments on Question 145

Yes.

146. Should it be made clear, in the proposed new statute, that a six-year time limit to claim compensation runs from the date of vesting (or from the date when the claimant first knew, or could reasonably have been expected to have known, of the date of vesting)?

(Paragraph 18.22)

Comments on Question 146

The experience of larger schemes with more complex impacts taking time to evidence suggests that this may not now be the right approach which might perhaps be better founded using a period of 6 years from a date of 'declared completion'.

This would require an acquiring authority to publish a "declared completion" date in the same manner as the original CPO.

Alternatively, some flexibility should be afforded the LTS to hear claims outside this period in exceptional circumstances.

147. Should it be made clear, in the proposed new statute, that the same time limit operates for any claim of disputed compensation, regardless of whether it follows a notice to treat or a GVD?

(Paragraph 18.22)

Comments on Question 147

Yes.

148. What, if any, changes should be made to the time limit to claim compensation?

(Paragraph 18.23)

Comments on Question 148

Time limits should be consistent, if only to avoid confusion.

The time limit for lodging a claim should coincide with the six year time limit from the date of vesting to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation.

However, there may be rare occasions where, for whatever reason, a claimant is not aware that his property interest has been compulsorily acquired until some time after vesting (this may include cases where other land was taken instead for a pipeline). That should not fundamentally preclude the right to claim compensation and so the six year time rule for an

application to the Lands Tribunal should only commence from the date that the claimant was aware of the acquisition but it should be incumbent on the claimant to demonstrate why such a late claim is being made.

149. Should the LTS be given discretion to extend the time limit in some circumstances?

(Paragraph 18.23)

Comments on Question 149

Save for the situation where the claimant did not know of the acquisition, the need of certainty suggests there should be no discretion.

150. Should the current rules on expenses be amended to allow the LTS a wider discretion to award claimants all of their reasonable expenses in some situations, even if they are ultimately awarded a smaller sum than had been offered?

(Paragraph 18.26)

Comments on Question 150

Yes. By contrast to many other disputes, a claimant in a CPO dispute would not have incurred any such costs where it not for the CPO (which he would not have provoked) and so the LTS should have this discretion, albeit taking account of where a claimant has acted unreasonably.

The CAAV and SAAVA represent many of those acting for claimants and urge that the new legislation for a revised CPO regime should clearly state the obligation for the reimbursement of reasonable professional costs reasonably incurred by the claimant in protecting and representing his position in response to the CPO.

151. Should provision be introduced to allow the LTS to make an order at an early stage, to limit the expenses of a claimant in appropriate cases?

(Paragraph 18.27)

While seeing merit in reserve powers for the LTS to limit the expenses of either or both an acquiring authority or a claimant in particular case (in the a manner available to an arbitrator under the 2010 Act), we are concerned that is expressed solely in terms of claimants on whom a CPO has been imposed. A claimant's costs can be increased by the actions of acquiring authorities (as where they refuse to agree written-only representations or engage senior counsel for hearings).

We believe that the default positon shod be that an acquiring authority should not be entitled to reclaim its expenses in a compensation dispute save in exceptional circumstances.

152. There should be a prescribed form to claim an advance payment.

(Paragraph 18.29)

Comments on Question 152

Members' experiences with the AWPR suggest there are major problems in practice with the operation of the advance notice procedure. Despite serving payment requests, we are advised that Transport Scotland failed to pay claims for an advance payment timeously, apparently having no procedures to do so.

Wider experience points to acquiring authorities' assessment of claims on a cautious basis leaving affected parties out of pocket.

Thinking it likely that requiring a prescribed form will simply lead to technical challenges that it has not been used by claimants who, whether for good reason or ignorance, do not use the exact form, we do not agree with this proposal.

If, however, it is adopted, then the law must require the acquiring authority to advise all potential claimants of the advance payment procedure and supply copies of the prescribed form.

That form should then be accepted as the foundation for subsequent claims rather than the claimant having to issue multiple advance payment requests.

We suggest that the combination of providing a form to applying for advance payment, a period (say, 21 days) for the acquirer to request more information and a realistic rate of compound interest on late payments following a 90 day notice might help to improve the timeliness of handling claims for an advance payment of compensation.

153. Are there circumstances in which an acquiring authority should be required to make an advance payment before taking possession?

(Paragraph 18.31)

Comments on Question 153

Compensation should be due immediately upon temporary access for investigative works etc with interest payable on such claim from that date.

154. Should it be competent for the LTS to provide an enforceable valuation figure for an advance payment?

(Paragraph 18.33)

Comments on Question 154

Unless an accelerated route is provided, this proposal appears cumbersome. By the time LTS makes an order, it might be irrelevant and a waste of all parties' time. We prefer a direct legislative obligation for realistic advance payments to be made within the due period.

155. At what rate should interest be paid on advance payments, and should the acquiring authority be liable for an increased rate if payment is delayed?

(Paragraph 18.34)

Comments on Question 155

The statutory interest rate payable has been 0% since 2009. That does not serve as a discipline for the process – instead, it makes the claimants a cheap source of finance for acquires. That rate does not reflect the cost of borrowing - most overdrafts are 3% over base.

A significant rate of interest is essential for the validity of the advance payment process.

The standard rate used in commercial contracts is more often at around 4 per cent over base and the statutory rate of interest on late commercial payments is 8 per cent over base as set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002:

To encourage acquiring authorities to make proper assessments of compensation timeously in response to such notices it would seem reasonable that the acquiring authority pay interest on a penal rate on the basis on any balance outstanding from the date that payment under a 90 day request should have been made.

In the event that an affected party is incurring a loss greater than this it should be open for this to form a separate Head of Claim. This would properly balance the interests of CPO powers and those of affected parties.

156. It should be competent, where all the parties agree, for an advance payment to be made to the landowner where the land is subject to a security.

(Paragraph 18.36)

Comments on Question 156

Yes.

A payment made to the party holding security may result in penalties. If this does occur then this should form part of any disturbance claim (a point that we understand is accepted in practice).

157. Should the LTS have discretion to: -

(a) provide for interest from a date earlier than its award, and

(b) increase the rate of interest where it finds that there has been unreasonable conduct by an acquiring authority?

(Paragraph 18.38)

Comments on Question 157

The simplest answer would be for the acquiring authority to pay interest on the basis set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002 from the date that payment should have been made – as the Scottish Government and Parliament expect of any other commercial body.

Notwithstanding any such basis of interest, the legislation must not rule out any entitlement for a claimant to seek interest as part of a disturbance payment.

The LTS should have at least the same powers as those given to an arbitrator by Scottish Arbitration Rule 50 to award interest.

158. What are the advantages and disadvantages in resolving disputes in compulsory purchase cases by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

Comments on Question 158

Arbitration or expert determination may commonly be more cost effective in smaller value disputes. There should be encouragement for the parties to agree on mediation where this is not inappropriate.

159. Can consultees provide evidence of costs incurred in relation to resolving disputes by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

Comments on Question 159

While there is little recent experience of arbitration in rural maters in Scotland (following the changes to dispute resolution made by the Agricultural Holdings Act 2003), the major modernisation of Scottish arbitration law achieved by the Arbitration (Scotland) Act 2010 offers serious opportunities for arbitration to be a practical means to settle many more "routine" compulsory purchase disputes, whether by agreement between the parties or at the direction/under the aegis of the LTS.

In the context of current agricultural tenancy reform discussions, we have undertaken some comparison of costs of English and Welsh arbitrations under similar rental provisions with those of rental cases under the Scottish Land Court procedures. These showed that arbitration may typically cost less than a sixth of the cost of a Land Court case – and often much less. This especially the case as English and Welsh arbitrators have gained confidence in the statutory means available to manage and control cost awards.

Expert determination, being less adversarial in its approach, can often be cheaper still.

Mediation is a different approach being in some sense an extension of negotiation but in a framework and with assistance that may lead the parties to reach a package settlement, potentially covering more than might be subject to formal dispute procedures. If it fails, the

parties who paid for the mediation still face the costs of the next step in dispute resolution, however that may be done.

In this we can see that the legislation could very usefully see the LTS:

- positively encourage (but not insist on) mediation as a precursor to any litigation
- able to use arbitration and expert determination as alternative procedures under its authority (alongside simplified, informal and written-only procedures)
- or, alternatively, encourage the use of arbitration and expert determination on a voluntary basis by the parties.

The combination of those options should aid settlements, lower costs and ease the pressure of cases on the LTS – all improving timeliness.

Chapter 19 Crichel Down Rules

As a preliminary comment, we are increasingly seeing land taken for CPO projects is not limited to what is immediately required for the project but also additional land for more extensive landscaping and mitigations works. HS2 is seeing land taken for replacement woodland planting on least a ten to one ratio.

160. Should the Rules for giving former owners of compulsorily acquired land a right of pre-emption, where the land is no longer required for the purpose for which it was purchased, be placed on a statutory footing?

(Paragraph 19.5)

Comments on Question 160

Yes.

The original Crichel Down case arose from political recognition of a moral principle here – that when land that has been taken by compulsion for a public purpose is no longer needed for that purpose the first claim on it is by the original owner (and descendants).

This has a particular relevance to much rural work as compulsory purchase is typically often of only a part of a continuing farm to which the land taken would still be relevant.

The acquiring authority should not be able to gain financially from its use of these privileged powers and so the price to be paid on any buy-back should be assessed on the same basis as the original compensation. The acquiring authority should not be able to argue “ransom value” in this assessment.

161. Should the Rules apply to all land acquired by, or under threat of, compulsion?

(Paragraph 19.9)

Comments on Question 161

Yes.

162. Should the obligation to offer back land continue to be limited to cases where the land has undergone no material change since the date of acquisition?

(Paragraph 19.11)

Comments on Question 162

No. Even in cases where the land has changed in character, such as having buildings, dwellings or trees planted upon it should be offered back. It would be unattractive to see a change in character used to justify the acquiring authority seeking a ransom value from the original owner.

The option should lie with the dispossessed landowner, not the acquirer.

As the acquiring authority often fails to manage land taken for mitigation works or control vermin, to the detriment of the claimant's retained land, there anyway may be good reasons for the landowner have that land back.

163. Are the current provisions setting out the interests which qualify for an offer to buy back land satisfactory?

(Paragraph 19.12)

Comments on Question 163

These are probably satisfactory.

164. Should the same time limit apply in relation to the obligation to offer back land, regardless of the type of land acquired, and how long should that time limit be?

(Paragraph 19.15)

Comments on Question 164

A uniform time limit of 20 years should apply.

165. Should a time limit be introduced for land purchased between 1 January 1935 and 30 October 1992?

(Paragraph 19.15)

Comments on Question 165

No.

166. Should the seven exceptions to the obligation to offer back, currently provided for in the Rules, be retained and are there other exceptions which should be included?

(Paragraph 19.16)

Comments on Question 166

No – the acquirer has declared the land surplus for its purposes. It was not taken for general public purposes. If it is wanted for other purposes, then statutory procedures should be used for that.

167. Should the special procedure in paragraph 23 of, and Annex 1 to, the Rules, relating to the obliteration of boundaries in agricultural land, be retained?

(Paragraph 19.17)

Comments on Question 167

Yes.

168. Do time limits in the current Rules to carry out the process to offer back land operate satisfactorily?

(Paragraph 19.21)

Comments on Question 168

No. The time limits should be extended.

169. Should clawback provisions in terms of the development value of surplus land be time limited and, if so, to what extent?

(Paragraph 19.24)

Comments on Question 169

No time limit should apply. Surplus land should be returned to the landowner if not used for the scheme. The acquirer should not benefit financially from uses unrelated to those for which the land was taken.

170. The LTS should have a general jurisdiction to resolve disputes which arise in relation to the disposal of surplus land.

(Paragraph 19.26)

Comments on Question 170

Yes but, as aired above there should be provision for the LTS to have the case management powers to direct that a dispute is to go to arbitration or expert determination as well as to encourage mediation.

Chapter 20 Miscellaneous issues

171. Should section 89 of the 1845 Act be repealed and not re-enacted?

(Paragraph 20.4)

Comments on Question 171

Yes.

172. The law on the taking of enforcement action should be amended so as to make it clear that a third party under a back-to-back agreement is entitled to enforce possession by virtue of the CPO.

(Paragraph 20.5)

Comments on Question 172

Yes.

173. Does section 114 of the 1845 Act work satisfactorily?

(Paragraph 20.10)

Comments on Question 173

No.

174. Where a short tenancy is compulsorily acquired, should account be taken, for the purposes of assessing compensation, of the likelihood that it will be continued or renewed?

(Paragraph 20.18)

Comments on Question 174

Yes.

The assessment should be based on the claimant's realistic expectation of continued occupation of the land.

In this vein, much fairer justice would be done to many tenants if the decision in *Bishopsgate Space Management Ltd v London Underground Ltd* regarding s.20 of the English Compulsory Purchase Act 1965 could be reversed as we see that it could be followed in Scotland. This decision sees the tenant treated as though his tenancy would end by the landlord taking advantage of the earliest possible date to do so. While there will always be some specific instances where circumstances would see early repossession, this is an inherently implausible as a general assumption in the real world, in which owners have chosen to let properties for an income. If they wanted them back, they would not have let them, however much they may also have reserved the possible power to do so.

The practical effect of following that assumption is that the tenant's business and interest would commonly be undervalued, often substantially so, so limiting his ability to re-establish himself. The compensation should be based on the reasonable expectation as to the period, short or long, that the business would actually remain in occupation.

175. Provision along the lines of sections 99 to 106 of the 1845 Act should be included in the proposed new statute.

(Paragraph 20.23)

Comments on Question 175

Yes.

176. Should the proposed new statute provide that any tax liability which the landowner incurs as a result of the compulsory acquisition may be recoverable under the head of disturbance?

(Paragraph 20.27)

Comments on Question 176

Yes.

These liabilities arise from actions that the claimant did not intend but which are forced on him by the CPO for reasons unrelated to him and over which he has no control.

177. Are there any other aspects of the current compulsory purchase system, not mentioned in this paper, to which consultees would wish to draw to our attention?

(Paragraph 20.29)

(Paragraph 20.27)

Comments on Question 177

Yes. In our opening remarks we regretted the omission of consideration of the issues of blight, injurious affection and Part 1 claims.

Equally, the important place of the utilities in the world of compulsory purchase needs to be considered as part of this process. Omitting them omits perhaps the major area of work and so issues for affected parties and the reputation of the process.

We trust this is of assistance to the Scottish Law Commission in respect of reforming of the CPO regime in Scotland and would be happy to meet to address any queries you may have in respect of the matters revised or to expand on some of the comments made.

Yours faithfully,

Jeremy Moody
Secretary and Adviser
Central Association of Agricultural Valuers