

RESPONSE FORM

DISCUSSION PAPER ON COMPULSORY PURCHASE

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

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Summary of Questions and Proposals

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 The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.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

Agreed as this should result in a simpler, more streamlined statutory codification which could simplify the underlying law. However it is likely that compulsory purchase will remain an area which will lend itself to generating a lot of case law on both the exercise of the relevant powers and the interpretation and application of the compensation/valuation rules.

As our business operates across the UK, we do have some concerns that a new statute could introduce differentiation in treatment of affected parties both north and south of the border which could affect how we deal with affected parties.

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 Proposal 2

Yes as it includes land, buildings and structures, land covered by water and any right or interest over land. Given that in Scots Law land is defined as being everything from the centre of the earth to the sky, it should be made clear that land could mean all or any part of the land, for example, air space or subsoil.

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 Proposal 3

Yes. The general right should include power to create new rights or interests in or over land, for example a lease, a servitude or a wayleave. The new statute should set out how the

terms or conditions of these documents would be agreed and how they would bind both parties.

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 Proposal 4

No comments.

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 Proposal 5

Yes this would be useful for acquiring authorities. A power to take temporary possession should set out the affected land, the temporary use for which possession is being taken, for example for access or for a construction compound, and the period of temporary use. Regarding the period of temporary use, this should not be too prescriptive or limiting otherwise the power will be of little value to acquiring authorities. We would draw your attention to the power to take temporary possession set out in private Acts of the Scottish Parliament, for example Edinburgh Tram (Line One) Act 2006. Finally where temporary possession could affect a statutory undertakers' apparatus, the power to take temporary possession should include asset protection safeguards.

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 Proposal 6

The right to compensate those whose private property interest has been compulsorily acquired should be expressly provided for in the new statute.

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 Proposal 7

Yes.

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 Proposal 8

No comments.

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 Proposal 9

We see no reason why the procedures to be set out in the new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B.

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

(Paragraph 5.18)

Comments on Proposal 10

No comments.

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 Proposal 11

The powers contained in section 83 of the 1845 Act allow for surveying, the taking of levels of land, probing or boring to ascertain the nature of the soil and setting out the line of the works. It should be made clear that this would include carrying out environmental surveys and placing and leaving monitoring equipment on the land.

Where the land being surveyed contained existing apparatus of statutory undertakers there should be some conditions around the carrying out of any intrusive surveys.

This power should be without prejudice to the existing and specific powers of entry granted to statutory undertakers under other enactments. The new statute should not seek to amend these specific powers.

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

(Paragraph 5.24)

Comments on Proposal 12

The current list is satisfactory.

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 Proposal 13

It is appropriate that only statutory objectors can insist upon a hearing or inquiry. However where the objections raised by a statutory objector concern legal issues or matters of compensation which should be dealt with by the LTS and the statutory objector should not be able to insist upon a hearing or inquiry. Vexatious statutory objectors should not be able to insist upon a hearing or inquiry although we appreciate that this is subjective and given the implications of a CPO it is likely that a decision maker would err on the side of caution and hold a hearing or inquiry.

The proposal, that if a certain percentage of landowners objected or if those objected represented a certain percentage of the land affected the requirement to have an inquiry would be triggered, is not appropriate as it does not take into account the substance of the objections.

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 Proposal 14

Yes however there should be a balance between allowing the acquiring authority to resolve objections and enter in to voluntary agreements and allowing the CPO to proceed as expeditiously as possible to avoid delay to major infrastructure projects. Delay can make projects unaffordable. We would suggest a period of 3 months from the last date for lodging objections.

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 Proposal 15

In principle DPEA could have discretion over the process for determining objections however this would need to be exercised carefully, given the implications of a CPO, and good reasons would require to be given as to why a specific process had been chosen and others discounted. Statutory objectors may feel prejudiced if the DPEA considered that either no further procedure is required or that the matter could be dealt with by written submissions. This could lead to more judicial reviews and cause delay to the delivery of major infrastructure projects.

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

(Paragraph 5.32)

Comments on Proposal 16

Agreed.

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 Proposal 17

It may be appropriate in some circumstances for the Scottish Ministers to delegate the confirmation of a CPO to a Reporter. It may also be appropriate for example where there are no objections to a CPO for the acquiring authority to confirm their own CPOs. However

this would need careful consideration given the implications of a CPO to avoid an increase in challenges. Scottish Ministers should retain a right to call in a CPO for their confirmation. Further decisions which could affect operational land of statutory undertakers should remain with Scottish Ministers and should not be delegated to either a Reporter or to the acquiring authority where the affected statutory undertaker has objected to the CPO.

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 Proposal 18

They are satisfactory but consideration should also be had to other methods for example notification by email and publication of notices on websites which would supplement traditional advertisement and notification methods. It may also be prudent for advertising and notification requirements to be contained in secondary legislation so that if necessary, to keep abreast of technology, the requirements can be updated.

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

(Paragraph 5.46)

Comments on Proposal 19

Yes.

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 Proposal 20

No. We need to be able to react to changing priorities and requirements of Ofgem and any conditions could fetter that ability.

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 Proposal 21

Yes; reasonably and properly incurred expenses should be recoverable.

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

(Paragraph 5.50)

Comments on Proposal 22

Yes.

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

(Paragraph 5.50)

Comments on Proposal 23

The entry should be made both a new Register of CPOs and in the Land Register.

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

(Paragraph 5.59)

Comments on Proposal 24

Yes.

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 Proposal 25

It is unclear what is meant by the phrase “reasonably likely to proceed”. It could have different meanings in each case and therefore it would be difficult to enshrine this precondition in statute. In the case of regeneration project where there is a private developer involved, then in principle, such a test would be prudent. The current guidance deals with this and this is perhaps where should a test should be contained rather than in the new statute. For infrastructure projects where there is already a regulatory framework around approvals and funding in our view a test is not required nor appropriate.

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 Proposal 26

Yes although Scottish Ministers would still have the ability to hold an inquiry if they considered it appropriate. Other methods for considering the matter, for example written submissions, a site visit and/or a hearing, should be considered as they may be more appropriate.

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 Proposal 27

Yes.

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 Proposal 28

It would be helpful if the process following an inquiry had clearer timescales albeit that we accept that the discretion of Scottish Minister cannot be fettered. Perhaps if there were target dates for Reporters to have submitted their report to Scottish Ministers and for Scottish Ministers then to consider and make a decision. This would give more transparency and certainty.

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

Yes.

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 Proposal 30

Yes but it may be difficult to quantify the level of damages.

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

(Paragraph 6.39)

Comments on Proposal 31

Yes.

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 Proposal 32

Yes to provide certainty to the acquiring authority who are seeking to rely on and implement the CPO as soon as possible.

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

(Paragraph 6.45)

Comments on Proposal 33

If any objector can prove that they were not notified and have only become aware of the CPO then they should be permitted to make a challenge at a later stage.

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 Proposal 34

Yes.

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 Proposal 35

Yes. However the ability to extend the period to implement a CPO where there has been a challenge or series of challenges should not automatically suspend the operation of the CPO. For example if we have promoted a CPO for land required to allow the reinforcement or replacement of damaged infrastructure there may be an urgent need to commence the works, and the developer may wish to implement part of the order pending the outcome of the challenge, either because only part of the order is affected by the challenge or because the acquiring authority believes that the challenge is without merit.

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 Proposal 36

This is supported.

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 Proposal 37

Yes, that would provide clarity.

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 Proposal 38

Yes this is supported. The LTS would be the appropriate forum to consider such proceedings.

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

(Paragraph 7.19)

Comments on Proposal 39

Yes there should be a time limit. For consistency 6 years may be appropriate.

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

(Paragraph 7.25)

Comments on Proposal 40

Yes. This information should be in a prescribed form for consistency.

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

(Paragraph 7.29)

Comments on Proposal 41

No comments.

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 Proposal 42

No because at both points the claimant would have been aware of the CPO.

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

(Paragraph 7.40)

Comments on Proposal 43

Yes.

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 Proposal 44

Yes, it should be competent for an acquiring authority to withdraw a notice to treat. They should be entitled to do so any time prior to the notice to treat ceasing to have effect.

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 Proposal 45

Yes there may be circumstances, particularly where CPOs are promoted by statutory undertakers, where an acquiring authority may be required to withdraw a notice to treat after they have entered on to the land. These are likely to be rare. In such a case, there should be an obligation on the acquiring authority to make good any damage caused and/or pay compensation.

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 Proposal 46

No we believe that the period should remain unchanged. The ability to enter on to the land

within 14 days is sometimes critical to the delivery and reinforcement of infrastructure.

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

No any counter-notice should be served prior to the acquiring authority taking entry to the land.

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

(Paragraph 7.73)

Comments on Proposal 48

It would be unusual for entry not to have been taken as soon as permitted. However there may be circumstances where entry is not taken at that time. We would suggest that a notice of entry remains valid for 3 months.

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 Proposal 49

The acquiring authority should serve notice on all parties identified in the CPO. Even where an inquiry authority has made all diligent inquiries, it may still not be possible to identify holders of 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 Proposal 50

No comments.

51. Should a GVD be available in all circumstances?

(Paragraph 7.89)

Comments on Proposal 51

Yes.

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

(Paragraph 7.89)

Comments on Proposal 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 Proposal 53

Yes.

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 Proposal 54

It is difficult to see how entry would be taken early before vesting under a GVD unless a voluntary agreement has been reached which allows early entry. As part of that agreement it is likely that compensation or some form of payment would have been agreed. So in our view compensation and any interest should run from the date of vesting. If there were statutory powers allowing entry prior to vesting then in principle compensation and interest should run from the date of entry.

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 Proposal 55

This is supported.

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 Proposal 56

No an acquiring authority needs certainty for budgeting and affordability purposes. Compensation should run from the date of vesting. National Grid is also concerned that such a discretion would encourage a greater number of LTS references in which the valuation date is disputed due to the potential to gain advantage from changes in market conditions if a different valuation date is used. National Grid considers that the public interest lies in certainty as to how claims should be valued.

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 Proposal 57

- a) Yes.
- b) Yes.

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

(Paragraph 7.114)

Comments on Proposal 58

Yes we would support this.

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 Proposal 59

No further comments.

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 Proposal 60

No we think that, while the new method may be preferable to the current GVD method, the notice to treat method should be retained.

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

(Paragraph 7.120)

Comments on Proposal 61

See our response above.

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 Proposal 62

Yes this should be a valid method for transferring the land.

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 Proposal 63

a) Yes.

b) 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 Proposal 64

Yes that would simplify matters.

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 Proposal 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 Proposal 66

Agreed.

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 Proposal 67

Yes.

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 Proposal 68

Yes.

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 Proposal 69

Yes.

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 Proposal 70

Yes on registration of the GVD or the acquiring authority's title, the Keeper should remove the standard security from the register and in effect extinguish it.

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

(Paragraph 8.75)

Comments on Proposal 71

These sections should be consolidated. It should be clear that where a CPO is used all burdens are extinguished unless the CPO provides otherwise.

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 Proposal 72

Yes for example, leases, servitudes and wayleaves.

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 Proposal 73

Provisions along the lines of the Mining Code should be included in the proposed new statute.

PART 3: COMPENSATION

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 Proposal 74

Agreed.

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 Proposal 75

The land should be valued on the basis of a no scheme world.

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

(Paragraph 11.42)

Comments on Proposal 76

Compensation should not take account of the issue for negative equity.

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

(Paragraph 11.53)

Comments on Proposal 77

Yes, agreed.

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

(Paragraph 11.55)

Comments on Proposal 78

As this is the test in England this would retain consistency and the “devoted to a purpose” test should be retained.

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 Proposal 79

Yes.

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 Proposal 80

No comments.

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 Proposal 81

The definition of scheme will require to be considered on a case by case basis. It should be defined with reference to the CPO and the statement of reasons.

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 Proposal 82

No the scheme should be disregarded.

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 Proposal 83

It should be disregarded.

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 Proposal 84

No there should be no limitation to any disregard.

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 Proposal 85

No it should be for a claimant to provide evidence as to whether the assumptions should apply.

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 Proposal 86

Yes.

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 Proposal 87

The date of vesting.

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 Proposal 88

No comments.

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 Proposal 89

No comments.

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 Proposal 90

No comments.

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 Proposal 91

No comments.

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 Proposal 92

The date of vesting.

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 Proposal 93

No comments.

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 Proposal 94

Yes the entire scheme should be deemed to be cancelled not just the intention to acquire the relevant land.

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 Proposal 95

No comments.

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 Proposal 96

No comments.

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

(Paragraph 13.76)

Comments on Proposal 97

No comments.

Chapter 14 Valuation of land to be acquired - CAADs

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 Proposal 98

A time limit for applying for a CAAD should be linked to confirmation of the CPO. We would suggest that there should be a time limit of 6 months after the date of confirmation.

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

(Paragraph 14.12)

Comments on Proposal 99

Currently CAADs do not provide sufficient information. A CAAD should contain conditions like a planning permission so that any planning constraints which may affect the value of the land are known. The CAAD should also contain heads of terms or the commercial provisions of any legal agreement, again so that how this affects the valuation of the land and ultimately the compensation can be considered and is transparent.

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 Proposal 100

No comments.

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 Proposal 101

No comments.

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

(Paragraph 14.30)

Comments on Proposal 102

Yes.

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

(Paragraph 14.30)

Comments on Proposal 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 Proposal 104

That would provide clarity and consistency and, as a CAAD is used for valuation purposes, this would seem to be sensible.

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 Proposal 105

The parties should not be entitled to insist on a public inquiry. The matter should be dealt with like a planning appeal where the need for any further procedure and the type of

procedure is a matter for the Reporter to determine.

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

(Paragraph 14.36)

Comments on Proposal 106

No.

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

(Paragraph 14.53)

Comments on Proposal 107

Given that a CAAD is for valuation purposes in principle the LTS could consider an appeal however it is not clear whether they would have the right skill set and expertise to do so.

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 Proposal 108

This may be a sensible compromise to allow the final decision to be taken by the LTS but for the planning considerations to be dealt with by a Reporter.

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 Proposal 109

No it must be demonstrated that it would have reasonably have been expected to be granted.

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 Proposal 110

Yes.

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

(Paragraph 14.64)

Comments on Proposal 111

No comments.

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 Proposal 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 Proposal 113

Yes.

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

(Paragraph 15.37)

Comments on Proposal 114

Yes at the date of vesting.

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 Proposal 115

Yes.

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

(Paragraph 15.49)

Comments on Proposal 116

Yes as this can help the acquiring authority mitigate compensation and accommodation works and may be preferred by the affected party. The new statute would have to make it clear that the acquiring authority have the right to carry out such works and would have to provide it with the necessary rights to do so eg access rights etc. However it must be for the acquiring authority to decide whether it carries out accommodation works or pays compensation. So any provision in the new statute must not make it mandatory for the acquiring authority to carry out accommodation works.

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 Proposal 117

Yes.

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 Proposal 118

No they should be retained.

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 Proposal 119

Yes.

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

(Paragraph 16.34)

Comments on Proposal 120

Yes for clarity and certainty.

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

(Paragraph 16.38)

Comments on Proposal 121

Yes.

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 Proposal 122

No. It is not clear why compensation for disturbance would arise from such an early date.

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 Proposal 123

No this does not appear to be appropriate and could encourage parties to rack up costs simply because they are recoverable. Compensation is paid from the public purse and so the new statute should not, without good justification, seek to increase the likely compensation costs of promoting a scheme.

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 Proposal 124

We do not consider that compensation for disturbance should be payable from before the confirmation of the CPO. Lost development potential should not be a disturbance cost – it is picked up in the planning assumptions or hope value attributed in determining the value of the land.

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

(Paragraph 16.50)

Comments on Proposal 125

No comments.

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

(Paragraph 16.57)

Comments on Proposal 126

Acquiring Authorities should not have to look into corporate structuring decisions. Corporate claimants should ensure that claims are made by all relevant entities and that the losses are correctly claimed by the relevant claimant.

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

(Paragraph 16.69)

Comments on Proposal 127

No comments.

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

(Paragraph 16.77)

Comments on Proposal 128

There is currently flexibility on the current system for personal circumstances to be taken into account when assessing compensation claims. Equivalent reinstatement, for example, offers one means of dealing with the need for special adaptations to property to meet specific personal circumstances of the claimant. It would be difficult to define "personal circumstances" in a statute without unintentionally causing hardship to some.

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 Proposal 129

Claimants have a general duty to mitigate loss at all times.

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 Proposal 130

Compensation is being paid from the public purse and so any compensation payments must be justifiable. The acquiring authority must also demonstrate that it has obtained value for money. Equally a claimant should not be able to insist on financial betterment from the CPO.

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 Proposal 131

No comments.

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 Proposal 132

No it should be the date of vesting.

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 Proposal 133

No comments.

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

(Paragraph 16.101)

Comments on Proposal 134

Yes as it would appear obsolete.

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 Proposal 135

Yes other than discretionary payments. If a person is not legally entitled to a disturbance payment, it is not clear in what circumstances a discretionary payment would be paid by the acquiring authority, particularly as compensation is paid from the public purse and as the acquiring authority should act consistently when dealing with compensation claims.

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 Proposal 136

Yes in relation to any disputes. However see our response above regarding discretionary payments.

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 Proposal 137

No comments.

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

(Paragraph 17.21)

Comments on Proposal 138

No comments.

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 Proposal 139

No comments.

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 Proposal 140

No comments.

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 Proposal 141

It should be up to the agricultural landowner to demonstrate its loss.

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 Proposal 142

We do not support this in relation to farm loss. All compensation claims must be evidenced and justified. No comments in relation to home loss.

**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 Proposal 143

Agreed. All disputes in relation to compensation should be dealt with by the LTS.

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 Proposal 144

The process can take a long time and can be expensive for all parties. The process should be simplified and streamlined, with clear and fixed timescales.

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 Proposal 145

Yes, this seems to be an historic anomaly. All disputes in relation to compensation should be dealt with by the LTS.

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 Proposal 146

Yes. This would provide clarity and certainty for both acquiring authorities and affected parties. The six years should apply to both lodging a claim and referring the matter to the LTS where there is a dispute.

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 Proposal 147

Yes if there is to be more than one method of implementing a CPO. Again that would provide clarity and certainty and also consistency.

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

(Paragraph 18.23)

Comments on Proposal 148

The current time limit of 6 years seems to be appropriate.

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

(Paragraph 18.23)

Comments on Proposal 149

No.

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 Proposal 150

Yes the rules should be amended to allow the LTS a wider discretion, however this discretion needs to be exercised carefully to avoid encouraging unreasonable claims or increasing the number of cases referred to the LTS. If the process itself was less costly that may also be beneficial.

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)

Comments on Proposal 151

Yes, although an application for the equivalent of a protective expenses order would need to be carefully scrutinised to ensure that they do not encourage frivolous, vexatious or unreasonable claims. Again if the process was less costly and quicker this may be less of

an issue.

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

(Paragraph 18.29)

Comments on Proposal 152

We would support this. This will encourage the correct information to be supplied to the acquiring authority to allow claims for advance payments to be dealt with.

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 Proposal 153

It is likely that it would be difficult for an acquiring authority to be able to make an advance payment before taking possession from a governance perspective. In addition if the GVD procedure or the new unitary procedure is used, it is difficult to see how the need to make advance payments before taking possession would arise.

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

(Paragraph 18.33)

Comments on Proposal 154

It is not clear how this would work in practice. Given that compensation is being paid out of the public purse, the valuation of the advance payment needs to be transparent and there needed to be a clear audit trail. Any advance payment should be based on the acquiring authority's estimate. It is not acceptable for the acquiring authority to make an overpayment in the hope that the claimant will pay it back. If the issue is the failure of acquiring authorities to pay then it is not clear that this proposal would improve matters.

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 Proposal 155

No comments.

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 Proposal 156

Yes.

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 Proposal 157

- a) Interest should be applied from the date of vesting. The LTS should not discretion in this regard.
- b) It may be difficult to demonstrate that there has been unreasonable conduct by the acquiring authority. In addition it is subjective. Given that compensation is paid from the public purse we do not think that this is appropriate.

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 Proposal 158

ADR is not usually successful. See our earlier comments on the LTS process.

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 Proposal 159

No comments.

Chapter 19 Cichel Down Rules

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 Proposal 160

No comments.

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

(Paragraph 19.9)

Comments on Proposal 161

No comments.

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 Proposal 162

No comments.

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

(Paragraph 19.12)

Comments on Proposal 163

No comments.

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 Proposal 164

No comments.

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

(Paragraph 19.15)

Comments on Proposal 165

No comments.

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 Proposal 166

No comments.

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 Proposal 167

No comments.

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

(Paragraph 19.21)

Comments on Proposal 168

No comments.

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 Proposal 169

No comments.

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 Proposal 170

Yes this is supported.

Chapter 20 Miscellaneous issues

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

(Paragraph 20.4)

Comments on Proposal 171

Yes on the basis that it would appear to be redundant in practice.

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 Proposal 172

No comments.

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

(Paragraph 20.10)

Comments on Proposal 173

No comments.

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 Proposal 174

No comments.

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 Proposal 175

This is supported.

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 Proposal 176

No comments.

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

(Paragraph 20.29)

Comments on Proposal 177

In England there is a power for requisitioning information at the start of the CPO process in order to establish the identity of owners, tenants, and other benefitted parties. While it is

not always necessary to resort to this power, it can be useful for acquiring authorities to have such a power. There is currently no equivalent power in Scotland.

General Comments

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.