

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 The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.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

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

Consideration should be given to extending the definition of land to include other interests / tenements in land such as minerals, sportings and salmon fishing or to clarify that it already includes such interests.

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 ability to create other types of interest in land for permanent or temporary use may mitigate the interference with landowner’s property and/ or business and save money for the acquiring authority if the land does not have to be acquired.

The new rights could include personal real burdens in favour of the acquiring authority, a new Compulsory Purchase (CP) Licence for temporary access for the carrying out of works, storage etc or CP lease where exclusive possession is required. All of the new rights should be branded in a similar fashion, each preceded by words such as Compulsory Purchase to immediately alert any interested parties to the significance of these rights.

Any new rights created should be registrable in the Land Register

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

Any new real burdens which are to be created under CP could be akin to personal real burdens created under the Title Conditions (Scotland) Act 2003. They could be in favour of the acquiring authority with conditions attached as to what rights they could benefit from and secondary legislation prescribing which authorities could use such real burdens.

Similar consideration could be given to creating new CP servitudes in favour of the acquiring authority. This may be straying into an area of property law which is in need of review but might be a starting point. Finding a benefited property for some utility servitudes can cause problems. The same might apply in CP situations when all that is needed is a right to lay pipes or cables or a right of access.

If personal CP real burdens and servitudes could be created, the need for dual registration would also be dispensed with for all and not just for pipes and cables.

When considering what type of additional rights may be acquired compulsorily, thought should be given as to how long such rights will be needed. For example, if real burdens were employed to prevent owners from building on land needed for verge or sight lines for road widening, the owners in theory could go to the Lands Tribunal to seek variation or discharge of such a real burden. This would also apply in the case of servitudes. Conditions may need to be added to any provision permitting CP real burdens and servitudes to deal with the options for variation and discharge.

If real burdens are to be used, consideration must also be given as to whether such burdens must comply with the rules for constituting real burdens contained in the Title Conditions (Scotland) Act 2003. For example, it may not always be practicable to have the content of the burden within the 4 corners of the deed and to make the condition praedial. Provision may be needed to allow for reference to publicly available documents.

If CP leases could be created as a statutory type of lease, we would hope that such leases could be registered in the Land Register, irrespective of the length of the lease, and thereby act as a flag to all prospective purchasers that the land is affected by CP. Given the different status of such a lease, parties should quickly become aware that it is not the same kind of agreement as a commercial or residential lease. Such leases could contain standard obligations which landlords and tenants must comply with. The question of irritancy and termination could require special treatment. Also liability post termination of the lease for environmental issues would have to be dealt with.

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

Power to take temporary possession should be explored. The arrangements could be under a licence to occupy which is for a fixed term and licence fee. If the term had to be extended that should be agreed between the parties. If agreement cannot be reached, compulsory acquisition powers could be resorted to after dispute resolution procedures have been exhausted.

Any such licence must set out exactly what the authority are entitled to do and what they cannot do. If the authority are to have exclusive possession of the land, a lease would be more appropriate. Whichever mechanism is used, reinstatement obligations would have to be agreed and set out in the lease or licence.

Again, notice of any such licence should appear against the title to the Property in the Land Register and we would suggest that the “compulsory purchase” branding be used.

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

Chapter 5 Procedure for obtaining a CPO

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

(Paragraph 5.46)

Comments on Proposal 19

It would seem sensible for an acquiring authority to be able to revoke a CPO but such a power must be introduced subject to constraints which prevent authorities pushing forward with schemes in the knowledge that revocation is possible. This power should therefore be linked to the proposal at 25 below that a CPO should only be confirmed if there is a reasonable prospect of it proceeding.

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

Yes. Landowners cannot be left with a CPO potentially hanging over their land as it will inevitably affect value and plans to sell, refinance, refurbish or develop the property and any business carried on there. We would suggest both safeguards be put in place, i.e. a minimum period of for example, 10 years before the same proposal can be resurrected and then only with the consent of the Scottish Ministers.

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

Agreed

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

(Paragraph 5.50)

Comments on Proposal 22

Agreed.

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

No. We would suggest that all matters relating to CPOs be registered in the Land Register. The Keeper of the Registers of Scotland has been charged by the Scottish Government with leading a steering group to explore the development of a central hub for information relating to property. The creation of another Register would simply add to the list of portals which would have to be brought together in such an exercise.

Any deed which ultimately transfers ownership of the property will be registered in the Land Register. It would make sense for the CPO to be registered there, particularly if the

proposals for temporary and new permanent rights under CPO are adopted and those new rights over land have to be registered. Those dealing with property, ie buying, selling, funding and leasing property would welcome the information relating to all of these being in the one place.

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

Yes

Chapter 6 Challenging a (confirmed) CPO

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

If authorities were to be permitted to withdraw a notice to treat, it would have to be within a short period of time and before they have taken entry to the land. The owner of the land may still need to be compensated in such circumstances and consideration should be given to preventing the authority resurrecting such a scheme within a certain period of time.

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

If authorities were allowed to withdraw notice to treat after taking entry to land, this could leave owners in a very difficult position if they have been proactive and found new homes or business premises.

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

Yes. A short tenancy may be a residential Short Assured Tenancy which the tenant is assuming will continue and a tenant nearing the end of a long lease similarly may be expecting to stay in the same premises. In the case of a long lease, it may take some tenants some time to relocate.

51. Should a GVD be available in all circumstances?

(Paragraph 7.89)

Comments on Proposal 51

Yes subject to a single procedure being adopted below.

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

Yes but provided there is a mechanism for anyone whose land is captured by the GVD to retrospectively claim compensation. Such an owner may not discover that a piece of their land is missing until they come to sell, develop, lease or fund their property. In order to protect such persons, compensation for any land affected by a GVD for which no owner could be traced should be available for up to 10 years after the land has vested in the authority.

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

Simplifying the procedures for CPO would be attractive to many.

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

Agreed. It could be useful as an alert to those examining title to give the Disposition a name under the CPO legislation and for a note to be added to the Land Register for future purchasers.

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

Agreed

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

Agreed.

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

Agreed. The single method will lend itself to making things more straightforward and efficient and in turn less expensive. That said, flexibility must be provided for to allow for the creation of the new rights referred to above if such new rights are to be taken in isolation and to deal with situations where only temporary powers are to apply.

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, provided that compensation is payable to an owner whose land has been acquired and who was not given the opportunity to participate in the CPO process. We would trust that such an event would be a rare one as the acquiring authority will be under a duty to carry out all proper due diligence on the ownership of any land affected by their plans.

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. This would be very helpful for those who are dealing with the land at any future point to establish the position as far as burdens and servitudes are concerned. If the proposals here come to pass, they can also be certain that title passed to the acquiring authority free of any defects.

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

The explanatory notes to Section 107 say that it can apply where compulsory purchase powers could have been used. It needs to be made clear when Section 107 applies. Does the authority have to go through the procedure for obtaining a CPO even though it ultimately does not rely on it or is it sufficient that the authority has CPO powers?

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

Agreed.

Chapter 20 Miscellaneous issues

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

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 Proposal 176

Yes