Shepherd and Wedderburn LLP responses to Scottish Law Commission Discussion Paper on Compulsory Purchase

Introduction

This document sets out our views on a number of the questions posed by the Scottish Law Commission in its consultation paper of December 2014. We have not attempted to answer all of the questions posed but have concentrated in particular on questions on which we have a strong view.

This paper has been prepared as part of a consultation process. It is for general information only and is not intended and should not be construed as legal advice in relation to a particular situation or transaction. This paper reflects solely the view of Shepherd and Wedderburn LLP at this time as to how the law could be changed as a result of the Scottish Law Commission's Discussion Paper. It does not represent the views of any clients of Shepherd and Wedderburn LLP

As a final initial observation, we should say that we think the structure and the content of the discussion paper is excellent and we are grateful to the Commission for the way in which the paper has been organised and promoted.

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1 The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.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

We agree

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)

Yes

3. Should the general power to acquire land compulsorily include power to create new rights or interests in or over land? (Paragraph 2.70)

Yes. However, the rules by which compensation is calculated must be set out clearly within the legislation. We have experience of representing an objector to an Order promoted under the Transport and Works (Scotland) Act where one of the main grounds of objection was that the Order permitted the compulsory creation of rights over our client's land without appropriate corresponding compensation provisions.

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)

It would be useful for the proposed new statute to expressly state that any new rights created through the CP would be capable of registration in the Land Register of Scotland and binding on successors in title for the period of time for which the new right is created through the CP - whether or not such a right would be a real right under general property law.

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)

Yes. This would enable the Acquiring Authority to reduce impact on the landowner in respect of areas of land required on a temporary basis for example during the initial stages of a scheme. It is proposed that the temporary right would be included in the GVD/CPNT and such right would be noted on the title of the land affected. The period for which the right subsists would be stated so that it is clear from the Land Register of Scotland when the right expires. The procedures relating to the exercise of temporary rights must be drafted in a way which ensures that sufficient advance notice is given to the dispossessed party that they do not experience undue hardship. The operative provisions of the Forth Crossing Act appear to strike a reasonable balance between the needs of the acquiring authority and the needs of the dispossessed party. We

would, however, emphasis that the rules for calculating the compensation which a dispossessed party is entitled to must be clearly set out within the body of the legislation itself. We are currently representing a party who has been temporarily dispossessed of its interest in the land under the provisions of the Forth Crossing Act. Our clients obtained a Certificate of Appropriate Alternative Development from Fife Council but the acquiring authority (Transport Scotland representing Scottish Ministers) appealed that decision. Scottish Ministers as determining authority appointed a Reporter to consider the CAAD appeal. The Reporter recommended the grant of the CAAD on appeal but Scottish Ministers disagreed with their Reporter's conclusions that a CAAD was competent in that case. The matter is currently before the Court of Session.

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)

We agree

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)

To a large extent, yes, although we do have concerns that the "general" compulsory purchase provisions which allow only for outright acquisition and not the creation of rights is a fairly blunt instrument which may not achieve the requirement of proportionality.

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)

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)

No

10. Is there any relevant legislation missing from that list? (Paragraph 5.18)

Not that we are aware of.

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)

No comment

12. Is the current list of statutory objectors satisfactory and, if not, what changes should be made, and why? (Paragraph 5.24)

We wonder whether heritable creditors should also be added to the list.

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)

No. In the event that only a single Landowner or small number of owners object and insist on an Inquiry, the Inquiry process should be relatively speedy. We believe it is important that statutory objectors are given the opportunity to have their say and question the acquiring authority in a public forum on matters relevant to the acquisition (excluding compensation).

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)

No comment

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)

No. We believe that the Reporters should continue to encourage parties in appropriate cases to agree evidence in advance of Inquiries and, indeed, to take evidence in the form of written submissions. We believe, however, that, in view of the significant impact of a Compulsory Purchase Order on affected persons, they should retain the right to demand a Hearing or Public Inquiry if they consider the case merits it.

16. The timescales for the process of securing CPOs should continue to be set out in subordinate legislation. (Paragraph 5.32)

Yes

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)

No. We believe that acquiring authorities should be entitled to confirm their own CPOs in circumstances where no objections remain to the CPO at the point of confirmation.

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)

No. We consider that while the obligation should remain to place the relevant information in hard copy form in an appropriate location should remain, that a further obligation to publish the information electronically should be imposed through the new legislation.

19 An acquiring authority should be able to revoke a CPO. (Paragraph 5.46)

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)

No. Provided an adequate compensation framework exists we do not believe there is a need for any such constraints.

21. Any person directly affected by the revocation of a CPO should be able to recover reasonable out-of-pocket expenses. (Paragraph 5.47)

Yes

22. Acquiring authorities should be required to register CPOs and revocations of CPOs. (Paragraph 5.50)

Yes

23. Should there be a new Register of CPOs, or should an entry be made in the Land Register? (Paragraph 5.50)

We do not believe there should be a new register of CPOs. We consider that details of the confirmed CPO should be registered in the Land Register.

24. Is the current three year validity period of a confirmed CPO reasonable? (Paragraph 5.59)

In major developments, for example offshore wind farms, the onshore compulsory purchase is likely to be one of a large number of consents/permissions required from various authorities/parties. Due to uncertainties around timescales for the CPO process, the developers require to promote a CPO early in the development process to ensure the scheme is not delayed due to lack of land rights. Therefore an up to 3 year period may be justified in certain circumstances. That said we recognise that without justification the 3 year period may be of concern to landowners. Accordingly we would be supportive of the Law Commission's proposal to reduce the time limit to 18 months with provision for the Acquiring Authority being entitled to include within their CPO a longer period to reflect any special circumstances of the scheme.

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)

No. We do not believe that there should be a legislative pre-condition that a CPO will only be confirmed where there is clear evidence that a project is reasonably likely to proceed. We consider that the guidance contained in the Circular is sufficient to cover this point.

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)

No. The nature of the alternative public right of way is a matter that we consider should be examined if objections to its relocation are made.

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)

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)

No

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)

No comment

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)

No comment

31. Do paragraphs 15 and 16 of Schedule 1 to the 1947 Act operate satisfactorily? (Paragraph 6.39)

No comment

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)

No

33. Are there circumstances in which such a challenge should be permitted to be made at a later stage? (Paragraph 6.45)

No

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)

While on the face of it this is attractive, it is not clear to us what remedy would resolve the substantial prejudice that had been caused to the party in question. If a party has their interest acquired by virtue of a CPO which they did not have the opportunity to object to, they will still receive compensation for the loss based on the value of his land but it is difficult to see what further remedy would adequately compensate him for his true loss. A general provision allowing for damages may be insufficient since there will inevitably be arguments further down the line as to whether his objection would have made any difference and whether any damages should properly be payable.

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)

Yes. We would suggest that the relevant period should start to run on the date of expiry of the challenge period or if a challenge is lodged the date of final determination of the challenge(s).

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)

Yes

37. Should the proposed new statute list all the interests in respect of which a notice to treat should be served? (Paragraph 7.15)

Yes

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)

Yes

39. Should there be a time limit within which such proceedings must be raised? (Paragraph 7.19)

Yes

40. Should a notice to treat be accompanied by information as to how compensation may be claimed? (Paragraph 7.25)

Yes

41. Does paragraph 7 of Schedule 2 to the 1947 Act operate satisfactorily in practice? (Paragraph 7.29)

No comment

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)

Yes

43. Does the three-year time limit on the validity of the notice to treat work satisfactorily in practice? (Paragraph 7.40)

No comment

44. Should it be competent for an acquiring authority to withdraw a notice to treat and, if so, within what period? (Paragraph 7.51)

[Consider]

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)

No

46. Should the period after which entry can proceed, following a notice of entry, be extended to, say, 28 days? (Paragraph 7.67)

No comment.

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)

No comment.

48 For how long should a notice of entry remain valid? (Paragraph 7.73)

No comment.

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)

Yes

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)

No comment.

51. Should a GVD be available in all circumstances? (Paragraph 7.89)

No comment.

52 Are the time limits for implementing a GVD satisfactory? (Paragraph 7.89)

No comment.

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)

No comment.

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)

No comment.

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)

No comment.

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)

No comment.

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)

We agree

58. The provisions of sections 84 to 86 of the 1845 Act should be repealed and not replaced. (Paragraph 7.114)

No comment.

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)

No comment.

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)

Yes

61. If so, what features should it have in addition to, or in place of, those mentioned above? (Paragraph 7.120)

No comment.

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)

We agree

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)

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)

We agree

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)

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)

We agree

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)

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)

We agree

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)

We agree

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)

We agree

71. Do the 1997 Act section 194 and the 2003 Act sections 106 and 107 require reform or consolidation? (Paragraph 8.75)

Yes

72 It should be competent to acquire new rights subordinate to ownership by means of a CPNT or GVD or equivalent. (Paragraph 8.81)

We agree

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)

No comment

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)

Yes

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)

Yes

76. Does the current law take account of negative equity satisfactorily and, if not, what changes should be made? (Paragraph 11.42)

Yes. Although we can see the difficulties involved for individuals in this situation, the general principle that compensation should be based on equivalence should continue to apply.

77. Provision along the lines of rules 2, 4 and 5 should be included in the proposed new statute. (Paragraph 11.53)

Yes

78. Should a test along the lines of the "devoted to a purpose" test be retained? (Paragraph 11.55)

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)

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)

No. We agree with the views expressed in the Discussion Paper in paragraphs 11.64 and 11.65.

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)

This is a very difficult question to answer clearly and concisely. We believe however that "the scheme" should be considered broadly and not just be reference to an individual compulsory purchase order which clearly forms part of a much larger project

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)

No comment

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)

No comment

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)

No comment

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)

Yes. The purpose of the section is to allow the affected proprietor to obtain the value he would have done in no scheme world. It seems to us artificial to look at the prospect of obtaining Planning Permission for the acquired land in conjunction with other land. The Landowner can, of course, apply for Planning Permission over land which is partly outwith his control. The Planning Permission itself does not necessarily enhance the market value of that party's land which might not increase to

any great extent, depending on the particular factors of the case (e.g. the number of additional Landowners that would be required in order to make up the development site that benefited from the Planning Permission).

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)

We agree

87. What should be the relevant date for determining whether there is existing planning permission over land to be compulsorily acquired? (Paragraph 13.22)

We consider that the relevant date should be the same as the relevant valuation date in the 1961 Act.

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)

No

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)

N/A

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)

We agree

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)

Yes

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)

The relevant date should be the same as the relevant valuation date in the 1961 Act. It seems logical that all planning assumptions that can or should be made are made on a consistent date.

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)

This seems sensible. Although it will inevitably require a re-writing of history, it does give the affected party an opportunity to promote a case based on what would truly have happened on the valuation date if the compulsory purchase had never affected his property.

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)

We agree

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)

We agree

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)

Yes. A Landowner should be compensated based on the value of his land at the relevant date. The prospect of Planning Permission gain granted subsequent to that date should be taken account of in the compensation exercise. If there was only

limited prospect of subsequent Planning Permissions being granted at the relevant date, then it does seem anomalous for further compensation to be paid in the future.

97. If not, should the period for considering subsequent planning permission remain as 10 years? (Paragraph 13.76)

N/A

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)

As expressed later in this chapter, we believe that the CAAD process should be revised to require appeals against CAAD decisions to be made to the Lands Tribunal.

99. Do CAADs currently provide sufficient information and, if not, what further information should they provide? (Paragraph 14.12)

We do not believe that sufficient information is currently required with applications for CAADs. The judgement on where to draw the line is a difficult one but, on balance, it seems to us that if a Landowner wishes to obtain full development value for a site as a result of a positive CAAD, he should require to submit the same level of detail as would be required in order to obtain Planning Permission in Principle. The only exceptions to this are we do not believe it is practical to require the usual pre-application consultation requirements to be fulfilled for developments of a major scale. Nor do we believe that full EIA procedures can be followed as it is inevitable that statutory consultees and members of the public are unwilling to engage in considering the environmental effects of a hypothetical development that will, in practice, never occur.

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)

We disagree. We believe that the valuation date should be the correct date for considering the physical features of the site and the planning assumptions which apply to it. If the relevant date for a CAAD assessment is linked to the date of publication of the CPO, a Landowner may be deprived of the true value of his site at the valuation date since the CAAD is potentially linked to a much earlier date at which the prospects of obtaining Planning Permission may have been poorer (e.g. Spirerose). We consider that a fairer approach is to assess the CAAD against planning policy (always excluding the scheme) on the relevant valuation date, working on an assumption that the CPO was cancelled as at the date of its publication. That approach provides the Landowner with the opportunity to develop a case for a CAAD in the no scheme world from the moment of publication of the CPO as opposed to working on the hypothetical assumption that an application was made and the decision taken on effectively the same date. We recognise that this could give rise to some greater uncertainty for acquiring authorities who will not be able to control the valuation date with as much certainty as the date on which the Compulsory Purchase Order is published but, in striking a balance, it seems that this is the fairest approach.

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)

We agree

102. The cancellation assumptions in relation to CAADs should be set out expressly in the proposed new statute. (Paragraph 14.30)

Yes

103. The same cancellation assumptions should apply to consideration of all potential planning consents, including CAADs. (Paragraph 14.30)

We agree

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)

See our answer to 100 above.

105. Should the parties continue to be entitled to insist upon a public inquiry when appealing against a CAAD decision? (Paragraph 14.33)

Yes. CAADs are, by their nature, complicated proposals and it is important that if any of the Applicant, the acquiring authority or the planning authority feel the need to test each other's evidence by question, that opportunity should be given.

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

Yes. We see no reason that the 3 month time limit for appealing planning decisions should not apply to CAADs.

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

Yes. This would help to avoid the situation which pervades at the moment whereby Scottish Ministers have, on occasion, appealed to themselves against positive CAAD decisions issued by planning authorities. We are not aware of any appeal by Scottish Ministers to Scottish Ministers being rejected.

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)

Yes

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)

No. If the relevant dates for assessing CAAD applications are amended, the affected owner will have the option of seeking a certain planning position or relying on hope value without an assumed Permission.

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)

Yes

111. In any event, should the same criteria be applied in relation to all relevant planning assumptions? (Paragraph 14.64)

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)

We agree

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)

We agree

114. Claims for injurious affection should be assessed as at the date of severance. (Paragraph 15.37)

While we understand the logic behind assessing injurious affection as at the date of severance, it seems to us that there is a danger that fact will be replaced with fiction. For example, if severance occurs on 1 June 2015 but the parties are unable to agree quickly what the value of the severance claim should be, it is conceivable that the matter would have to be referred to the Lands Tribunal for determination. It may take 2 years for the Tribunal to reach a view because of initial informal negotiations post severance and subsequent formal procedures in the Tribunal itself. In a scenario

where the Lands Tribunal is being asked to rule on injurious affection caused by the scheme, it seems difficult to accept that the Tribunal and the parties to the case would have to ignore what had actually happened on the ground in the 2 year period since severance actually occurred and, instead, attempt to imagine what might have happened based on the parties' state of knowledge as at 1 June 2015. For those reasons, we suggest that injurious affection should be assessed, with the agreement of the parties, at the date of severance, failing which on the earlier of (a) the date of the Lands Tribunal's decision; and (b) the date of completion of the works authorised by the project.

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)

We agree

116. The proposed new statute should confer a discretion on an acquiring authority to carry out accommodation works. (Paragraph 15.49)

We agree

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)

No. See our answer to 118 below.

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)

We agree with this proposal. The valuation of land acquired is undertaken on the basis that the scheme has been cancelled. It is a hypothetical valuation undertaken to put the Landowner into the position he would have been were it not for the scheme itself. If it is accepted that that principle should continue to underpin the system of compulsory purchase compensation, it seems to us wrong that the acquiring authority should be entitled to set-off an increase in value of retained land which the Landowner may have no intention of selling.

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)

We agree, although we do consider that a claim for disturbance should be consistent with the claim concerning loss of market value.

120. There should be an express statutory provision for disturbance compensation. (Paragraph 16.34)

We agree.

121. Should the principle of causation in relation to disturbance compensation be set out in the proposed new statute? (Paragraph 16.38)

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)

We agree.

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)

We agree.

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)

Yes.

125. Should the proposed new statute enable investment owners to claim a wider range of disturbance compensation? (Paragraph 16.50)

Yes.

126. Do the current rules of compensation for disturbance work satisfactorily where there are issues of corporate structuring involved? (Paragraph 16.57)

Yes.

127. Should the proposed new statute remove the impecuniosity rule as it has been established at common law? (Paragraph 16.69)

Yes.

128. Should claimants' personal circumstances be taken into account when considering the assessment of disturbance compensation? (Paragraph 16.77)

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)

Yes.

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)

We agree.

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)

A rebuttable presumption that compensation should be based on relocation of the business seems to us to be a sensible starting point. The presumption could be rebutted in cases where the evidence at the time showed that the relocation was likely to have such a detrimental impact on profit that a reasonable businessman in the circumstances of the claimant would not proceed with the relocation.

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)

Yes. We think that it should be possible for the parties to agree an assumed disturbance value at the time of acquisition but, in the absence of such agreement, the level of disturbance compensation should be quantified after the event. We do, however, suggest that in order to mitigate the impact of disturbance on an affected party, provisions should exist for allowing that party to receive early advance payments prior to completion of the scheme. We would suggest that the new legislation includes a swift dispute resolution procedure to allow that level of advance compensation to be determined in the absence of agreement of the parties.

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)

Our answer to this question is similar to 132. It should be possible at the very least to secure an advance payment towards relocation of the business based on what the parties agree (or a third party determines) are the likely costs of relocation.

134. Section 38 of the 1963 Act should be repealed and not re-enacted. (Paragraph 16.101)

We agree

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)

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)

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)

No comment.

138. Should the current system, of calculating home loss payments as a prescribed percentage of market value, be retained? (Paragraph 17.21)

No comment.

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)

No comment.

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)

No comment.

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)

No comment.

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)

No comment.

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)

We agree

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)

We have no particular concerns over the operation of the LTS. We do, however, suggest, as mentioned above, that the CAAD process should be controlled by the LTS through appointment of Reporters rather than by Scottish Ministers.

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)

We agree

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)

Yes.

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)

Yes.

148. What, if any, changes should be made to the time limit to claim compensation? (Paragraph 18.23)

We do not believe that any particular changes require to be made in relation to the time limit to claim compensation. We would recommend that any document served on effected parties in relation to the compulsory purchase of their land make it clear what time limits apply in relation to lodging claims for disputed compensation.

149. Should the LTS be given discretion to extend the time limit in some circumstances? (Paragraph 18.23)

Provided sufficient clarity on the time limit is given to affected parties, we do not envisage that discretion would be required.

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)

Yes.

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)

Yes.

152. There should be a prescribed form to claim an advance payment. (Paragraph 18.29)

Yes.

153. Are there circumstances in which an acquiring authority should be required to make an advance payment before taking possession? (Paragraph 18.31)

Yes. See our comments above in relation to questions 132 and 133.

154. Should it be competent for the LTS to provide an enforceable valuation figure for an advance payment? (Paragraph 18.33)

Given the purpose of the advance payment is often to alleviate immediate hardship, the LTS's procedure for this would have to be streamlined to ensure swift resolution of the issues.

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)

No comment.

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)

We agree

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)

(a) We agree; and (b) We agree.

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)

No comment.

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)

No comment.

Chapter 19 Crichel 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)

Yes.

161. Should the Rules apply to all land acquired by, or under threat of, compulsion? (Paragraph 19.9)

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)

Yes.

163. Are the current provisions setting out the interests which qualify for an offer to buy back land satisfactory? (Paragraph 19.12)

Yes.

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)

Yes. A period of 25 years seems reasonable.

165. Should a time limit be introduced for land purchased between 1 January 1935 and 30 October 1992? (Paragraph 19.15)

Depending on the timing of any legislation, we suggest that the 25 year rule should apply here as well.

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)

The rules seem adequate at present,

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)

Yes.

168. Do time limits in the current Rules to carry out the process to offer back land operate satisfactorily? (Paragraph 19.21)

No comment.

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)

We are not convinced that clawback provisions should be retained in relation to land disposed under the Crichel Down Rules. The Landowner in question will already have had to pay market value for the land and that will reflect any element of hope value which exists at the time of disposal.

170. The LTS should have a general jurisdiction to resolve disputes which arise in relation to the disposal of surplus land. (Paragraph 19.26)

Yes, we agree

Chapter 20 Miscellaneous issues

171 Should section 89 of the 1845 Act be repealed and not re-enacted? (Paragraph 20.4)

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)

We agree.

173 Does section 114 of the 1845 Act work satisfactorily? (Paragraph 20.10)

No comment.

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)

No comment.

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)

We agree.

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)

Yes.

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)