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 The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.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

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)

Comments on Proposal 3

Yes, it would be beneficial to be able to impose additional restrictions or positive obligations in situations where a new right is permissible under the enabling legislation. This may also enable a smaller area of land to be acquired compulsorily.

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

New rights can only take the form of the servitude (with relevant conditions to protect the party whose interests are acquired). As noted in the Discussion Paper new rights cannot take the form of a Lease is this is a bi-lateral contract.

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, a power to take temporary possession would be useful to both acquiring authorities and landowners. It should take the form of a temporary licence to occupy with relevant protective conditions (e.g. causing the least disturbance, making good all damage etc) with an obligation to pay suitable compensation.

The land and the purpose for which the land may be used should be described. It will also be necessary to make provision for the notice period required prior to taking possession, what changes to the land may be made (e.g. demolition of existing structures, removal of vegetation) and provision for reinstatement.

The period of permitted possession would have to be specified, this being linked to the commencement of the project or particular works within the project. Provision must be made for extension to the permitted period at the request of the acquiring authority and with a mechanism for deciding on an extension request should agreement not be reached with the landowner.

There should be a maximum period of possession that can be considered as temporary and beyond which the land must be acquired.

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

Agreed.

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

Agreed.

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

Agreed.

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

No, the standard procedure should apply in all cases.

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

(Paragraph 5.18)

Comments on Proposal 10

We are not aware of any other relevant legislation.

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

Yes.

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

Yes, the list includes all those directly affected by a CPO.

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

No. We agree that the current position can result in a single statutory objector delaying a project. It may be determined that the objector's case is not well-founded or sufficiently strong to outweigh the public benefit of the underlying project. However, the suggestion that a specified percentage of landowners or affected land should be required before an inquiry/hearing can be insisted upon pre-supposes that the single objector does not have as valid or as strong an objection. Further, the loss of a small area of land to a single objector (e.g. garden ground) may potentially be of more significance to that objector than loss of a larger area to a major landowner.

Compulsory purchase remains a fundamental intrusion by the state into a private property rights. In our view it is necessary that all or any statutory objector(s) are given the opportunity to state their case at an inquiry or hearing session. This is both a necessary safeguard and important to the public perception of the compulsory acquisition process.

If it is proposed to restrict the circumstances it will be necessary to define either (i) circumstances where the restriction applies or (ii) circumstances where the restriction does not apply. We consider that certain objectors (e.g. owners or occupiers of residential property) should be excluded from the restriction. Generally, it would be very difficult to define the circumstances or classes in which a restriction should or should not apply and would necessarily involve some arbitrary thresholds.

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

No. We agree that there can sometimes be a considerable delay at this stage. However, the opportunity for the acquiring authority to seek to resolve objections can be useful for all parties and save time within the overall CPO process. In our view that the period after which matters will be referred to the DPEA should be a matter of Scottish Ministers' policy and good case management, having regard to the circumstances of the particular case, rather than be specified in legislation. Scottish Ministers may wish to adopt a policy that cases will ordinarily be referred to the DPEA within a specified period. Once the technical check is complete and objections have been received and forwarded to the acquiring authority the Scottish Ministers may wish to query whether there is a reasonable likelihood that objections will be resolved and require the acquiring authority to justify any delay in forwarding the case to the DPEA. As noted, the acquiring authority will have the opportunity to resolve objections before, and indeed after, this stage and it would be open to the Scottish Ministers to adopt a strict approach. However, a measure of flexibility should be retained. We also query what consequences or process of enforcement would attach to the Scottish Ministers failure to meet a statutory deadline.

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

No, unless the all the parties are content that the DPEA can proceed by a procedure other than inquiry/hearing.

We agree that giving the DPEA discretion over the procedure may reduce the timescale for determination. In practice it may be likely that a Reporter would adopt an oral procedure for more sensitive cases (e.g. those involving residential property) if this was requested by a relevant objector. However, we agree with the point made in paragraph 5.40. Compulsory acquisition is a fundamental intrusion into private property rights which can be distinguished from planning decisions. As a matter of principle, persons directly affected should be accorded a right to be heard in an oral procedure.

An exception may be when all parties state that they are content for determination on the written evidence, subject to the Reporter's power to require an oral procedure notwithstanding such agreement should this be deemed necessary.

The legislation should however make it clear that the particular form of inquiry or more formal hearing is at the discretion of the DPEA.

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

All CPOs should require to be confirmed by the Scottish Ministers (or some other independent body). We note that there may be occasions when there is no outstanding objection to a CPO. In such a circumstance there may be no prejudice in the Scottish Ministers authorising the acquiring authority to confirm its own CPO and provided certain safeguards were satisfied (as noted in paragraph 5.40). However, we agree that that the checking process would in effect be confirmation by another name and it is questionable whether the process would be significantly quicker.

It is also important to note the real and perceived value of a second-tier of review and confirmation by the Scottish Ministers. By definition the acquiring authority promoting the CPO considers its CPO to be in the public interest and to outweigh any detriment to individual landowners. It is valuable to have this assessment assessed and confirmed by an independent confirming authority even in the absence of objection. Further, compulsory acquisition of property, even where found to be justified, is a significant intrusion into fundamental property rights. It is important that the procedure is perceived to be open and fair by affected parties. In this regard, the requirement for confirmation by Scottish Ministers provides a useful safeguard.

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

The current requirements are satisfactory, although an obligation to advertise on a website may assist in publicising the CPO more widely.

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

(Paragraph 5.46)

Comments on Proposal 19

Agreed. Given that the underlying purpose of such a power is to remove the potential for blighting of properties we would query whether there should be a duty to revoke a CPO should the acquiring authority conclude that they can no longer proceed with the underlying project. This would impose a more positive obligation while leaving the discretionary decision with the acquiring authority.

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 consider this to be unnecessary.

It is likely that a confirmed CPO will be revoked only rarely. The initiation of a further CPO process will be rarer still. An acquiring authority will be aware that the effect of revocation is that the entire CPO process must be replicated, of the time and cost that will be incurred by the acquiring authority and other parties, and of the potential impact on affected parties. An acquiring authority will not lightly initiate a further CPO process. If a further CPO is initiated this is likely to be because of some substantial change in funding or some other matter and it should be for the acquiring authority (and ultimately the confirming authority) to determine whether this justifies a further CPO having regard to the overall test of public benefit. Public benefit could potentially be lost if the acquiring authority is prohibited from initiating a further CPO.

A prohibited period or requirement for Scottish Ministers' consent could also have the effect of discouraging an acquiring authority from revoking a CPO and so prolonging the period of blight for affected properties.

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, although in practice this could potentially make an acquiring authority less likely to revoke a CPO rather than wait for the period of validity to expire.

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

(Paragraph 5.50)

Comments on Proposal 22

Agreed, although there may sometimes be a potential practical issue in accurately identifying the relevant land. Perhaps the position can be developed in conjunction with the roll out of the reform of the Land Registration system under the 2012 Act.

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

There may sometimes be a potential practical issue in accurately identifying the relevant land and a Register may be more efficient than registering against numerous different titles.

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

(Paragraph 5.59)

Comments on Proposal 24

There is a strong case for introducing some flexibility into the period of validity. We agree that 3 years can be seen as excessive. However, in large infrastructure projects the 3 year period can be necessary. We support the approach adopted in the Planning Act 2008 whereby a prescribed period is set out in Regulations, and perhaps remains at 3 years, but the confirmed order may specify a longer or shorter period. It would be for the acquiring authority to justify the required period of validity should this attract objection.

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. It does not appear to be in the public interest that CPO powers be given if there is no certainty that a project is reasonably likely to proceed. We recognise that the concept of a reasonable likelihood may potentially be a difficult test to apply as a CPO may be promoted prior to the conclusion of funding. For this reason, acquiring and confirming authorities ought to be given much clearer and robust guidance on how they are to go about confirming the reasonable likelihood of development being delivered.

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, but should the Reporter consider that the proposed replacement raises issues requiring an the hearing of evidence an inquiry should remain an option.

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. This would make the process more efficient. In practice the proposed extinguishment may be considered as distinct session or agenda point within the combined inquiry.

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

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)

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.

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.

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

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)

Comments on Proposal 34

Yes, in the case of a procedural failure. The courts are well equipped to make the judgement as to whether the seriousness of the failure and any attendant prejudice requires that the CPO is quashed or some other remedy is more appropriate.

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

(Paragraph 6.51)

Comments on Proposal 35

On balance, no. This is likely to be a relatively rare occurrence and would presumably also lead to extension of the period of validity for all other affected landowners as well as the litigant. This approach is not seen in other areas such as a legal challenge to a planning permission. We note that the answer may be different if the period of validity of a CPO is significantly reduced per Proposal 24.

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

We concur.

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, although there ought to be flexibility to cater for new forms of interest created after the new statute comes into force.

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

We concur.

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

(Paragraph 7.19)

Comments on Proposal 39

Yes

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

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

(Paragraph 7.29)

Comments on Proposal 41

We do not have sufficient experience of this issue to offer a view.

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

Yes

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

We do not have sufficient experience of this issue to offer a view.

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, within three months.

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

No

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

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

Yes

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

(Paragraph 7.73)

Comments on Proposal 48

Thirty days

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 (if the tenant under the short tenancy can be identified – short leases are not registrable at the Land Register and therefore can be "invisible" to the acquiring authority)

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

We do not have sufficient experience of this issue to offer a view.

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

We concur.

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

We concur.

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

We concur

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

Yes

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

We concur.

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

We concur

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 view offered

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

Yes

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

Must be map based

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

We concur

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

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

We concur

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

We concur

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

We concur

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

We concur

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

We concur

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

No

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

We concur

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

Yes

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

"If the seller of their own volition sold the property tomorrow on the open market, what would they reasonably expect to get for it" is a sound starting point. If the new starting point were to be (and known by those affected to be) value to the seller plus a premium to reflect compulsion, that could from the off make the process seem less aggressive towards the "seller", and would set a better tone for subsequent discussions. To what extent under current law do those affected enter this process assuming that they are going to have to fight for every penny?

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

Yes, but only to the extent that any effect of severance on the assessment of compensation in relation to the retained land does not already reflect that depreciation.

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

No. In the example of Mr Kerr, in reality Mr Kerr would not put his property on the market while it was in negative equity, so the "value to the seller" on the open market is not a fair reflection of equivalence, and the acquiring authority should not be permitted to take advantage of an economic circumstance not of Mr Kerr's making. Mr Kerr did not strike a bad deal; he just struck it in the wrong place at the wrong time. Where the acquiring authority

is acting in support of a private venture, the inequity is greater, because the private entity is obtaining the land at a discount and taking advantage of Mr Kerr's misfortune.

Perhaps the "rule" for negative equity is that the minimum compensation payment should be that which leaves the "seller" with no debt to any lender(s) with a heritable security over the property?

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

Agreed.

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

(Paragraph 11.55)

Comments on Proposal 78

Yes, although some softer version might be better, e.g. the "adapted and normally used" wording. What about cases where property is not "devoted" to a purpose, but still has no general demand or market? Of course, such cases may be so vanishingly rare that there is no need to distinguish.

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

Perhaps the onus should be shifted to the acquiring authority to defend its valuation as being sufficient to resume the activity elsewhere. It is the acquiring authority who is inconveniencing the claimant, so requiring the claimant to make the running, possibly at some cost to them, e.g. for an independent valuation, seems unfair, and may serve to reinforce a perception that the process is adversarial.

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

Yes.

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

81. How should the "scheme" be defined?

(Paragraph 12.78)

Comments on Proposal 81

Carefully. The judgement in Waters v Welsh Development Agency provides some good guidelines, perhaps.

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

On the whole, yes, albeit subject to some equitable limitation which does not cause the total compensation bill to become so expensive that the scheme cannot be pursued.

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 in the (perhaps unlikely) event that there is a discounting effect on the value.

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

«InsertTextHere»

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

It should perhaps at least be considered where any value arising from statutory planning assumptions applied to land other than the land which is compulsorily acquired would accrue at the time of valuation, but not if the increase in value is merely speculative or hope value.

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

Agreed.

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/entering into possession.

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

Yes. Perhaps it should be coupled with an assumption that the development can actually be carried out. That is, if the acquiring authority's proposals could only be carried out by the authority, the assumption would not apply. This would allow for some valuation uplift in the case where an acquiring authority is acquiring on behalf of a private entity, while not acting against the interests of any publicly beneficial projects.

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. Or perhaps only if the result is positive in relation to the value.

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

Agreed.

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. Where a property being acquired would be capable of such subdivision, why should the assumption not apply? In what way is this greatly different from valuation based on selling property in parts rather than as a whole?

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

Date of vesting/possession.

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

Agreed.

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

Agreed.

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

Agreed.

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, by reference to the last sentence of paragraph 13.75.

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

(Paragraph 13.76)

Comments on Proposal 97

No, 5 years seems a reasonable balance.

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

«InsertTextHere»

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

(Paragraph 14.12)

Comments on Proposal 99

«InsertTextHere»

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

Agreed.

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

Agreed.

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

Agreed.

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

(Paragraph 14.30)

Comments on Proposal 103

Agreed.

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

Agreed.

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

No, written submissions should be sufficient.

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

Bring it in line with planning appeals.

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

Yes.

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

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)

Comments on Proposal 109

Yes.

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

No.

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

(Paragraph 14.64)

Comments on Proposal 111

Yes.

Chapter 15 Consequential loss – retained land

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

(Paragraph 15.18)

Comments on Proposal 112

Agreed.

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

Agreed.

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

(Paragraph 15.37)

Comments on Proposal 114

Agreed.

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

Agreed.

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

Agreed.

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

Agreed. This squares with equivalence. In a "normal" situation a landowner would be entitled to any windfall value. Acquiring authority wanting to have their cake and eat it.

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

Agreed.

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

(Paragraph 16.34)

Comments on Proposal 120

Agreed. Codify the common law position.

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, even if it represents only an incremental improvement which is available for judicial refinement.

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

Agreed. The notice seems like a good opportunity also to alert the claimant to their obligations in relation to mitigation.

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

Agreed.

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

Yes, although possibly tempered by a test that there was some reasonable likelihood that planning permission would have been pursued/obtained, and/or some evidence of intention on the part of the claimant to realise value from development potential.

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

(Paragraph 16.50)

Comments on Proposal 125

Yes.

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

«InsertTextHere»

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

Yes.

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

(Paragraph 16.77)

Comments on Proposal 128

Yes, although on an equitable basis to ensure that the claimant's personal circumstances

are not being taken advantage of.

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

Agreed. The claimant should be given adequate notice of their obligation to mitigate their loss, in terms clear enough to the lay-person as to what that means.

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

Agreed.

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

«InsertTextHere»

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

Yes.

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

Yes.

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

(Paragraph 16.101)

Comments on Proposal 134

Agreed.

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.

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.

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

Yes. Increase to 2 years.

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.

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

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

Yes. A person's personal and sentimental attachment to their home should not be valued differentially based on the value of the bricks and mortar.

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

Yes.

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

Agreed.

General Comments

Social, economic and political contexts are all very different now. There is a far greater sense of justice and injustice, fairness and unfairness, and a far higher expectation of the "right" to be heard and taken into account.

The current CPO process is essentially adversarial. A great deal might be achieved by making it a more collaborative process, acknowledging at all stages that claimant's rights are being taken against their better wishes. Claimants should be entitled to and should receive more contextual information, assistance and advice than at present, to make the entire process less adversarial and less stressful.

Has any analysis been carried out on the cost of the system in terms of managing objections, etc. taking account of claimants' and acquiring authorities' costs? It seems likely that applying cost to creating a system which provides contextual and timely assistance to claimants, coupled with a premium payment, would end up costing less overall.

Expectation management.

Abolish CAADs

Too much onus on the claimant to establish and/or defend their claim, when it is they who are being inconvenienced. They should be compensated fairly, but never excessively: not ransom but also not just open market value.

The whole process is complex, confusing, long-drawn-out and expensive.

There is a significant lack of reasonable certainty about how the process will run, when and approximately how much compensation will be, so that it is hard for claimants to forward plan in a meaningful way. The stress that that creates should be mitigated by better expectation management, and help for claimants, especially those unable to fund their own professional advice.

A means to prevent acquiring authorities from obtaining CPO confirmation but sitting on it for ages, e.g. until a more economically advantageous moment.

Local authorities should have power to acquire to address areas of general dilapidation and

lack of repair without having a requirement to have settled planning policy in place.

Clarify ability to convert acquired land to other uses and to sell for other purposes.

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.

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

No comment

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

Agreed.

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.

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.

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

(Paragraph 18.23)

Comments on Proposal 148

No comment.

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

(Paragraph 18.23)

Comments on Proposal 149

Yes.

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.

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.

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

(Paragraph 18.29)

Comments on Proposal 152

Agreed.

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

Yes, where the owner is suffering interim financial disadvantage as a direct result of the CPO process.

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

Yes, in the absence of agreement.

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

Base lending rate.

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

Agreed.

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

Yes.

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

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)

Comments on Proposal 159

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)

Comments on Proposal 160

Yes – it is unsatisfactory at present because there is no obligation to apply the Rules which gives rise to uncertainty.

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

(Paragraph 19.9)

Comments on Proposal 161

Yes – if your land is taken for statutory purposes and then not used, you should be able to get it back.

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

Yes – if for example a hospital or waste water treatment works has been constructed on the land it would be odd and unexpected if the original owner was to be offered it back.

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

(Paragraph 19.12)

Comments on Proposal 163

We would suggest that if the original owner is deceased, the only other party who should be offered the land is the current owner of the "remaining land" not acquired – and only if there is a mutual boundary with that land and that remaining land remains in the same use as it was in at the time of acquisition.

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

Leave as is.

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 leave as is – to make such a change would be retrospective in effect.

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

Leave as provided in the Rules

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 view

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 experience of this but it may be possible to follow the example of the tenant right to buy legislation.

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 – too complex for statute – should be valued taking account of hope value.

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

Agreed

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 – seems to be redundant.

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 view

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

(Paragraph 20.10)

Comments on Proposal 173

No view

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 – but (a) assess on the basis of what a "market landlord" rather than the "actual landlord" would agree having regard to the market at the date of compensation and (b) also take into account the likelihood of a break notice being exercised.

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

There should be a power to get the court to sign a discharge if the creditor cant be found or refuses to sign.

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

Not any tax liability - restrict to the value of the lost opportunity to mitigate tax liability.

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

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.