RESPONSE

by the judges of the Court of Session

to the Scottish Law Commission Discussion Paper on Compulsory Purchase (DP No 159)

General

The judges of the Court of Session very much welcome the Scottish Law Commission's review of the law of compulsory purchase. As is clear from the Discussion Paper, much of the basic statute law in this area is extremely old, dating from the 1840s, and it is long overdue for review. The original legislation is obviously dated in style. Moreover, it has been amended and supplemented repeatedly by subsequent Acts. A thorough review of the law followed by a total restatement of the legislation is long overdue.

The following response is confined to limited aspects of the Discussion Paper. Most of the Paper, together with the relative questions and proposals, is concerned with the procedures used to effect compulsory purchase and the manner in which compensation is calculated. These are matters that fall within the everyday experience of conveyancing solicitors, surveyors and public authorities rather than the courts. For that reason we do not consider that we can make a significant contribution to these aspects. So far as the rules for compensation are concerned, the necessary policy decisions will inevitably involve some degree of political judgment, and we think that the most helpful contributions will come from public authorities, developers and other commercial and landowning interests, and bodies that represent members of the public who may be affected by compulsory purchase, together with the solicitors and surveyors who advise those involved in the compulsory acquisition of land. Once again, judges are not involved in the underlying policy questions. The actual assessment of compensation is generally carried out, in the last resort, by the Lands Tribunal for Scotland, and we would expect that its members will be able to make a valuable contribution to the issues that have been raised regarding compensation. They are, however, clearly in a different position from the judges of the Court of Session.

Considerable case law exists, and it is true that litigation involving compulsory purchase comes before the courts on a regular basis. Nevertheless, the function of the judges is to apply the statutory scheme and to ensure that that scheme works in practice in a fair and efficient manner. That will normally involve a purposive and contextual interpretation of legislation, and we think that it is important that the fundamental policies underlying legislation should be made as clear as possible. Provided that this is done, we have little doubt that the judges of the Court of Session can continue to apply the statutory scheme in an appropriate way.

Against that background, we have the following specific comments.

Proposal 1

We agree that the current legislation as to compulsory purchase should be repealed and replaced by a new statute. In this respect, we agree with the reasoning in chapter 1 of the Discussion Paper.

Chapter 3

Chapter 3 is concerned with the impact of human rights legislation, and in particular the European Convention on Human Rights, on compulsory acquisition and compensation. It is clear that the Human Rights Act 1998, together with the Scotland Act 1998, and the Convention will have an important impact in this area. This will inevitably be worked out by the courts on a case-by-case basis.

At paragraphs 3.40 and following there is a discussion of the concept of proportionality. This is a concept which, we find, assumes an ever-increasing importance in the law. This is true not merely in cases governed by the Convention; the principle has also worked its way into domestic law, over a wide range of fields. As the Discussion Paper indicates at paragraph 3.43, a recurring and possibly increasing difficulty is extrapolating between the decisions made in widely differing policy areas. Yet a further issue is the fact that proportionality appears to be emerging as a concept in domestic law, independently of the Convention. Arguably this is only a matter of terminology; in purely domestic cases the courts have been prepared for many years to make a judgment about what is fair and reasonable, and that is perhaps to be considered as proportionality under a different name. Indeed, the fundamental concept of proportionality is extremely simple, whatever the difficulties of applying it in individual cases. So far as compulsory purchase is concerned, we think that the statement of the law by Maurice Kay LJ in *R (Clays Lane Housing) v Housing Corporation*, [2005] 1 WLR 2229, is helpful on rights arising under article 1 of the First Protocol to the Convention. On the concept of proportionality, we should perhaps draw attention to two recent cases, albeit in very different areas of law: *Bank Mellat v HM Treasury (No 2)*, [2014] AC 700, and *Main v Scottish Ministers*, 2015 SLT 349. Both of these contain a general discussion of the concept and its history.

Article 8 raises more difficult issues, but we think that the review of recent case law by the Commission should be of assistance if any such cases should arise in future. Those cases must be decided on their individual facts. In relation to article 6, we agree with the Commission that it is most unlikely that present procedures would be incompatible with the Convention.

Question 7

In the light of the foregoing comments, we agree with the Commission's view that the current statutory provisions applicable to compulsory purchase in Scotland are compatible with the Convention. Obviously it cannot be guaranteed that nothing will ever happen in an individual case that is incompatible, but we think that the likelihood of this is so remote that it may be ignored.

Questions 9 and 10

We are unaware of 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. We are not aware of any relevant legislation missing from that list.

Question 22

We can see an advantage in requiring the registration of CPOs and their revocation in a central register, in view of the difficulties highlighted at paragraph 5.48.

Question 23

While this question is a matter on which solicitors and others engaged in conveyancing are better qualified to comment, it appears to us that there is a considerable advantage in not increasing the number of public registers unnecessarily. For that reason, we are inclined to favour a system of making entries relating to CPOs in the Land Register. It is important, however, that appropriate procedures should be agreed with the Keeper of the Registers.

Questions 29 and 30

We think that the existing law is reasonably clear. In a case of bad faith, it is likely that one of the grounds set out in the well-known statement of the law by LP Emslie in *Wordie Property Co Ltd v Secretary of State for Scotland*, 1984 SLT 345, will be available. We do not see any reason for being over-prescriptive in this area of law; the existing principles are flexible and are readily capable of meeting the needs of individual cases.

Questions 32 and 33

We consider that any challenge to a CPO based on Convention rights should be treated in exactly the same way as any other challenge. If this is not done, affected parties who find themselves out of time for an ordinary challenge will contrive a challenge based on Convention grounds with a view to circumventing the time limit. We do not consider this desirable.

Question 34

We agree that, where an applicant has been substantially prejudiced by a procedural failure, the court should have a discretion to grant some remedy less than the quashing of the CPO, in whole or in part. We consider that flexible remedies are generally desirable, to enable the courts to meet the wide range of circumstances that may come before them in an appropriate way without being forced into artificial forms of reasoning. An element of discretion in the remedies that are available can be extremely helpful in individual cases.

Question 36

We agree that any restatement of the law relating to compulsory acquisition should include provision along the lines of sections 6 to 9 of the 1845 Act.

Question 37

We can see advantages in a statutory list of all the interests in respect of which a notice to treat should be served. Nevertheless, we would defer to the views of those engaged in everyday practice in this area.

Questions 38 and 39

We think that it would be advantageous if it were made clear that a person claiming to be the holder of an interest in the land who has not been served with a notice to treat has the right to raise proceedings to determine the right to compensation and the amount of such compensation.

Propositions 53 and 54

We agree with both of these propositions. The law as developed in *Birrell Ltd v Edinburgh District Council*, 1982 SC (HL) 75, appears to us to be, as indicated at paragraph 7.97, a principled position that accords with general standards of fairness.

Proposition 55

We agree that a situation falling within section 12(5) of the 1963 Act should form an exception to the two previous propositions, for the reasons stated at paragraph 7.99.

Chapter 7

Chapter 7 raises issues of great importance. Nevertheless, we consider that the views of those involved in the everyday work of compulsory acquisition and of the Lands Tribunal for Scotland are likely to have greater everyday knowledge, and we would defer to their views.

Chapters 8 and 9

These are matters on which we would defer to the experience of conveyancers involved in this area of law.

Compensation and valuation: chapters 10-17

While the courts are frequently called upon to adjudicate on questions relating to compensation and valuation, the task that they perform generally involves interpretation of the legislation together with the application of general principles of judicial review. The general issues of policy that underlie the drafting of the statutory provisions are matters on which those who have everyday contact with compulsory acquisition are better qualified to express an opinion.

Proposition 143

We agree that the sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted.

We have no comments on the remaining issues raised in chapter 18; it seems to us that the Lands Tribunal for Scotland and those who appear before it regularly will be in the best position to provide a considered view.

Chapter 19

We think that the questions in this chapter are best answered by those involved in compulsory acquisition on a regular basis; the involvement of judges in this area is intermittent and inevitably focused by the particular dispute under consideration.

Question 160

We can see advantages in having the rules for giving former owners of compulsorily acquired land rights of pre-emption where the land is no longer required placed on a statutory footing. While the Crichel Down Rules are well known, their precise application is not clear in all circumstances, and we can see considerable virtue in providing legislative certainty. Nevertheless, it is clear that the Rules apply to a wide range of situations, and it may be that an element of discretion is appropriate to allow the maximum flexibility in their application.

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