RESPONSE FORM
DISCUSSION PAPER ON COMPULSORY PURCHASE

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 The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.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

Yes. The Faculty of Advocates agrees with the Commission's first proposal. There is a strong case for reform, for the reasons outlined by the Commission at paragraphs 1.9 – 1.14 and at Chapter 4 of its Discussion Paper. The Faculty agrees with the Commission's view at paragraph 1.14 that the aim should not merely be to consolidate, but where appropriate to fill in the gaps and to reflect the courts' decisions in the new legislation.

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, subject to the points noted below. The current definition is wide, including subordinate real rights over land, which the Faculty of Advocates supports. The Faculty is not aware of any difficulties being caused by the current definition.

The Faculty notes however that the definition does not expressly provide that 'land' includes everything above and beneath land, as rights of ownership in land extend *a caelo usque ad centrum*. So, for example, it does not expressly make provision for the inclusion of airspace. The Faculty considers that such rights would have to ~~are~~ be implied (as suggested by Professor Robinson and Ms Farquharson-Black in their text book *Compulsory Purchase and Compensation: The Law in Scotland* (3rd edn, 2009) at para 3.11, in respect of the previous definition). If the Commission does, however, decide to restate the definition, it may be helpful to make this express.

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

The Faculty of Advocates supports a power to create new rights or interests over land for the reason suggested by the Commission at paragraph 2.70, but suggests that the rights or interests which could be acquired should be listed in the statute.

The Faculty of Advocates agrees that there should be a power to create new servitudes and real burdens. The limits of these rights are well defined and therefore there would be sufficient protection for the interests of the landowner. For example, a servitude must be exercised *civiliter*, real conditions must not be repugnant with ownership. The Faculty agrees, as suggested by the Commission at paragraph 2.67, that there should be a power to impose conditions in respect of the acquired rights, although this should be subject to a requirement that the conditions benefit the acquired right (in a way similar to the test in section 3(3) of the Title Conditions (Scotland) Act 2003 concerning the constitution of real burdens).

The Faculty supports the power to acquire a 'wayleave', although agrees that the concept of wayleaves more generally requires further consideration.

The Faculty does not consider that there should be the power to create a lease, for the reasons summarised by the Commission at paragraph 2.60. A lease would involve the landowner being forced into a contractual arrangement with the acquiring authority, and would impose obligations on the landowner. The Faculty does not consider this would be appropriate without the landowner's consent.

The Faculty agrees with the Commission's observation that there is no apparent reason why an acquiring authority should be able to create a standard security.

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

The Faculty of Advocates considers that the power to create new rights over land should be limited to a power to create new rights of the kind which are presently recognised under Scots property law. As noted in the previous answer, the Faculty of Advocates considers that the particular rights which an acquiring authority should be able to acquire should be listed in the statute. The reason for limiting these to those currently recognised under Scots law is that those rights are subject to clear, well recognised rules and limits. The only exception is wayleaves, and as the law is unclear, it may be preferable to specify in the statute what a wayleave right can consist of.

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. The Faculty of Advocates considers that such a power is essential, and that it should be specifically set out in the statute.

The Faculty agrees that the power should include the option of non-exclusive possession in appropriate cases, for example the right to take access. It is also important that access can be taken over airspace, for example for use of a crane, and the statute should explicitly provide for this.

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

Yes. The Faculty of Advocates agrees that this right should be expressly provided for. Something as fundamentally important as the right to compensation should be explicit rather than implicit.

If a right to create new property rights is given to acquiring authorities, including restrictions on use, there should also be an express right for the landowner to claim compensation if any new rights are created over their property.

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

The Faculty of Advocates considers that the right to an inquiry, and a right to compensation where loss is incurred, in every case must be preserved in order to ensure that compulsory purchase law is consistent with the Convention. An inquiry is vitally important because it is through evidence being led in the form of examination in chief and cross examination of witnesses that the full implications of the CPO can be identified and the proportionality of any proposed CPO assessed. The Faculty of Advocates agrees with the Commission's view, expressed at para 3.64, that the Court must always be able to consider the proportionality of any decision to ensure it is Convention compliant. The Faculty of Advocates notes that the individual circumstances of a case will always be relevant to proportionality, which is apparent from the fourth of Lord Reed's four considerations about 'proportionality' in *Bank*

Mellat v HM Treasury (No 2) [2014] AC 700, at para [74]:

> "*whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.*"

It is arguable that the "exceptional circumstances" test which is applied to housing eviction cases following *Pinnock* may not be the test which is to be applied in compulsory purchase cases. The reason for the "exceptional circumstances" test is that the fact that a lease has been terminated, and the local authority is entitled to possession as the landlord, is a strong factor which suggests that an order for possession is proportionate. That presumption does not apply in compulsory purchase cases where a landowner is being deprived of their own property, and accordingly it is important that in any case the right to an inquiry is retained to enable a proper assessment of proportionality to be undertaken.

Aside from these comments, the Faculty of Advocates agrees with the Commission's view that Scots compulsory purchase law is likely to be Convention compliant.

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

The Faculty of Advocates agrees. It is simpler, and more likely to be Convention compliant, if the same procedure is used each time.

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

Not that the Faculty of Advocates is aware. The Faculty considers that there is considerable merit in using the same procedure in every case of compulsory purchase, as suggested in the previous answer.

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

(Paragraph 5.18)

Comments on Proposal 10

The Faculty of Advocates is not aware of any legislation missing from the list.

11. Do the powers to survey land, contained in section 83 of the 1845 Act, operate satisfactorily in practice? If not, what alterations should be made?

(Paragraph 5.20)

Comments on Proposal 11

The Faculty of Advocates is not aware of any problems with how the provision has been applied in practice.

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

(Paragraph 5.24)

Comments on Proposal 12

The Faculty of Advocates does not suggest any change to the list of statutory objectors.

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

The Faculty of Advocates is strongly of the view that there should be no restrictions on the circumstances in which a statutory objector can insist upon an inquiry. The state's right to acquire private property from private individuals and companies, whilst necessary, has been described by the courts as a "*draconian"* power (for example, by Purchas LJ in *Chilton v Telford Development Corporation* [1987] 1 WLR 872 at 878) and is one which should only be exercised after due consideration and due process. The right to an inquiry should be absolute for anyone that could be directly affected by a CPO, regardless of the size of their property. It is important that there is an opportunity for evidence to be led and witnesses to be cross examined. The right should therefore be to an inquiry rather than a hearing. The Faculty considers that the right to an inquiry is an important element in ensuring that

compulsory purchase law remains compliant with the Convention.

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

The Faculty of Advocates considers that there is merit in having a specified time limit for a referral to the DPEA. A landowner, whose land may be under the threat of a CPO, should have the matter determined as quickly as possible. The time period is a matter of policy, although the Faculty suggests that the time period should be similar to those for statutory appeals or other statutory deadlines so as to ensure consistency in the process wherever possible.

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. As noted above, the power to acquire land by compulsory purchase is a "draconian" one. The nature of the power is therefore such that an objector should always have the right to an inquiry in any case involving a CPO. The Faculty of Advocates is strongly opposed to any suggestion that the reporter could determine a case based on for example written submissions and / or a site visit, or that there should be anything less than an inquiry.

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

The Faculty of Advocates considers the timescales should continue to be set out, but has no view as to whether this is best in primary or secondary legislation.

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

Yes. The Faculty of Advocates considers that it is important that CPOs made by local authorities and statutory undertakers should require to be confirmed by the Scottish Ministers for the reasons outlined by the Commission.

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 Faculty of Advocates agrees with the Commission's suggestion that publication should be made on the acquiring authority's website. The Commission considers that the methods of sending notice should be the same as those contained in the Title Conditions (Scotland) Act 2003.

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

(Paragraph 5.46)

Comments on Proposal 19

The Faculty of Advocates agrees that an acquiring authority should be able to revoke a CPO.

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

The Faculty of Advocates considers that any revocation should require the acquiring authority to compensate the landowner for any loss incurred. Separately, the Faculty considers that the consent of the Scottish Ministers should be required and that there should

be a fairly lengthy time period before the proposal can be re-initiated.

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, together with any damages suffered as a result.

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

(Paragraph 5.50)

Comments on Proposal 22

Yes, the Faculty of Advocates considers that this would be a helpful development.

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

(Paragraph 5.50)

Comments on Proposal 23

The Faculty of Advocates considers that the Land Register would be preferable, to avoid a multiplicity of registers.

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

(Paragraph 5.59)

Comments on Proposal 24

Yes, the Faculty of Advocates considers that three years is reasonable and is not aware of any practical difficulties which the current time period has caused.

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

The Faculty of Advocates considers that this is essential, and suggests that the test should be higher for the acquiring authority to meet. A CPO should only be confirmed when there is evidence that the project is "almost certain" to proceed. The Faculty would favour this precondition being expressly included in the legislation.

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

The Faculty of Advocates considers that there should continue to be a right to an inquiry if a CPO would affect a public right of way. The Faculty of Advocates does not consider that this right should be removed, even if an alternative route is proposed, because the alternative route should be subject to the scrutiny of an inquiry if there is opposition. Whilst the Faculty recognises the issues raised by the Commission, it remains of the view that given the "draconian" power being exercised there should be an inquiry, even if that inquiry takes time.

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

The Faculty of Advocates considers that it is extremely important that the right to an inquiry is retained in all cases, to ensure that any CPO which is objected to is properly considered. Provided that fundamental principle is borne in mind, the Faculty agrees that it is desirable to ensure that an inquiry is resolved as quickly as possible. The Faculty does not, therefore, object to a proposal which would see an inquiry into the CPO itself combined with the inquiry into the loss of a public right of way as long as the acquiring authority ensure that proper scrutiny is given to each ground of objection to the CPO.

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

The Faculty of Advocates does not have any further comments.

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

The Faculty of Advocates considers that the usual grounds of judicial review should be available to challenge a CPO. It is not apparent why the law should be any different for the exercise of compulsory purchase powers than it is for any other decisions taken by acquiring authorities. The tight timescales mean that any challenge will be brought promptly, and provision is made in the Court Rules for urgent disposal of the appeal in cases where that is required (Rule 41.4). The statutory grounds of challenge have been given a wide interpretation (as evident from the quotation from Lord President Emslie's opinion in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 34 which is quoted by the Commission at para 6.37). The Faculty strongly opposes any suggestion that the Court's powers to review a CPO decision should be restricted.

In relation to bad faith specifically, it is not clear whether this is a ground of review which is distinct from the grounds of review set out by Lord President Emslie in *Wordie*. 'Bad faith' may simply be a type of irrationality, which Lord President Emslie suggests is a ground of review. We note, for example, the discussion in Wade & Forsyth, *Administrative Law* (11th edn, 2014) at p 354 – 355.

We agree, however, that any challenge to the CPO based on any ground, including bad faith (or even fraud), should be made within the prescribed time limit (subject to the point we make below). Otherwise, any claim should be restricted to damages.

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, there should be a right to damages for any ground of challenge, including bad faith, outside the period for challenging the validity of the CPO. There is no justification for limiting the time period for claiming damages.

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

(Paragraph 6.39)

Comments on Proposal 31

As noted above, the Faculty of Advocates considers that the usual grounds of review should be available to challenge a CPO. The wording of the statute has been interpreted as having a wide meaning, which the Faculty would wish to retain. Given that there has been some dispute about the interpretation of the current wording, it may be helpful to restate the test to ensure that the usual grounds of judicial review are available.

The Faculty considers that specific provision should be made for the Court to allow a challenge to proceed outwith the time limit in circumstances similar to *McDaid v Clydebank District Council* 1984 SLT 162. The Faculty therefore recommends the Court should have a power similar to that in section 27A of the Court of Session Act 1988 to extend the period in which a judicial review petition can be allowed to proceed.

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

The Faculty of Advocates agrees that such a challenge should also be made within the six-week period. A right to damages on the grounds of a breach of Convention Rights under the Human Rights Act 1998 or the Scotland Act 1998 should be capable of being made outwith the six week period.

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

Six weeks is a very short period of time. Whilst it is likely that an individual ought to be able to challenge a CPO within the relevant time period, there may be circumstances in which that is simply not possible. Similarly, there may be a change in circumstances which requires in exceptional cases an acquiring authority to reconsider the proportionality of a measure in order to be Convention compliant. The Faculty of Advocates therefore favours giving the Courts a power to hear appeals outwith the time period in exceptional cases, as

suggested above, for all grounds of review (including human rights grounds).

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

The Faculty of Advocates considers that the CPO should be quashed in its entirety. As noted above, the power to make a CPO is a "draconian" one, and it is right that the correct procedure should be followed. 'Substantial prejudice' is not an easy hurdle for an appellant to meet, and if it is met the CPO should not be allowed to stand.

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

(Paragraph 6.51)

Comments on Proposal 35

Yes. The Faculty of Advocates considers that this is a fair proposal which will discourage any challenges seeking to 'run down the clock'.

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

Yes. The Faculty of Advocates is not aware of any practical problems caused by these provisions.

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. The Faculty of Advocates considers that there would be merit in such a list to ensure that it is clear to all parties who should be served with a copy of the notice.

38. It should be made clear that a person claiming to be the holder of an interest in land, and who has not been served with a notice to treat, has the right to raise proceedings to determine (a) that the interest attracts compensation and (b) the amount of that compensation.

(Paragraph 7.19)

Comments on Proposal 38

Yes.

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

(Paragraph 7.19)

Comments on Proposal 39

The Faculty of Advocates does not consider that there should be a time limit, although if there is it should only run from the date the person making the claim becomes aware of their claim.

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

The Faculty of Advocates is not aware of practical problems caused by paragraph 7, and agrees with the points made by the Commission at para 7.29.

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

The Faculty of Advocates is not aware of any problems with the system as it is currently operating. It is important that compensation is assessed on a case by case basis. It may take a considerable amount of time between the date of the service of a notice to treat and the taking of possession by the acquiring authority, and a landowner should be able to continue to use their land in the normal way (which might include carrying out work) during that period.

The Faculty of Advocates therefore supports a position where improvements carried out after the date of the notice to treat being served are compensated if incurred in the ordinary course of managing the land. A subjective approach is, however, important to ensure that the financial burden on tax payers is not increased unnecessarily.

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

(Paragraph 7.40)

Comments on Proposal 43

Yes. The Faculty of Advocates agrees that there should be a time limit on the currency of a notice to treat, and is not aware of any practical problems caused by the current three year period.

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, subject to payment of compensation and the reasonable expenses of people who were directly affected by the notice to treat. The Faculty of Advocates is not aware of any practical problems being caused by the present, six week period.

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

The Faculty of Advocates does not consider that an acquiring authority should be able to withdraw a notice to treat once they have entered on to the land.

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

The Faculty of Advocates considers Questions 46 & 47 are policy matters but consider that the latter would be the preferable option as it allows the acquiring authority access in urgent cases but also places the financial risk on them.

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

As above.

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

(Paragraph 7.73)

Comments on Proposal 48

The Faculty of Advocates considers that there should be a limit on how long a notice remains valid and a period of 6 months would be appropriate.

49. Should the acquiring authority be required to serve notice of their intention to make a GVD on holders of a short tenancy or a long tenancy with less than one year to run?

(Paragraph 7.78)

Comments on Proposal 49

The Faculty of Advocates considers this is a policy matter and has no comment.

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

The Faculty of Advocates considers that the current provisions adequately safeguard the interest of the acquiring authority and the landowner.

51. Should a GVD be available in all circumstances?

(Paragraph 7.89)

Comments on Proposal 51

The Faculty of Advocates considers this a policy matter and has no comment.

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

(Paragraph 7.89)

Comments on Proposal 52

The Faculty of Advocates considers the time limits are acceptable.

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

Subject to proposal 56 the Faculty of Advocates agrees.

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

Subject to proposal 56 the Faculty of Advocates agrees.

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

Subject to proposal 56 the Faculty of Advocates agrees.

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

The Faculty of Advocates agrees.

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

The Faculty of Advocates can see there may be some utility in such a provision in exceptional circumstances but it should not be used in substitution for the requirement to carry out extensive title searches or the requirement to seek authority from the court in cases where a question arises as to whether the land in question forms part of the common good.

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

The Faculty of Advocates agrees.

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

The Faculty of Advocates considers this a policy matter but sees no particular difficulties with the current time limits.

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

The Faculty of Advocates considers this to be a policy matter and has no comment.

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

The Faculty of Advocates considers this to be a policy matter and has 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)

Comments on Proposal 62

The Faculty of Advocates agrees that the current law is unnecessarily complex and that there would be advantages in following the position adopted in England and Wales.

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

The Faculty of Advocates agrees that if the GVD procedure is retained the current rules on transfer of the land should continue.

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

The Faculty of Advocates considers this is a policy matter and has no comment.

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

The Faculty of Advocates consider this a policy matter and has no comment.

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

The Faculty of Advocates considers that it would be appropriate to require the Keeper to add a note on the Land Register stating that the tile has been acquired by compulsory purchase.

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

The Faculty of Advocate agrees that the current law on this point is unduly complex. As to any new procedure the Faculty considers this a policy matter and has no comment.

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

The Faculty of Advocates agrees for the reasons set out in paragraph 8.57.

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

The Faculty of Advocates agrees for the reasons set out in paragraphs 8.64 and 8.65.

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

(Paragraph 8.75)

Comments on Proposal 71

The Faculty of Advocates can see an advantage in consolidation. As to reform the Faculty considers this a matter of policy and has no further comment.

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

The Faculty of Advocates has no comment.

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

The Faculty of Advocates has 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)

Comments on Proposal 74

The Faculty of Advocates consider this a policy matter and has no comment.

75. Should depreciation of the value of the acquired land, caused by its severance from the retained land, be taken into account when assessing its value?

(Paragraph 11.34)

Comments on Proposal 75

The Faculty of Advocates considers that for the reasons set out in paragraph 11.33 depreciation of the value should be taken into account when assessing the value of the acquired land.

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

The Faculty of Advocates has concerns that the current law does not take account of negative equity satisfactorily.

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

The Faculty of Advocates has no comment.

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

(Paragraph 11.55)

Comments on Proposal 78

The Faculty of Advocates has no comment.

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

The Faculty of Advocates has no comment.

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

The Faculty of Advocates has no comment.

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

81. How should the "scheme" be defined?

(Paragraph 12.78)

Comments on Proposal 81

The Faculty of Advocates considers this a matter of policy and has no comment.

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

The Faculty of Advocates considers this a matter of policy and has 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)

Comments on Proposal 83

The Faculty of Advocates considers this a matter of policy and has 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)

Comments on Proposal 84

The Faculty of Advocates considers this a matter of policy and has 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)

Comments on Proposal 85

The Faculty of Advocates considers that there is considerable merit in following the approach adopted in England and Wales which provides for a more realistic assessment of the planning position and is consistent with taking account of existing planning permissions.

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

The Faculty of Advocates agrees that existing planning permissions should continue to be taken into account.

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 Faculty of Advocates considers that it would be logical that the relevant date should be the date when the acquiring authority enter on to and take possession of the land.

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

The Faculty of Advocates agrees with the Scottish Law Commission, and the English Law Commission, that this assumption is an unnecessary complication.

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

See above.

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

Although this proposal is in some respects a policy matter, the case of *Greenweb Ltd v London Borough of Wandsworth*, [2009] 1 WLR 612 illustrates how after a prolonged period an unintended windfall benefit could arise. For the reasons set out in the Discussion Paper the Faculty of Advocates agrees that the statutory assumption of planning permission for development in paragraph 1 of Schedule 11 to the 1997 Act should be repealed.

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

The Faculty of Advocates agrees that there is no particular reason why there should be a statutory assumption that planning permission ought to be granted for use of a single dwelling house as two or more separate dwelling houses, therefore paragraph 2 of Schedule 11 to the 1997 Act should be repealed

92. In terms of special assumptions in respect of certain land comprised in development plans, what should be the relevant date for referring to the applicable development plan?

(Paragraph 13.40)

Comments on Proposal 92

The Faculty of Advocates considers that the assumed relevant date for referring to an applicable development plan in a notice to treat ought to be the date when the acquiring authority enter on and take possession of the land. This would be consistent with the position as regards the grant of planning permission.

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

The Faculty of Advocates supports the proposal that the underlying scheme should be deemed to be cancelled at the time when the CPO is first published. The publication of a CPO inevitably must impact upon the marketability and value of the affected land. In certain situations, that may have an adverse impact upon the value of the land, but alternatively – say in the case of land assembly for a major commercial development – might generate an incidental windfall to the relevant owner. A CPO will not simply appear from the blue, but will arise from the provisions of an extant Development Plan, or the process of site identification or allocation of uses undertaken in the course of preparing a future Development Plan.

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

For the reasons set out in the Discussion Paper the Faculty of Advocates agrees that the scope of the underlying "scheme" to be cancelled should be the whole scheme and not simply the intention to acquire the relevant land.

95. Provision along the lines of section 14 of the 1961 Act, as amended, should be included in the proposed new statute.

(Paragraph 13.68)

Comments on Proposal 95

There is an evident element of uncertainty in the law underlying the valuation of subjects which are compulsorily acquired arising from the significant change in form of a Development Plan from that envisaged by the 1947 Act. The principle proposed both reflects such change and clarifies what is actually intended to be valued. The Faculty of Advocates support the proposed inclusion of provisions in a new statute along the lines contained in Section 14 of the 1961 Act.

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

The Faculty of Advocates does not support the proposal that provisions in Part V of the 1963 Act for compensation, where permission is granted for additional development after compulsory acquisition, should be repealed and not re-enacted. The Discussion Paper highlights that there are arguments on both sides. Compulsory purchase powers are a draconian power which interfere with rights of property, and as a matter of general principle ought not to be used more extensively than necessary. If an area of land is compulsorily purchased and is not required for the scheme and is not offered back to the original landowner, it seems unfair that the acquiring authority may obtain a windfall benefit from developing the land for an alternative valuable purpose which the original landowner is deprived of as a result of the exercise of statutory powers for a purpose which is not in fact implemented in relation to the land in question. In addition a Planning Authority has the ability to enhance the value of land which it has compulsorily acquired through the grant of an appropriate Planning Consent. Whilst it is correct to say that arrangements could be made to ensure that the divested landowner retains a right of clawback by disposing of land privately, it is more difficult to see how that could be protected where, say, land was acquired by GVD, absent the provision. A failure by an Acquiring Authority to act in good faith when using its powers could potentially be the subject of a reference to the PSOS or potentially challenged by Judicial Review, but this would require the divested landowner to act after the event and would require evidence of bad faith. The Faculty of Advocates does not consider that any potential difficulties in budget planning for a project would justify repeal of this provision.

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

(Paragraph 13.76)

Comments on Proposal 97

The Faculty of Advocates agrees that Section 31 appears to be anomalous in that the normal basis for compensation is the market value of the land at the time of the compulsory purchase. However, as noted in response to Question 96 this situation only arises where the acquiring authority obtained more land than it actually needed for the purpose of the original scheme, and may obtain a windfall benefit from having done so. Under the 1963 Act, the period specified in Section 31 as originally enacted [and by its predecessor, Section 18 of the Town and Country Planning (Scotland) Act 1959] was 5 years. The Section was repealed in its entirety by the Land Commission Act 1967, but was subsequently reinstated with a 10 year period by the Planning and Compensation Act 1991. The general rationale for those parts of the 1991 Act which concerned compensation was to maintain the general structure of the regime, but to improve its fairness and efficiency. At that time there had been a proposal to extend the period to 21 years. Any period specified will necessarily be arbitrary to some extent as there is no clearly correct period. The Faculty of Advocates suggests that the time period might be reduced to 5 years as originally enacted. This would be consistent with the intended life-cycle of a Development Plan. It is suggested in further

support of this time period that an analogy could be drawn with the 5 year period for short negative prescription, as this period would extinguish any residual interest of the former landowner in the land.

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

The Faculty of Advocates considers that, as with Q. 97, there is an element of arbitrariness attached to the suggestion of a period of time within which a CAAD ought to be sought. In particular, a balance requires to be struck between the interests of a divested landowner in having sufficient opportunity to identify potentially appropriate CAAD schemes with adequate clarity against the interest of the Acquiring Authority in establishing the cost of the land in question. As previously noted however, a CPO scheme will not arrive out of the blue. Accordingly, the principle of applying a time limit to applying for a CAAD subsequent to the making of a CPO is supported in principle. The Faculty of Advocates considers that the time period for applying for a CAAD ought to fairly reflect the amount of information which the applicant requires to provide in support of the application. The more detailed information that a CAAD application is required to provide, the greater should be the time permitted. Nonetheless the Faculty of Advocates believes that for policy reasons of certainty the amount of time permitted ought to be limited. The Faculty of Advocates has no specific period of time in mind.

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

(Paragraph 14.12)

Comments on Proposal 99

The Faculty of Advocates has no comment on whether further information should be provided in applying for a CAAD, or if so, what.

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

The Discussion Paper acknowledges that there are pros and cons in relation to the relevant date for determination of a CAAD. There obviously is an element of artificiality within the process which renders valuation on a specific date potentially liable to produce unfair outcomes for either party in the real world. The Faculty of Advocates considers that the principle of identifying a date in Statute is correct, and for the reasons set out in paragraphs 14.17 and 14.19 of the Discussion Paper agrees that provisions along line of Section 30(2) of the 1963 Act should apply in new statute. The Faculty of Advocates also agrees that these should apply to statutory planning assumptions and to CAADs.

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

The Faculty of Advocates agrees with the reasoning of Lord Hope of Craighead in *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment*, [2000] 2 AC 307, and further agrees that there would be benefit from clarity in the Statute as regards the cancellation assumptions. The Faculty of Advocates supports this proposal.

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

The Faculty of Advocates supports this proposal.

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

(Paragraph 14.30)

Comments on Proposal 103

The benefits of securing consistency within the system favour the adoption of the same

criteria for all potential planning consents, including CAADs. The Faculty of Advocates supports this proposal.

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

The Faculty of Advocates has no comment on this proposal.

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

On one view the Compulsory Purchase/CAAD provisions may be viewed as anomalous within the planning regime established under the 2006 Act. On another view, there is a significant difference between the obtaining of a Planning Consent which cannot be implemented without the agreement of the landowner, and the divesting of land which is of an irrevocable nature in the first instance. The Faculty of Advocates supports the view that determining disputes ought to be proportionate to the issues in dispute. The CPO process constitutes an interference with the landowner's property rights and means that the landowner has suffered a loss. A claimant for compensation must establish through the use of evidence that he or she has suffered a particular loss and the valuation of that loss. Disputes about loss invariably involve competing evidence, in particular competing expert evidence. As a matter of principle the landowner should be allowed the opportunity to establish the full extent of the disputed loss through leading evidence, and all parties ought to be entitled to test the credibility and reliability of any other party's evidence through examination and cross-examination of witnesses. A full public inquiry may not be proportionate where what was being acquired was a small extent of ground in order to improve a road junction. However the Faculty of Advocates is not aware of any information to support the view that the right to insist on a public inquiry is being abused. In general the Faculty of Advocates considers that parties should continue to be entitled to insist upon a public inquiry when appealing against a CAAD decision.

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

The Faculty of Advocates considers that there is a strong argument in favour of adopting a common deadline for a right of appeal against the Planning Authority's CAAD decision of three months. A CAAD is a form of Planning Application, perhaps demanding justification for accepting or refusing a substantial departure from what the Development Plan foreshadows for a site. The process is different from a Planning Application because it is dealing with a hypothetical situation, and will not have been through the same pre-application process which an actual Planning Application would have undergone to try to resolve potential problems. The Planning Authority's decision may involve the attachment of conditions which require to be considered.

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

The Faculty of Advocates considers that an appeal against a CAAD should continue to be made to the Scottish Ministers rather than the LTS. The core issue in a CAAD is whether planning permission ought to be granted (even though only on a hypothetical basis). This raises the same planning considerations, including approach to planning policy, as would be the case in an application for actual planning permission. We believe that it is logical for the same body to make the final determination in respect of both types of application. The Faculty of Advocates considers that the current appeal system functions efficiently and provides a proportionate means of adjudicating upon disputes. We do not consider it to be efficient for that same role to be duplicated for CAADs by the LTS. We further believe that retaining the same appeal system for planning appeals and CAADs would also avoid the risk of inconsistent decision making.

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

If contrary to our views above, the final decision maker was the LTS we believe that the inquiry procedure should be retained, with the reporter reporting to the LTS. We note that the LTS do hold hearings in locations close to the subject matter of applications to them, but we consider that there are other procedural advantages which would be obtained by maintaining an appeals system within the DPEA Reporters Unit in terms of the accumulated detailed knowledge of the planning process.

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

Although it is a matter of policy, the Discussion Paper highlights a distinction which has no apparent justification and may be unduly harsh. The Faculty of Advocates considers that there is no reason to maintain the different tests which apply under Sections 24 and 25 of the 1963 Act. The Faculty of Advocates therefore supports the removal of this unfair distinction, and agrees that in considering a CAAD, it should be assumed by the Planning Authority that planning permission which could reasonably have been granted would have been granted.

110. Where none of the statutory assumptions apply should such planning permission be reflected, for the purposes of valuation, in hope value only?

(Paragraph 14.64)

Comments on Proposal 110

Assuming the change suggested in Q. 109 is made, the Faculty of Advocates supports the proposal that where none of the statutory assumptions apply, then for valuation purposes only hope value should be considered.

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

(Paragraph 14.64)

Comments on Proposal 111

The Faculty of Advocates considers that it is appropriate that the same criteria should apply to all relevant planning assumptions.

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

For the reasons referred to in paragraph 15.17 of the Discussion Paper, the Faculty of Advocates agrees with this proposal.

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

For the reasons referred to in the Discussion Paper, the Faculty of Advocates agrees with this proposal.

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

(Paragraph 15.37)

Comments on Proposal 114

For the reasons referred to in the Discussion Paper, the Faculty of Advocates agrees with this proposal.

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

For the reasons referred to in paragraph 15.44 of the Discussion Paper, the Faculty of Advocates agrees with this proposal.

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

The Faculty of Advocates supports this proposal for the reasons set out in the Discussion

Paper. It should be made clear in any legislation conferring a discretion on the acquiring authority to carry out the accommodation works that this is a discretion to agree with the landowner a scheme of accommodation works, and that this is on the existing common law basis, i.e., that the landowner cannot be compelled to accept a proposed scheme, that failure to agree a scheme of accommodation works will not affect the amount of compensation to be paid, and that the acquiring authority has the power to give an undertaking not to use the acquired land for certain specified purposes (provided that such undertaking is not inconsistent with the purpose for which the land is acquired). If there were to be a mandatory requirement to carry out a scheme of accommodation works a number of safeguards would require to accompany a change in the law. There would need to be a framework created within which such powers were to be exercised in order to ensure that retained land is kept in as useful a state as possible, and also a dispute resolution procedure created to deal with arguments about the scope, effect and costs of what was being proposed or sought.

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

For the reasons set out in the Discussion Paper, the current balance between the private interests of a landowner and the general public interest regarding betterment does appear to be reasonable. However the Faculty of Advocates agrees that there is a problem in identifying contiguous or adjacent land, and that the effect of the current rule can be unfair.

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

As the Discussion Paper notes, there are a number of potential solutions to the problem and it is ultimately a policy decision as to what amounts to a "fair" solution which balances private and public interests. The Faculty of Advocates makes no comment on the merits of what is proposed.

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

The Faculty of Advocates agrees that the decision of the majority in *Horn v Sunderland Corporation*, [1941] 2 KB 26 is illogical, and that the assessment of compensation for disturbance ought to be carried out separately from the assessment of market value of the property.

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

(Paragraph 16.34)

Comments on Proposal 120

The Faculty of Advocates support the proposition that to overcome the problem created by *Horn v Sunderland Corporation*, there should be a separate express statutory provision for disturbance compensation.

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

The Faculty of Advocates can see the attraction in having the principle of causation in relation to disturbance compensation set out in a statute which is intended to be a modern and comprehensive restatement of the law. However the more detailed the statement seeks to be the greater the scope there may be for future dispute as to what is intended. A concise general statement would be easier to apply, but in practice it is not clear that this will make any real difference as matters will still come down to the circumstances of particular cases as to whether there is a causal link.

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

For the reasons set out in the Discussion Paper, the Faculty of Advocates agrees with this proposal.

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

For the reasons set out in the Discussion Paper, the Faculty of Advocates agrees with this proposal.

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

As the general approach to compensation is to put the landowner into a position equivalent to his or her position prior to the compulsory purchase, in so far as money is capable of doing so, and losses caused as a result of the loss of development potential have previously been recognised as a valid claim, the Faculty of Advocates considers that in principle there is no reason why such losses should not continue to be compensated. The claimant's case in *Arcofame Properties Limited v London Development Agency*, [2012] UKUT 107 (LC) which was based on *Pattle v Secretary of State* failed in law due to the way it was argued, and also failed on its facts due to the absence of supporting evidence for that part of the claim. However, the Faculty of Advocates considers that any difficulties which may exist in establishing the claim do not amount to a reason for not accepting this as an appropriate head of claim.

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

(Paragraph 16.50)

Comments on Proposal 125

The Faculty of Advocates considers that while the ability of investment owners to claim a wider range of disturbance compensation than currently permitted might be considered a matter of policy, it recognises that it would be consistent with general principle underlying the approach to compensation for the proposed new statute to allow for such claims (subject to considerations of remoteness).

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

The Faculty of Advocates considers that the extent to which it is appropriate to pierce the corporate veil is a policy issue and has no comment.

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

The Discussion Paper notes that the impecuniosity rule can appear harsh, and does not sit well with the general principal that a landowner should be restored to an equivalent position that they would have been in but for the scheme. The Faculty of Advocates also considers that the analogy with developments in the law of damages is apt. Since the intention of the new statute is to create a modern scheme for compensating those affected by compulsory purchase on a consistent basis, and having regard to the other proposals in the Discussion Paper, the Faculty of Advocates considers that it would be anomalous to allow the existing common law rule to remain undisturbed and it supports the proposal.

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

(Paragraph 16.77)

Comments on Proposal 128

The existing provision in Section 43 of the 1973 Act appears rather dated and is potentially open to challenge as discriminatory in relation to the age limitation of 60. The Faculty of Advocates suggests that consideration should be given to reviewing this Section at the same time as any changes might be made to extending the extent to which personal circumstances might be taken into account when considering the assessment of disturbance compensation. We do not foresee any particular difficulty if claimant's personal circumstances were to be taken into account in accordance with the qualifications expressed at paragraph 16.77 of the Discussion Paper.

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

For the reasons set out in the Discussion Paper the Faculty of Advocates supports this proposal.

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

For the reasons set out in the Discussion Paper the Faculty of Advocates supports this proposal.

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

For the reasons set out in the Discussion Paper the Faculty of Advocates sees merit in having the rules for displacement of a business set out in the statute, as the existing common law test in *Director of Buildings and Lands v Shun Fung Iron Works Ltd*, [1995] 2 AC 111 does not deal fully with some of the practical issues which need to be addressed.

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

For the reasons set out in paragraphs 16.94 – 16.96 of the Discussion Paper the Faculty of Advocates considers that it would be appropriate for the valuation date for disturbance compensation to be different from the valuation date in relation to the compulsory acquisition of land.

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

The Faculty of Advocates considers that the fixing of the timescale for determination of a claim for disturbance compensation on the basis of relocation is a practical matter about which it has no comment.

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

(Paragraph 16.101)

Comments on Proposal 134

The Faculty of Advocates agrees that retention of the discretionary power under section 38 is unnecessary having regard to the provisions of sections 34 and 35 of the 1973 Act.

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, the Faculty of Advocates considers that disturbance payments along these lines should be retained.

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, the Faculty of Advocates considers the LTS should have jurisdiction in each instance.

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

The Faculty considers that this is ultimately a question of policy.

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

Again, this is ultimately a matter of policy. In principle, however, since home loss payments are designed to reflect emotional upset and inconvenience, there would appear to be no good reason why such payments should be a prescribed percentage of market value (albeit that the market value of a property may be a valid factor to take into account).

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

On this hypothesis, it may make sense to provide for maxima and minima to reflect trends in inflation, subject to periodic review to ensure that the policy objectives continue to be met.

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

This is considered to be a policy question. It is observed, however, that it may be possible to adopt a sensible hybrid scheme involving a base payment and layered additional payments having regard to various relevant factors.

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.

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

The Faculty of Advocates agrees that superseded and redundant dispute resolution provisions within the 1845 Act should be repealed and not re-enacted.

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

This question may be best addressed by other consultees. From the perspective of the Faculty of Advocates, the LTS is accessible and there is flexibility in adopting procedures that reflect a degree of formality appropriate to the case at hand. It is inevitable that some complex cases will require the involvement of counsel or solicitors and the use of expert witnesses. In such cases, formal adversarial procedure is merited. In terms of the overall timescales for a decision it is not uncommon for LTS proceedings to be initiated then sisted

or continued in order to allow further discussions between parties. The fact that those discussions are carried out "under the shadow" of the LTS can in some instances be useful in bringing about a negotiated settlement. Where, however, a case is being brought forward through LTS proceedings, in order to inform parties (and manage expectations) at an early stage in proceedings it may be useful to provide a target decision date based upon an indicative timetable. It is not considered that the LTS fees are too high, but it is recognised that an unsuccessful party in a complex case may be faced with very high exposure to expenses. Further comment on the issue of expenses is made below in response to questions 150 and 151.

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

The Faculty of Advocates agrees. This would provide greater continuity in decision-making and give parties confidence that the dispute will be settled by a specialist tribunal with experience in this area.

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

It is essential that there is clarity over the point in time from which the 6 year period will run. The Faculty of Advocates agrees with the proposed approach.

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, for the sake of clarity.

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

(Paragraph 18.23)

Comments on Proposal 148

Because of the potential time elapse in quantifying a claim, it is accepted that a 6 year period is appropriate. This does not of course prevent a claim being brought within an earlier period of time, if appropriate in the circumstances. What perhaps needs to be avoided is a culture of working towards the 6 year time limit (with the result that progression of the claim and discussion over compensation are liable to drift).

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

(Paragraph 18.23)

Comments on Proposal 149

The Faculty favours a simple and clearly understood time limit, albeit one that reflects the points made in the preceding response.

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

This is likely to be controversial, and will reflect the interests of the party affected. For the reasons alluded to in the Discussion Paper, however, the Faculty of Advocates agrees that a wider discretion would be appropriate, provided that the claimant could establish that they had acted reasonably in not having accepted the tender at an earlier stage (and acted reasonably in the conduct of the proceedings thereafter). Further, the potential exposure to expenses could be regulated by an order made at an early stage of proceedings – see below.

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

It is considered that the threat of compulsory acquisition in the public interest might justify the use of a Protective Expenses Order or “PEO” (in the same way that such Orders are now

made under Chapter 58A of the Court of Sessions Rules for claims falling under the provisions of the Aarhus Convention on Access to Justice). The terms of any rule for a PEO would require to be thought through so as to reach an appropriate balance between the private and public interests. Careful consideration would be required as to the appropriate level of "cap" that would apply (and any cross-cap). Also, the possibility of an adverse award of expenses being made against a claimant is a factor that can help to bring about a reasonable settlement. Unlike claims under the Aarhus Convention, fundamentally the claimant is seeking to protect a private interest (albeit one upon which the public interest may have an impact). Therefore, if PEO protection is to be introduced, then it is thought that this should not exclude liability for expenses incurred through unreasonable behaviour on the part of the claimant (whether in the conduct of the proceedings or, for example, by refusing a settlement offer unreasonably).

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

The Faculty of Advocates considers that in certain circumstances the acquiring authority should be required to make an advance payment before taking possession. Generally, this should be in circumstances where the claimant is taking reasonable steps to mitigate loss by relocating prior to the acquiring authority taking possession. An advance payment could help to lessen consequential losses and avoid or reduce later arguments about causation.

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

To make advance payments workable, it is thought that it should be competent for LTS to

provide an enforceable valuation figure.

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

The Faculty of Advocates considers that the rate of interest currently provided for should be increased in the event of late payment.

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

The Faculty of Advocates considers that, in principle, the answer to parts (a) and (b) of this question is “yes”. However, the Faculty would defer to those with greater insight as to the practical difficulties that currently arise.

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

The Faculty of Advocates can offer only general comments. It is considered that ADR may

be of assistance in suitable cases where both parties are willing to engage. Parties to a dispute should be encouraged to consider mediation. However, use of ADR should not be compulsory. The observations of Lord Hamilton (as to the potential for delay and significant costs arising in arbitration) are underlined.

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

Although there are many variables (which are difficult to assess in the abstract) in principle it is not thought that a properly case managed reference to the LTS should prove more expensive than arbitration or other ADR in a comparable case.

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, the right of pre-emption should be placed on a statutory footing. The present level of uncertainty as to the applicability of the Rules and their consistent application is unsatisfactory.

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

(Paragraph 19.9)

Comments on Proposal 161

For the reasons given, the Rules should apply to all land acquired by, or under threat of, compulsion.

162. Should the obligation to offer back land continue to be limited to cases where the land has undergone no material change since the date of acquisition?

(Paragraph 19.11)

Comments on Proposal 162

No, it should not. Since the land has been acquired compulsorily (or under threat of compulsion), it is not considered that material change in the character of the land is a factor which should, in principle, displace the obligation to offer surplus land back to the former owner. It would be a matter for the former owner to decide whether to take up the offer at the current market value (which, in light of the change in character, may or may not prove attractive). It is recognised that this will increase the administrative burden on the acquiring authority but that burden is thought reasonable given the imposition on private interests in the public interest. A simple obligation to offer back surplus land (subject to the possibility of exceptions referred to at question 166 below) also avoids any unilateral decision by the acquiring authority as to what amounts to a change in character.

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

The Faculty is not aware of there being deficiencies in the current approach, but would defer to the experience of others.

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

In the interests of clarity and certainty, yes. The period of 25 years seems appropriate.

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

There should be no separate time limit for land purchased between these dates.

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

The general principle should be that there is an obligation to offer back. It is considered that this reflects common fairness, as observed by Bingham L.J. in *R v Commission for the New Towns Ex. Parte Tomkins (1988) 58 P&CR 57*:

> "*When land is compulsorily purchased the coercive power of the state is used to deprive a citizen of his property against his will. He is obliged to take its assessed value whether he wants it or not. This exercise is justified by the public intention to develop the land in the wider interest of the community of which the citizen is a part. If, however, that intention is not for any reason fulfilled, and the land becomes available for disposal, common fairness demands that the former owner should have a preferential claim to buy back the land which he had been compelled to sell, provided he is able and willing to pay the full market price at the time of repurchase.*"

Thus, where the land has become surplus to the scheme for which acquisition was justified, it is not considered that unrelated "exceptions" should deprive the former owner of the opportunity to repurchase. In the event that any "exception" is to be retained (whether specific or more general) it is considered that the onus should rest upon the relevant authority to establish a clear justification, in the public interest.

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

Where there are practical difficulties which prevent the land being offered back then it is accepted that special procedures should be retained.

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

The Faculty would defer to those with greater experience as to the operation of the time limits. Clearly there will be a need to balance effective administration with practical considerations. It may be that the overall time limit may require adjustment to reflect this.

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

The Faculty of Advocates agrees that in principle clawback provisions should be time limited.

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

The Faculty of Advocates agrees that the LTS should have jurisdiction to resolve such disputes.

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

The Faculty of Advocates is not convinced that this provision should be repealed, even if little used in practice. This is the underlying statutory right to obtain possession under the 1845 Act, if necessary by court order.

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

It is agreed that this amendment would remove any doubt over the matter.

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

(Paragraph 20.10)

Comments on Proposal 173

The Faculty of Advocates considers that any replacement system is a matter of policy.

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

The Faculty of Advocates agrees that the principle of equivalence should apply and such losses should be recoverable (albeit the valuation of the "loss" may be problematic). Therefore, account should be taken of the likelihood that a short tenancy will be continued or renewed.

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

The Faculty of Advocates agrees.

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

The Faculty of Advocates agrees. Fairness dictates that a landowner should not be faced with an additional, unplanned tax liability as a consequence of the compulsory acquisition.

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

The Faculty of Advocates has no further comments to add.

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.