HENDERSONS
CHARTERED SURVEYORS

Our Ref: ECH/AB

5 August 2015

The Chief Executive
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

Dear Sir

Review of Compulsory Purchase in Scotland

Mindful of the long awaited Review of Compulsory Purchase in Scotland I apologise for the lateness of my brief submission.

In passing comment I am primarily a rural practitioner working most commonly with Greenfield type CPO scenarios. These will range from projects such as the M80, M77 and associated larger infrastructure type projects. The promoted private orders such as we have seen with the likes of the Airdrie to Bathgate Rail Link and associated rail infrastructure which have become more prevalent over the last ten years. I am also heavily involved in water/sewerage legislation which I think needs to be updated and I would have to state in passing to firstly be more consistent with good practice. In turn we have seen a significant growth in the energy infrastructure and its delivery and increasingly its reference to Compulsory Purchase be that conventionally by way of electricity projects (Necessary Wayleaves) and I think also with the evolution and emergence of hydrocarbon onshore exploration (CBM and Shale Gas).

I am also very conscious that I am currently engaged in trying to address the deficiencies left from the 2003 Agricultural Holdings (Scotland) Act. In this regard I am mired in the Supreme Court Judgement as to the legislative competency of aspects of that legislation. I have also attended the Land Court with regard to the ongoing frustration and exasperation of practitioners but most pertinently people directly affected by the deficiencies of the 2003 legislation. I make the point merely to emphasise the importance in good drafting.

I am therefore in part sympathetic to the challenges that face those drafting new legislation such as to make it in "plain English" which at times I have to say still seems sadly lacking but also to deliver the intentions of these weighty and lengthy consultation processes.

The procurement of major infrastructure projects with the advent of design build finance has changed totally the traditional statutory authority. They are simply faceless administrators who devolve or seek to devolve responsibility down a contracting chain which become ever lengthier and ever more litigious. Fundamentally for those blighted or affected by statutory projects it becomes ever more ineffectual in addressing the deficiencies which statutory projects can and do create. The simplest point of remedy or repair of basic defects is simply a disproportionate administrative chain if indeed it is ultimately resolved. Statutory powers give the Authority significant rights but it also imposes responsibilities and obligations. It is this latter regard which is now being too readily ignored by statutory promotors.

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Legislative change will bring about legislative discussion and no doubt by the nature of legal process will only be tested and delivered by way of adversarial judgements through the Lands Tribunal system. I have no doubt changes will come that will aid the delivery of statutory process and make the schemes and delivery of process much more straightforward for Councils and statutory bodies. The defect may not lie in the legislation wholly at present but the absence of those skilled enough to actually interpret and carry forward the delivery of the legislation.

Changes are needed such as with those made in the English CPO system notably home loss.

I would ask for one fundamental change. That being as follows:-

The underlying principle of Compulsory Purchase is its necessity or its function to deliver works that are required in the greater good for the balance of the community/society. In turn the claimant fundamentally should be no worse or no better off. The simple practical reality is that the commitments given at the outset of schemes prove to be hollow. The procurement and delivery methods undermine that yet further and leave those members of the community affected by such schemes and notably those who are perhaps least prepared or resourced to be able to champion or defend their position worse off than legislation intended. Through my practicing career I have found that those larger organisation or those higher net worth individuals or companies who have the resources are well equipped to meet the challenges of CPO. Indeed they undoubtedly are able to fund that professional debate and invariably find satisfaction by way of compensation settlement.

Many of the agricultural community however are not as sufficiently well resourced and certainly not elderly parties who are bamboozled and genuinely fearful of the layers of bureaucracy and at times administrative threat comes with the process. I have found they do not necessarily take issue with the principle of what is to be achieved although there may be at times disappointed to see the change. What they are dismayed by is the delivery and the failure of those responsible for schemes to meet their obligations, be that compensation or simply delivery of competent schemes. Statutory bodies who benefit from such powers seem to have little regard and certainly no fear of any accountability for their deficiencies. That is not restricted to compensation but simply the level of incompetence which is shown in the delivery of the scheme. I have witnessed first hand the stress that this causes notably older members of the community. The worry, anxiety and the genuine health related stress that is induced by these problems. I therefore ask that in the Review that the onus of responsibility be shifted from the claimant to the statutory authority benefiting from the powers it seeks to apply. In doing so the statutory body must demonstrate that they have implemented the said scheme competently, proficiently and to the standards of good practice expected of their said disciplines, eg road building, pipe laying and so forth. They do so in a timely manner and in doing so that they have compensated in full and can demonstrate that they have compensated those affected by the project. Such cost of referral to the Lands Tribunal in pursuing the determination of such compensation process will be met other than in frivolous or unreasonable situations by the promoting Statutory body.

If the above onus is shifted which in fairness it should be since the schemes are being undertaken for the benefit of the wider society then the wider society through its statutory agent in essence should be able to demonstrate and prove that they have compensated in full and delivered the scheme proficiently thereby mitigating and ensuring that the claimants are not unnecessarily disadvantaged. That does not seem an unreasonable 'balance' to introduce. Compensation is sadly the 'crude' mechanism by which 'affected' partied can seek to redress to the loss, damage and expense of a project. The change of emphasis may once again bring at best a fairness and accountability.

I would also like to extend an invitation to any members of the Consultation Group who would wish to inspect first hand examples of major infrastructure projects typified by the above comments. They can witness first hand the gross deficiencies left by schemes to which there seems to be almost no recourse to the deficiencies of authorities. They can see and witness first hand the stress and anxiety that is caused. Realistically most claimants cannot resource modern actions against statutory bodies who invariably have the resources of the public purse to mount almost unlimited defence. It is therefore essential that this wealth of resource is constructive and used to deliver good practice.

Professional Fees

Claimants are entitled to professional representation. The reality is a generation if not two of professional practitioners have been discouraged from accepting such instructions as 'fee' practices by statutory bodies are manipulated to be so restrictive. In my efforts over the years in sitting with the RICS (Scotland) CPO Forum and formerly Fees Group in seeking to constructively redress this issue. Pre devolution it was always deferred by Government and post devolution something always promised under the much 'deferred' CPO Review. The Professional Bodies can no longer advise on fee scales or reimbursement rates for such work as European Law has decreed this is anti-competitive. This leaves a free for all amongst statutory organisations to 'dictate' their scales in many cases based upon 'abandoned' practices, eg (Ryde's Scale in England and works has been set aside but not so in Scotland given their devolved powers). This 1996 Ryde's Scale is now so dated as to be embarrassing but not so if you are a statutory Authority. The Scale had its own merits and the principles can still be applied if done so with regular updates and correct application in full. Consistent with much of the failings of the CPO system statutory bodies or agencies do not understand the Scale nor seek to apply in full.

In my own rural domain I am now expected to be compensation surveyor but invariably part environmental specialist, part acoustic specialist, part engineer to name but a few of the many statutory consultants claimants face with statutory projects. Normal individual claimants or small businesses simply do not have the resource to fund reasonable examination. If the onus of proof changes to the Authority and the possible costs in full of Lands Tribunal referral then Statutory promotors will at least have an 'expert court' in which to examine their actions are consistent with the statutory principles from start to finish.

I wish the Law Commission every genuine success in its review of such a root and branch exercise. I do ask however that it comes forward to the benefit of all and not merely the statutory promoters.

Yours faithfully,

E C Henderson