Scottish Law Commission
promoting law reform

REPORT BY

THE SCOTTISH LAW COMMISSION

TO THE SCOTTISH GOVERNMENT

ON THE CONSOLIDATED RESPONSES TO

DISCUSSION PAPER ON COMPULSORY PURCHASE NO. 159

SEPTEMBER 2016

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SECTION A

Glossary, list of abbreviations and lists of legislation, cases and publications

Glossary and list of abbreviations

AA. Acquiring authority. The body seeking to acquire the land under the compulsory purchase order. This may be a local authority, Government Ministers (whether Scottish Ministers or UK Ministers) or a statutory body such as a roads authority or Transport Scotland. An acquiring authority may be a private entity empowered by a special Act to carry out a development. See "promoter" and "special Act".

ASP, asp. Act of the Scottish Parliament.

AWPR. Aberdeen Western Peripheral Route, sometimes known as the Aberdeen Bypass.

A1P1. Article 1 of Protocol 1 to the Convention (set out in paragraph 3.36 of the Discussion Paper).

Blight. The detrimental effect on property values which results from public sector actions or decisions.

BLP. Basic Loss Payment.

Bona fide. In good faith; honest and genuine.

CAAD. Certificate of appropriate alternative development. See Chapter 14.

Convention. European Convention on Human Rights.

CP. Compulsory purchase.

CPNT. Compulsory purchase notice of title.

CPO. Compulsory purchase order. A legal authorisation which allows certain bodies to acquire land, without the need for consent by the owner of that land.

DCF. Discounted Cash Flow.

DCLG. Department for Communities and Local Government.

DP. Scottish Law Commission Discussion Paper on Compulsory Purchase (Scot Law Com Discussion Paper No 159, 2014). Also referred to as "Discussion Paper".

DPEA. Directorate for Planning and Environmental Appeals.

DV. District Valuer.

ECtHR. European Court of Human Rights.

Engagement event. An event listed in Part D of this Report.

FLP. Farm Loss Payment.

GVD. General Vesting Declaration. One of the two methods by which a CPO may be implemented (the other being a notice to treat). See Chapter 7 of Discussion Paper.

HLP. Home Loss Payment.

Injurious affection. The adverse effect on the land retained caused by the CPO, including by the construction and use of the works on the land acquired. See Chapter 15 of Discussion Paper. See also "severance".

Intra vires. Within the legal powers of a body. See also "*ultra vires"*.

Land Register. The Scottish register of land, regulated by the Land Registration etc. (Scotland) Act 2012. See "Register of Sasines".

Lands Tribunal. Lands Tribunal for England and Wales. (http://www.justice.gov.uk/tribunals/lands).

Law Commission. Law Commission for England and Wales.

Liferent. A right to use someone else's property for life.

LTS. Lands Tribunal for Scotland. (http://www.lands-tribunal-scotland.org.uk/).

Mining Code. A group of provisions in the Railways Clauses Consolidation (Scotland) Act 1845 which regulate exploitation of minerals under the land being acquired. See Chapter 9.

Notice to treat. One of the two methods by which a CPO may be executed (the other being a GVD). See Chapter 7.

OLP. Occupier's Loss Payment.

OMV. Open market value.

Part 1 Claims. Claims made under Part 1 of the Land Compensation (Scotland) Act 1973, for compensation for depreciation caused by public works.

PEO. Protective Expenses Order.

Pertinent. Right pertaining to a piece of land which is automatically transferred with that land. For example, a right of way over neighbouring land.

PLI. Public Local Inquiry.

***Pointe Gourde* principle.** "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition." See paragraph 12.17 of the DP.

Private Act. A legislative Act which applies to a particular individual or group of individuals, or corporate entity. In contrast, a public Act applies to everyone within the jurisdiction of the legislature. See also "Special Act".

Promoter. A nineteenth-century term, referring usually to a private company which has particular compulsory purchase powers under a special Act. Superseded by and interchangeable with "acquiring authority". See "Acquiring authority".

Real burden. An obligation affecting land, which normally requires something to be done or not to be done by the landowner.

Register of Sasines. The older Scottish register of land, established by the Registration Act 1617. Full name is the General Register of Sasines. Gradually being replaced by the Land Register. See "Land Register".

RICSS. The Royal Institution of Chartered Surveyors, Scotland. (http://www.rics.org/uk/about-rics/where-we-are/uk/scotland/).

Scott Committee. Committee set up towards the end of World War I. Its terms of reference were: "to consider and report upon the defects in the existing system of law and practice involved in the acquisition and valuation of land for public purposes, and to recommend any changes that may be desirable in the public interest."

SCPA. Scottish Compulsory Purchase Association. (http://www.compulsorypurchaseassociation.org/scottish-committee.html).

Servitude. A right of a landowner to enter or make limited use of neighbouring land.

Severance. A particular example of injurious affection where the value of the land retained is reduced because it has been separated from the land compulsorily acquired. See "injurious affection".

SG. Scottish Government.

SLC. Scottish Law Commission.

SMs. Scottish Ministers.

Special Act. A legislative Act which applies exclusively to a particular person situation, or area. For example, the Forth Crossing Act 2011 (asp. 2). See also "private Act".

Standard Security. A right in security in land is called a "heritable security". The only type of heritable security competent in modern law is the standard security. Created by registration in the Land Register. (The English equivalent is a mortgage).

TS. Transport Scotland.

Ultra vires. Outwith the legal powers of a body. If a statutory authority is acting *ultra vires* it is purporting to carry out acts which it does not have the power to carry out. See also *"intra vires".*

Legislation

English 1845 Act. Lands Clauses Consolidation Act 1845 (c. 18).

1845 Act. Lands Clauses Consolidation (Scotland) Act 1845 (c. 19).

Lands Clauses Acts. 1845 Act and the Lands Clauses Consolidation Acts Amendment Act 1860 (c. 106), and any Acts for the time being in force amending those Acts.

1845 Railways Act. Railways Clauses Consolidation (Scotland) Act 1845 (c. 38).

1919 Act. Acquisition of Land (Assessment of Compensation) Act 1919 (c. 57).

1945 Act. Town and Country Planning (Scotland) Act 1945 (c. 33).

1946 Act. Acquisition of Land (Authorisation Procedure) Act 1946 (c. 49).

1947 Act. Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c. 42).

1947 Planning Act. Town and Country Planning (Scotland) Act 1947 (c. 53).

1949 Act. Lands Tribunal Act 1949 (c. 42).

1959 Act. Town and Country Planning (Scotland) Act (c. 70)

1961 Act. Land Compensation Act 1961 (c. 33).

1963 Act. Land Compensation (Scotland) Act 1963 (c. 51).

1965 Act. Compulsory Purchase Act 1965 (c. 56).

1969 Act. Town and Country Planning (Scotland) Act 1969 (c. 30).

English 1973 Act. Land Compensation Act 1973 (c. 26).

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1979 Act. Land Registration (Scotland) Act 1979 (c. 33).

1980 Act. Local Government, Planning and Land Act 1980 (c. 65).

1991 Act. Planning and Compensation Act 1991 (c. 34).

1997 Act. Town and Country Planning (Scotland) Act 1997 (c. 8).

1998 Act. Human Rights Act 1998 (c. 42).

Late Payment Regulations. Late Payment of Commercial Debts (Scotland) Regulations 2002 (SSI 2002/335).

2003 Act. Title Conditions (Scotland) Act 2003 (asp. 9).

2007 Act. Transport and Works (Scotland) Act 2007 (asp. 8), sometimes referred to as "TAWS" by consultees.

Arbitration Act. Arbitration (Scotland) Act 2010 (asp. 1).

2010 Act. Interpretation and Legislative Reform (Scotland) Act 2010 (asp. 8).

2011 Act. Localism Act 2011 (c. 20).

2012 Act. Land Registration etc. (Scotland) Act 2012 (asp. 12).

2016 Act. Housing and Planning Act 2016 (c. 22).

Northern Irish 2016 Act. Land Acquisition and Compensation (Amendment) Act (Northern Ireland) 2016 (c. 28).

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R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23.

Arcofame Properties Limited v London Development Agency [2012] UKUT 107 (LC).

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Birrell Ltd v City of Edinburgh District Council 1982 SC (HL) 75.

Bishopsgate Space Management v London Underground Ltd [2004] 2 EGLR 175.

Bishopsgate Parking (No 2) Ltd v Welsh Ministers [2012] UKUT 22 (LC).

Bryan v United Kingdom (1996) 21 EHRR 342.

Chilton v Telford Development Corporation [1987] 1 WLR 872.

County Properties v Scottish Ministers 2002 SC 79.

Christies of Scotland Ltd v Scottish Ministers 2016 GWD 5-120.

Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111.

Donovan v Welsh Water and Alfred McAlpine Homes Midlands (1994) 67 P&CR 233.

Elgindata Ltd No2 (Re) [1992] 1 WLR 1207.

Emslie v Scottish Ministers 2014 SLT (Lands Tr) 39.

Findlay's Executor v. West Lothian Council [2006] CSOH 188.

Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment [2000] 2 AC 307.

Glasgow Airport Ltd v Chalk 1995 SLT (Sh Ct) 111.

Gordon and Others –v- National Grid Gas plc LTS June 8, 2016.

Greenweb Ltd v London Borough of Wandsworth [2008] EWCA Civ 910; [2009] 1 WLR 612.

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Lynch –v- Glasgow Corporation (1903) 5 F 1174; (1903) 11 SLT. 263.

Lindon Print Ltd v West Midlands CC (1987) 283 EG 70.

Main v Scottish Ministers [2015] CSIH 41.

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Metropolitan Board of Works v McCarthy (1874-75) LR 7 HL 243.

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Pattle v Secretary of State [2009] UKUT 141 (LC).

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Poole v South West Water [2011] UKUT 84 (LC).

R v Commission for the New Towns, ex parte Tomkins 87 LGR 207; (1989) 58 P & CR 57.

R (Clays Lane Housing) v Housing Corporation [2004] EWCA Civ 1658.

R (on the application of Wright and others) v Secretary of State for Health and another [2009] UKHL 3.

Robertson's Trustees v Glasgow Corporation 1967 SC 124.

Royal Bank of Scotland Plc v Clydebank DC 1992 SLT 356.

Salvesen v Riddell [2015] CSIH 1.

Scarborough Muir Group Limited v Scottish Ministers [2016] CSIH 5.

South Lanarkshire Council v Lord Advocate 2002 SC 88.

Stirling Plant (Hire and Sales) Ltd v Central Regional Council Times, 9 February 1995.

Strang Steel v Scottish Ministers 2015 SLT (Lands Tr) 81.

Tesco Stores Ltd v Dundee City Council [2012] UKSC 13.

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SECTION B

List of all who submitted formal responses, with the abbreviation used for them throughout the Report

1.	**JRR**	Professor Jeremy Rowan Robinson
2.	**AJ**	Antony C O Jack
3.	**SE**	Stan Edwards
4.	**JL**	Jeremy Law
5.	**NTS**	National Trust for Scotland
6.	**CC**	Craig Connal QC
7.	**WLC**	West Lothian Council
8.	**BR**	Brian Reeves
9.	**DSS**	David Strang Steel
10.	**RC**	Renfrewshire Council
11.	**NHS**	NHS National Services Scotland Central Legal Office
12.	**SOLAR**	Society of Local Authority Lawyers and Administrators in Scotland
13.	**S&P**	Strutt & Parker
14.	**JW**	John Watchman
15.	**DLA**	DLA Piper Scotland LLP
16.	**SCPA**	Scottish Compulsory Purchase Association
17.	**LTS**	Lands Tribunal for Scotland
18.	**SFHA**	Scottish Federation of Housing Associations
19.	**OM**	Odell Milne
20.	**SSE**	SSE plc
21.	**DVS**	District Valuer Services (Property Services arm of the Valuation Office)
22.	**GCC**	Glasgow City Council
23.	**CAAV**	Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association
24.	**SB**	Shona Blance
25.	**EAC**	East Ayrshire Council
26.	**NG**	National Grid plc
27.	**SthLC**	South Lanarkshire Council
28.	**RTPI**	Royal Town Planning Institute Scotland
29.	**Brodies**	Brodies LLP
30.	**IG**	Isobel Gordon
31.	**ACES**	Association of Chief Estates Surveyors, Scottish Branch
32.	**SBC**	Scottish Borders Council
33.	**SS**	Shelter Scotland
34.	**DJH**	D J Hutchison
35.	**S&W**	Shepherd and Wedderburn LLP
36.	**SP**	Scottish Power Ltd
37.	**JM**	J Mitchell
38.	**MacR**	MacRoberts LLP
39.	**SLE**	Scottish Land and Estates
40.	**LSS**	Law Society of Scotland
41.	**JCoS**	Judges of the Court of Session
42.	**SW**	Scottish Water
43.	**FoA**	Faculty of Advocates
44.	**SPF**	Scottish Property Federation
45.	**SPEN**	Scottish Power Energy Networks Holdings Ltd

46. **HCS** Hendersons Chartered Surveyors
47. **RBS** The Royal Bank of Scotland plc

SECTION C

INTRODUCTION

1. This report contains a summary of all submissions received in response to the Discussion Paper (No 159) on Compulsory Purchase. It includes each proposal or question in the DP, together with all responses to that proposal/question made in formal submissions, and also responses made informally or at engagement events. Where necessary an explanation of the proposal/question has been included. Finally the responses for each proposal/question are summarised.

Summary of progress to date

2.1 The DP was published in December 2014. The consultation period ended in June 2015, with submissions continuing to be received until August 2015. SLC worked with major stakeholders, both during and after the consultation period, attending engagement events in Edinburgh, Glasgow and Aberdeen. SLC received 47 formal and 9 informal responses to the DP.

2.2 SLC and SG officials met in the latter part of 2015 and again in early 2016 to consider options for taking forward this exceptionally extensive and far-reaching law reform project, including the possibility of reform by way of four Bills rather than the one lengthy comprehensive Bill contemplated by the DP. Consideration was also given to SG updating their internal guidance.

2.3 This report has now been prepared to summarise the responses to the DP and engagement events, to aid SG in their consideration of reform of CP. SLC stands ready to assist SG with progress in whatever way is considered to be most effective. It now awaits a decision from SG as to the future role of SLC in relation to CP reform.

Commentary on submissions.

3.1 The submissions in response to the DP were of a high quality and not only addressed CP legislation but considered its interaction with general property law and taxation. Professional organisations with experience in CP produced excellent submissions following consultation with their membership, organised events and actively encouraged post-consultation feedback. SLC is indebted to the many acquiring authorities, professional organisations, individuals and private practice specialists who gave their time and insight. Specific mention must be made of the Scottish Compulsory Purchase Association which organised events across the country not only to engender discussion on CP reform but to allow and support challenging discussion amongst contributors from both the public and private sector.

3.2 It is important to note that a high proportion of agreement on a proposal or in response to a question did not always reflect a fully considered response. On many occasions the majority response favoured one side of the argument without explanation while a minority gave a well-argued, powerful case for the other side. Submissions from organisations which canvassed members with direct experience of the system tended to

reflect a broader understanding and a wider perspective of the issues involved. This produced strong arguments for reform.

Over-arching themes

4. Several over-arching themes emerged from the submissions.

4.1 Consultees agreed with the suggestion in the DP that the legislation is old, difficult to understand and does not work effectively in a modern context.

4.2 Consultees took the view that the whole system, both procedurally and in relation to the award of compensation, does not operate fairly. Concerns were expressed that it is discriminatory as each AA has evolved different methods of dealing with CPOs.

4.3 Consultees suggested that the principle of equivalence rarely applies and parties from whom land is taken are generally left worse off, with a disproportionate cost to those affected.

4.4 In some cases, consultees suggested that there is a culture of resistance to paying proper compensation, where there appears to be a fundamental disconnect between the taking of land on the one hand and the giving of compensation on the other. Some AAs appear to treat these as two entirely separate steps rather than one flowing automatically from the other.

4.5 There was considerable support for the view that the DP, although extensive, was not wide enough. Consultees considered that the consultation should also have covered the topics set out in paragraphs 2.9 and 2.10 of the DP. For a more extensive list of areas not covered by the DP, but where consultees had strong views that they should have been so covered, please see the summary of responses to question 177 of the DP.

4.6 Several consultees suggested that SG Guidance should be updated, with particular emphasis on the guidance issued to SG agencies. The draft guidance for dealing with CAADs should be finalised and issued. Some consultees suggested that SG agencies do not always operate best practice.

4.7 There is a strong desire among stakeholders for SG to make progress quickly on CP reform, using current powers where primary legislation is not required. They flagged up, as an example, the ability of SG to review and, where necessary, provide for different minimum and maximum amounts for home loss payments in terms of section 28(5) of the Land Compensation (Scotland) Act 1973.

4.8 Some consultees suggested that the CP system was designed for projects which were truly for the benefit of the general public. They expressed the view that it does not always work well for CPOs involving the private sector or those promoted by utility companies where the benefit of shareholders may be perceived to be the uppermost consideration. They considered that human rights issues in these two situations need to be addressed.

Developments in England and Wales

5. The UK Government has made recent progress on reform of CP law. This has been started by way of incorporating reform into other legislation for which there is already a Parliamentary timetable. Sections 172-206 of the Housing and Planning Act 2016 relate to CP. A further UK Government consultation addressing more fundamental compensation issues of CP closed in May 2016.

SECTION D

Engagement events during and post consultation

25.03.2015	RICSS Event, Edinburgh
16.04.2015	SCPA Event at Brodies, Edinburgh
22.04.2015	RICSS Event, Edinburgh
23.04.2015	SCPA Event at Burness Paull, Aberdeen
23.04.2015	SCPA Event at CMS, Edinburgh
27.04.2015	RICSS Event, Edinburgh
06.05.2015	DLA Piper Presentation, Edinburgh
13.05.2015	MacRoberts Presentation, Glasgow
15.05.2015	Shepherd and Wedderburn Presentation, Edinburgh
13.08.2015	Meeting with RBS, Edinburgh
13.08.2015	Meeting with Lloyds Bank, Edinburgh
09.09.2015	Meeting with Council of Mortgage Lenders, Edinburgh
03.11.2015	SCPA Event at Burness Paull, Aberdeen
04.11.2015	SCPA Event at Brodies, Edinburgh
25.05.2016	CMS Presentation, Edinburgh
26.05.2016	CMS Presentation, Glasgow

SECTION E

Proposal/question, all related responses, explanation of proposal/question and summary of responses

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

(Paragraph 1.14)

Respondent	
1 . Professor Jeremy Rowan Robinson	[General Comments] I share the Commission's view that the current legislation is not fit for purpose and that a modern, comprehensive statutory restatement is long overdue.
2. Antony C O Jack	4. Yes, the legislation is far too complex, which seems to me to be, in itself, a breach of a subject's human rights. That it is known and admitted to be too complex makes the continued use of it unconscionable. 28. CP is an enforced purchase, in the public interest. Yet the process appears punitive. Your Paper admits the process to be difficult to understand, except to CP practitioners, including at Paragraph 1.43, and indeed paragraph 2.16 of your Paper on your 8th Programme, there are admissions of the chaotic nature of Compulsory Purchase, and the distress and waste of resources it causes. I suspect a lay person has little chance. The progress of a CPO appears interminable. The procedures, as published by the Scottish Government in its guidance, are difficult to comprehend, and omit information.
6. Craig Connal QC	The answer is clearly yes. The current system has become ridiculously complicated. It resembles some kind of under-sea wreck, so encrusted with layers of barnacles laid down in successive years that it is now difficult to see what the original structure was. Indeed, although for obvious practical reasons the form of the Consultation Paper follows an analysis of the existing law a more radical approach to produce a stripped-down version, may be justified on the grounds of accessibility and simplicity.
7. West Lothian Council	Agreed. It would be most useful if the new statute could be in plain English.
10. Renfrewshire Council	Agreed. The current statutory framework is cumbersome, out of date and long overdue for modernisation.
12. Society of	Agreed. The current statutory framework is cumbersome, out of date

Local Authority Lawyers and Administrators in Scotland	and long overdue for modernisation.
13. Strutt & Parker LLP	We wholeheartedly agree. The current legislation spread as it is between various enactments since 1845 is cumbersome and not fit for purpose in the current age. Legislation such as the Defence Act 1842, invoked by the MoD against a landowner as recently as 2005, is arguably not ECHR compliant in that there is no right to a hearing.
14. John Watchman	2.3 I agree that the current legislation is not fit for purpose. The SLC's proposal to repeal the existing legislation and replace it by a single new statute is supported.
16. Scottish Compulsory Purchase Association	This proposal is whole-heartedly supported although it is recognised that it will prove a complex task to draft appropriate legislation which is clear and unambiguous in nature that can deal with all of the complexities discussed below. Further, it is considered that there should be a single CPO system along the lines of (a) the promotion of a draft CPO, (b) objection process (c) Hearing or Inquiry process (d) confirmation/modification/rejection of a draft CPO (e) General Vesting Declaration/vesting date and possibly (f) a date for the formal completion of the public work.
17. Lands Tribunal for Scotland	The LTS welcomes the discussion paper and readily agrees with the SLC that a modern restatement of the law of compulsory purchase is required. … … The LTS does not underestimate the challenge of setting out a system which provides both certainty and fairness. Given the complexity of some of the disputes, which may to some extent be unforeseeable, we venture to suggest it may be appropriate for the new legislation to provide an express set of guiding principles within its own framework. That way the legislation can be given a purposive construction, and avoid some of the controversies which have beset the existing legislation.
18. Scottish Federation of Housing Associations	3.1.2 The SFHA would endorse any improvements to the current CPO system, which brings certainty into the process, produces fair timescales and cost and results in an appropriate value for a site reflecting its use for affordable housing. 3.1.3 Undoubtedly some public interest power to compulsorily acquire land must be available in Scotland and CPO's have existed for a long time. The origins and evolution through adding to statutes throughout the last centuries clearly demands a modernisation in terms of statute and it is hoped that the opportunity will be taken to

	define an improved process and categorise clear circumstances where CPO's are appropriate, with the provision of affordable housing being a public interest activity.
19. Odell Milne	Agreed. The confusing old legislation and lack of clarity is not conducive to fairness neither to the public nor to those acquiring authorities which want to use CP. However, the legislation must continue to reflect the need for a balance between the interests of the acquiring authorities seeking to deliver a public scheme and the interference with landowners' ECHR rights. Therefore whilst simplicity and streamlining procedure may be attractive, this should not be delivered at the cost of removing landowners' rights to be consulted and to object. Certainty on compensation entitlement and clear dates on which land value is to be assessed and payment made is in the interests of both landowner and acquiring authority, as is simplicity and clarity as to procedure and time limits; and timing certainty is also of value to both. Therefore new legislation, alongside balancing the conflicting interests of the acquiring authority and private property rights, should concentrate on these areas. Where a public sector acquiring authority utilises CP powers to assist with delivery of public works by a private sector company, the balance must be more rigorous. Such companies are likely to be focused on their own commercial needs in the interest of shareholders. Acquiring authorities which utilise CP powers prior to handing over delivery of the scheme to such a third party should be responsible for additional checks and balances to ensure protection for private land interests. Consideration also needs to be given to the extent to which compulsory purchase powers can be contained in private Acts of the Scottish Parliament, Transport & Works (Scotland) Orders (TAWS) and in UK statutes such as in relation to electricity, gas provision and telecommunications. Whilst legislation on these matters may not be within the scope of the SLC's remit and recommendations, there should be an awareness of how any reforms or improvements to "compulsory purchase law" (based on the 1947 Act) could be delivered in such a way as to benefit or be used for CP authorised by such other authorising statutes.
20. SSE plc	The statutory framework within which compulsory purchase is carried out is somewhat piecemeal with diverse, overlapping and confusing legislation in force which does not lead to clarity of process. We would agree that the current legislation should be repealed and replaced by a new statute.
21. District Valuer	This proposal is whole-heartedly supported although it is recognised

Services	that it will prove a complex task to draft appropriate legislation which is clear and unambiguous in nature that can deal with all of the complexities discussed below.
22. Glasgow City Council	Agree.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. The current legislation set out in various statutes and amending statutes over the 170 years since 1845 is cumbersome for all concerned. Consolidation is desirable as is a review in the light of contemporary circumstances. We agree that there should be a single standard procedure. This procedure should entail: - a) Promotion of draft CPO b) Time for objections c) Hearing or Inquiry d) Procedure for confirmation/modification/rejection of draft CPO e) Vesting (include a requirement to provide broad details of any claim) f) Date for declaring formal completion of the scheme.
24. Shona Blance	If the result is that the process more fairly compensates a landowner for the loss of their land and the process is clearer then yes.
25. East Ayrshire Council	Agreed. A new statute would hopefully make the process clearer and more user friendly.
26. National Grid plc	Agreed as this should result in a simpler, more streamlined statutory codification which could simplify the underlying law. However it is likely that compulsory purchase will remain an area which will lend itself to generating a lot of case law on both the exercise of the relevant powers and the interpretation and application of the compensation/valuation rules. As our business operates across the UK, we do have some concerns that a new statute could introduce differentiation in treatment of affected parties both north and south of the border which could affect how we deal with affected parties.
27. South Lanarkshire Council	The Council fully support this proposal. The current legislation is not fit for purpose – it is piecemeal, complex and out of date.
28. Royal Town Planning Institute	RTPI Scotland agrees with the proposal to repeal the current

Scotland	compulsory purchase legislation and replace it with a new statute.
29. Brodies LLP	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	New Statute supported.
32. Scottish Borders Council	Agreed.
33. Shelter Scotland	As the Scottish Law Commission's Discussion Paper proposes that the Compulsory Purchase statutes be repealed and rewritten we think this would be an opportune time to consider adding to the suite of property powers to better allow them to be used to achieve the policy goals of the statutory bodies who hold them. In the first instance, the Scottish Empty Homes Partnership would advocate for our proposed Housing Re-Use Power to be among a new suite of powers. We recognise that the proposed Compulsory Sale Order power is another option. While it would not achieve everything we think a Housing Re-use power could, we do see much merit in it and from the feedback we have received it is a power that councils would use. We would therefore also support the adoption of a Compulsory Sale Order Power should it emerge as the most viable option.
35. Shepherd and Wedderburn LLP	We agree.
36. Scottish Power Ltd	[Cover Letter] Overall we welcome efforts to clarify and simplify the compulsory purchase process because we believe that this should deliver a more effective exercise of compulsory purchase powers along with expediency of the whole process.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Scottish Land & Estates is in principle in favour of the simplification and modernisation of the law around compulsory purchase and appropriate streamlining of processes involved. We welcome the suggestion of considering court decisions in addition to the existing myriad of legislation in updating the legislation. Generally, there is a need to redress aspects of the law in favour of claimants which are currently skewed towards authorities. Given the importance of human rights and private property rights it is vital that repeal and replacement is properly considered to avoid any unintended consequences which could have a deleterious effect. Compulsory purchase is in many senses a draconian power, which should only be resorted to once best endeavours have been used to acquire by

	negotiation and agreement and where there is a clear public interest involved. The current morass of legislation is not fit for purpose.
40. Law Society of Scotland	We welcome the repeal and the replacement of compulsory purchase legislation and the compensation code with a new statute. We do not under-estimate the complexity of such an undertaking, but believe that a properly drafted Bill could result in a more efficient and fairer system of compulsory purchase and compensation which benefits the economy and social justice.
41. Judges of the Court of Session	[General Comments] As is clear from the Discussion Paper, much of the basic statute law in this area is extremely old, dating from the 1840s, and it is long overdue for review. The original legislation is obviously dated in style. Moreover, it has been amended and supplemented repeatedly by subsequent Acts. A thorough review of the law followed by a total restatement of the legislation is long overdue. [Proposal 1] We agree that the current legislation as to compulsory purchase should be repealed and replaced by a new statute. In this respect, we agree with the reasoning in chapter 1 of the Discussion Paper.
42. Scottish Water	Agreed.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree. The discussion paper amply demonstrates the scope and scale of the confused state of compulsory purchase legislation and we believe this can only be rectified by a replacement Statute.
45. Scottish Power Energy Networks Holdings Ltd	[Cover Letter] Overall we welcome efforts to clarify and simplify the compulsory purchase process because we believe that this should deliver a more effective exercise of compulsory purchase powers along with expediency of the whole process.
Further responses, either made informally or at engagement	At all of our engagement events, the need for reform of CP law was expressed by speakers and agreed to by attendees.

events	
Analysis	
Explanation of proposal	None required.
Summary of responses and analysis	All 35 consultees who addressed this proposal answered "yes" and this was supported strongly at all of the engagement events. 14 consultees asserted that CP law was too complex, unclear and not fair. 10 consultees argued that the current system is not fit for purpose and, therefore, that a modern restatement in plain English is required of compulsory purchase legislation. Eight consultees agreed with this proposal without providing further reasoning. Three consultees (LTS, SFHA and OM) considered that reform would allow for more certainty. OM commented about the need for a more rigorous balance of rights where the private sector was involved, by giving more responsibilities to AAs. The FoA commented that any reform should not only consolidate the law but, where appropriate, fill in the gaps and reflect the courts' decisions in the new legislation. SS commented that this would also be the right time to add to the suite of property powers to better allow AAs to achieve policy goals.

2. **For the purposes of compulsory purchase, is the current definition of "land", set out in the 2010 Act, satisfactory?**

(Paragraph 2.56)

Respondent	
2. Antony C O Jack	I note that the Discussion Paper has not referred to the definition at s. 277 the 1997 Act. In terms of CP of land, and I mean 'any land/land right', it seems to me that the issue is back to the fundamental initial test of justification [see Paragraph 5 above]: is it really, really needed in the public interest. It seem to me is if any land/land right is needed, then the CPO should be allowed to purchase it.
7. West Lothian Council	"Land" includes buildings and other structures, land covered with water, and any right or interest in or over land. The first part of the definition of land is clear and unambiguous. The words "any right or interest in or over

	land" should be clarified.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	We consider this satisfactory.
15. DLA Piper Scotland LLP	It is a mistake to exclude the conveyancing practicalities of airspace acquisition. The vast majority of CPOs are for road projects. A recurring issue with those is how to deal with acquisition of rights for bridges – is it a servitude or acquisition of airspace. If CPO law is being reformed it makes sense to tackle the main practical issues which are faced. This is one of them. The problem is partly the definition of "land" referred to on page 19 [of the DP]. This only seems to allow for the acquisition of rights in airspace, not the acquisition of the airspace itself.
16. Scottish Compulsory Purchase Association	It is considered that in compulsory purchase, an acquiring authority should be required to acquire all property interests in, under and over "land and buildings" which incorporate all pertinents and rights that are proposed to be compulsorily acquired. Thus, the current definition in the 2010 Act is perhaps slightly restrictive and the definition of "land" requires to be widened accordingly.
19. Odell Milne	I have already provided information to the SLC committee [Advisory Group] with regards to the definition of land. I consider that the definition should encompass all rights in land (including the interests of life-renters, heritable creditors, common property, common interest in water, mineral rights, sporting rights, fishing rights etc.). I also consider that it should be possible to obtain new rights rather than taking full ownership if that would minimise the interference with private rights or the need to take land. There should be a clear entitlement to take land temporarily where that would be sufficient to deliver the public benefit and the provisions for compensation in the event of such temporary land take should provide for payment of compensation for the duration of the temporary occupation. Widening the legislation to include all these rights, and (as is set out later) provision of a comprehensive list of parties on whom notification is to be served, brings a heavy burden on promoters to identify and serve notice on all interests. I do not agree that the Section 106 procedure should be used widely in

	relation to all these interests since in my view such interests can be significant. Therefore, careful consideration needs to be given to the entitlement to notification and to the parties who are entitled to be treated as "statutory objectors". However, this must be balanced with the reasonableness of requiring the acquiring authority to identify and notify all such parties.
20. SSE plc	We would agree that the current definition of land is satisfactory as it encompasses subordinate rights.
21. District Valuer Services	Yes.
22. Glasgow City Council	Yes. Re content of para 2.52 [of the DP], a Standard Security *ad factum praestandum* may be a circumstance where a standard security could be acquired.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. However, any doubt as to its comprehensiveness of the interests that may be acquired should be resolved by broadening it.
24. Shona Blance	No it is set too widely.
25. East Ayrshire Council	Yes, the current definition appears to be satisfactory.
26. National Grid plc	Yes as it includes land, buildings and structures, land covered by water and any right or interest over land. Given that in Scots Law land is defined as being everything from the centre of the earth to the sky, it should be made clear that land could mean all or any part of the land, for example, air space or subsoil.
27. South Lanarkshire Council	The Council are satisfied with the current definition of "land".
29. Brodies LLP	Consideration should be given to extending the definition of land to include other interests/tenements in land such as minerals, sportings and salmon fishing or to clarify that it already includes such interests.
31. Association of Chief Estates Surveyors Scottish Branch	Definition could be widened.

32. The Scottish Borders Council	I would agree that the land definition under the Interpretation and Legislative Reform (Scotland) Act 2010 is sufficiently wide subject to the marine work gloss given by the 1937 Act. [Harbours, Piers and Ferries (Scotland) Act 1937, c. 28.]
35. Shepherd and Wedderburn LLP	Yes.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	No. We have concerns that the current definition of land in the Interpretation and Legislative Reform (Scotland) Act 2010 would appear to be too restrictive in its terms and should include airspace rights. The definition of land in the Town and Country Planning (Scotland) Act 1997 includes servitudes. There has to be a commonality of definition of land which is sufficiently broad to encompass any anticipated rights which a project may have to acquire.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree with the definition as specified (the "2010" definition) including the wider rights identified and discussed in paragraphs 2.46 to 2.55.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	This question was designed to find out whether stakeholders had any concerns about the definition, and whether stakeholders thought the definition covered all necessary rights.
Summary of responses and analysis	25 consultees responded to this question, and 13 thought that the current definition of "land" set out in the 2010 Act was satisfactory. Nine thought it was unsatisfactory and a further three suggested improvements. Of those who disagreed, SCPA viewed the definition in the 2010 Act as slightly restrictive and suggested it required to be widened. OM considered that the definition should encompass all rights in land including the interests of liferenters and heritable creditors, common property, common interest in water, mineral rights, sporting rights, fishing rights etc. Brodies suggested that consideration should be given to extending the definition of land to include other interests in land such as minerals, sporting rights, salmon fishings, or to clarify that the definition already includes such interests. LSS felt the definition was too restrictive and should include airspace. They also took the view that there should be a commonality of definition of land which is sufficiently broad to encompass any anticipated rights which the AA may need to acquire for the project. AJ pointed out that the definition does not tie in with the definition of land in the 1997 Act, section 277. Three consultees (NG, FoA and SPF) while answering that it was satisfactory, went on to suggest improvements. NG suggested that it should be made clear that land could include airspace or subsoil. FoA noted that the definition does not expressly provide for everything above and beneath land (*a coelo usque ad centrum*). SPF stated that the definition of land should include the wider rights identified at paragraphs 2.46-2.55 of the DP.

3. **Should the general power to acquire land compulsorily include power to create new rights or interests in or over land?**

(Paragraph 2.70)

Respondent	
2. Antony C O Jack	See text at question 2, above.
7. West Lothian Council	Agreed. Those rights or interests should be clearly set out and should be limited to rights required as a consequence of the Compulsory Purchase Order. If a general power to create new rights

	was granted it would create challenges as to what can be created.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes. The ability to acquire servitudes, wayleaves or impose new real burdens would be desirable, as would the ability to specify rights of access for potentially severed land remaining in the ownership of affected parties to head off any protracted negotiations on accommodation works or arguments about severance (see comments at 177 below). [Response to 177] The idea of acquiring rights short of ownership and the creation of burdens on property not being acquired to benefit property that is being acquired is covered in Chapter 2. There is no suggestion, however, of conferring on an acquiring authority a right, while compulsorily acquiring property to impose a burden or servitude on the acquired property to benefit adjoining or potentially severed property. Such a right would be desirable and in the spirit of mitigating loss to the party whose land is being acquired and to that of third parties. For example, where acquiring land would otherwise sever other land, a right of access over the acquired land to the severed land could be conferred. At the moment that can only be done by agreement and such a right would avoid protracted negotiations on accommodation works or arguments about severance and the risk of never reaching agreement at all. It would also potentially reduce the compensation due to affected parties.
13. Strutt & Parker LLP	We endorse the comment that acquiring authorities attempt to impose conditions as part of servitudes but do understand the need for such rights (such as restrictions on buildings over electrical cables etc.). We consider that any new legislation should provide that any CPO should be proportionate to the need and by the least intrusive means.
14. John Watchman	3.1 Compulsory purchase ought to be an option of last resort. If there is a more proportionate alternative (such as a lease, servitude or a wayleave) short of compulsory purchase to achieve a public interest objective, then that alternative should be used rather than compulsory expropriation. 3.2 An example of that approach is a compulsory electricity wayleave under the Electricity Act 1989. The Scottish Government's standard terms for a compulsory electricity wayleave are set out at Appendix 3 of the Scottish Government's 2014 guidance 'Applications to the Scottish Ministers for the Grant of a Necessary Electricity Wayleave

	in Scotland'.
15. DLA Piper Scotland LLP	[Answer to question 3 and 4] General CPO powers need to give the maximum flexibility in terms of the interests or rights which can be acquired. This also needs to reflect the reality of CPOs. With a servitude required in relation to a linear project such as a road, the concept of a dominant proprietor is artificial. Private bills have removed the requirement for a dominant proprietor. Perhaps this should be provided for more generally.
16. Scottish Compulsory Purchase Association	It is considered that it should be permissible for an acquiring authority to create new rights or interests in or over land that has been compulsorily acquired by that authority but such creation requires to be proportionate in nature and should involve the least intrusive method.
19. Odell Milne	Yes because taking lesser rights or interests in land can minimise the land take or impact on a landowner. There can be an issue with taking rights for, say, drainage, in that often the route of flow will not be known until after construction. There may therefore be a need to draft the entitlement to take such rights to allow the precise location of the right to be determined later, provided it is not outwith agreed limits of deviation. Whilst this does mean that there is less certainty, it may result in a lesser interference with landowners' rights. It would also give the promoter the flexibility needed.
20. SSE plc	We would agree that in certain circumstances, the ability to create new rights or interests in or over land would be more proportionate than outright acquisition and would be attractive (i) to acquiring authorities as the compensation following from acquisition of such a right may be less than if the land was acquired outright, and (ii) to landowners, who would not experience the same level of disturbance as would be experienced if their rights as proprietor must be acquired. As an example, a servitude right of access may be mutually beneficial to both parties (with a new access route capable of being used by all parties).
21. District Valuer Services	Yes – it is understood that such powers currently exist under some Acts. These powers should be available as an alternative to outright acquisition as will often be less intrusive.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers	Yes – with compensation for losses arising from that creation. New legislation should provide that any CPO should be proportionate to the need and seek only the means that are least intrusive on those who could be affected. We endorse the comment that acquiring authorities attempt to

Association	impose conditions as part of servitudes, understanding the need for such rights (such as building over electrical cables etc.).
24. Shona Blance	No as above.
25. East Ayrshire Council	Yes, this seems appropriate.
26. National Grid plc	Yes. The general right should include power to create new rights or interests in or over land, for example a lease, a servitude or a wayleave. The new statute should set out how the terms or conditions of these documents would be agreed and how they would bind both parties.
27. South Lanarkshire Council	The Council believes that there should be a power to create new rights or interests in or over land where the land itself is not being compulsorily acquired. It considers that this would benefit both parties e.g. the creation of a new servitude would allow the land owner to continue to enjoy his land subject to the servitude and would mean the acquiring authority would only need to acquire what it required and also have the advantage of requiring to pay less compensation.
29. Brodies LLP	Yes. The ability to create other types of interest in land for permanent or temporary use may mitigate the interference with landowner's property and/ or business and save money for the acquiring authority if the land does not have to be acquired. The new rights could include personal real burdens in favour of the acquiring authority, a new Compulsory Purchase (CP) Licence for temporary access for the carrying out of works, storage etc. or CP lease where exclusive possession is required. All of the new rights should be branded in a similar fashion, each preceded by words such as Compulsory Purchase to immediately alert any interested parties to the significance of these rights. Any new rights created should be registrable in the Land Register.
30. Isobel Gordon	Whilst we accept the need for this, we agree with your comments that acquiring authorities attempt to impose conditions as part of servitudes. This is an issue of concern in any widening of current powers. It is our experience that operators such as NG seek servitudes over a limited width albeit the effects of the rights being granted are far greater than the servitude width. In their literature and in letters to affected landowners NG attempt to impose on landowners a requirement to contact them in respect of digging near the pipeline (not just over the servitude area). They

	even seek to charge for works undertaken to protect the pipe. There is a causal link between the presence of the pipe in the land and planning restrictions imposed via the HSE. This restrictive zone is determined by the thickness of the pipe and the pressure of the gas; both of which are controlled by the acquiring authority. In our case the consultation zone led to the inability of us to construct turbines within a distance greater than the CPO servitude width of 24.4 m. You will note that the recent need to move the concert T in the Park from Balado Airfield in Kinross was as a consequence of safety issues arising from the presence of BP pipe installed under CPO powers. Clearly these rights need to be set out in the CPO conveyance document in such a manner that the rights are as granted by statute and cannot be increased or permit change of use etc. Likewise it is not acceptable for governments or licencing authorities to create by provision of later statute changes to increase change or add on a use to a CPO acquired right as there is no provision for further compensation after the CPO claim procedure is agreed. That is not fair as an additional burden is created on the land in question which is simply 'stolen by statute'.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	I would largely concur with the views expressed by Douglas Blyth from SOLAR in his response on this proposal. I would add that in my view having the ability to tie everything properly together within part of the overall compulsory purchase process would benefit all parties, by limiting acquisition of rights to what is actually necessary. It would also aid the Reporter in being able to assess whether the project to which the compulsory acquisition relates is likely to be achievable.
35. Shepherd and Wedderburn LLP	Yes. However, the rules by which compensation is calculated must be set out clearly within the legislation. We have experience of representing an objector to an Order promoted under the Transport and Works (Scotland) Act where one of the main grounds of objection was that the Order permitted the compulsory creation of rights over our client's land without appropriate corresponding compensation provisions.
36. Scottish Power Ltd	[Accompanying letter dated 19 June 2015]

	Rights We support the ability to acquire "*rights"* separate to ownership on the basis that this provides enhanced flexibility to the scale and type of development proposed. However, we believe that it would not be proportional to acquire "*rights*" in all circumstances, for example the laying of cables or provision of access or even time limited rights for construction or operational life of an asset. We would therefore welcome clarity of the nature and terms of "*rights*" which could be granted. It may be advantageous for the types or terms of "*rights*" to be prescribed by statue in order to avoid a situation where "*lease*" type rights could be debated at an inquiry in terms of appropriateness which would be unnecessary, if "ownership" were to be requested. This would also simplify and focus the inquiry process. It would then be for parties to argue for a variation from any prescribed form of statutory "*rights*". While it would be preferable for any "rights" to neatly reflect the known, and understood "property rights", we do not consider that this is required in the case where "rights" are properly constituted, and authorised, by the enabling statute. It should also be possible for acquiring authorities to be granted "rights" to carry out activities such as mitigation on land.
38. MacRoberts LLP	Yes, it would be beneficial to be able to impose additional restrictions or positive obligations in situations where a new right is permissible under the enabling legislation. This may also enable a smaller area of land to be acquired compulsorily.
39. Scottish Land and Estates	Potentially the ability to create new rights or interests may be beneficial in place of acquisition. Ownership is not necessarily always the preferred option and in some instances a servitude may be more appropriate. However, the law around "wayleaves" should be considered in tandem with any proposal to extend powers to create new rights or interests. Where rights in land are acquired by privatised utilities the value of those rights should be taken into account. Any new legislation should provide that any CPO should be proportionate to the need and by the least intrusive means.
40. Law Society of Scotland	Yes. Such rights could encompass both temporary rights to enable construction to take place, but also permanent rights which, although necessary, do not require outright ownership which is important for the purposes of ECHR as only minimum interest should be compulsorily acquired. There is uncertainty as to the nature of new rights which are compulsorily acquired and their relationship to such rights that can be created either statutorily or by prescription. The creation of servitudes under CPO presents some difficulties in reconciling these with servitudes created voluntarily. Specific reference to Section 27 of the Forth Crossing Act 2011 is made.

	Rather than relying upon the creation of servitude under an enabling Act, this adopts the procedure with some amendments for the creation of a servitude under Section 75 of the Title Conditions (Scotland) Act 2003. Our concern is that there is a requirement under Section 75 for there to be a benefit to property. We consider that a servitude right should not, for the purposes of its existence, require a benefited property. We believe that there should be a list of types of rights which can be acquired and also specification of those rights which cannot be acquired. Additional provisions would also be required to protect the exercise of the servitude from any interference by the owner over which the servitude has been taken.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We see the potential benefit for the acquiring authority and importantly, the landowner, of extending new rights over land through compulsory purchase. We support the possibility therefore of using compulsory purchase to acquire new rights where appropriate, for example to apply new real burdens or other restrictions. Our view is that if compulsory purchase is to operate efficiently and effectively then it requires flexibility as well as the protection of rights.
45. Scottish Power Energy Networks Holdings Ltd	[Accompanying letter dated 19 June 2015] Rights We support the ability to acquire "*rights"* separate to ownership on the basis that this provides enhanced flexibility to the scale and type of development proposed. However, we believe that it would not be proportional to acquire "*rights*" in all circumstances, for example the laying of cables or provision of access or even time limited rights for construction or operational life of an asset. We would therefore welcome clarity of the nature and terms of "*rights*" which could be granted. It may be advantageous for the types or terms of "*rights*" to be prescribed by statue in order to avoid a situation where "*lease*" type rights could be debated at an inquiry in terms of appropriateness which would be unnecessary, if "ownership" were to be requested. This would also simplify and focus the inquiry process. It would then be for parties to argue for a variation from any prescribed form of statutory "*rights*" While it would be preferable for any "rights" to neatly reflect the known, and understood, "property rights", we do not consider that this is required in the case where "rights" are properly constituted, and authorised, by the enabling statue. It should also be possible for acquiring authorities to be granted "rights" to carry out activities such as mitigation on land.
Further responses, either made informally or at engagement events	At one event participants stressed the importance of acquiring all the interests in land required for a development, subject, of course, to notification and compensation. Participants expressed the view that there should be a single procedure to acquire each relevant interest, irrespective of the nature of that interest. For example, the same procedure should apply for acquiring both securities and leases. Participants noted that care required to be taken to ensure that all rights were included in any list set out in future legislation.
Analysis	
Explanation of question	None required.

Summary of responses and analysis	Of the 29 responses to this question, 28 responded positively. Only one (SB) responded negatively, arguing that the power was already set too widely. Brodies suggested that the new rights could include a Compulsory Purchase Lease or a Compulsory Purchase Licence for temporary occupation, and that all new rights should be branded in a similar fashion, each proceeded with words such as "Compulsory Purchase" to alert interested parties to the significance of these rights.

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)

Respondent	
7. West Lothian Council	The creation of new rights and interests would create challenges if there was a general power to create new rights and interests. If a list of rights and interests that could be acquired by CPO were made and that would assist. A caveat to creating new rights and interests is that there may be unintended consequences which follow the creation of new rights and interests. Any such new rights and interests would need to be carefully considered before being adopted into law. Clarity should be provided on what rights to compensation would be available to owners and others adversely affected by the creation of new rights.
10. Renfrewshire Council	It is suggested that only new servitudes and, possibly, real burdens would be applicable in this context. In order for the creation of new servitudes and/or real burdens to be effective, it is suggested that as much detail of the nature, rights and obligation of these would need to be intimated at the outset. The other rights, e.g. leases, securities do not fit well with the compulsory nature of the acquisition, although that is not to say that these could not be negotiated separately between the parties.
12. Society of Local Authority Lawyers and Administrators in Scotland	It is suggested that only new servitudes and, possibly, real burdens would be applicable in this context. In order for the creation of new servitudes and/or real burdens to be effective, it is suggested that as much detail of the nature, rights and obligation of these would need to be intimated at the outset. The other rights, e.g. leases, securities do not fit well with the

	compulsory nature of the acquisition, although that is not to say that these could not be negotiated separately between the parties. It would be helpful to expressly indicate that any new rights have the same effect as existing terms of general property law.
13. Strutt & Parker LLP	It is our experience that electricity undertakers, for example, frequently seek CPO rights for cables (e.g. for offshore windfarms) where less intrusive powers exist (necessary wayleave procedure). The CPO route is sought by cable operators in preference to necessary wayleaves because they are selling on any rights they acquire for monetary gain. If the general power to acquire new rights or interests in or over land are to be included, there should be a general duty on an acquiring authority to use the least intrusive mechanism available, in effect enshrining in law the comment at paragraph 3.4.2. [3.42 of DP]
15. DLA Piper Scotland LLP	General CPO powers need to give the maximum flexibility in terms of the interests or rights which can be acquired. This also needs to reflect the reality of CPOs. With a servitude required in relation to a linear project such as a road, the concept of a dominant proprietor is artificial. Private bills have removed the requirement for a dominant proprietor. Perhaps this should be provided more generally.
16. Scottish Compulsory Purchase Association	It is not considered that there is any conflict between CPO law and general property law.
19. Odell Milne	I have made a number of comments in previous correspondence and meetings with the Committee [SLC Advisory Group] with regards to the relationship between compulsory acquisition of new rights or interests and general property law. I have mentioned particularly those rights where the legislation is not clear. Consideration needs to be given to the practicalities of notification of interested parties. Whilst on the face of the relevant register there may be evidence of an agricultural tenant's or a community's pre-emptive right to buy, these are not currently parties entitled to notification as holders of such interests. Whilst an agricultural tenant may be entitled to notification as lessee or occupier, there does not appear to be any obligation in the CP legislation in its current form to notify communities who have registered pre-emptive rights to buy nor agricultural tenants who have done so in respect of that right. On one view, there can be no problem with "over-notification", but over-notification may result in more objections and further work for the acquiring authority to determine whether or not such objectors are "statutory".

	Another category of interest which is not visible from the register is the interests of beneficiaries under a Trust. Where a Trust holds title the beneficiaries under the Trust are not entitled to notification. However to include parties with registered pre-emptive rights to buy such as agricultural tenants and community bodies, where (the landowner may never choose to sell the land and so the pre-emptive right may never be exercised) is that any different from the position of a beneficiary whose title to the land may vest at, say, age 18, 21 or 40? It would not be reasonable for promoters to have to investigate the provisions of trust deeds (and indeed many are confidential and not publicly available or registered). It may be that trustees' obligation to act in the best interests of the trust beneficiaries, avoids any problems of that nature and perhaps all that is required is that legislation makes it clear that the acquiring authority is entitled to rely on that and therefore notification to the Trustees is sufficient to comply with the obligation to notify. Although partnerships can now hold title to land in the name of the partnership, title is often held in the names of some or all of the partners. There is no clarity on the face of the Register as to any changes in the partnership and as to who the current partners are. Whilst investigation and enquiries can take place, there is a risk for an acquiring authority that notice is not served on the party who is the "owner" of the property. Furthermore, ownership may be dealt with in the partnership accounts where interests in the property are allocated to the partners' capital accounts and the allocation may not coincide with the position on the title at all. Information which enables the "owner" in such situations to be determined is not easily obtained by an acquiring authority. An acquiring authority can serve notice on all parties whom it understands are partners and on the partnership itself. Should provision be made that notification to a partnership by name of itself is sufficient? However that approach is not without risk since the partner who receives the notification may not tell the other partners and they would be deprived of an opportunity of objecting. Common property can result in problems for promoters of schemes. Whilst the "*PMP Plus Limited v Keeper of the Registers of Scotland Lands Tribunal (Scotland) 20 November 2008* case" may now have been decided, the position of acquiring authorities is still difficult. The land may remain vested in the original developer since the disposition did not transfer title, but that land is subject to the rights and interests of all the common property owners. Should the valuation of that land take into account those interests even if at the time of the transfer, there was no certainty as to ownership? In some cases the developer has now been taken over by another company or been dissolved. The interest may have fallen to the Crown and should acquisition from the Crown be possible in those

	limited circumstances? Whilst the QLTR may have indicated that in general they are open to sale of land at the DV's valuation, if notification has been served on a company thought to own the land at the time of acquisition, it may have been included in the CPO and it is not until later that it is discovered that the land interest lies with the QLTR. Separate negotiations then need to take place for title to transfer and that can delay delivery of title which can interfere with a tight programme for construction. Should there be an obligation to serve notice on all the holders of a common right to use (i.e. the beneficiaries of burdens in that common land) or only on those owners if they have a right of common property? Where Registers of Scotland in conjunction with Ordnance Survey redraw maps, issues can arise in relation to the authority contained in the authorising CPO, TAWS or private act. If an area is "re-mapped" part way through a CP exercise could legislation be put in place to enable the acquiring authority to acquire the land on the "new OS" even if that does not coincide with the original OS on which the CPO plans were based? An example of this issue in practice occurred in Stowe on the Borders Railway where the OS was redrawn for the area. Parliamentary plans (equivalent of CP maps) did not coincide with the version of OS scheme being used at the time of acquisition. Therefore the authority to acquire the land did not "match up". It is possible that other issues may arise as a result of the ongoing collaboration between Registers of Scotland in conjunction with the OS team following the coming into force of the Land Registration etc. (Scotland) Act 2012. It is understood that that process may involve title boundaries being drawn to match "fence boundaries", whether or not the actual title reflects that position. This could result in problems for promoters determining compensation where the title which is provided to them, does not reflect the same boundaries as the Title Sheet or reports based on the OS being used by Registers of Scotland at the time of acquisition. Can provision be made in the legislation to clarify these uncertainties and difficulties? An issue arises with regard to common interest in water, which is enjoyed by any owner of the *alveus* from source to sea. Whilst there is no specific legal provision, it might be considered that the interest is akin to a servitude which would mean that advertising and lamppost notice would be sufficient. However, the owner of the *alveus* of the river with a common interest in the water could have a genuine interest in the flow and could be materially detrimentally affected by a change in the flow in the case, for example of an owner of the *alveus* downstream from the compulsory acquisition who either has a hydro scheme or salmon fishings.
20. SSE plc	An approach which allows the acquisition of new rights by

	compulsion would more closely mirror the approach that is taken by acquiring authorities when negotiating the acquisition of rights in land voluntarily. At present, if an acquiring authority cannot agree a voluntary arrangement for a right in land, it has to pursue a CPO to acquire the land which may be disproportionate.
22. Glasgow City Council	It is logical that the nature of the rights/interests should equate with general property law rights of a permanent nature and that where apposite there should be an ancillary right to attach conditions and reservations all as may ultimately be determined by the Reporter.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Members report that electricity undertakers, for example, frequently seek CPO rights for cables (e.g. for offshore windfarms) where less intrusive powers exist (necessary wayleave procedure). The CPO route is sought by cable operators in preference to necessary wayleaves as they can then sell on any rights they acquire for monetary gain. If the general power to acquire new rights or interests in or over land are to be included, there should be a general duty on an acquiring authority to use the least intrusive mechanism available, in effect enshrining in law the comment at paragraph 3.4.2. [3.42 of DP].
27. South Lanarkshire Council	The Council would suggest that any new rights or interests in or over land would be limited [to] those rights recognised by general property law. This would have the advantage of ensuring the rights are capable of registration and will bind successor owners of the land affected.
29. Brodies LLP	Any new real burdens which are to be created under CP could be akin to personal real burdens created under the Title Conditions (Scotland) Act 2003. They could be in favour of the acquiring authority with conditions attached as to what rights they could benefit from and secondary legislation prescribing which authorities could use such real burdens. Similar consideration could be given to creating new CP servitudes in favour of the acquiring authority. This may be straying into an area of property law which is in need of review but might be a starting point. Finding a benefited property for some utility servitudes can cause problems. The same might apply in CP situations when all that is needed is a right to lay pipes or cables or a right of access. If personal CP real burdens and servitudes could be created, the need for dual registration would also be dispensed with for all and not just for pipes and cables. When considering what type of additional rights may be acquired

	compulsorily, thought should be given as to how long such rights will be needed. For example, if real burdens were employed to prevent owners from building on land needed for verge or sight lines for road widening, the owners in theory could go to the Lands Tribunal to seek variation or discharge of such a real burden. This would also apply in the case of servitudes. Conditions may need to be added to any provision permitting CP real burdens and servitudes to deal with the options for variation and discharge. If real burdens are to be used, consideration must also be given as to whether such burdens must comply with the rules for constituting real burdens contained in the Title Conditions (Scotland) Act 2003. For example, it may not always be practicable to have the content of the burden within the 4 corners of the deed and to make the condition praedial. Provision may be needed to allow for reference to publicly available documents. If CP leases could be created as a statutory type of lease, we would hope that such leases could be registered in the Land Register, irrespective of the length of the lease, and thereby act as a flag to all prospective purchasers that the land is affected by CP. Given the different status of such a lease, parties should quickly become aware that it is not the same kind of agreement as a commercial or residential lease. Such leases could contain standard obligations which landlords and tenants must comply with. The question of irritancy and termination could require special treatment. Also liability post termination of the lease for environmental issues would have to be dealt with.
30. Isobel Gordon	We are aware that electricity undertakers frequently seek CPO rights for electricity cables (e.g. for offshore wind farms) where less intrusive powers exist (necessary wayleave procedure). The CPO route is sought by cable operators in preference to necessary wayleaves solely because they are selling on any rights they acquire for monetary gain. If the general power to acquire new rights or interests in or over land are to be included, there should be a general duty on an acquiring authority to use the least intrusive mechanism available, in effect enshrining in law the comment at paragraph 3.4.2. [3.42 of DP].
32. Scottish Borders Council	I concur with the views expressed by Douglas Blyth from SOLAR in his response on this proposal.
35. Shepherd and Wedderburn LLP	It would be useful for the proposed new statute to expressly state that any new rights created through the CP would be capable of registration in the Land Register of Scotland and binding on successors in title for the period of time for which the new right is created through the CP - whether or not such a right would be a real

	right under general property law.
36. Scottish Power Ltd	While it would be preferable for any "*rights*" to neatly reflect the known and understood "property rights", we do not consider that this is required in the case where "*rights*" are properly constituted, and authorised, by the enabling statue. It should also be possible for acquiring authorities to be granted "*rights*" to carry out activities such as mitigation on land.
38. MacRoberts LLP	New rights can only take the form of the servitude (with relevant conditions to protect the party whose interests are acquired). As noted in the Discussion Paper new rights cannot take the form of a Lease is this is a bi-lateral contract.
39. Scottish Land and Estates	Where a necessary wayleaves procedure is available for example, it ought to be used in place of CPO procedure. The less intrusive option for the landowner should always be preferred.
40. Law Society of Scotland	We refer to our response at question 3 above.
43. Faculty of Advocates	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.
44. Scottish Property Federation	No comments further to our answer to proposal 3.
45. Scottish Power Energy Networks Holdings Ltd	While it would be preferable for any "*rights*" to neatly reflect the known and understood "property rights", we do not consider that this is required in the case where "*rights*" are properly constituted, and authorised, by the enabling statue.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	This question was designed to achieve commentary on whether CP law required to tie in, at all points, with general property law, or whether consultees favoured giving the CP system a set of different rules in relation to rights or interests.

Summary of responses and analysis	There were 21 substantive responses to the question, many of which raised interesting issues. S&P, CAAV and IG all noted that an AA should be under a duty to use the least intrusive means of securing its aim. They pointed out that utility providers frequently sought CPO rights for cables when they could use the necessary wayleave procedure. They asserted that utility providers then sold on the rights acquired for monetary gain, e.g. in relation to windfarms. WLC and FoA proposed that there should be a list of rights and interests which could be acquired by CPO. WLC, RC, SOLAR, and SBC all had reservations about creating new rights and interests. GCC took the view that the nature of rights and interests acquired under CPO powers should equate to general property law rights. SthLC and FoA agreed that any new rights or interests should be limited to those recognised by general property law. FoA pointed out that such rights are subject to clear, well recognised rules and limits. Brodies noted that there was a need to solve the general property law problem of finding a benefited property, in cases involving rights in favour of utility companies, where the utility companies have no property ownership. They suggested that if CP servitudes and burdens could be created, the need for dual registration could be dispensed with. Brodies also noted the issue that it was not always possible to have a burden contained within the four corners of a deed. OM provided helpful comments on the practicalities of notification of interested parties, dealing with trusts, partnerships, communities with registered pre-emptive rights, owners of common property, the QLTR, changes to Ordnance Survey maps and common interests in water. S&W felt it would be useful for a proposed new statute to state expressly that any new rights created by CP would be capable of registration in the Land Register and be binding on successors-in-title for the period of time for which the new right was created, and whether or not such a right would be a real right under general property law. SP and SPEN stated that new rights should not have to reflect known property rights, so long as they were properly constituted by their enabling statute.

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)

Respondent	
2. Antony C O Jack	See text at question 2, above.
6. Craig Connal QC	Yes. See the discussion below. [paragraph 4. Acquisition of Rights Short of Ownership - Temporary Acquisition] Although this is not a matter much dealt with in the Paper, it touches on areas which are tackled under other heads and it may therefore be of value. It arises from an example which ultimately did not reach the courts. In the context of the building of the M74 extension, a large site was identified as required, not for part of the new road, but for a construction compound to be used by contractors working on the road during the lengthy period anticipated for construction. I do not know what approach had been adopted to such a requirement in the past. It may be that voluntary arrangements were reached or indeed that an area was compulsorily purchased. In this instance, what was sought was a right to 'acquire' temporarily for the duration of the works. This gave rise to debate on the part of the site owner as to whether it was, in law, competent to acquire such a temporary right. It was not one which readily fitted with the pattern of acquisition of ownership on which CPO procedure is based. Valuation could clearly be problematic given the difficult of crystal-ball gazing to a point at some future date when the property was returned. There was indeed a difference among the advisers - myself on the one part and a leading member of the bar on the other - with one arguing that it did not fall within the statutory acquisition powers and the other arguing, pragmatically, that if it was of evident utility for the scheme, the Court would likely hold that it did … … Matters proceeded. I have no further information as to the basis on which that occurred or on the basis on which compensation was arranged. It seems to me to be unlikely that this would be the only scheme with a requirement of this nature. Consideration might usefully be given as to whether, in principle, such rights ought to be capable of being compulsorily purchased and if so, on what basis. The matter

	could then be made clear by statute or rule to avoid future litigation.
7. West Lothian Council	Such a general power would appear to have its attractions and would be welcomed in practical terms for purposes such as accommodation works. The legislation would need to be carefully worded so that it is only the temporary use and possession that the acquiring authority can make of the land. Landowners will want to be satisfied that there is clarity in the provisions and that there are penalties imposed on an acquiring authority who breaches the temporary arrangements. This would fit in with the requirements of Article 1 of the First Protocol of the Human Rights Act 1998.
10. Renfrewshire Council	Yes. To give some indication of the duration of the possession would seem appropriate, if not by reference to a specific date then on the occurrence of certain events. It may also be appropriate to specify the proposed condition which the temporary land should be in at the point at which it is handed back to the owner. It may also be possible that the owner would prefer that the acquiring authority acquire the land outright as its temporary loss may be tantamount to severance or blight.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes. To give some indication of the duration of the possession would seem appropriate, if not by reference to a specific date then on the occurrence of certain events. It may also be appropriate to specify the proposed condition which the temporary land should be in at the point at which it is handed back to the owner. It may also be possible that the owner would prefer that the acquiring authority acquire the land outright as its temporary loss may be tantamount to severance or blight. Reference to the terms of the Opencast Coal Mining Acts may be a useful guide.
13. Strutt & Parker LLP	We understand the need for such rights. In exercising such rights it must be made clear in what state the land is to be returned to the landowner as well as the timing as this

	is a factor in assessing compensation.
14. John Watchman	Temporary possession 4.1 The fundamental problem here is the uncertainty about the period of temporary possession required. Public projects more often than not exceed the anticipated duration of works. Any extension of an initial or extended temporary possession period would almost inevitably be given. There is no incentive for the acquiring authority to get it right first time. Further the landowner might make plans on the basis that the land will be returned after the specified period and those plans would be undermined, or at least be prejudiced, by any extension of that period. Further it is not unknown for acquiring authorities that initially wanted land for temporary possession to subsequently want permanent possession of the land.
15. DLA Piper Scotland LLP	A general power to take temporary possession would be very helpful. There are models in various private bills. The issue of compensation for temporary possession needs to be considered. The current legislation is ambiguous on whether a CAAD is competent for temporary possession and perhaps this point should be clarified.
16. Scottish Compulsory Purchase Association	It would be useful for acquiring authorities to have a general power to take temporary possession – particularly with regard to land that would be used indirectly with regard to the public work e.g. compound storage areas, access etc. However, care has to be exercised to ensure that compensation is payable and that the terms and conditions of occupation are properly agreed. Further, the acquiring authority should serve a formal notice of the termination date and this date would trigger the six year time-bar rule for any application to the Lands Tribunal for Scotland for disputed compensation.
19. Odell Milne	Yes, as noted above, this would be useful for acquiring authorities although from the perspective of landowners this entitlement must be on condition that the temporary occupation is for a definite duration. Recent private Acts have allowed for temporary occupation until one year after “completion of the works”. Whilst this is an attractive approach for promoters, it does leave landowners in a difficult position since they are not sure how long the term of the occupation will continue. Furthermore, it is difficult for the landowner to know what would constitute “completion of work”. Provision must be made for compensation. Many landowners feel that it is unreasonable that compensation for loss only is payable, rather than rent. This is consistent with the rest of the CP compensation regime but it might be considered that there is some justification for such a view, since any other party to whom land was made available would normally be obliged to pay. Furthermore, for

	landowners, proving loss of rent or other loss can be time consuming and expensive and the time taken for promoters to negotiate and deal with them can also be significant. Therefore providing for a fixed "statutory" loss of occupation/rent payment might not be unreasonable. Any provisions relating to temporary occupation would need to make clear what the acquiring authority was entitled to do on the land and in particular whether or not the acquiring authority is entitled to demolish buildings, build structures temporary or permanent; and what is to happen to the land at the end of the period of temporary occupation by way of reinstatement obligations etc. A lease would make provision for these types of issues. [See also answer to question 2.]
20. SSE plc	A general power to take temporary possession would be very useful for acquiring authorities – again it mirrors what would be negotiated in a voluntary situation for a short term land requirement, say for a site construction compound which might only be needed for the duration of a construction project. Again, having the ability to seek such an order would mitigate the impact on both the affected landowner in terms of certainty of duration and the acquiring authority in terms of compensation payable.
21. District Valuer Services	It would be useful for acquiring authorities to have a general power to take temporary possession – particularly with regard to land that would be used indirectly with regard to the public work e.g. compound storage areas, access etc. However, care has to be exercised to ensure that compensation is payable and that the terms and conditions of occupation are properly agreed. Further, the acquiring authority should serve a formal notice of the termination date and this date would trigger the six year time-bar rule for any application to the Lands Tribunal for Scotland for disputed compensation.
22. Glasgow City Council	Yes - the right to have temporary impingements of property rights would be extremely helpful and would result in interests which equate with the actual requirements being CPO'd. Sec 196 of the 1997 Act [Town and Country Planning (Scotland) Act 1997] does cover some of this but I don't find it straightforward to implement. Features - the purpose, the period (with relevant trigger and notice), identification of those who have the benefit, obligations re insurance, indemnification and reinstatement, all akin to a temporary licence. The right would require to be binding on successors of those enjoying the property rights impinged on.
23. Central Association of	While we understand the need, especially by contractors working on a project, for such temporary possession, we believe that this

Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	should be a matter for commercial negotiation, not compulsion. As part of due process, a CPO should be certain as to: • the area to be taken • the purpose for which it is taken • and, in this case, the period for which it is to be taken. Given that the need for such facilities as compounds is often pragmatic, we are concerned that these key definitions of what is to be taken cannot be satisfactorily made the subject of a CPO. There should not be a power to take whatever land is desired at the time for as long as is wanted and for any purpose. We have seen specific issues with HS2 where the railway is to be laid in a tunnel constructed by cut and cover means. HS2 is only seeking temporary possession of the land but proposes only to pay rent for it without recognising the larger impact on the farm accounts of losing a significant fraction of its area for the time involved while the farm's overheads are unchanged. If powers are to be given to take land temporarily, then the CPO must be clear as to the state in which the land is to be returned to the landowner as well as the timing as these can be relevant when assessing compensation.
25. East Ayrshire Council	Yes, this would be useful although it would need to be clear what land was required and how long it would be required for. Provision should also be made as to reinstatement of the land/what condition the land should be in when handed back to the landowner.
26. National Grid plc	Yes this would be useful for acquiring authorities. A power to take temporary possession should set out the affected land, the temporary use for which possession is being taken, for example for access or for a construction compound, and the period of temporary use. Regarding the period of temporary use, this should not be too prescriptive or limiting otherwise the power will be of little value to acquiring authorities. We would draw you attention to the power to take temporary possession set out in private Acts of the Scottish Parliament, for example Edinburgh Tram (Line One) Act 2006. Finally where temporary possession could affect a statutory undertakers' apparatus, the power to take temporary possession should include asset protection safeguards.
27. South Lanarkshire Council	The Council would welcome a general power to take temporary possession as described in paragraphs 2.71 to 2.73 of the report [DP]. It would reduce the impact on the owner of the land who would still be entitled to compensation for the temporary interruption to the

	occupation of his land while recognising that the acquiring authority only had a temporary need to use the land in question. To take temporary possession the acquiring authority will need to be able to:- • Clearly identify the land required • Detail the reason for the land being required i.e. site compound during construction project; and • Detail the period the land was required for. However this may be problematic for some projects and there would need to be provision allowing the period to be extended if required (without requiring the consent of the land owner). The Council acknowledge that compensation would be payable for the temporary possession which would be calculated according to the normal rules with the right of recourse to the LTS.
29. Brodies LLP	Power to take temporary possession should be explored. The arrangements could be under a licence to occupy which is for a fixed term and licence fee. If the term had to be extended that should be agreed between the parties. If agreement cannot be reached, compulsory acquisition powers could be resorted to after dispute resolution procedures have been exhausted. Any such licence must set out exactly what the authority are entitled to do and what they cannot do. If the authority are to have exclusive possession of the land, a lease would be more appropriate. Whichever mechanism is used, reinstatement obligations would have to be agreed and set out in the lease or licence. Again, notice of any such licence should appear against the title to the Property in the Land Register and we would suggest that the "compulsory purchase" branding be used.
30. Isobel Gordon	Temporary rights were granted in the NG servitude imposed on us which were time limited to five years, yet the Schedule A conveyance does not have provision for such an important element. The 5 years temporary occupation rights itself was over and above the required need and places the landowner at unnecessary disadvantage. The Scottish Ministers should make it their scope to establish and only confirm a CPO temporary rights for a minimum necessary period. In exercising such rights it must be made clear in what state the land is to be returned to the landowner as well as the timing as this is a factor in assessing compensation. This was an issue for us in that NG failed to put the land into good agricultural condition before handing it over.

31. Association of Chief Estates Surveyors Scottish Branch	Yes. In several cases landowners negotiate agreements with the acquiring authority to allow use of a larger area and wait until the works to be completed to define the actual land take. Negotiation of side agreements or 'leases' may add an element of cost and dispute to the process. It may be possible that the owner would prefer that the acquiring authority acquire the land outright as its temporary loss may be tantamount to severance or blight.
32. Scottish Borders Council	Agreed that general power to take temporary possession would be helpful and that this would be a good alternative to there being the ability to compulsorily enter into a lease. However it would be preferable to have both. In terms of features of possession, I would suggest that the acquiring authority would have whole rights in terms of using the land for that period as if they had compulsorily purchased it subject to returning the land to its original state at the end of the fixed period at their own expense. I think it would be unhelpful to have it any more narrowly restricted than this in terms of features.
35. Shepherd and Wedderburn LLP	Yes. This would enable the Acquiring Authority to reduce impact on the landowner in respect of areas of land required on a temporary basis for example during the initial stages of a scheme. It is proposed that the temporary right would be included in the GVD/CPNT and such right would be noted on the title of the land affected. The period for which the right subsists would be stated so that it is clear from the Land Register of Scotland when the right expires. The procedures relating to the exercise of temporary rights must be drafted in a way which ensures that sufficient advance notice is given to the dispossessed party that they do not experience undue hardship. The operative provisions of the Forth Crossing Act appear to strike a reasonable balance between the needs of the acquiring authority and the needs of the dispossessed party. We would, however, emphasise that the rules for calculating the compensation which a dispossessed party is entitled to must be clearly set out within the body of the legislation itself. We are currently representing a party who has been temporarily dispossessed of its interest in the land under the provisions of the Forth Crossing Act. Our clients obtained a Certificate of Appropriate Alternative Development from Fife Council but the acquiring authority (Transport Scotland representing Scottish Ministers) appealed that decision. Scottish Ministers as determining authority appointed a Reporter to consider the CAAD appeal. The Reporter recommended the grant of the CAAD on appeal but Scottish Ministers disagreed with their Reporter's conclusions that a CAAD was competent in that case. The matter is currently before the Court of Session.

36. Scottish Power Ltd	[continued on general comments on Rights] It should also be possible for acquiring authorities to be granted "*rights*" to carry out activities such as migration on land. [continued on general comments on Crichel Down Rules] We support enhanced flexibility by granting an acquiring authority temporary access for works such as pre-construction survey for a limited period. However we question the appropriateness of the approach, set out in paragraphs 2.71 to 2.73. [See also answer to question 160.] Answer to question 160 We support enhanced flexibility by granting an acquiring authority temporary access for works such as pre-construction survey for a limited period. However we question the appropriateness of the approach, set out in paragraphs 2.71 to 2.73 [of the DP, relating to the temporary possession and use of land]. We consider that an alternative would be to expand the Crichel Down Rules to strengthen the obligation on the acquiring authority to return the land to the affected landowner. This would bring an increase in protection which could allow additional land, granted as part of any CPO, to be afforded additional/temporary rights or acquisition of a more expansive area of land to facilitate the construction process. Under the current process there is a risk that, in seeking to minimise the amount of land acquired, the acquiring authority does not acquire enough land or rights because of a lack of detailed information available at the point when the CPO is sought or the proposed technology or planned implementation changes during project development and implementation. We also highlight that, under the Electricity Act 1989 (as amended), there are various powers of access available to generation licence holders relative to surveys and other activities. We would not support any variation to those existing rights.
38. MacRoberts LLP	Yes, a power to take temporary possession would be useful to both acquiring authorities and landowners. It should take the form of a temporary licence to occupy with relevant protective conditions (e.g. causing the least disturbance, making good all damage etc.) with an obligation to pay suitable compensation. The land and the purpose for which the land may be used should be described. It will also be necessary to make provision for the notice period required prior to taking possession, what changes to the land may be made (e.g. demolition of existing structures, removal of

	vegetation) and provision for reinstatement. The period of permitted possession would have to be specified, this being linked to the commencement of the project or particular works within the project. Provision must be made for extension to the permitted period at the request of the acquiring authority and with a mechanism for deciding on an extension request should agreement not be reached with the landowner. There should be a maximum period of possession that can be considered as temporary and beyond which the land must be acquired.
39. Scottish Land and Estates	We would envisage that such a power may be useful for acquiring authorities, but the taxation implications of such temporary (change of) use should be considered to ensure that the landowner is not financially disadvantaged and in the first instance such temporary possession should be through evidence of negotiated agreement with both parties consenting, with compulsion as a backstop. Both the timing of return of the land and condition of the land returned needs to be clearly expressed.
40. Law Society of Scotland	Yes, we consider such a power would be useful. We are aware of it having been used in the Edinburgh tram project and consider it is a pragmatic solution to situations where access or storage space are required only during construction. It avoids the acquiring authority having to incur the costs of outright purchase and it is also likely to reduce claims for injurious affection or blight as it is only a temporary measure. That said, it is important that any such use should be adequately compensated. We do not offer suggestions on the proper valuation of such a claim but it is clear that in some cases the disruption could be so significant as to completely inhibit a previous use of the land. Might a right to seek sale be helpful? Should it include the creation of new rights too (e.g. servitude)? In addition, the current system of having temporary possessions dis-applies the compensation code and there is a prospect for abuse and unfairness to affected owners. Therefore, this particular right should be subject to specifically defined proposals that shall relate primarily to construction works.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Yes, we support this proposal. Again this could add to the flexibility of CPOs for an acquiring authority while at the same time guaranteeing appropriate protection for the landowner, as well as providing the landowner with surety of retaining ownership of the asset which could be important in the context of their individual commercial circumstances.
45. Scottish Power Energy Networks Holdings Ltd	It should also be possible for acquiring authorities to be granted "*rights*" to carry out activities such as migration on land. We support enhanced flexibility by granting an acquiring authority temporary access for works such as pre-construction survey for a limited period. However we question the appropriateness of the approach, set out in paragraphs 2.71 to 2.73. [See also answer to question 160 We support enhanced flexibility by granting an acquiring authority temporary access for works such as pre-construction survey for a limited period. However we question the appropriateness of the approach, set out in paragraphs 2.71 to 2.73 [of the DP relating to the temporary possession and use of land]. We consider that an alternative would be to expand the Crichel Down Rules to strengthen the obligation on the acquiring authority to return the land to the affected landowner. This would bring an increase in protection which could allow additional land, granted as part of any CPO, to be afforded additional/temporary rights or acquisition of a more expansive area of land to facilitate the construction process. Under the current process there is a risk that, in seeking to minimise the amount of land acquired, the acquiring authority does not acquire enough land or rights because of a lack of detailed information available at the point when the CPO is sought or the proposed technology or planned implementation changes during project development and implementation. We also highlight that, under the Electricity Act 1989 (as amended), there are various powers of access available to licence holders relative to surveys and other activities. We would not support any variation to those existing rights.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	This question has two parts. Firstly, it asked how much support there was for the principle of giving the power to take temporary possession. Secondly, it asked what features the power should have.
Summary of responses and analysis	30 consultees responded to this question and 29 agreed that a general power to take temporary possession would be useful and helpful. One (CAAV) believed that the conditions for temporary possession should be a matter for commercial negotiation, rather than compulsion. Of the 29 who agreed, many made the point that such a right or power would require to be subject to clear conditions and adequate compensation. SOLAR suggested the conditions set out in the Opencast Coal Mining Acts might be a useful guide. DLA pointed out that there were model conditions in various private Acts. OM suggested that a lease might be the answer as it would be a suitable vehicle for such conditions, and it would allow the option of payment of rent rather than, or possibly as an equivalent to, compensation. S&W and Brodies said that the temporary right should appear on the Land Register. Matters which would require to be addressed were identified as:- • duration, and penalties for overrun; • careful wording regarding the extent of temporary use and possession and penalties on AAs which breach; e.g. whether buildings may be built or indeed demolished; • detail on condition of land at occupation and condition required on the AA's departure; • what happens if the AA decides during the period of temporary possession that they in fact wish permanent possession; • clarification on whether a CAAD is appropriate in a temporary possession situation (see *Scarborough Muir Group Limited v Scottish Ministers*); • AA should be under an obligation to serve a formal termination notice which would trigger the six year time-bar rule for any application to LTS for disputed compensation; • insurance, indemnification and reinstatement; • making conditions binding on successors; • the exact use, e.g. access or construction compound or access through airspace by a crane; • asset protection safeguards; • the possibility of eventual blight; • taxation consequences.

	CAAV were concerned that a temporary occupation would not be capable of sufficiently precise definition of its terms to qualify as a CPO, as a CPO should be certain as to the area to be taken, the purpose for which it is taken and, in this case, the period for which it is taken. SP and SPEN, while supportive of the principle of temporary rights, questioned the approach of the DP. They suggested that an alternative would be to expand the Crichel Down Rules to strengthen the obligation on the AA to return the land to the previous landowner.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, the lack of an express right doesn't seem to have been a problem but it would seem sensible to confer such a right.
7. West Lothian Council	Agreed. This would provide clarity.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We agree that this should be expressly stated. We also note the statement at [paragraph] 10.4 [of the DP] that compensation has always been paid in the UK where a Public Authority acquires the property of an individual. That is not strictly the case, as we see it, in that Scottish Water acquires rights to lay pipelines through land and pays no compensation for the presence of the pipe in the land, merely the disturbance arising from installation. The presence of the pipe does have a diminution in value but it is extremely difficult to ascertain values and Scottish Water point blank refuse to pay for this. This should be considered in contrast to the situation in England.
14. John Watchman	**Human rights** 5.1 In my opinion there should be a 'front-loading' of

	consideration of ECHR Article 8 and A1P1. An acquiring authority's Statement of Reasons should be required to be sent along with the notice of making the CPO or the draft CPO as the case may be. (*Compulsory purchase and compensation: A guide for owners, tenants and occupiers in Scotland* (Scottish Government 2011), at paragraph 32.) That Statement of Reasons should address matters including ECHR Article 8 and A1P1. This, in turn, would ensure that ECHR Article 8 and A1P1 have been considered and addressed both prior to making the CPO or the draft CPO as the case may be. In relevant cases the acquisition authorities should consider a proposed Statement of Reasons as part of the suite of documents considered before the relevant authority makes the compulsory acquisition order. The recipients of the compulsory acquisition notice etc. would then be aware that ECHR Article 8 and A1P1 have been considered and the terms of that consideration. 5.2 At paragraph 3.80 of the Discussion Paper it is stated that: '… it now appears to be settled law that provided there is an option of appeal to an independent and impartial tribunal, Article 6(1) will not be breached where there is an exercise of administrative discretion by a decision-maker which is not itself independent and impartial.' That statement is overly simplistic and is, in my opinion, flawed. 5.3 In cases of 'the classic exercise of administrative discretion' judicial review of the legality of the administrative decision will only be sufficient where the initial decision on the merits involves a quasi-judicial procedure that sufficiently complies with ECHR Article 6(1). The manner in which the decision was arrived at is important. 5.4 For instance, in the *Alconbury* decision it is clear in relation to findings in fact and the inferences from fact the relevant safeguards (including those provided by the public inquiries and related post-inquiry procedures) were essential to the acceptance of a limited review of fact by the courts. Therefore the availability of judicial review at the end of a decision-making process does not of itself guarantee that the process is ECHR Article 6(1) compliant. [For further details see *Local Planning Reviews in Scotland* (Avizandum, 2015), Ferguson and Watchman, Chapter 1.] 5.5 I would also draw attention to the summary of the law by Baroness Hale of Richmond in *R (Wright and Others) v Secretary of State for Health*: [2009] UKHL 3, at para 23]. 'It is a well-known principle that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent

	and impartial tribunal which exercises 'full jurisdiction': *Bryan v United Kingdom* (1995) 21 EHRR 342. ... What amounts to 'full jurisdiction' varies according to the nature of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject-matter of the decision and the quality of the initial decision-making process. If there is a 'classic exercise of administrative discretion', even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case.' (underlining my emphasis). 5.6 Therefore the requirements include a procedure that is quasi-judicial; a procedure that allows interested parties to have their views thoroughly aired and considered and a procedure which substantially complies with the rights guaranteed by Article 6.
16. Scottish Compulsory Purchase Association	This proposal is supported on the basis that an acquiring authority is required to compulsorily purchase all private property interests that exist and to pay compensation accordingly.
19. Odell Milne	Agreed. However, whilst at first glance this would seem like a "no brainer", such a statement might cast doubt on the availability of compensation in situations where compulsory acquisition is being promoted other than under a CPO e.g. where compulsory acquisition is being promoted under a private Act, TAWS or under UK wide statutes, or where the nature of the acquisition is "quasi compulsory purchase". Provided any such statement does not take away any existing rights to compensation, it should be included.
20. SSE plc	We would agree that although the right to compensation exists in practice, a definitive statement would give clarity to affected parties.
21. District Valuer Services	This proposal is supported on the basis that an acquiring authority is required to compulsorily purchase all private property interests that exist and to pay compensation accordingly.
22. Glasgow City Council	Agree.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We agree that this should be expressly stated. We also note the statement at [paragraph] 10.4 [of the DP] that compensation has always been paid in the UK where a Public Authority acquires the property of an individual. However and unfortunately, that is not the case in Scotland. By contrast to England and Wales – and also the Isle of Man - when Scottish Water acquires rights to lay pipelines through land it pays no

	compensation for the presence of the pipe in the land, merely the disturbance arising from installation – however great the resulting diminution in value. The point can be put simply: of two identical fields, one has a sewer across it and one does not. Which field would a purchaser with free choice choose to buy? While some of the resulting difference will lie in injurious affection the loss of that tunnel of land is not paid for. We are further concerned by Scottish Water's refusal to accept liability for damage caused by bursts in sewage pipes installed under compulsory powers.
24. Shona Blance	Yes.
25. East Ayrshire Council	Agreed. This would remove all doubt and make it clear for those using and relying on the legislation.
26. National Grid plc	The right to compensate those whose private property interest has been compulsorily acquired should be expressly provided for in the new statute.
27. South Lanarkshire Council	The Council agrees with this proposal. Given that the exercise of CPO powers deprives the land owner of his property it should be recognised that the land owner is entitled to compensation. This would clearly recognise the rights of both parties when CPO powers where being exercised.
30. Isobel Gordon	We agree that this should be expressly stated.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. The Scottish Borders Council	Agreed.
35. Shepherd and Wedderburn LLP	We agree.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	We agree that the right to compensation should be expressly provided for in the new statute, since as the paper recognises it can be readily inferred from the existing legislation and cases, but is not directly stated. We are aware of UK Government proposals to consult on the repeal of the Human Rights Act and replace it with a British Bill of Rights and would recommend that developments in that regard are monitored. The sacrifice of land business interests for the public good requires

	to be properly recognised and fairly and fully compensated for.
40. Law Society of Scotland	Yes. We agree that it should be, rather than the position that we have which is a sequential reference back to older statutes. This, of course, causes difficulties in the understanding of the public at large that their right to compensation applies. We therefore suggest that this right to compensation as the result of compulsory purchase should be placed on the face of the new statute.
41. Judges of the Court of Session	**Chapter 3** Chapter 3 is concerned with the impact of human rights legislation, and in particular the European Convention on Human Rights, on compulsory acquisition and compensation. It is clear that the Human Rights Act 1998, together with the Scotland Act 1998, and the Convention will have an important impact in this area. This will inevitably be worked out by the courts on a case-by-case basis.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree strongly. It is vital that this is enshrined in the new legislation if the good respect with which UK and Scottish property investment is regarded is to be supported by the new Statute. The importance of this provision is summarised in the quotation provided by the Discussion document on p. 28, attributed to Lord Denning.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	None required.
Summary of responses and	There was unanimous agreement with this proposal amongst the 27 consultees who addressed it.

analysis	Five consultees (WLC, SSE, EAC, SthLC and LSS) argued that this would provide greater clarity than the current legislation for those dealing with CP. Two consultees (S&P and CAAV) explained that it was not always the case that CPOs are compensated. They noted that SW pays only for disruption caused by installation of pipelines in the ground and does not compensate for the diminution in value of the land, in contrast to England where such compensation is paid. JW argued that the Convention and human rights law had to be addressed from the outset as this would be the best way to ensure the CPO is compliant with human rights law. SLE raised concern with Scots CP law and the effect of the proposed repeal of the Human Rights Act 1998 and replacement by a Bill of Rights, and encouraged monitoring of the position. OM argued that, while the right to compensation should be expressly provided for, this must not adversely affect other areas where compulsory acquisition is being promoted other than under a CPO, such as through private Acts, the 2007 Act or under UK-wide statutes. It should be made clear that any express right does not take away any other existing rights to compensation. FoA argued that something as fundamentally important as the right to compensation should be explicit rather than implicit.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, I agree.
2. Antony C O Jack	**25.** At Chapter 3 your Discussion Paper deals with human rights. At Chapter 6 you raise the issue of bad faith, but chose not to define it. At Paragraph 1 above, I hope I have set down my feelings clearly. I am confused – and therefore I return to my base premise – the initial test. On the one had I understand that ownership and enjoyment of property is a fundamental Convention freedom, under Article 1 of the first Protocol; as is a right to fair consideration of civil matters before an impartial tribunal before Article 6; as is a right to private and family life under Article 8; and freedom of expression and receive information under Article 10 of the European Convention for Human Rights and the Protection of Fundamental

	Freedoms [ECHR]. **26.** On the other hand it is unarguable that on occasion the public interest will conflict with the individual. For example recently fundamental freedoms in the UK have been eroded in the public interest in terms of anti-terrorism legislation. The issue of public interest over individual interest is enshrined in the Convention. It therefore seems to me that if the Acquiring Authority is acting in the public interest, then in that public interest the Authority's actions should be transparent, and honest.
6. Craig Connal QC	**Chapter 3** Does A1 P1 not depend on looking at the matter wholly through the telescope of a public interest? (See for example 3.34 and 3.46 [of the DP]). **Answer to question 7** This question on the convention is debateable, given some of the issues discussed above.
7. West Lothian Council	No. There is a reference to interference with human rights and that any such interference needs to be the least intrusive. The council considers that the requirement needs to be higher than that. The party affected by the CPO order should, so far as is practicable, be kept in a position where they are no worse off than they were before the exercise of the power. That should include rehoming and payment of financial compensation at a level that allows the party subject to the CPO to not be disadvantaged by the CPO process.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	With the exception of the Defence Act as set out in proposal 1, we broadly agree with this save that there is no acknowledgement of the effect on individuals affected by a compulsory purchase order in the present compensation provisions.
15. DLA Piper Scotland LLP	We do not agree with interpretation placed on case law on article 6. (Please see our comments on Chapter 5 [question 13] via the Law Society's response.) We think any reduction in the right to be heard for a CPO objection risks a successful article 6 challenge.
16. Scottish	It is agreed that the current statutory provisions are compatible with

Compulsory Purchase Association	the Convention and it is a fundamental principle that within Scotland each citizen's human rights continue to be recognised and respected. However, it would appear that provided an acquiring authority can show good justification for the compulsory purchase of private property interests and that the public work is suitably demonstrated to be in the public interest for the benefit of a local community or wider society, then such appropriation is appropriate.
18. Scottish Federation of Housing Associations	1.1.4 Our interest in commenting on the discussion paper on compulsory purchase is land acquisition issues which often impede the building of new homes through unreasonable seller expectations, lack of contact or general intransigence to the principle of providing new social homes. SFHA is however acutely conscious of the necessity for CPO powers to be exercised fairly, appropriately and in accordance with the democratic process and in a way consistent with legitimate rights of owners. On the 800th Anniversary of the sealing of the Magna Carta, which amongst other things progressed the right to hold land and enshrined the right not to have it taken away, it is incumbent upon Legislators to have the highest regard of the legitimate interests of owners balanced by the justifiable demands of communities and their representatives.
19. Odell Milne	I agree that the current statutory provisions applicable to CP in Scotland are compatible with the Convention although there is inconsistency as between CP procedures under different authorising authorities and as to the application of compensation. If those differences were identified analysed and considered, I am not sure that all statutory provisions would be considered compatible. I am not a human rights specialist, but it is my understanding that to be compliant, any interference with ECHR rights must not discriminate. I would also have a concern that for CPOs promoted by the Scottish Ministers, where the Scottish Ministers also act as confirming authority, there may be a suggestion that the Ministers are "judge and jury" in their own cause. Perhaps consideration could be given to the creation of an independent confirming authority so that it is clear that justice is not only done but seen to be done.
20. SSE plc	In the absence of evidence to the contrary, we would agree.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We broadly agree with this save for: • the curious anomaly just mentioned regarding the lack of compensation for land taken by water pipes and sewers in Scotland • the absence of any acknowledgement of the stress caused to individuals affected by a compulsory purchase order in the

	present compensation provisions.
24. Shona Blance	Yes but the interplay between the statutes relating to a CPO and other inter related aspects of the process do not in my view always comply.
25. East Ayrshire Council	Yes, for the reasons set out in the discussion paper.
26. National Grid plc	Yes.
27. South Lanarkshire Council	Yes.
30. Isobel Gordon	[General Comments] You will understand therefore why we consider the current legislation to provide inadequate protection for landowners affected by such powers and welcome reform. As the legislation stands, a landowner "sells" his property for a scheme for an unknown sum, payable at some indeterminate date in the future with no interest payable on that sum until settlement. What property owner would allow such a situation in the real world? It is the CPO process and cost implications that mean that landowners cannot 'risk' being treated fairly as expert and legal costs outweigh many potential claims. If the system was fair then many more would and should be able to challenge the settlement offered and terms. It appears that the Tribunal system itself is barrier because of the legal and expert costs and preferred procedural method that becomes entrenched in to the mind sets of the lawyers etc. and quite obvious simple wish to reduce the workloads of the Tribunal. If the system was operating correctly clearly landowners should not fear it, there would be more challenges by the simple law of averages as it stands now it is like a flip of the coin and the coin has 'tails you lose' on both sides. The overriding principle is that it should be fair and no more rights sought by acquiring authorities than provided for under statute.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn LLP	To a large extent, yes, although we do have concerns that the "general" compulsory purchase provisions which allow only for outright acquisition and not the creation of rights is a fairly blunt instrument which may not achieve the requirement of

	proportionality.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	As far as we are aware no court has found the compulsory purchase order procedures under the 1997 Act to be in breach of Article 8 of the ECHR, although we understand that there may be issues around acquisition by the Ministry of Defence in terms of the Defence Act 1842 where there is no hearing.
40. Law Society of Scotland	Yes we agree that the current statutory framework is ECHR compatible, but that compatibility does not rely solely upon the supervisory jurisdiction of the courts. It also requires an adherence to the affected person's rights to be heard in objection to a decision of Ministers where the dispossession of the individual's property is at stake.
41. Judges of the Court of Session	[General Comments on Chapter 3] At paragraphs 3.40 [of the DP] and following there is a discussion of the concept of proportionality. This is a concept which, we find, assumes an ever-increasing importance in the law. This is true not merely in cases governed by the Convention; the principle has also worked its way into domestic law, over a wide range of fields. As the Discussion Paper indicates at paragraph 3.43, a recurring and possibly increasing difficulty is extrapolating between the decisions made in widely differing policy areas. Yet a further issue is the fact that proportionality appears to be emerging as a concept in domestic law, independently of the Convention. Arguably this is only a matter of terminology; in purely domestic cases the courts have been prepared for many years to make a judgment about what is fair and reasonable, and that is perhaps to be considered as proportionality under a different name. Indeed, the fundamental concept of proportionality is extremely simple, whatever the difficulties of applying it in individual cases. So far as compulsory purchase is concerned, we think that the statement of the law by Maurice Kay LJ in *R (Clays Lane Housing) v Housing Corporation*, [2005] 1 WLR 2229, is helpful on rights arising under article 1 of the First Protocol to the Convention. On the concept of proportionality, we should perhaps draw attention to two recent cases, albeit in very different areas of law: *Bank Mellat v HM Treasury (No 2)*, [2014] AC 700, and *Main v Scottish Ministers*, 2015 SLT 349. Both of these contain a general discussion of the concept and its history. Article 8 raises more difficult issues, but we think that the review of recent case law by the Commission should be of assistance if any such cases should arise in future. Those cases must be decided on their individual facts. In relation to article 6, we agree with the Commission that it is most unlikely that present procedures would

	be incompatible with the Convention. [Question 7] In the light of the foregoing comments, we agree with the Commission's view that the current statutory provisions applicable to compulsory purchase in Scotland are compatible with the Convention. Obviously it cannot be guaranteed that nothing will ever happen in an individual case that is incompatible, but we think that the likelihood of this is so remote that it may be ignored.
42. Scottish Water	Yes.
43. Faculty of Advocates	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 [of the DP], 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.
44. Scottish Property Federation	We do – however it will be important that the further provisions relating to compensation are transferred to the new Statute appropriately, including issues surrounding disturbance compensation or injurious affection.
46. Hendersons Chartered Surveyors	[General comments] 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 in 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. … … 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. … 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.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	30 consultees considered this question. 23 agreed with the SLC view that the current statutory provisions applicable to CP in Scotland are compatible with ECHR. One consultee (WLC) disagreed outright. Six consultees discussed issues of human rights in general terms without answering the question specifically. Several of the consultees who agreed that the current provisions are compatible, raised concerns about some human rights issues in relation to CP. S&P said that, with the exception of the Defence Act 1842, they broadly agreed with the SLC view, except that there is no acknowledgement of the effect on individuals affected by a CPO in the present compensation provisions. OM considered that there was inconsistency as between the CP procedures of different AAs and as to application of compensation. While the provisions were generally compatible with the Convention, if the differences in procedures were identified, analysed and considered, she was not sure that all statutory provisions would be considered compatible. She noted concern over CPOs where the SMs were both the AA and confirming authority. In such instances they could be seen as "judge and jury". She suggested considering the creation of an independent confirming authority so that it would be clear that justice was not only done but seen to be done. CAAV agreed that the statutory provisions were compatible subject to two exceptions: non-payment of compensation for land taken for water pipes and sewers, and the absence, in the present compensation provisions, of any acknowledgement of the stress caused to individuals affected by CPOs. SB qualified her agreement by stating that the interplay between the statutes relating to a CPO and other inter-related aspects did not always comply. S&W argued that proportionality may not be achieved if the general

	CP provisions only allowed for outright acquisition and not the creation of rights. They suggested this was a fairly blunt instrument which may not meet the requirement of proportionality. JCoS agreed with the SLC view that the current statutory provisions applicable to CP in Scotland were compatible with ECHR. While it cannot be guaranteed that nothing would ever happen in an individual case that would be incompatible, they thought that the likelihood of that was so remote that it could be ignored. S&P and SLE referred to concerns about the Defence Act 1842 where a hearing was not available and so may not be Article 6 compliant. [See paragraph 3.72 of the DP.] One consultee (WLC) believed that the current Scottish CP statutory provisions are not compatible with the Convention. They argued that while, currently, the interference needs to be the least intrusive, the standard should be higher. As far as practicable, the person subject to the CPO should be no worse off as a result of the CPO, and this should include re-homing and payment of financial compensation at a level that means they are not disadvantaged by the CPO process. Six consultees discussed issues of human rights in general terms without answering the question specifically. Two of these (AJ and SFHA) considered the importance of legislators balancing the interests of the individual and the public. AJ further argued that, in using CP powers against the rights of the individual, AAs should be transparent and honest. CC asked whether compatibility with A1P1 of the Convention depended on looking at the matter wholly through the telescope of a public interest. He thought the answer to question 7 was debatable. DLA believed there might be a successful Article 6 ECHR challenge if there were to be any reduction in the right to be heard on a CPO objection. IG argued that the current provisions provide inadequate protection for landowners affected by CP powers, and would welcome reform. HCS stated that while the statutory provisions give AAs significant rights, they also impose responsibilities and obligations which AAs are too willing to ignore.

8. **Compulsory purchase by local authorities under local Acts should be carried out by means of the standard procedure.**

(Paragraph 5.5)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, I see no convincing reason why this should not be the position.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed. It would be preferable to have only one procedure in a single Act.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We agree that there should be a single standard procedure. This procedure should entail: - a) Promotion of draft CP b) Time for objections c) Hearing or Inquiry d) Procedure for confirmation/modification/rejection of draft CPO e) Vesting (include a requirement to provide broad details of any claim) f) Date for declaring formal completion of the scheme.
16. Scottish Compulsory Purchase Association	This proposal is supported on the basis that all entities in Scotland that possess CPO powers act in a standard and consistent fashion. See also our response to proposal 1 above. In addition, it is considered that there should be a standard compensation claim form issued by all entities having CPO powers, at the latest, at the time of the issue of the General Vesting Declaration; that form should require the claimant to provide the acquiring authority with details regarding the claimant, agent(s) involved, the interest to be acquired, any loans/burdens/mortgages affecting the subjects, the amount of compensation sought, bank account details etc. and thus would mean that the acquiring authority would have sufficient information to undertake an initial appraisal of the likely compensation payable: this process would aid the speed of processing an initial application for an Advance Payment of Compensation.
19. Odell Milne	Agreed – where possible a standard and consistent procedure should be used. One of the issues in relation to CP and quasi compulsory purchase is the apparent “unfairness” for landowners faced with different procedures. In many cases the inconsistencies

	arise in relation to utilities compulsory acquisition carried out by statutory undertakers which is outwith the scope of the SLC consultation. However, the more that can be done to avoid such inconsistencies and apparent unfairness, the better.
20. SSE plc	We have no particular view on this.
21. District Valuer Services	This proposal is supported on the basis that all entities in Scotland that possess CPO powers act in a standard and consistent fashion. In addition, it is considered that there should be a standard compensation claim form issued by all entities having CPO powers, at the latest, at the time of the issue of the General Vesting Declaration; that form should require the claimant to provide the acquiring authority with details regarding the claimant, agent(s) involved, the interest to be acquired, any loans/burdens/mortgages affecting the subjects, the amount of compensation sought, bank account details etc.
22. Glasgow City Council	Agree.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
27. South Lanarkshire Council	The Council fully supports this proposal. This will ensure a standardised approach regardless of the enabling act which will also have the benefit of making it easier to understand.
28. Royal Town Planning Institute Scotland	RTPI Scotland agrees that compulsory purchase by local authorities under local Acts should be carried out by means of the standard procedure.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	I would concur that compulsory purchase by local authorities on the local acts should be carried out by means of the standard procedure. In terms of standard procedure it is stated what meant is the procedure set out in the 1947 Act. I would agree that this is a helpful start point and would observe that it would be worth in terms of the finalised legislation reviewing the standard procedure to make sure it is entirely fit for purpose.

35. Shepherd and Wedderburn LLP	Yes.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	For the sake of simplicity we agree that this proposal makes sense and that a non-standard or different procedure should not be required. The procedure should be clear from start (promotion of the scheme) through the objection and hearing/inquiry process, the confirmation or otherwise, the vesting to the end (formal completion of the scheme).
40. Law Society of Scotland	Yes, we agree. We consider that standardisation of the procedures would be of advantage to practitioners and the public alike.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees. It is simpler, and more likely to be Convention compliant, if the same procedure is used each time.
44. Scottish Property Federation	We agree that local authorities seeking compulsory purchase should use the standard procedure. This may help to empower local authorities to make greater use of compulsory purchase.
Further responses either made informally or at engagement events	None.
Analysis	
Explanation of proposal	None required.
Summary of responses and analysis	There were 23 responses to this proposal. 22 agreed and SSE said that they had no particular view. Therefore, there was overwhelming support for this proposal. SCPA and DVS took the opportunity to suggest that, in addition to supporting the proposal to ensure all entities which possess CPO powers act in a standard and consistent fashion, there should also be a standard compensation claim form issued by all such entities. This should be issued, at latest, at the time of issue of the GVD and would require the claimant to provide to the AA details of the claimant, agent(s) involved, interest to be acquired, any secured loans or title conditions affecting the property, the amount of compensation sought and bank account details. SCPA argued that this would mean that the AA had sufficient information to undertake an initial appraisal and would aid the speed of processing an application for an advance payment of compensation.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	The more you can bring the enactments in Appx B into line with standard procedures, the simpler things will be.
7. West Lothian Council	No.
10. Renfrewshire Council	None that we can think of.
12. Society of Local Authority Lawyers and Administrators in Scotland	None that we can think of.
13. Strutt & Parker LLP	We see no reason why this should not be the case.
16. Scottish Compulsory Purchase Association	We see no reason why these procedures should not be used for compulsory acquisition.
19. Odell Milne	I see no reason why the proposed new statute should not be used for compulsory acquisition under any of the enactments. The only proviso I would add is that it would be unfair to change the position for current schemes already authorised since, if compulsory acquisition had already taken place under a private Act of Parliament, and any additional acquisition is authorised after the coming into force of any new CP legislation, it would not be equitable for parties affected by such acquisition to be treated differently to those from whom land was acquired prior to the coming into the force of the new CP procedures. This may not be so much of an issue for new acquisition, but may be relevant for outstanding compensation claims under recent private Acts to which the current framework must apply. I do not anticipate that any legislation would be retrospective so I do not think this would be a problem. [See also final paragraph of answer to question 1] Consideration also needs to be given to the extent to which compulsory purchase powers can be contained in private Acts of the

	Scottish Parliament, Transport & Works (Scotland) Orders (TAWS) and in UK statutes such as in relation to electricity, gas provision and telecommunications. Whilst legislation on these matters may not be within the scope of the SLC's remit and recommendations, there should be an awareness of how any reforms or improvements to "compulsory purchase law" (based on the 1947 Act) could be delivered in such a way as to benefit or be used for CP authorised by such other authorising statutes.
20. SSE plc	It is an over-simplification of legislation to suggest that a unified procedure could or should be used for *all* types of acquisitions under all of the enactments listed in Schedule [Appendix] B. The consultation paper envisages that only heritable rights in "land" are to be affected by the present proposed reform, however if the new unified procedure is intended to encompass all compulsory acquisitions (either now, or by extension in future), including non-heritable rights in land, it is considered likely that there will be an argument for maintaining separate procedures in relation to the procedure used for the making of applications to Scottish Minsters for authorisation to acquire particular rights and the procedure that would govern the application process. It may be the case that procedures to hear objections to such applications could be unified, as could any proceedings related to compensation issues. The particular types of acquisition which we envisage may continue to require a separate procedure are discussed in the Table below. For completeness, it may prove useful to the Commission to have a summary of the statutory powers of compulsory acquisition that statutory undertakers / utility companies are entitled to exercise: The Electricity Act 1989, section 10(1) and (5), and Schedules 3,4 and 5; The Communications Act 2003, section 118 and Schedule 4; The Telecommunications Act 1984, as amended by the Communications Act 2003, Schedule 2; The Gas Act 1965, section 12(1) , section 13(1) and Schedule 4; The Gas Act 1986, section 9(3) and Schedule 4. The comments made in the Table below address competing considerations and are not intended to indicate that we necessarily disagree with a possible widening of the procedure to cover acquisitions other than "land". The appropriateness of any future single unified procedure for different acquisitions broader than of "land" will depend upon the detail of the proposal.

		Authorising Power (include section)	Reasons why special procedure is required
		The Electricity Act 1989 ("the 1989 Act"). Section 10(1), Schedule 3 and paragraphs 6 to 8 of Schedule 4.	In terms of Section 10(1) of the 1989 Act, a person authorised by licence to carry out activities falling within the terms of section 6 of the 1989 Act, has various powers under both Schedule 3 and Schedule 4 to the 1989 Act, for the purposes of carrying out the authorised activity. Schedule 3 is concerned with the compulsory purchase of land and in terms of paragraph 15 of Schedule 3, the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 applies to the compulsory purchase of land or rights. In terms of paragraph 1(2) of Schedule 3, "land" is defined as including any right over land, which can include the creation of new rights as well as acquiring existing rights. Clearly the rights that can be acquired under these provisions are intended to be heritable rights over land and it appears that these could be covered by a reformed procedure. Under Schedule 4, paragraph 6, a licence holder is given the power to acquire necessary wayleaves for the purpose of installing or keeping installed electric lines on, under or over any land. This is an important provision for the generation, transmission, distribution and supply businesses of utility companies. The lawful entitlement to acquire necessary wayleaves, together with the temporary continuation of existing wayleaves for a period following termination of a wayleave by a landowner or occupier of land, are both of considerable importance to these businesses in maintaining security of supply to customers. A wayleave is not a heritable right in land and when a necessary wayleave is granted by the Scottish Ministers it is normally for a limited period. The 1947

			Act does not apply to the compulsory acquisition of wayleaves. The procedure is contained in paragraphs 6 to 8 of Schedule 4 and involves an application being made direct to the Scottish Ministers. Thereafter, in the event that the owner and/or occupier objects to the grant of a necessary wayleave, the procedure to hear objections is similar to that followed through to hear objections into a compulsory purchase order. Normally a hearing, rather than a public inquiry, is fixed and a reporter appointed to hear the parties and report to the Scottish Ministers with a recommendation to either grant or refuse the application. Disputes over compensation are dealt with using the same procedure that is used for compulsory acquisitions under the Land Compensation Act 1961 and the Land Compensation Act 1963. The application process for necessary wayleaves is much simpler and straightforward than the procedures under the 1947 Act. It is generally a much speedier and flexible procedure to that contained in the 1947 Act. It is not clear whether or not the compulsory acquisition of wayleaves is a form of compulsory acquisition that would be covered by the proposal for a single procedure. While it is acknowledged that a wayleave does not create a heritable right in land, nonetheless it does involve the compulsory acquisition of a right in, under or over land.
		Section 10(5) of, and Schedule 5 to, the 1989 Act.	We understand that the current review will not affect procedures for necessary wayleaves. We would be concerned if the procedure related to necessary wayleaves became more complex, rigid and time consuming. Whilst the equivalent acts in respect of the Gas Act 1984 and the Telecommunications Act 2003 do not contain rights for necessary wayleaves, compulsory purchase powers

			are included within those statutes, and the same considerations as with the Electricity Acts apply. There is a separate power provided under section 10(5) of the 1989 Act for the compulsory acquisition of water rights for hydro-electric stations. In relation to the exercise of that power, a separate and distinct procedure is provided under Schedule 5 to the 1989 Act. The procedure under the 1947 Act does not apply to this compulsory acquisition. There are various complexities associated with the acquisition of water rights that don't apply to the acquisition of other property rights. One of the main differences is that the procedure makes provision for the draft Order to be served on a number of named affected persons on whom the draft Order must be served, which is unique to the acquisition of water rights, and which wouldn't apply in relation to the acquisition of land. Such consultees include salmon fisheries boards and SEPA. Consultation with SEPA is if of particular importance having regard to its responsibilities in relation to implementation of the EU Water Framework Directive. The requirements of that Directive are of relevance to the issue of making provision for compensation water, which may be associated with the compulsory acquisition of water rights. It is therefore considered necessary to give particular consideration to ensuring a separate procedure is maintained for the compulsory acquisition of water rights.
	[See also answer to Q 60] The proposals put forward by the Commission would seem to promote a sensible procedure and we would welcome a single statutory procedure for the making and confirming of CPO's but it		

	should be recognised that this should not be applied in relation to separate statutory processes already in place under the Electricity Act 1989, and certain other legislation as outlined in our response to question 9.
21. District Valuer Services	We see no reason why these procedures should not be used for compulsory acquisition.
22. Glasgow City Council	None of which I am aware.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We see no reason why this should not be the case.
25. East Ayrshire Council	There doesn't seem to be any reason why the enactments in Appendix B should not be subject to the new Act.
26. National Grid plc	We see no reason why the procedures to be set out in the new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B.
29. South Lanarkshire Council	Not in the Council's opinion
31. Association of Chief Estates Surveyors Scottish Branch	The expectation is they should be used. Flood Prevention work often includes temporary use of land and proposals in paragraphs 2.71 to 2.73 [of the DP] are relevant.
32. Scottish Borders Council	None known.
35. Shepherd and Wedderburn LLP	No.
38. MacRoberts LLP	No, the standard procedure should apply in all cases.
39. Scottish Land and Estates	None as far as we are concerned.
40. Law Society of Scotland	We do not believe there is any reason why the proposed procedures should not be used. We refer to our comments at question 8 above.
41. Judges of the Court of Session	**Questions 9 and 10** We are unaware of any reason why the procedures to be set out in the proposed new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B.

42. Scottish Water	None.
43. Faculty of Advocates	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.
Further responses either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	There were 23 responses to this question. 22 of these agreed that there was no reason why the procedures to be set out in any proposed new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B. SSE, however, felt that it was an over-simplification of the legislation to suggest that a unified procedure could or should be used for all types of acquisitions under all the enactments listed in the Appendix. They provided a detailed explanation of why the procedures should not apply to wayleaves. The DP stated at paragraph 2.66 that, although there were strong agreements for a review of statutes in this area, such a review could not be done within the scope of this project. Thus there is no proposal to alter the rights of utility providers in relation to wayleaves.

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

(Paragraph 5.18)

Respondent	
7. West Lothian Council	The council is not aware of any relevant legislation missing from the list.
10. Renfrewshire Council	No. In our view the list is comprehensive.
12. Society of Local Authority Lawyers and Administrators in Scotland	No. In our view the list is comprehensive.
13. Strutt & Parker	We are disappointed that the opportunity is not being taken to

LLP	consider streamlining differing provisions in these other legislation. For instance the right for water authorities to install water and sewerage pipes in land without paying compensation for the existence of the pipe and the diminution of value arising therefrom appears ripe for reform. We are particularly concerned by Scottish Water's refusal to accept liability for damage caused by bursts in sewage pipes installed under compulsory powers.
16. Scottish Compulsory Purchase Association	None of which that we are aware.
19. Odell Milne	I am not aware of any missing legislation.
20. SSE plc	We are not aware of any legislation that is missing from that list.
21. District Valuer Services	None so far as is known
22. Glasgow City Council	Not in so far as I am aware.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We have not seen any omissions from the list of legislation in Appendix B to the paper.
25. East Ayrshire Council	Not that we are aware of.
27. South Lanarkshire Council	Not as far as the Council is aware.
28. Royal Town Planning Institute Scotland	The Community Empowerment Bill was passed by the Scottish Parliament on 17 June 2015. We consider that this new legislation should be added to the list as the new powers for communities will be a consideration in the new Compulsory Purchase legislation drafting. We also consider that the Historic Environment (Scotland) Act [2014 asp 19] should be added to the list of legislation as well as the secondary legislation currently being prepared. This Act and its secondary legislation deals with list building consents and conservation area consents (amongst other things). These should

	be taken into consideration for any new CPO legislation.
32. The Scottish Borders Council	None known
35. Shepherd and Wedderburn LLP	Not that we are aware of.
38. MacRoberts LLP	We are not aware of any other relevant legislation.
39. Scottish Land and Estates	Not that we are aware of, but we would question whether there is also scope to streamline any of this legislation at this time.
40. Law Society of Scotland	The table of current legislation conferring powers of compulsory purchase in Scotland at Appendix B is comprehensive and we have no comments to make.
41. Judges of the Court of Session	We are not aware of any relevant legislation missing from that list.
42. Scottish Water	No.
43. Faculty of Advocates	The Faculty of Advocates is not aware of any legislation missing from the list.
Further responses either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	There were 21 responses to this question. Of these, 19 considered that there was no legislation missing. S&P did not identify any missing legislation but stated that they were disappointed that the opportunity was not being taken to consider streamlining differing provisions in other legislation. They suggested that SW should be liable, and obliged to pay compensation, for damage caused by bursts in their pipes. RTPI stated that the Community Empowerment (Scotland) Act 2015, and the Historic Environment (Scotland) Act 2014, should be added to 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)

Respondent	
7. West Lothian Council	The legislation does not set out the form of notice or how it should be

	served. The new Act should set out the form of notice and the information that should be provided in such a notice. It should also reflect the wording of Section 26 of the 2010 Act which refers to service of documents. The party seeking to exercise a right to survey should be obliged to provide information on what they are proposing. The landowner has no right, in terms of Section 83 to object to or challenge the notice or the proposed action. The new Act should make provision for a landowner affected by such a notice to challenge the notice within a tight timeframe. The grounds for challenge should be set out in the legislation. Any exercise of rights to survey should carry with it a requirement to pay adequate compensation for losses incurred by owners or others affected by it.
10. Renfrewshire Council	We are not aware of the provisions of S83 being routinely used; rather the matter of entry for survey is seen as yet another area of potential negotiation or conflict between the parties. An explicit statement to that effect in any new style CPO or statutory notice would go some way to paving the way as of right to enter the land for survey.
12. Society of Local Authority Lawyers and Administrators in Scotland	We are not aware of the provisions of S83 being routinely used; rather the matter of entry for survey is seen as yet another area of potential negotiation or conflict between the parties and can significantly delay negotiations and/or the CPO. The reform should specifically state to include such rights to undertake survey being an automatic entitlement of promoting authority but put it in more modern context. This could be incorporated into an explicit statement to that effect in any new style CPO or statutory notice and would go some way to paving the way for a request to enter the land for survey.
13. Strutt & Parker LLP	The powers to survey land have become much more prominent in recent years because of the increased requirement for environmental surveys in route selection but also because of design and build. It is our experience that acquiring authorities (particularly Transport Scotland) cites their statutory powers to carry out such work but fail to point out rights to compensation. We agree that it is necessary for acquiring authorities to have powers of entry for survey purposes. We do not agree that a warrant should be given on “emergency” grounds. If access is urgently needed for survey purposes and that access is refused, a warrant can be sought on grounds of refusal. We do not consider it proportionate to allow a warrant to be sought on any other grounds for survey purposes.

	All powers of entry should have a corresponding obligation to keep any damage to a minimum, to make good all damage It should be a condition of any such access that any loss or damage should be paid for by the acquiring authority and no landowner or occupier should be left worse off following exercise of such rights. An authority can go onto land with not less than 3 and not more than 14 days' notice. The issue here is the practice of statutory authorities in respect of this right. Although such works may have been planned for some time it is our experience that notice is given to the landlord at the last minute (often citing the minimum notice provisions set out in the legislation). This is especially relevant around harvest time when a prior consultation and delay of a few days might make the job easier for both sides. Intrusive survey works, such as the digging of trail pits and boreholes, have a significantly greater impact on the occupier of the land than non-intrusive works. We therefore suggest that if a notice period of less than 28 days is adopted for non-intrusive surveys, the 28 day minimum period should apply for intrusive works where the surface of the land is disturbed. We consider that a notice period of 28 days would be more reasonable than the current provisions. Such survey work is likely to be planned some time in advance and a 28 day notice period should not unduly inconvenience acquirers in most circumstances. We consider that 14 days is the absolute minimum notice period for non-intrusive survey works and that any shorter period would be unreasonable. Compensation must also include an obligation to reimburse landowner's time and any professional fees incurred. Acquiring authorities exercising such powers should be under a duty to inform affected parties of their rights to compensation.
16. Scottish Compulsory Purchase Association	This is an issue referred to in our Introduction above. It has been the experience of many members of SCPA that, in order to identify the options available and to ensure justification of compulsory purchase, a number of acquiring authorities in Scotland now undertake extensive and significant initial "survey and investigation" works in connection with a public work. These investigations go beyond the survey process and in many cases will involve a quite extensive and invasive inspection of the relevant lands to determine, amongst other things, the subsoil conditions, any contaminative/hazardous materials that may be present, the topography of the land and such process may involve damage to the land. In addition, extensive and detailed questionnaires tend to be utilised in connection with these investigation works which require to be completed by the landowner often in conjunction with his/her agent. Whilst it is accepted that

	physical entry to the relevant lands will be necessary, it is suggested that a minimum of seven clear days' notice is required to be given. In principle, the SCPA supports the actions of an acquiring authority to undertake these investigations but, equally, the extent of these investigations does mean that landowners may incur quite considerable time, cost and expense and thus all reasonable costs and expenses require to be recovered from the acquiring authority at the time of being incurred whether or not any of the surveyed land is later acquired. The power to enter land by a potential acquiring authority in such circumstances requires carrying (financial) responsibilities.
19. Odell Milne	So far as I am aware they work in practice although a simpler process not unlike the Section 140 process under the Roads (Scotland) Act 1984 might be worth considering. It should be clear that any investigations which result in loss or damage should be compensated. In some cases landowners are left with damage to land and find it difficult to claim for that loss or damage. There should be provision that compensation for damage is paid, or reinstatement carried out by the acquiring authority to the satisfaction of the landowner, whether or not land is acquired at a later date. I consider that such provisions should be subject to a time limit for payment or carrying out reinstatement.
20. SSE plc	We have had no particular experience of using these rights here, as some equivalent rights do exist, particularly under the Electricity Act 1989 which allows for power to survey upon notice. We would agree however that a provision to allow powers for an acquiring authority to survey land in advance of making an Order would be practical as it allows for accurate information to be obtained to allow for refinement of engineering designs and a more targeted delivery of land acquisition. This ability to take access on to land at an early stage is therefore to the potential benefit of all parties.
21. District Valuer Services	It is unclear as to why there is a maximum of 14 days' notice. A longer period would allow a mutually convenient time to be agreed e.g. if harvest was imminent the survey should take place after the farmer has had the opportunity to get the crop off. Often the required access is taken through agreement due to the inflexibility of the statutory provisions. The powers should be available to all authorities with statutory powers and there should be a minimum notice period – say 7 days
22. Glasgow City Council	I don't have knowledge of how this works in practice so I can't comment on that. Is it competent for an acquiring authority to permit the 3rd party in an Agency CPO to have the benefit of this power?
23. Central	The use of powers to survey land has grown in recent years with the

Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	increased requirement for topographical, sub-soil, contamination, environmental, archaeological and other surveys in route selection generally – and now also with the adoption of design and build procedures. Owners and occupiers may be expected to provide extensive information to assist this process. We are concerned by members' reports of acquiring authorities (particularly Transport Scotland) citing their statutory powers to carry out such surveys – which can be disruptive - but then fail to point out rights to compensation. We accept that it is necessary for acquiring authorities to have powers of prior entry for survey purposes but it is also disruptive and expensive for those affected. However, we do not agree that a warrant for such access should be given on "emergency" grounds. If access is urgently needed for survey purposes and that access is refused, a warrant can be sought on grounds of refusal. We do not consider it proportionate to allow a warrant to be sought on any other grounds for survey purposes. All powers of entry should have a corresponding obligation to keep any damage to a minimum and to make good all damage It should be a condition of any such access that any loss or damage should be paid for by the acquiring authority and no landowner or occupier should be left worse off following exercise of such rights. An authority can go onto land with not less than 3 and not more than 14 days' notice. The issue here is the practice of statutory authorities in respect of this right. Although such works may have been planned for some time, notice seems often to be given to the landowner or tenant at the last minute (often citing the minimum notice provisions set out in the legislation). This is especially relevant around harvest time or silaging when a prior consultation and delay of a few days might make the job easier for both sides. Intrusive survey works, such as the digging of trial pits and boreholes, have a significantly greater impact on the occupier of the land than non-intrusive works. We therefore suggest that if a notice period of less than 28 days is adopted for non-intrusive surveys, a 28 day minimum period should apply for intrusive works where the surface of the land is disturbed. We consider that a notice period of 28 days would be more reasonable than the current provisions. Such survey work is likely to be planned some time in advance and a 28 day notice period should not unduly inconvenience acquirers in most circumstances. We consider that 14 days is the absolute minimum notice period for non-intrusive survey works and that any shorter period would be

	unreasonable. It is stressed that this does not mean that surveys cannot be undertaken on shorter notice, simply that that has to be agreed with the person affected. Compensation must also include an obligation to reimburse the time of the affected person and any professional fees incurred. Acquiring authorities exercising such powers should be under a duty to inform affected parties of their rights to compensation. This compensation should be statutory under the general provisions of the compulsory purchase legislation.
25. East Ayrshire Council	East Ayrshire Council has no practical experience in this matter and cannot comment on whether the Act operates satisfactorily in practice.
28. National Grid plc	The powers contained in section 83 of the 1845 Act allow for surveying, the taking of levels of land, probing or boring to ascertain the nature of the soil and setting out the line of the works. It should be made clear that this would include carrying out environmental surveys and placing and leaving monitoring equipment on the land. Where the land being surveyed contained existing apparatus of statutory undertakers there should be some conditions around the carrying out of any intrusive surveys. This power should be without prejudice to the existing and specific powers of entry granted to statutory undertakers under other enactments. The new statute should not seek to amend these specific powers.
27. South Lanarkshire Council	The Council suggests that the power to survey land should be amended to allow the acquiring authority to seek warrant to authorise entry onto the land in question to survey and/or carry out boring in the event that:- • entry to the land has been refused or refusal is expected or • the land is unoccupied or the occupier is temporarily absent.
30. Isobel Gordon	We understand why all acquiring authorities would prefer to have powers of entry for survey purposes, but that provision itself is a major infringement on landowner rights. It may be the case that that would be more acceptable once a formal need for the scheme had been confirmed but random search areas without the landowner's permission having been obtained is another potential example of 'stolen by statute'. For Acquiring authorities, including those with best intentions they should be required to make good that all loss or

	damage or failing this it should be paid for by the acquiring authority at the time and no landowner or occupier should be left worse off following exercise of such rights. In our experience acquiring authorities frequently fail to point out the right to compensation or the ability to engage professional advice to assist in such claims. We consider there should be an obligation on acquiring authorities to point this out. We consider that a notice period of 28 days would be more reasonable than the current short notice provisions. Survey work is planned some time in advance and a longer notice period should not unduly inconvenience acquirers in most circumstances. Intrusive survey works, such as the digging of trail pits and boreholes, have a significantly greater impact on the occupier of the land than non-intrusive works. There is a growing tendency of acquiring authorities to carry out such work as a result of many schemes being 'design & build." We therefore suggest that a longer notice period should apply for intrusive works where the surface of the land is disturbed. Compensation must also include a clear obligation to reimburse landowner's time and any professional fees incurred. In our experience some acquiring authorities claim the statutory right of access but fail to point out the right to compensation in so doing. There should be some mechanism to encourage swift payment otherwise the survey work can be done but the compensation not paid for years, or decades.
31. Association of Chief Estates Surveyors Scottish Branch	An explicit statement to that effect in any new style CPO or statutory notice would assist a request to enter the land for survey.
32. Scottish Borders Council	No comment. [See also general comments after question 177] The issue of temporary possession is mentioned at proposal 5. In some CPO cases being able to obtain access to survey the land at an early point in the process would be helpful. The information from the survey may demonstrate that the project proposed in terms of the CPO is unviable. More generally being able to carry out surveys in advance can mean that when the CPO process is completed works can promptly commence. It would be helpful if the legislation made provision for the acquiring authority to be able compel parties to allow them access for this purpose, in the event of failure to agree. I would suggest that such

	provision should take effect once the acquiring authority first make and advertise the CPO. It would be reasonable for compensation to be payable to the affected parties for compelling access, regardless of whether the CPO is confirmed & utilised.
37. J Mitchell	[From general comments] **Temporary rights** Promises made by Transport Scotland particularly in relation to our private drainage scheme have been rejected by the consortium building the road and Transport Scotland appear to be attempting to abrogate their responsibilities by insisting that this is a matter for discussion with the contractors. We have been seeking drawings of levels because of concerns regarding the increased risk of flooding on our property since 2007, but these have still not been forthcoming. As a consequence of the tender, extensive ground investigation works were required involving a series of pits and boreholes across our property from 2006, culminating in an extensive archaeological survey in 2014. We have had considerable difficulty in obtaining compensation for these works, let alone obtaining payment. We acknowledge that acquiring authorities should have a general power to take temporary possession but any new legislation must protect landowners' interest and provide for proper compensation at the time such entry is taken. We believe there should be a clear duty on acquiring authorities to take into account those affected by CPO schemes, both in the design and promotion phases as well as the implementation. The acquiring authority should not be able to abrogate its responsibility to those affected by the scheme to profit making third parties at any time.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Generally it ought to be recognised that surveys have become much more involved and complex over recent years, with environmental tests and design and build requirements and survey powers are used regularly. We accept that acquiring authorities will require prior access for survey work, but this should be on a proportionate basis with due notice. Any power of entry should require damage to be kept to a minimum and no landowner should be in a worse position than prior to implementation of the survey powers. It may also be necessary to consider how intrusive the powers required are, for example digging of boreholes etc. should probably require more notice than less

	intrusive survey work. We feel that the time and any professional fees which a landowner incurs should be reimbursed. It may also be that a duty could be placed on the acquiring authority to advise affected parties of their rights, particularly in terms of compensation.
40. Law Society of Scotland	The extent to which the powers of survey in section 83 are used is unclear. Many CPOs are promoted for roads purposes and there is a separate power of entry under section 140 of the Roads (Scotland) Act 1984 to enter land to undertake survey and boring activities for boring purposes. It is also noted that private bills authorising railways in Scotland have tended to include bespoke survey powers rather than relying on section 83 (for example, section 28 of the Airdrie-Bathgate Railway and Linked Improvements Act 2007. The rights of access granted in terms of private bills have tended to be have been more extensive than under section 783, perhaps indicating that the powers in section 83 are not adequate. Such extended powers have included, for example, the right to place and leave apparatus on land, as well as the right to undertake archaeological investigations. We would suggest that consideration is given to giving such wider powers of entry for all CPO schemes. It would be helpful to have specific powers of entry available in advance of the drafting of the CPO to identify the extent of the land to be acquired, subject to the usual safeguards of prior notice and compensation for damage, if any.
43. Faculty of Advocates	The Faculty of Advocates is not aware of any problems with how the provision has been applied in practice.
44. Scottish Property Federation	We have no views from members to the contrary. We support the case for costs associated with surveys to be reclaimed by landowners and therefore we support the retention of this procedure within the new Statute.
Further responses made informally or at engagement events	It was made clear at several engagement events that the issue of access by AAs is a source of considerable grievance. A range of stakeholders complained about:- • AAs outsourcing work to contractors and then refusing to speak to affected landowners; • the length of time taken to fill in questionnaires; • the costs of having to employ agents; • the length of time taken to obtain compensation; • the disruption to their lives as a result of inadequate forward-

	planning by AAs.
Analysis	
Explanation of question	Section 83 of the 1845 Act provides for entry for surveying, taking levels, probing or boring to ascertain the nature of the soil and for setting out the line of the works. No less than three and no more than 14 days' notice is to be given to owners or occupiers. This is subject to making compensation for damage. This right is given in respect of such lands as are required to be purchased or permanently used for the purposes, as defined in the 1845 Act. This question was designed to ascertain firstly whether section 83 works, and if as was suspected, it does not work, how it should be amended.
Summary of responses and analysis	Of the 21 responses only four thought that section 83 operated satisfactorily (OM, MacRoberts, FoA and SPF). SSE, GCC and EAC declared that they had no practical experience, but the balance of 14 all agreed that section 83 did not work. WLC thought that there should be a standard form of notice for entry, giving information on the proposal, and offering the landowner a tight timeframe for challenge. RC and SOLAR thought the provisions of section 83 were not routinely used, and that parties were more likely to enter negotiation. LSS also stated that the extent to which section 83 was used was unclear and that parties looked to private Acts and the Roads (Scotland) Act 1984. SCPA explained that, in order to identify options available and to ensure justification of CP, a number of AAs now undertake extensive and significant initial survey and investigation works. They advised that these investigations go beyond the survey process and in many cases will involve a quite extensive and invasive inspection of the lands to determine subsoil conditions, any contaminative/hazardous materials, and topography. SCPA pointed out that such processes may involve damage to the land. Extensive and detailed questionnaires tended to be used in connection with the investigative works and these required to be completed by the owner, often in conjunction with an agent, meaning that landowners may incur considerable time, cost and expense. SCPA argued that, in such circumstances, the power to enter land should require to carry financial responsibilities. DVS felt that the 14 day period should be longer to allow mutually convenient entry e.g. after harvesting a crop. They also felt that a

	minimum period of 7 days was appropriate. CAAV stated that the use of powers had grown in recent years with increased requirement for topographical, subsoil, contamination, environmental, archaeological and other surveys in route selection, and that owners and occupiers were expected to provide extensive information. They noted that their members had reported AAs (particularly TS) citing their statutory powers but failing to mention rights to compensation. CAAV suggested that all powers of entry should have a corresponding obligation to keep damage to a minimum, landowners or occupiers should not be left worse off, and that compensation should be statutory. They also referred to the three day and 14 day time limits and said that although works have been planned for some time, notice is often only given at the last minute. They suggested a minimum period of 28 days for intrusive surveys and 14 days for non-intrusive surveys, unless all parties agree shorter timescales. S&P agreed that powers to survey land have become much more prominent because of the increased requirement for environmental surveys in route selection, and also because of the use of design and build contracts. They pointed to their experience of AAs (particularly TS) citing statutory powers to carry out work but failing to point out rights to compensation. S&P agreed with CAAV's views that those gaining entry should have a corresponding obligation to keep damage to a minimum and leave landowners or occupiers no worse off. They also agreed with CAAV on periods of notice. SLE and IG made points similar to SCPA, CAAV and S&P. JM expressed concern that TS had not dealt with aspects of entry appropriately. He took the view that AAs should not be able to abrogate responsibility to profit-making third parties. He cited his experience where, as a consequence of the construction contract tendering exercise, extensive ground investigation works were required, involving a series of pits and boreholes from 2006 and culminating in an extensive archaeological survey in 2014. He stated that he has had considerable difficulty in obtaining compensation. He acknowledged that there should be a power to take temporary possession but new legislation must protect landowners' interests and provide for proper compensation at the time entry is taken. He pointed out that he had been seeking detailed drawings since 2007 but these had still not been forthcoming. SthLC suggested that the power to survey land should be amended to allow the AA to seek warrant to authorise entry in the event that entry is refused or a refusal is expected, or where the land is unoccupied.

	Although OM thought that section 83 worked satisfactorily, she suggested that a process similar to section 140 of the Roads (Scotland) Act 1984 might be worth considering. She stated that it should be made clear that loss or damage should be compensated. NG wanted to extend section 83 to allow for environmental surveys and placing and leaving monitoring equipment on the land, and were keen to ensure that new legislation would not impact on their current powers. FoA and SPF were not aware of any problems.

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

(Paragraph 5.24)

Respondent	
1. Professor Jeremy Rowan Robinson	So far as I am aware, the current list of statutory objectors is satisfactory.
2. Antony CO Jack	At q**uestion 12**, the issue of Statutory Objectors is raised, which troubles me. The Discussion Paper at Paragraph 5.23, in terms of the notices to those affected, states: "These persons who are directly affected by the proposed CPO are known as "statutory objectors". Where is Rule 3(1) of the 1998 Rules. I am confused by what is written in the Paper. I have not found Rule 3(1), and the interpretation at Rule 3, for "Statutory Objector" is: "statutory objector" means an owner, lessee, or occupier of the land or any part thereof, who, being entitled to be served with notice of the making of the order, has duly objected to the making thereof in accordance with the provisions of the First Schedule to the Act and whose objection has not been withdrawn, or whose objection has been disregarded under- (a) paragraph 4(4) of that Schedule; or (b) section 200(1) of the Town and Country Planning (Scotland) Act 1997 (**6**); My understanding of the Rules is that a statutory objector is an owner [lessee or occupier] whom is entitled to have notice served on them *whom has an extant Objection*. I am astonished that the Discussion Paper has misrepresented the concept, and very much hope that this will not become enshrined in the law of Scotland. In terms of **question 12**, and the amendment of Paragraph 3(b) of the first

	Schedule of the 1947 Act [by 109(2) of the Title Conditions (Scotland) Act 2003]. I find burdens difficult to understand, but the amendment appears to require notice given only to those whom have a personal real burden, or those whose land is benefited. It seems to me that there are occasions where the owners of neighbouring land that gives benefit [to the land that is benefited] may also have a real interest in the CP, such as in the case of land that is of unknown ownership but in is in effect community land in nature. Further it is my view that those with interests, such as those with burdens, should be listed in an appropriate column in the Order's Schedule of Land/s to be Purchased
7. West Lothian Council	Heritable creditors should be included in the list of statutory objectors. The proposed CPO could adversely affect the value of the land that is secured to them.
10. Renfrewshire Council	The list seems sensible, although we would highlight the position of security holders, where we think their position could bear some clarification. It seems to be the case that they have a notifiable interest for the purposes of a Notice to Treat but not necessarily at the inception of the CPO itself. It has always been our practice at Renfrewshire Council to notify security holders at the inception of the CPO and we would consider it preferable if this was part of the statutory process and the security holders were added to the list of statutory objectors to be notified of the making of the Order at its inception. The cost of such newspaper notices can be considerable and perhaps other methods of advertisement should be considered, for example site notices and an online Council portal. However, in our view public notification by newspaper should continue in the meantime until some better form of universal notification is identified.
12. Society of Local Authority Lawyers and Administrators in Scotland	The list seems sensible, although we would highlight the position of Security holders, where we think their position could bear some clarification. It seems to be the case that they have a notifiable interest for the purposes of a Notice to Treat but not necessarily at the inception of the CPO itself, although it is understood that many CPO promoters will intimate the Order on them anyway as a failsafe. The need for 2 initial notices is also questioned, as is the necessity for these notices to be advertised in a local newspaper. The cost of such notices can be considerable. We understand that provision has developed over recent years for the intimation of public notices via an online portal. Whilst we appreciate that the issue of intimation of statutory notice by these methods may be beyond the scope of this discussion paper, we feel the use of online notification is worthy of

	investigation, especially in smaller project CPOs.
13. Strutt & Parker LLP	There is frequently difficulty in knowing what constitutes a 'local newspaper', with (for example) certain notifications regarding planning appearing only in certain papers with limited circulation. Notification of statutory objectors is a moot point in that quite often agricultural tenants are not given formal statutory notice (examples from AWPR can be provided).
16. Scottish Compulsory Purchase Association	The current list of statutory objectors is satisfactory but careful consideration requires to be given as to how statutory objectors are informed of the compulsory purchase process bearing in mind new technologies and means of communication.
19. Odell Milne	See below with regard to landowners. In my view, the key element of "unfairness" with regard to the parties considered to be "statutory objectors" is the position of landowners from whom no land is acquired. In some cases such parties may be more seriously affected than landowners from whom land is acquired, particularly where the frontager is a residential property. At the risk of increasing the number of statutory objectors, might consideration be given to the possibility of including, in the list of statutory objectors, house owners for residential properties which are within a certain distance from the land to be acquired? [See also answer to question 2] … Therefore, careful consideration needs to be given to the entitlement to notification and to the parties who are entitled to be treated as "statutory objectors". However, this must be balanced with the reasonableness of requiring the acquiring authority to identify and notify all such parties.
20. SSE plc	We would suggest that statutory undertakers are added to the current list, as often they have infrastructure within land which is held by way of statutory consent, and not necessarily by servitude or other registerable deed.
21. District Valuer Services	The current list of statutory objectors is satisfactory but careful consideration requires to be given as to how statutory objectors are informed of the compulsory purchase process bearing in mind new technologies and means of communication. Any changes should not replace, but be in addition to hard copies.
22. Glasgow City Council	I think that the heritable creditor ought to be added.
23. Central	It appears that acquirers may omit giving agricultural tenants their

Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	formal statutory notice (there are examples from the AWPR). As an operational matter, there is frequently difficulty in knowing what constitutes a 'local newspaper' for this purpose, with (for example) certain notifications regarding planning appearing only in certain papers with limited circulation.
25. East Ayrshire Council	The current list seems satisfactory.
26. National Grid plc	The current list is satisfactory.
27. South Lanarkshire Council	The Council does not believe that changes to the current list of statutory objectors are required.
35. Shepherd and Wedderburn LLP	We wonder whether heritable creditors should also be added to the list.
38. MacRoberts LLP	Yes, the list includes all those directly affected by a CPO.
39. Scottish Land and Estates	It appears satisfactory, although anecdotally we understand that agricultural tenants are sometimes not given formal statutory notice.
40. Law Society of Scotland	It is not clear what status an objection has if the original objector dies, becomes incapax, or is in administration. Can the objection continue to be maintained in such circumstances?
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates does not suggest any change to the list of statutory objectors.
47. The Royal Bank of Scotland plc	[from paragraph 2 of general response] Firstly we believe that it would be beneficial for all parties if there was a statutory obligation for heritable creditors to be given notice of intended compulsory purchases at the same time that the relevant property owner is given notice. As you will appreciate we have a financial interest in the property that we will want to protect but more importantly we will have a customer who will be facing a major issue in relation to their property. Having knowledge of the issue at an early juncture would assist us in helping that customer to the extent we can. In particular if the customer wishes to make a variation to their mortgage such as by obtaining a further advance or switching their product we have a regulatory obligation where we provide advice to ensure that the variation is suitable to the customer. A potential CPO is an important factor to be taken in account by us when advising the customer whether that variation is suitable for them and knowledge of the CPO is therefore essential to us ensuring good customer outcomes. A uniform process of notification would

	also assist us to streamline our processes further to ensure a consistent approach to customers facing a CPO.
Further responses made informally or at engagement events	Feedback at certain engagement events confirmed the desire to notify heritable creditors although not necessarily to have them as statutory objectors.
Analysis	
Explanation of question	This question has three parts. Firstly, it asked whether the current list of statutory objectors is satisfactory. If not, it asked consultees to suggest, and justify, any changes which should be made.
Summary of responses and analysis	Of the 22 responses to this question, the majority were broadly happy with the current list. However, WLC, RC, SOLAR, GCC, S&W and RBS all suggested that heritable creditors should be added to the list. RBS made a good argument for receiving notification, on the basis that they needed to be in a position of knowing all factors affecting the land before they could properly advise the borrower. OM considered that parties from whom no land is taken may be even more seriously affected than these from whom land is acquired, and suggested including on the list residential proprietors within a certain distance of the land being acquired. SSE considered that statutory undertakers should be added to the list as they often have infrastructure on land, held by way of statutory consent rather than by servitude or other deed.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Given the seriousness of the effect of a CPO on owners and occupiers, I would be reluctant to see the right to a hearing eroded - but there should be no right to insist on a public inquiry.
2. Antony CO Jack	I find the way **question 13** is put, is worrying, most especially the reference to one objector holding up progress. If there is only one plot of land being acquired, then there may be only one statutory objector [clearly land in multiple ownership may give rise to more than one objection]. Is a single objector to be prejudiced against, or is he/she to be the lucky 100%? The way the commission has put the question, that a "statutory objector can insist upon a hearing or Inquiry", is curious and alien to my understanding of the legislation. It

	is my understanding that it is not the statutory objector that insists on an Inquiry, that seems to me to the role of the Minister enshrined in UK law at paragraph 4(2) of the First Schedule of the 1947 Act, for some 65 years, prior to the signing of the ECHR. Effectively, there seems to me no difference between one objector and two, three or indeed any other number. The removal of an Inquiry stage, if that is necessary, would be like making authorities self-confirming – it would effectively mean that subjects would need to go straight to court. If the issue of CP is in breach of fundamental human rights, on the justification it is the in the public interest, and then a subject rights are to be further eroded on the ground of that subject being a minority party in the overall CPO Land : I find this appalling. Furthermore, historically, some CPs have been done in stages, would acquiring authorities under such a percentage scheme be plotting their plots strategically to disenfranchise the small land owner, and indeed adjust the size of the plots for percentage purposes? *It seems to me that this issue hinges on the concept of reasonableness, on both sides.* In these terms if there is firm justification for a CPO; proper early engagement; openness; and good faith efforts to negotiate: then it could be argued that anyone left at an Inquiry is acting unreasonably. This is a two sided issue, on the basis of my experience.
6. Craig Connal QC	No. [From General comments, page 2] This is an issue which impacts significantly on the practical manner in which CPOs proceed and has the capacity to make a real impact on the efficiency of the process and the timing within which decisions are reached. I am on record (in response to previous Scottish Government consultations) in pointing out that compensation is often a critical component, whatever the legal framework, in the decision-making process involving those unhappy with CPOs. While a landowner may or may not oppose the objectives of the CPO, he may also be in a position to take a view - or take advice - on his prospects of successfully persuading any decision-maker that his objection will be sustained. In that situation, a difficulty arises if he is unable to ascertain what compensation he is likely to receive. In my experience, it is common for parties, who may - realistically - believe that their prospects of opposing the fundamentals of the CPO project are not strong, to nevertheless maintain objections to that project in order to facilitate discussions with the acquiring authority over compensation. In many instances the acquiring authority, whatever the Scottish Office guidance, is unwilling, or professes itself unable, to enter such discussions in advance. The net result is

	unnecessary objections on grounds which are not truly intended to lead to a decision and thus delay to the process (and expense to all concerned). While the parallel is not exact, I can illustrate that by reference to the Edinburgh Tram Project. I was instructed by a number of land-owners, opposed to the Project but also, realistically, taking the view that their prospects of persuading the Scottish Parliament not to approve the project at all were poor. They were unable to persuade the tram promoters that they could or should enter into discussions on compensation at an early stage. The result was that, under the then system, Scottish Parliament committees were forced to deal with objections on the merits which, on one view, were unnecessary (indeed were subsequently dealt with following negotiations over compensation and removed before decisions had to be taken on them). Somewhere in the process it would potentially aid the speed and efficiency immeasurably if a mechanism could be found for requiring compensation to be discussed and perhaps even for some swift form of arbitration on the principles of such compensation, if contentious, so that these matters could be swept out of way early (or at a minimum key decisions be taken on them).
7. West Lothian Council	No.
10. Renfrewshire Council	It is conceded that often there is blurred distinction between those objections which are purely within the remit of the LTS and those which go to the heart of the justification for the CPO itself, the latter often being potentially being used to mask issues of valuation or compensation. Perhaps more discretion could be made available to the confirming authority and the Scottish Government to allow them to take a more robust view on the true nature of the objections.
12. Society of Local Authority Lawyers and Administrators in Scotland	The current procedure allows statutory objectors to lodge any objection, which are often more to do with valuation or have little merit, but which will trigger a Hearing or PLI. They can then withdraw the objections shortly before the Inquiry or Hearing but in the interim the CPO can have been delayed for up to a year ,which can have significant impact upon the costs of the project to the Promoter and who will also have incurred significant costs for preparing for the PLI or Hearing . Once a PLI or Hearing has been set, and then a preliminary hearing should be held at earliest date to determine if objections are valuation issues, in which case they should be deferred until after the

	CPO has been confirmed and if other objections have real merit. It is conceded that often there is blurred distinction between those objections which are purely within the remit of the LTS and those which go to the heart of the justification for the CPO itself, the latter often being potentially being used to mask issues of valuation or compensation. Perhaps more discretion could be made available to the confirming authority to take a view on these blurred objections which might focus the minds of objectors and acquiring authorities. There may also be merit in assessing whether a weighting could be given to a prospective objectors actual level of occupation or percentage ownership of the overall CPO land in assessing the extent to which those objections are given full consideration.
13. Strutt & Parker LLP	We accept that it is undesirable for one minor landowner to hold up a massive infrastructure project with its attendant cost implications and the uncertainty caused to affected parties (one such example being Mr Walton in respect of the AWPR). It is however difficult to see how restricting objections might operate so as not to infringe rights of individuals. We consider that there is a difficult balance to strike in this respect but that this is one of public policy.
14. John Watchman	**Procedure for obtaining a compulsory purchase order** 6.1 At least as a matter of policy, a statutory objector should have the right to choose the process for determining objections to a compulsory purchase. The suggestion that the Scottish Ministers acting through their reporters should be able to chooses that process – especially in cases where the Scottish Ministers are promoting compulsory purchase – appears to be unsustainable.
16. Scottish Compulsory Purchase Association	It is considered a fundamental democratic right and principle that any statutory objector has the option of submitting a written representation or being presented at either a Hearing or Inquiry as a consequence of objections raised to a draft Compulsory Purchase Order. Equally, it is considered that it would be similarly democratic that any non-statutory objector also has these options. However, a majority view is that it should only be statutory objectors who should retain the right to progress with a legal challenge to the Outer House of the Court of Session with appeals to the Inner House and thereafter to the Supreme Court; the legal challenge is limited however to a point of law and/or an alleged flaw in the CPO/objection/confirmation process. There is an alternative view that all objectors should retain the right to lodge a legal challenge on the basis that having been given a right to object, that party is entitled to have that objection dealt with fairly and in accordance with the

	current procedures.
19. Odell Milne	In my view, in the first instance, residential property owners of the type mentioned in response to question 12 above who are non-statutory objectors should be entitled to insist upon a hearing or inquiry and should also be entitled to progress a legal challenge on a point of law or flaw in process. It must be acknowledged, however, that for most objectors, the cost of such a challenge would prevent most people from proceeding. There is a genuine issue with the imbalance between the promoter and an ordinary member of the public. Of course, this is a much wider issue in relation to litigation generally but perhaps where a member of the public is facing so great an interference with his ECHR rights, consideration could be given to the availability of public funding for objections. Such objections could be approved by a funding authority, perhaps similar to the way legal aid is awarded. This must be balanced against the needs of the promoter whose strict budget cannot be expected to meet the cost of objections. Perhaps the justification for not funding the costs of objections is that a scheme is for public benefit. However, the issue becomes less clear cut if the scheme is being delivered by a private developer for profit. I wonder whether, given the serious interference with ECHR rights which compulsory acquisition reflects, there should not be some provision for legal advice to be met by the promoter up to a certain limit with provision that, if an independent tribunal determines, additional advice should be provided at public inquiry.
20. SSE plc	We would suggest that objections should be relevant and pertinent to the Order. Often an objector will maintain their objection as a means to assert a negotiating position on compensation to force an acquiring authority to negotiate in the hope that they would prefer to do that rather than go to hearing or inquiry.
21. District Valuer Services	It is considered a fundamental democratic right and principle that any statutory objector has the option of submitting a written representation or being presented at either a Hearing or Inquiry as a consequence of objections raised to a draft Compulsory Purchase Order. Equally, it is considered that it would be similarly democratic that any non-statutory objector also has these options. However, a majority view is that it should only be statutory objectors who should retain the right to progress with a legal challenge to the Outer House of the Court of Session with appeals to the Inner House and thereafter to the Supreme Court; the legal challenge is limited however to a point of law and/or an alleged flaw in the CPO/objection/confirmation process. There is an alternative view that all objectors should retain the right to lodge a legal challenge on the basis that having been given a right to object, that party is entitled to

	have that objection dealt with fairly and in accordance with the current procedures.
22. Glasgow City Council	This is a difficult question because it is the balance of the delivery of the public objective against the individual's right to be heard. On the one hand it would make sense to save public money but on the other there is a need to be transparent and fair and to be publicly perceived to be so. Consequently I think that the solution might lie in good communications (with information and guidance and say a nominated liaison civil servant for the objector in question) between Ministers and the statutory objector(s) and the subsequent management by DPEA of the process so that a hearing is the forum where there are few objectors or the objectors interests are proportionally small. I think also that at times there could be greater rigour around the analysis of the statutory objectors' position to ensure that the objection is legitimate e.g. at times I have thought that the issue is really one of compensation and that the additional objections are spurious but yet the objection has been retained. The concept of a process which enables the earlier addressing of objections in a way which leaves objectors with de minimis interests satisfied that their position is really a claim for compensation is compelling but there is a real possibility that that of itself creates a separate process of appeal etc. and so ultimately the status quo may be the best option.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	While it may appear undesirable for one minor and difficult landowner to hold up a massive infrastructure project with its attendant cost implications and the uncertainty caused to affected parties, we cannot see how restricting the right to have objections heard might operate so as not to infringe the rights of individuals. There should not be restrictions on this.
24. Shona Blance	No, whilst it is possible that a single landowner could unreasonably delay the CPO, to deny them access to an inquiry or hearing I would have thought could be a human rights issue. In addition if the preceding processes operate effectively the situations where this could arise should be limited. If they aren't then the processes used should be subject to examination and improvement.
25. East Ayrshire Council	The current position seems to be fairly reasonable. If there were limits introduced that only a percentage of landowners or landowners of a certain percentage of land being acquired could object, as per the discussion paper, how would this work in practice?
26. National Grid plc	It is appropriate that only statutory objectors can insist upon a hearing or inquiry. However where the objections raised by a statutory objector concern legal issues or matters of compensation

	which should be dealt with by the LTS and the statutory objector should not be able to insist upon a hearing or inquiry. Vexatious statutory objectors should not be able to insist upon a hearing or inquiry although we appreciate that this is subjective and given the implications of a CPO it is likely that a decision maker would err on the side of caution and hold a hearing or inquiry. The proposal, that if a certain percentage of landowners objected or if those objected represented a certain percentage of the land affected the requirement to have an inquiry would be triggered, is not appropriate as it does not take into account the substance of the objections.
27. South Lanarkshire Council	The Council acknowledges the importance of balancing the interests of the owners of the land affected by a CPO and the acquiring authorities. However it may be that the grounds for objecting should be tightened up to minimise the risk of a frivolous or vexatious objection resulting in an inquiry or hearing being held with the resultant delay to a project. Under the present rules the Scottish Ministers act as intermediary between objectors and acquiring authorities as the parties seek to agree a compromise to objections. The Council would suggest that the Scottish Ministers should have the right to declare objections frivolous or vexatious subject to an appropriate review mechanism being put in place.
31. Association of Chief Estates Surveyors Scottish Branch	Landowners have used objections as a negotiating position to achieve side agreements from the acquiring authority. A balance is needed between allowing affected parties to object and to reach the confirmation stage without delay.
32. Scottish Borders Council	Point raised is whether a single objector of only a small part of the land covered by the CPO should be able to delay the project by insisting upon a hearing. I have some disquiet with the fettering of one's rights to have a matter listened to at an inquiry hearing based on just the percentage of land they hold in terms of the overall project. It would be perfectly possible for 95% of the land to be relating to someone with an extensive farm holding or just an extensive land holding where that land a small amount in relation to the holding, is of little intrinsic value and does not including any buildings. Whereas in the same scenario it could be the other 5% someone holds is their home and therefore is therefore arguably of added significance and importance to them in terms of being compulsorily forced to sell it. Provided a safeguard was put in place for a right to a hearing if it is the compulsory acquisition of an objector's principal residence, then I can see the benefit in respect of all other land and buildings of having

	a restriction in terms of an individual objector having a right to a hearing. If a percentage is to be used then perhaps 10% of the total land being acquired by the CPO would be an appropriate threshold.
35. Shepherd and Wedderburn LLP	No. In the event that only a single Landowner or small number of owners object and insist on an Inquiry, the Inquiry process should be relatively speedy. We believe it is important that statutory objectors are given the opportunity to have their say and question the acquiring authority in a public forum on matters relevant to the acquisition (excluding compensation).
36. Scottish Power Ltd	[From general comments on Negotiations] In relation to paragraph 4.16, we question the statement that the CPO process is a sequential process. It is erroneous to suggest that compulsory acquisition cannot [be] commenced until voluntary discussions have also commenced (and been exhausted). In our experience, the steps and time taken to confirm an Order are lengthy and often protracted. We therefore support efforts to expedite the process by limiting the time available to an acquiring body to negotiate removal of an objection and thereby avoid the need to convene a hearing or inquiry. We have experienced situations where landowners have not engaged in negotiations unless a CPO process has commenced with a view to inflating commercial land values payable by a third party. We would welcome improved clarity and recognition on the need for, and ability to, commence compulsory processes at an early stage. This would be beneficial by allowing increased flexibility for an acquiring authority in relation to what can be acquired. We support the decision maker having discretion, similar to exists under the planning process, as to the method for resolving an objection to a CPO i.e. hearing, inquiry, or even written submissions. This discretion should redress opportunities for objectors to deliberately delay or frustrate project implementation where delivery is time critical. This could also be used for the purposes of disregarding objections which are considered [to] be frivolous. However it is important that a balance is struck by not undermining existing statutory provisions.
38. MacRoberts LLP	No. We agree that the current position can result in a single statutory objector delaying a project. It may be determined that the objector's case is not well-founded or sufficiently strong to outweigh the public benefit of the underlying project. However, the suggestion that a specified percentage of landowners or affected land should be required before an inquiry/hearing can be insisted upon pre-supposes that the single objector does not have as valid or as strong an objection. Further, the loss of a small area of land to a single objector (e.g. garden ground) may potentially be of more significance

	to that objector than loss of a larger area to a major landowner. Compulsory purchase remains a fundamental intrusion by the state into a private property rights. In our view it is necessary that all or any statutory objector(s) are given the opportunity to state their case at an inquiry or hearing session. This is both a necessary safeguard and important to the public perception of the compulsory acquisition process. If it is proposed to restrict the circumstances it will be necessary to define either (i) circumstances where the restriction applies or (ii) circumstances where the restriction does not apply. We consider that certain objectors (e.g. owners or occupiers of residential property) should be excluded from the restriction. Generally, it would be very difficult to define the circumstances or classes in which a restriction should or should not apply and would necessarily involve some arbitrary thresholds.
39. Scottish Land and Estates	It is important that in considering any restriction, the fundamental individual rights of an individual are considered, but we do recognise that with major infrastructure projects delays and uncertainty on the back of objections from one individual would on the face of it seem contrary to public interest and policy.
40. Law Society of Scotland	We would recommend that a cautious approach is taken to any restrictions on the right to a hearing or inquiry. In the case of *Bryan v United Kingdom* (1995) 21 EHRR 342, the European Court of Human Rights considered the adequacy of legal review by the High Court in order to secure compliance with Article 6. In finding that there was compliance with Article 6 in the context of an appeal against a planning enforcement notice, the Court found it was necessary to have regard to the whole process. This included matters such as the subject matter of the decision, the manner in which the decision was arrived at, and the uncontested safeguards attending the procedure before the inspector including the quasi-judicial character of the proceedings, the duty incumbent on each inspector to exercise independent judgement, the requirement that inspectors must not be subject to improper influence and the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality. It was not therefore availability of judicial review which by itself gave Article 6 compliance. It was the overall process in the context of the type of decision (including its quasi-judicial nature) coupled with the right to legal challenge. Restricting the right to a hearing reduces the quasi-judicial aspect of proceedings. In a compulsory purchase process - where the subject matter is the compulsory acquisition of property. We consider that such a restriction could increase the risk that the procedure would be found to be non-compliant with Article 6

	of the ECHR (Right to a Fair Hearing). Therefore, the right to be heard at a hearing or inquiry should be maintained. Having said that, members have the experience of CPO procedures which have arguably been unnecessarily protracted through late withdrawal of objections where objectors had not initially understood the CPO and withdrew their objections when this was explained. By that time, the public inquiry has been organised and had to proceed notwithstanding that objections had been withdrawn. This does not seem to be a good use of public resources and provision should perhaps be made for the cancellation of public inquiries in these circumstances.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We do not support the proposition that only landowners of a certain proportion should be allowed to insist upon a hearing or inquiry where they are subject to compulsory purchase of their land/property ownership.
45. Scottish Power Energy Networks Holdings Ltd	[From general comments on Negotiations] In relation to paragraph 4.16, we question the statement that the CPO process is a sequential process. It is erroneous to suggest that compulsory acquisition cannot [be] commenced until voluntary discussions have also commenced (and been exhausted). In our experience, the steps and time taken to confirm an Order are lengthy and often protracted. We therefore support efforts to expedite the process by limiting the time available to an acquiring body to negotiate removal of an objection and thereby avoid the need to convene a hearing or inquiry. We have experienced situations where landowners have not engaged in negotiations unless a CPO process has commenced with a view to inflating commercial land values

	payable by a third party. We would welcome improved clarity and recognition on the need for, and ability to, commence compulsory processes at an early stage. This would be beneficial by allowing increased flexibility for an acquiring authority in relation to what can be acquired. We support the decision maker having discretion, similar to exists under the planning process, as to the method for resolving an objection to a CPO i.e. hearing, inquiry or even written submissions. This discretion should redress opportunities for objectors to deliberately delay or frustrate project implementation where delivery is time critical. This could also be used for the purposes of disregarding objections which are considered [to] be frivolous. However it is important that a balance is struck by not undermining existing statutory provisions.
Further responses made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	There were 25 responses to this question. 19 agreed that there should be no further restriction on the circumstances in which a statutory objector can insist upon a hearing or inquiry. Six felt that there were arguments in favour of restriction in some way. The majority were of the view that any objector should have the right to be heard, as CP is such a serious matter, where the state has a right which has been categorised by the courts as “draconian”. LSS pointed out that any further restriction may not comply with Article 6 of the Convention. There was recognition, however, across a substantial number of stakeholders that projects are being held up purely to assert negotiating position on compensation. While some consultees were not persuaded by the suggestion in the DP of linking the right to object to a minimum level of landholding, some did suggest that there needed to be more rigorous evaluation of objections at an earlier stage to ensure that the objection is legitimate.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, it should serve to concentrate the mind on any negotiations; and negotiations will not necessarily stop just because of the reference to the DPEA.
2. Antony C O Jack	In terms of **questions 14** and **15**, I am confused. An email dated 11 December 2014 from Scottish Government stated: "… City of Edinburgh Council are keen for us to progress the case to DPEA in respect of the outstanding objections as soon as we can, to enable them to start the process of arranging a PLI." It would seem, reading your Paper, that the Scottish Government's comment indicates a prejudicing of the Reporter's decision on how to head the Objector/s cases. In terms of **question 14**, and time limits, I am again confused. In the recent Buchanan Street Quarter, Glasgow, case, it appears from the DPEA website, the CPO was made on 6 August 2014 and was referred to DPEA in just a few days after the end of the Objection period, on 4 September, in just four weeks. Whereas 2014 CPO[1] & [2] first made on 8 September 2014 [second on 9 October] was, I understand, referred yesterday 24 weeks after it was made. In the light of the tampering with the first Order, I have a very uneasy feeling as to why referring the matter to DPEA has taken so long. In saying this, I do not advocate time limits *I advocate transparency*. In relation to CP, there is repeated comment about the need for quick progress – yet in the case of 2014 CPO [1] & [2], the delays from initial authorisation in August 2009 to date are, in my view, entirely in the hands of the Acquiring Authority whom appears to been acting strategically [i.e. very deliberately].
6. Craig Connal QC	No. That would be unnecessarily rigid.
7. West Lothian Council	Agreed. Six months would be appropriate.
10. Renfrewshire Council	Yes. We would suggest a time limit of a maximum of 2 months.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes. We would suggest a time limit of a maximum of 2 months, unless one of a list of identified reasons for not complying is founded on.
14. Strutt & Parker LLP	Whilst we can see that timescales could bring benefits, we would prefer to see them introduced on a non-statutory basis so that inspectors could have the discretion to extend the timescale if circumstances demanded it in a particular case. Inspectors should be under a duty to explain their reasons for extending the timescale at the time when that decision is taken. We note that timescales can be unhelpful in a Town and Country planning context. We have anecdotal evidence that under-resourced

	planning officers, rushed into making decisions, will sometimes refuse an application early in the process rather than spend time dealing with it and risk breaching the deadline. We would be anxious to avoid the risk of anything similar happening in the compulsory purchase appeal context.
16. Scottish Compulsory Purchase Association	The issue of incorporating a specified time limit has been discussed for some time now and it is recognised that there are both advantages and disadvantages thereto. The main disadvantage of not having a specified time period is that in many cases matters are left to drag on for some considerable time – thus leading to the justification that the speed of the CPO process is glacial in nature. Nevertheless, it is recognised that some objections will raise complex challenges to acquiring authorities and that sufficient time needs to be given to the matter. However, an acquiring authority should realise from a fairly early stage in the compulsory purchase process the likely resistance that will be met from landowners – principally from initial meetings and discussions and thus acquiring authorities require to react appropriately thereto. Further, on the basis that there is more than sufficient examples of the extremely slow pace of compulsory purchase then the insertion of specified time periods is, on balance, to be welcomed. Thus, it is considered that a specified time limit should be incorporated within the proposed new statute and within such time limit the Scottish Ministers must refer cases to the DPEA; this should be not greater than six months following the final date for the lodging of objections to the draft CPO.
19. Odell Milne	Yes, this would be helpful. As set out below, this need not prevent ongoing consultation and negotiation. I would suggest an appropriate time limit might be six months from the receipt of the final objection.
20. SSE plc	Specification of time limits within the new statute would give certainty of timing and clarity on process to ensure programme delivery and also minimise periods of uncertainty for all affected parties. We would suggest a period of 3 months for reference of cases by the Ministers to the DPEA.
21. District Valuer Services	The issue of incorporating a specified time limit has been discussed for some time now and it's recognised that there are both advantages and disadvantages thereto. The main disadvantage of not having a specified time period is that in many cases matters are left to drag on for some considerable time – thus leading to the suggestion by some that the speed of the CPO process is unnecessarily slow. Nevertheless, it is recognised that some objections will raise complex challenges to acquiring authorities and that sufficient time needs to be given to the matter. However, an acquiring authority should realise from a fairly early stage in the compulsory purchase process the likely resistance that will be met from landowners – principally

	from initial meetings and discussions and thus acquiring authorities require to react appropriately thereto. Further, on the basis that there are more than sufficient examples of the extremely slow pace of compulsory purchase then the insertion of specified time periods is, on balance, to be welcomed. Thus, it is considered that a specified time limit should be incorporated within the proposed new statute and within such time limit the Scottish Ministers must refer cases to the DPEA; this should be not greater than six months following the final date for the lodging of objections to the draft CPO.
22. Glasgow City Council	I think not. My preference is that CPO guidelines should indicate best practice timescales for issuing responses to objections and for the referral by Ministers to DPEA.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We can see that planned timescales could bring benefits but believe they should be introduced on a non-statutory basis, giving inspectors the discretion to extend the timescale if circumstances demanded it in a particular case. Inspectors should be under a duty to explain their reasons for extending the timescale at the time when that decision is taken. We note that timescales can be unhelpful in a Town and Country planning context, having anecdotal evidence that under-resourced planning officers rushed into making decisions will sometimes refuse an application early in the process rather than spend time dealing with it and risk breaching the deadline. We are anxious to avoid the risk of anything similar happening in the compulsory purchase appeal context.
24. Shona Blance	Not unless it is in circumstances whereby it is clear that the landowner is acting unreasonably.
25. East Ayrshire Council	The introduction of a time limit would provide more certainty and perhaps reduce delay. No view as to the time limit.
26. National Grid plc	Yes however there should be a balance between allowing the acquiring authority to resolve objections and enter in to voluntary agreements and allowing the CPO to proceed as expeditiously as possible to avoid delay to major infrastructure projects. Delay can make projects unaffordable. We would suggest a period of 3 months from the last date for lodging objections.
27. South Lanarkshire Council	The Council would support the inclusion of a specified time limit for referring cases to the DPEA. This would give the CPO process more certainty for all parties and reduce delays associated with the current process. The Council would propose referrals are made within 2 months.
28. Royal Town	RTPI Scotland considers that new CPO legislation, regulations and

Planning Institute	guidance should be closely linked with planning legislation.
31. Association of Chief Estates Surveyors Scottish Branch	Yes. We would suggest a time limit of 2 months.
23. Scottish Borders Council	Yes, there should be a specific time period for the Scottish Ministers to refer the case to the DPEA. If a case has been referred to the DPEA this does not of itself prevent an inquiring or hearing ceasing to be needed to be held in the event that the objectors have removed their objection. In theory negotiations can remain on-going right up until the actual inquiry or hearing date to try and resolve matter. It is acknowledged there could be some cost implications if a hearing was cancelled at the last minute, however having set timescales for reference to the DPEA to ensure that the CPO is determined as quickly as possible in my view outweighs this. I would propose that Scottish Ministers must refer the case to the DPEA within a period of 28 days from whenever Ministers first receive the CPO or the period for objection ends, whichever is the later would be appropriate.
38. MacRoberts LLP	No. We agree that there can sometimes be a considerable delay at this stage. However, the opportunity for the acquiring authority to seek to resolve objections can be useful for all parties and save time within the overall CPO process. In our view that the period after which matters will be referred to the DPEA should be a matter of Scottish Ministers' policy and good case management, having regard to the circumstances of the particular case, rather than be specified in legislation. Scottish Ministers may wish to adopt a policy that cases will ordinarily be referred to the DPEA within a specified period. Once the technical check is complete and objections have been received and forwarded to the acquiring authority the Scottish Ministers may wish to query whether there is a reasonable likelihood that objections will be resolved and require the acquiring authority to justify any delay in forwarding the case to the DPEA. As noted, the acquiring authority will have the opportunity to resolve objections before, and indeed after, this stage and it would be open to the Scottish Ministers to adopt a strict approach. However, a measure of flexibility should be retained. We also query what consequences or process of enforcement would attach to the Scottish Ministers failure to meet a statutory deadline.
39. Scottish Land and Estates	We would be cautious about decisions which are rushed due to an arbitrary deadline, but generally would be supportive of time limits introduced, which could also incorporate some leeway.

40. Law Society of Scotland	Yes, we agree that there should be a time limit. We would suggest that this should be the same as in planning appeals within three months.
42. Scottish Water	Yes, three months.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Yes it is important that some certainty of timescales is established for the affected landowner where Scottish Ministers seek to refer a case to the DPEA. This is after all a matter of personal rights being withdrawn which suggests the need for a stricter timescale than is the case with planning matters that are referred to the DPEA. The discussion paper amply captures this difference under later paragraph 5.30.
Further responses made informally or at engagement events	None.
Analysis	
Explanation of question	This question has two parts. Firstly, it asked whether there should be a time limit for referral of cases by SMs to the DPEA. Secondly, it asked what the time limit should be.
Summary of responses of analysis	There were 26 responses to this question. In relation to the first part, 17 were in favour of a time limit. One (SLE) wanted to be cautious about making decisions and did not express a view for or against a time limit. CC felt a time limit would be unnecessarily rigid. S&P, GCC and CAAV saw the value of time limits but felt they should be non-statutory and come within guidelines. SB was against a time limit. RTPI considered that CPO legislation should be closely linked to planning legislation. MacR felt that the period of referral should be a matter for SMs'

	policy and good case management, having regard to the circumstances of the particular case. They questioned what would happen if SMs failed to comply with a statutory deadline. AJ seemed to suggest that delay is used by AAs in a strategic way. In relation to the second part, four suggested six months (WLC, SCPA, OM and DVS), four suggested two months (RC, SOLAR, ACES and SLC), four suggested three months (SSE, NG, LSS and FoA) while SBC suggested 28 days. Reasons given for supporting time limits were:- • concentrating the minds in relation to negotiation, • matters would not be left to drag on, as sometimes happens under the current regime, • it would not stop ongoing negotiations, • certainty and clarity.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Given the seriousness of the effect of a CPO on owners and occupiers, I would be reluctant to see the right to a hearing eroded - but there should be no right to insist on a public inquiry.
2. Antony CO Jack	*[cont.]* My gut answer to **question 15** about DPEA determining objections is a very loud NO. However, I have [at Paragraph 20 below] suggested that someone independent should confirm a CPO. Confirming a CPO is different to determining Objections, is it? That said I do not know the statistics of how many times a Minister has ignored the advice of a Reporter. Is the Reporter a different [or a sufficiently different] entity to the DPEA for the more rigorous needs of the process?
6. Craig Connal QC	Some form of "court hearing" should be required i.e. decisions on paper should be avoided. The form of the hearing should be capable of being more flexible than at present. Parties should be able to opt the other way i.e. for the matter to be dealt with on paper if they so wish.
7. West Lothian Council	The issues in a planning appeal are not necessarily the same issues that will arise in a CPO appeal. Accordingly, reporters would need to be trained in the issues that arise in a CPO appeal. With appropriate training leaving the DPEA to determine the process

	is appropriate. The DPEA process for dealing with CPO appeals should require the reporter to come to a conclusion as to how the case should be dealt with. The process of evidence ingathering should be based on the current planning appeals processes.
10. Renfrewshire Council	Yes this would be an excellent idea as it would potentially speedup the CPO process.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	We consider that the DPEA should have such discretion subject to a statutory requirement to balance public and private interests.
16. Scottish Compulsory Purchase Association	It is considered that the DPEA should not have discretion over the process for determining objections to a CPO. As is stated in the Discussion Paper, compulsory purchase requires a much more vigorous balancing of the public interest set against private interests and that any objector affected should have the fundamental democratic right to be heard – either in writing or orally- and to be able to cross-examine relevant officials. Whilst it is recognised that such a view may extend the time period of compulsory purchase, it is considered that this is a price worth paying to ensure the protection of fundamental democratic rights. In this case, the tail should not wag the dog. However, it is a moot point as to whether or not the ultimate decision should continue to rest with The Scottish Ministers based upon the Reporter's Report and Recommendations- as in many cases, the acquiring authority will be, in essence, the Scottish Ministers who should not be seen to be prosecutor, jury and judge.
17. Lands Tribunal for Scotland	If the procedures for determining CPO objections are not robust then legal and HR challenge is more likely and, from the perspective of the LTS, there risks a greater sense of grievance by the time an objector has become a claimant for compensation. The problem with "hearings" in the planning setting is that cross examination is not permitted. Take a particular CPO scenario. A development is a commercial development to be carried out by a private developer. The development has the active support of the planning authority. The developer cannot assemble the site by agreement with all the landowners. Therefore the developer secures a typical back to back agreement with an acquiring authority for the latter to use its compulsory powers and then transfer the land to the developer. Objectors might well seek to cross examine the authority/ developers in order to explore issues such as the extent of public

	interest in the project, the likelihood of the development proceeding, available funding etc. In such a case it would seem surprising that there would be no right to cross examine those promoting the development. It is understood that DPEA statistics show very few "inquiry sessions" (i.e. where cross examination is permitted) are allowed in planning cases. It would be fair to say they are not routinely allowed. Such procedural decisions (i.e. whether to hold a "hearing" as opposed to "inquiry session" or even whether to hold any form of hearing at all) are not appealable. If the reporters have discretion not to permit the procedure sought by an objector in a CPO setting, there is a risk of injustice and legal challenge. It should be recalled that one of the reasons why the previous planning system survived challenge in *Alconbury* (citation at n.69 paragraph 3.74 of Discussion Paper) was because parties had the opportunity to cross examine at the public inquiry (Lord Slynn of Hadly paragraph 46). As the SLC points out, compulsory purchase requires a more rigorous exercise than the vast majority of planning cases. This point is also relevant to the determination of CAADs discussed below. We think any discretion of the DPEA as to procedure should be subject to the right of parties to public inquiry.
19. Odell Milne	No. The nature of the compulsory acquisition and the seriousness of its interference with private interests mean that any objector must have a fundamental right to be heard in writing or orally. This is one of the checks which should not be removed in any streamlining of procedure.
20. SSE plc	We would suggest that the DPEA should have discretion over the process, with the ability to take representations from the parties and reach their own informed decision on the most suitable process in the circumstances.
21. District Valuer Services	It is considered that the DPEA should not have discretion over the process for determining objections to a CPO. As is stated in the Discussion Paper, compulsory purchase requires a much more vigorous balancing of the public interest set against private interests and that any objector affected should have the fundamental democratic right to be heard – either in writing or orally - and to be able to cross-examine relevant officials. Whilst it is recognised that such a view may extend the time period of compulsory purchase, it is considered that this is a price worth paying to ensure the protection of fundamental democratic rights.
22. Glasgow City Council	For the reason specified at 13 I think not.

23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We consider that the DPEA should not have such discretion. If such discretion is given, it should be subject to a duty of care for the interests of those affected.
24. Shona Blance	No for the reasons stated in [paragraph] 5.30 [of the DP].
25. East Ayrshire Council	This would seem to be reasonable, however the grounds on which the discretion can be exercised may need to be detailed to reduce any uncertainty or unfairness in the process.
26. National Grid plc	In principle DPEA could have discretion over the process for determining objections however this would need to be exercised carefully, given the implications of a CPO, and good reasons would require to be given as to why a specific process had been chosen and others discounted. Statutory objectors may feel prejudiced if the DPEA considered that either no further procedure is required or that the matter could be dealt with by written submissions. This could lead to more judicial reviews and cause delay to the delivery of major infrastructure projects.
27. South Lanarkshire Council	Given that the effect of a successful CPO is to deprive the owner of their property it would seem reasonable for that person to expect a hearing. However it may be beneficial to have the option of written submissions and/or site visit being made available to the objectors by DPEA.
28. Royal Town Planning Institute Scotland	RTPI Scotland considers that new CPO legislation, regulations and guidance should be closely linked with planning legislation. We therefore agree that the DPEA should have discretion over the process for determining objections to a CPO in a similar way in which they have in relation to planning matters. We consider that there should be an opportunity for the reporter to select the most appropriate means of the objections being heard, this may not always be a full inquiry. We support more frequent use of written submissions and hearings as with planning matters.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	In general, subject to my comments at proposal 13, I would concur with the assertion in respect of compulsory purchase that given the importance of the process to the landowner concerned that their right to be heard is of utmost importance.

	Up until recent years the right to be heard was often interpreted as meaning inquiry, this has changed to hearing in most cases now. Arguably this move away from an adversarial system to an Inquisitorial one already limits a private individual's ability to be heard and to make their case. It is acknowledged that generally a hearing does enable matters to be more quickly dealt with and considered by the Reporter. On one level the DPEA having the discretion to opt for a hearing or an Inquiry while still balancing parties' rights, might be seen as sufficient discretion. It is only in relatively recent times in planning that is has become entirely at the discretion of the Reporter to assess whether a matter be dealt with by written submissions or hearings. Arguable this can be to the detriment of all parties concerned as where there are complex issues that they do not believe can actually be dealt with by written submissions, they have no ability to force the matter to be heard. Given the critical importance of compulsorily purchasing someone's land it would not in my submission generally be appropriate for this change to occur in respect of compulsory purchase. As observed in paragraph 5.27 [of the DP] if it is agreed between statutory objectors and the Council that a hearing just comprise written representations without oral proceedings then this can occur currently on occasion. This could perhaps be more clearly stated in the new statute or indeed the accompanying regulations. What might well be possible would be for the Reporter to either through written submission or indeed through a pre-hearing meeting with all parties set out what the Reporter considers to be the various issues and give parties the opportunity to submit whether they believe these can be dealt with by written submission, hearing or indeed inquiry. If either the statutory objector or indeed the acquiring authority believes that either a hearing or inquiry if necessary on a particular topic then their right to be heard on that topic should be respected in terms of the statute and it should be necessary for that issue to be heard. It should be at the discretion as it currently is of the Reporter whether that can be by hearing or inquiry. However if such a process was put in place it may well be possible for certain aspects to be dealt with by agreement, by written submissions therefore restricting hearings down to a limited number of issues. If in terms of proposal 13 there is a restriction on certain statutory objectors being able to insist upon inquiry or hearings, because of their relatively small holding, then if they are the only party holding

	out for a hearing on a topic once this initial step has been done and everyone else is happy to be dealt with by written submissions then on that adapted principle they would not to be able to force a hearing on the subject and it would be at the discretion of the Reporter.
35. Shepherd and Wedderburn LLP	No. We believe that the Reporters should continue to encourage parties in appropriate cases to agree evidence in advance of Inquiries and, indeed, to take evidence in the form of written submissions. We believe, however, that, in view of the significant impact of a Compulsory Purchase Order on affected persons, they should retain the right to demand a Hearing or Public Inquiry if they consider the case merits it.
36. Scottish Power Ltd	*[from general comments on Negotiations]* We support the decision maker having discretion, similar to exists under the planning process, as to the method for resolving an objection to a CPO i.e. hearing, inquiry or even written submissions. This discretion should redress opportunities for objectors to deliberately delay or frustrate project implementation where delivery is time critical. This could also be used for the purposes of disregarding objections which are considered be frivolous. However it is important that a balance is struck by not undermining existing statutory provisions. For example, the existing determination processes in relation to licence holders seeking to compulsory acquire rights held by another licence. We would not support any changes which could undermine or circumvent these existing provisions.
38. MacRoberts LLP	No, unless the all the parties are content that the DPEA can proceed by a procedure other than inquiry/hearing. We agree that giving the DPEA discretion over the procedure may reduce the timescale for determination. In practice it may be likely that a Reporter would adopt an oral procedure for more sensitive cases (e.g. those involving residential property) if this was requested by a relevant objector. However, we agree with the point made in paragraph 5.40 [should be 5.30 of the DP]. Compulsory acquisition is a fundamental intrusion into private property rights which can be distinguished from planning decisions. As a matter of principle, persons directly affected should be accorded a right to be heard in an oral procedure. An exception may be when all parties state that they are content for determination on the written evidence, subject to the Reporter's power to require an oral procedure notwithstanding such agreement should this be deemed necessary. The legislation should however make it clear that the particular form

	of inquiry or more formal hearing is at the discretion of the DPEA.
39. Scottish Land and Estates	We see no reason why DPEA should not have discretion in this regard.
40. Law Society of Scotland	We refer to our answer to question 13. The right of statutory objectors to be heard should be maintained. We have concerns over applying the procedure currently used in planning appeals and development plan examinations to CPO processes. With development plans, an objector has no entitlement to make any further representations beyond the terms of their initial representation. The availability of any further procedure is entirely at the discretion of the Reporter. The vast majority of development plan representations are dealt with without any form of further procedure and further discussion between the planning authority and objectors is discouraged. Similarly, the vast majority of planning appeals are dealt with on the basis of the initial grounds of appeal and the response from the planning authority. The focus of development plan and appeal procedures has been on front-loading the process with further procedure being the exception. We question whether this expedited form of process is appropriate for dealing with the potentially severe interference with property rights which may result from compulsory purchase. We refer to our comments above on Article 6 compliance. There is also a significant difference between the nature of a dispute in compulsory purchase and planning processes. In the latter, whilst there may be some scope for agreement between the parties, this tends to be more in the nature of narrowing the issues in dispute with a fundamental change in position being comparatively unusual. With compulsory purchase, there can be significant changes in the parties' positions during the objection process which often leads to the withdrawal of objections. The objection process needs to be flexible enough to allow parties to develop their cases in this way. Furthermore, the technical nature of compulsory purchase orders means that the practical nature of the impact of a compulsory acquisition on a plot may not be apparent from the terms of the order itself. It is sometimes only when the promoting authority responds to an objection that the objector may understand the purpose of the acquisition and can properly formulate their objection or enter into meaningful discussions with the promoter. Any changes to the objection system needs to recognise the time constraints under which the promoter may be required to act and the limited information which may initially be available to objectors. There must be a fair procedure by which the terms of objections may be developed and negotiated. Experience shows that this need not necessarily lead to a lengthy process as discussions between the

	parties often lead to withdrawal of objections and a shorter period of time being required for Reporters to prepare their recommendations for Scottish Ministers.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	No, for the reasons previously provided in our answers to proposals 13 and 14. The compulsory acquisition by the state/public authority of a private property/land is much more important to an individual concerned, possibly involving their forced relocation in certain circumstances, than the success or failure of a planning application.
45. Scottish Power Energy Networks Holdings Ltd	[from general comments on Negotiations] We support the decision maker having discretion, similar to exists under the planning process, as to the method for resolving an objection to a CPO i.e. hearing, inquiry or even written submissions. This discretion should redress opportunities for objectors to deliberately delay or frustrate project implementation where delivery is time critical. This could also be used for the purposes of disregarding objections which are considered be frivolous. However it is important that a balance is struck by not undermining existing statutory provisions. For example, the existing determination processes in relation to licence holders seeking to compulsory acquire rights held by another licence. We would not support any changes which could undermine or circumvent these existing provisions.
Further responses made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	There were 30 submissions to this question. 17 took the view that DPEA should not have discretion, 12 thought the DPEA should have discretion and JRR suggested that the discretion should be qualified. The submissions from legal organisations and an individual solicitor (LSS, FoA, S&W, MacR, LTS, and OM) were of the view that CP was

	such a drastic option that any objector affected should have the democratic right to a public hearing and be able to cross-examine officials. LSS took the opportunity to emphasise the importance of Article 6 compliance. This view was also backed by SCPA, DVS and CAAV. The submissions from AAs (RC, SOLAR, SSE, EAC, NG and ACES) stated that the DPEA should have a similar discretion to that which they have in planning matters. JRR was reluctant to see the right to a hearing being eroded by discretion being given to the DPEA, but did not believe there should be a right to insist upon a public inquiry.

16. **The timescales for the process of securing CPOs should continue to be set out in subordinate legislation.**

(Paragraph 5.32)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes the timescales should continue to be set out in secondary legislation.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	On balance, the fixing of time limits within subordinate legislation is accepted although we are not aware of any time limits around the confirmation process (as opposed to the advertising and initiation processes) being anything other than indicative in the CPO guidance. A clear statement of all the time limits attaching to the various stages in the process would be helpful.
12. Society of Local Authority Lawyers and Administrators in Scotland	On balance, the fixing of time limits within subordinate legislation is accepted although we are not aware of any time limits around the confirmation process (as opposed to the advertising and initiation processes) being anything other than indicative in the CPO guidance. A clear statement of all the time limits attaching to the various stages in the process would be helpful, possibly as part of an overall procedure manual.
13. Strutt & Parker LLP	There should be a minimum timescale set out in primary legislation.

16. Scottish Compulsory Purchase Association	This proposal is supported.
19. Odell Milne	Agreed. However I have some concern that this risks consistency and fairness as between landowners facing different kinds of process. On the basis that the Scottish Ministers would weigh such considerations carefully before making a determination, the process of setting out the timescales in subordinate legislation should remain.
20. SSE plc	We would agree with this proposal, but the legislators should be mindful of keeping timescales as compact as possible, whilst at the same time recognising that there may be need for flexibility in more complex cases.
21. District Valuer Services	Yes.
22. Glasgow City Council	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	These should not be in primary legislation and there should be room for discretion to allow for circumstances.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Agreed.
27. South Lanarkshire Council	Agree.
28. Royal Town Planning Institute Scotland	RTPI Scotland agrees that timescales for the process of securing CPOs should be set out within subordinate legislation.
31. Association of Chief Estates Surveyors Scottish Branch	A clear statement of all the time limits attaching to the various stages in the process would be helpful.
32. Scottish Borders Council	This seems reasonable.
35. Shepherd and Wedderburn LLP	Yes.
36. Scottish Power Ltd	[from general comments on Negotiations] We support the provision of timescales for securing CPO's to be set out in subordinate legislation and the alignment of associated

	processes (e.g. challenges to CPO on the basis it is incompatible with the property owner's right, under the Convention, being required to be made within the general 6 week period for general challenges to the CPO.)
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	We believe that a minimum timescale could be set out in primary legislation and this should be considered.
40. Law Society of Scotland	We agree, subject to the proviso that they should be readily ascertainable by the public.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree that this is appropriate as it allows greater flexibility for altering timescales in the light of experience.
45. Scottish Power Energy Networks Holdings Ltd	*[from general comments on Negotiations]* We support the provision of timescales for securing CPO's to be set out in subordinate legislation and the alignment of associated processes (e.g. challenges to CPO on the basis it is incompatible with the property owner's right, under the Convention, being required to be made within the general 6 week period for general challenges to the CPO.)
Further responses made informally or at engagement events	None.
Analysis	
Explanation of proposal	None required
Summary of responses and analysis	26 consultees commented on this proposal. 23 agreed with it. Of the other three, S&P and SLE felt that a minimum timescale should be set out in primary legislation. FoA wanted the timescale to be set out, but had no view on whether it should be 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)

1. Professor Jeremy Rowan Robinson	The provision for promoters to confirm unopposed orders seems sensible if it leads to savings in time.
2. Antony C O Jack	At **question 17** you ask about self-confirmation of Orders. If there is any belief that promoters of schemes can act in bad faith, then they should not be put in a position of confirming their own CPO. Clearly I am of a view that Scottish Government and local authorities, quite alarmingly, seem to be far too cosy together, which inclines me to a view that there should be someone truly impartial involved in confirming CPOs.
6. Craig Connal QC	No, confirmation should be allowed where there are no objections.
7. West Lothian Council	An acquiring authority should be able to confirm their own CPO on the same basis as that permitted in England and Wales i.e. that the confirming authority is satisfied that the notification requirements have been complied with, that no objection has been made to the CPO, or that any objection has been withdrawn, and that the CPO can be confirmed without modification.
9. David Strang Steel	There needs to be judicial oversight in the exercise of compulsory powers to avoid potential misuse. The decision and reasoning of the confirming authority in such circumstances should be transparent and public. This is particularly so when confirmation is carried out by an arm of the promoting body. We consider it essential that any CPO legislation should set out a clear legal obligation of any confirming authority to act independently and judicially in order to emphasise that this is not merely a rubber stamp exercise as often appears to be the case.
10. Renfrewshire Council	In general the role of the Confirming authority for CPOs should continue, for the reasons outlined in the discussion paper. Checks and balances are required to safe guard the rights of parties affected by the CPO, as well as the responsibilities of the acquiring authority For those CPOs which attract no objections (e.g. where a property has been abandoned or where the owner of the land is unaware that the land forms part of their property) then there is obvious merit in investigating whether these orders could be subject to a streamlined procedure by the Scottish Government.
12. Society of Local Authority Lawyers and Administrators in Scotland	In general the role of the Confirming authority for contentious CPOs should continue, for the reasons outlined in the discussion paper. For those CPOs which attract no objections (e.g. where a property has been abandoned or where the owner of the land is unaware that

	the land forms part of their property) then there is obvious merit in investigating whether these orders could be subject to some streamlined procedure such as "self confirmation". The extent to which the erstwhile confirming authority actually has to be involved in this process should be explored and perhaps such "self confirmed" orders could be subject to automatic confirmation if no party subsequently objects within a 3 week period from when the confirmed Order is published. Further, the introduction of some form of "Expropriation Board" as an alternative point of confirmation, with limited but defined powers could assist the confirmation process.
13. Strutt & Parker LLP	On the face of it, yes, but issues could arise where there is little or no judicial oversight in the exercise of compulsory powers (as an example as is the situation in the Electronic Communications Code in respect of exercise of powers under paragraphs 5 and 21). Research indicates that the majority of CPOs are from the Scottish Ministers. It is accepted that a democratically elected body is the appropriate body to confirm CPOs but consider that revised legislation should spell out clear duties on any such confirming body. The procedure of confirmation of CPOs by the Scottish Ministers has given rise to issues recently. The Public Inquiry for the AWPR was presented with two alternative routes. The Reporter recommended that the Scottish Ministers consider carefully the compensation payable in respect of the AWPR preferred route, as against an Alternative put forward by affected landowners. (The Reporter's findings are at http://www.dpea.scotland.gov.uk/Document.aspx?id=135841). From evidence led at a subsequent Lands Tribunal hearing in Strang Steel –v- The Scottish Ministers (LTS/COMP/2013/12), it appears that this recommendation was not followed. In the M74 extension the Reporter's Recommendations were to reject the public works and associated CPO but this recommendation was rejected by the Scottish Ministers. The decision and reasoning of the confirming body in such circumstances should be transparent and public. This is particularly so where confirmation of CPO is done by an arm of the promoting body (e.g. Scottish Ministers for a Transport Scheme). We consider it important that any enactment should set out an obligation on the confirming authority to act independently and judicially in order to emphasise this is not merely a rubber stamp exercise as it appears to the wider public.

14. John Watchman	6.2 The principle of democratic accountability suggest that compulsory purchase orders should be confirmed or made by the Scottish Ministers (including through their reporters) and/or local authorities. That principle has in the past been translated by transferring some 'local development' planning appeals from the Scottish Ministers to planning authority 'Local Review bodies'. The choice of confirming and making authority (in the case of compulsory purchase promoted by the Scottish Ministers) is at least primarily a matter of policy.
16. Scottish Compulsory Purchase Association	It is considered that no acquiring authority should be able to confirm its own CPO. In any democratic system, there requires to be both checks and balances as well as transparency in the decision-making process whereby (negative or positive) prejudice is removed. Thus, the SCPA is strongly of the view that all Compulsory Purchase Orders require to be confirmed by an independent and arm's length organisation. This, of course, raises the question as to whether The Scottish Ministers are best placed to take such decisions as in some cases there can be a perception that they are supporting "their" schemes – the decision-making process in the case of M74 extension is a case in point whereby the Reporter's Recommendation was to reject the public work and associated CPO for a major transportation scheme promoted by Transport Scotland but, ultimately, The Scottish Ministers rejected the recommendation and the scheme proceeded. Nevertheless, democratically-elected representatives are best placed to take the ultimate public policy decisions.
19. Odell Milne	A third party review is essential and constitutes one of the important checks and balances which protects landowners' interests and ECHR rights. The Scottish Ministers may not be the best body to carry out the reviews. Indeed the recent M74 extension case where the reporter recommended that the scheme not be confirmed, but the Scottish Ministers rejected the recommendation, is an example of a situation where this may not, at least on the face of it, show the kind of fairness that is essential in any CP situation. Perhaps an independent confirming authority should review all CP schemes rather than the Scottish Ministers.
20. SSE plc	We would suggest that the involvement of the Scottish Ministers in the CPO process adds transparency and a level of independent scrutiny which would otherwise be absent and which might give rise to the potential for challenge if not available.
21. District Valuer Services	It is considered that no acquiring authority should be able to confirm its own CPO. In any democratic system, there requires to be both checks and balances as well as transparency in the decision-making process whereby (negative or positive) prejudice is removed. Democratically-elected representatives are best placed to take the

	ultimate public policy decisions. It also ensures consistency among local authorities by allowing Scottish Ministers to have an overview.
22. Glasgow City Council	I think that CPOs should be confirmed by Scottish Ministers; the gravitas of the process warrants this.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Since nobody should be judge and jury in their own cause when exercising such compulsory powers, we start from the position that no acquiring body should be able to approve its own CPO. It would then be normal for such approval to lie with Scottish Ministers. An exception might be for schemes which had no remaining objectors. However, the problem arises that many CPOs, especially those for larger schemes, are effectively promoted by Scottish Ministers, as where a CPO for a Transport Scotland scheme comes to Scottish Ministers for confirmation. The procedure for confirmation of such CPOs by Scottish Ministers has given rise to issues recently with such examples as: • The AWPR for which the Public Inquiry was presented with two alternative routes. The Reporter recommended that the Scottish Ministers consider carefully the compensation payable in respect of the AWPR preferred route, as against an alternative put forward by affected landowners. From evidence led at the subsequent Lands Tribunal hearing in Strang Steel v Scottish Ministers, it appears that this recommendation was not followed. • the M74 extension for which the Reporter's recommendation to reject the public works and associated CPO was rejected by Scottish Ministers. If Scottish Ministers are to be in this delicate position, it is essential that their procedure, reasoning and decisions in such circumstances must be transparent and public if they are to be proper, compatible with good government and better prepared against challenge. It is thus important that the compulsory purchase statute expressly imposes an obligation on the confirming authority to act independently and judicially in order to put it on a reputable footing and so less vulnerable to being seen by those losing property and being adversely affected as a routine fait accompli. The procedure for approving compulsory purchase, a key subject of this consultation, has to be seen to be reputable not simply a decorative, if expensive, exercise.
24. Shona Blance	Yes - essential to ensure consistency and compliance with the legislation.
25. East Ayrshire Council	If there are no objections to a CPO there could be merit in a streamlined confirmation process being put in place but confirmation

	of contentious CPO's should still be confirmed by the Scottish Ministers.
26. National Grid plc	It may be appropriate in some circumstances for the Scottish Ministers to delegate the confirmation of a CPO to a Reporter. It may also be appropriate for example where there are no objections to a CPO for the acquiring authority to confirm their own CPOs. However this would need careful consideration given the implications of a CPO to avoid an increase in challenges. Scottish Ministers should retain a right to call in a CPO for their confirmation. Further decisions which could affect operational land of statutory undertakers should remain with Scottish Ministers and should not be delegated to either a Reporter or to the acquiring authority where the affected statutory undertaker has objected to the CPO.
27. South Lanarkshire Council	The Council believe the current confirmation process involving the Scottish Ministers is appropriate. It is hoped that by having the Scottish Ministers carry out the confirmation process there is consistency of approach. It also allows for a balancing of the public and private interests by a body who is not directly involved in the CPO itself.
28. RTPI Scotland	Planning reform has been moving towards a more streamlined plan-led system which recognises the primacy of the Development Plan. Therefore, it could be argued that if a CPO is set out within the Development Plan which has gone through a process of scrutiny by DPEA, a CPO may not require to be signed off by Ministers.

30. Isobel Gordon	In our considerable experience of dealing with acquiring authorities we have not found them to be self-regulating enough to be granted such power. They are obliged to act in good faith however in reality that is never the case. Many now have shareholders to satisfy and the integrity of acquiring authority cannot be assumed – we have direct experience of this. In theory in our CPO case the need for the NG pipeline to be proven required to satisfy both the Public Inquiry Reporter and the Scottish Ministers - obviously a check did not happen. It seems wholly unreasonable to grant an acquiring authority the ability to confirm its own CPO because of the perceived conflict of interest. We accept that a democratically elected body should be the confirming authority but as a clear safeguard we consider it important that any enactment should set out an obligation on the confirming authority to act independently and judicially in order to emphasise this process is not merely a rubber stamp exercise. The procedure of confirmation of CPOs by the Scottish Ministers has given rise to local issues recently. The Public Inquiry for the AWPR was presented with two alternative routes. The Reporter recommended that the Scottish Ministers consider carefully the compensation payable in respect of the AWPR preferred route, as against an Alternative put forward by affected landowners. [The Reporter's findings are at http://www.dpea.scotland.gov.uk/Document.aspx?id=135841] From evidence led at a subsequent Lands Tribunal hearing in Strang Steel –v- The Scottish Ministers [LTS/COMP/2013/12], it appears that this recommendation was not followed. Likewise there was considerable surprise at the refusal of the Scottish Ministers to ratify the Reporter's decision rejecting the need for a CPO on the M74 extension. As landowners to we would look for the acquiring authority to be required to prove the need to a confirm authority before a CPO notice can be made, otherwise it creates undue expense on affected landowners. Once the need was established the notice could be served but not before, whilst retaining the ability to challenge the CPO. This would insure that only feasible schemes reach the CPO stage. The requirement to prove the need in the Public Inquiry would remain but should not be burden-some if it has already been proved at the Notice stage and would serve as a check that need requirement is still up to date.
31. Association of Chief Estates Surveyors Scottish	In general CPOs should continue to be confirmed by Scottish

Branch	Ministers. For those CPOs which have no objections such as abandoned property then a streamlined procedure such as “self confirmation” would be beneficial. This could be adjusted by the use of a Statutory Instrument in a similar way to the operation of the Use Class Order and the General Permitted Development Order.
32. Scottish Borders Council	If a CPO is objected to, objection remains and a hearing of some sort takes place then it is agreed that it is appropriate that the CPO must eventually be confirmed by Scottish Ministers. However in our view it would be appropriate like in England and Wales that if a CPO is not objected to or indeed all statutory objections have been removed and therefore there are no current objections, that the acquiring authority should be able to confirm the Order. The statement made in the paper, is not our view correct, that for an acquiring authority to confirm their own CPO requires just as much involvement of the confirming authority as the confirming authority themselves doing the confirmation. The difficulties that we have encountered in the past have been in respect of how promptly, once there are no objections & no other issues, that Scottish Ministers have then proceeded to get around to confirming the Order. It would be far less onerous, if it was the case that all that was needed was for a Scottish Government Department to provide confirmation, on behalf of Scottish Ministers, that either no objections have been received within the statutory period or indeed if statutory objections were received, confirmation between the parties that all objections had been removed and evidence of this. Indeed currently confirmation on this point is quite quickly supplied. The Council could then just proceed to confirm the CPO, it would not be likely to generate the same unnecessary delays as often occur at present in such a scenario. The two stated benefits to having confirmation are noted and are in general agreed. However in our view whilst we would agree that these are essential if objections remain and the matter goes to a hearing or indeed a Reporter ends up dealing with it by written representations if there are no such objections the benefit of expediently having a confirmed CPO outweighs the benefits of these safeguards. There does not appear to be a question in this paper regarding a reasonable period for Scottish Ministers to confirm a CPO once a Reporter has conducted a hearing. Whilst I acknowledge that is

	maybe is something to be dealt with by subordinate legislation to allow some flexibility, timescales on these points would be useful both in respect of the Reporter issuing a report and Ministers thereafter making a determination. It would appear that even guidance on these periods is lacking at the moment and would be welcome. Compulsory purchase is often necessary because of time constraints meaning that work needs to be urgently done and therefore having gone through the rest of the process months or even years further delay before a verdict is finally given is not particularly compatible with this. It would be far better for all parties with standard periods for both the Reporter to report and the confirming authority to either confirm or object, with both subject to provision that exceptionally these periods could be extended by Scottish Ministers subject to notification of the reasons why this exception is being applied in a particular case.
33. DJ Hutchison	We believe that there needs to be a form of independent judicial oversight in the exercise of compulsory powers. Any decision and reasoning of the CPO request in such circumstances should be transparent and public. This is particularly so when confirmation is carried out by an arm or related minister of the acquiring authority. We consider it essential that any CPO legislation should set out a clear legal obligation on any confirming authority to act independently and judicially in order to emphasise that this is not merely a rubber stamp exercise as often appears to be the case.
35. Shepherd and Wedderburn LLP	No. We believe that acquiring authorities should be entitled to confirm their own CPOs in circumstances where no objections remain to the CPO at the point of confirmation.
36. Scottish Power Ltd	*[from general comments on Staged Process* Compulsory acquisitions by a statutory undertaker involve two stages: (1) making a CPO; and (2) confirming a CPO by Ministers. In straightforward cases, we would suggest that a reporter confirms the making of a CPO, dispensing with the need for Ministerial involvement. In more complex cases, we agree that the two stage process should be retained with the caveat that Scottish Ministers can deviate from a Reporter's recommendation and confirm the Order where it can be demonstrated that a project is in national interests.
37. J Mitchell	*From general comments* **Confirmation of CPO**

	We find it somewhat strange that the Scottish Ministers should be able to confirm a CPO promoted by them. It would appear that in so doing they act as judge, jury and executioner! We are acutely aware of the issues that have arisen in respect of this elsewhere on the AWPR and we consider that all CPOs should be confirmed by an independent and arm's length organisation.
38. MacRoberts LLP	All CPOs should require to be confirmed by the Scottish Ministers (or some other independent body). We note that there may be occasions when there is no outstanding objection to a CPO. In such a circumstance there may be no prejudice in the Scottish Ministers authorising the acquiring authority to confirm its own CPO and provided certain safeguards were satisfied (as noted in paragraph 5.40). However, we agree that that the checking process would in effect be confirmation by another name and it is questionable whether the process would be significantly quicker. It is also important to note the real and perceived value of a second-tier of review and confirmation by the Scottish Ministers. By definition the acquiring authority promoting the CPO considers its CPO to be in the public interest and to outweigh any detriment to individual landowners. It is valuable to have this assessment assessed and confirmed by an independent confirming authority even in the absence of objection. Further, compulsory acquisition of property, even where found to be justified, is a significant intrusion into fundamental property rights. It is important that the procedure is perceived to be open and fair by affected parties. In this regard, the requirement for confirmation by Scottish Ministers provides a useful safeguard.
39. Scottish Land and Estates	It is important that confirmation should be public and transparent and provided that is the case, we have no issue with such CPOs being confirmed by Scottish Ministers. There should be express duties on the body confirming, especially where they are presented with different options.
40. Law Society of Scotland	We agree that the Scottish Ministers should be required to confirm CPOs where statutory objections have been made. We also suggest that where the CPO has not had any objections then the acquiring authority could confirm its own CPO – this is similar to the Stopping Up Order procedure.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.

44. Scottish Property Federation	Although it is attractive to consider alternative methods for confirming CPOs we agree with the sentiment expressed at the top of page 70 of the discussion paper – this is essentially about the acquisition of private property by the state and even if in the public interest this is compulsion – therefore we agree that 'Such a decision is essentially a political one.' We believe that CPOs must therefore continue to be confirmed by Scottish Ministers and within a reasonable timescale in order to provide certainty for the acquiring authority and the landowner.
45. Scottish Power Energy Networks Holdings Ltd	*[From general comments on Staged Process* Compulsory acquisitions by a statutory undertaker involve two stages: (1) making a CPO; and (2) confirming a CPO by Ministers. In straightforward cases, we would suggest that a reporter confirms the making of a CPO, dispensing with the need for Ministerial involvement. In more complex cases, we agree that the two stage process should be retained with the caveat that Scottish Ministers can deviate from a Reporter's recommendation and confirm the Order where it can be demonstrated that a project is in national interests.
Further responses made informally or at engagement events	Attendees agreed that checks and balances relating to CPOs should be completed by the Scottish Ministers as soon as possible, as the time taken to complete projects was holding back the development of the country. However, CPOs can have a profound effect on the landowner, so some believed that checks were necessary. It was suggested that where an objector backs down after a CPO has been sent to Scottish Ministers for confirmation, the order should remain with Scottish Ministers for checking as errors in the CPO may still be found.
Analysis	
Explanation of question	This question has two parts. Firstly, it asked whether SMs should confirm all CPOs. Secondly, if that was not the case, it asked in what circumstances an AA should be able to confirm their own order.
	There were 34 responses to this question. In relation to the first part of the question, asking whether SMs should confirm all CPOs, 27 were in favour of there being a body, independent of the promoting AA, to review and confirm the CPO. Of the 27, 19 were content for SMs to continue to be the confirming body. However, there was a substantial body of opinion (SCPA, SOLAR, S&P, CAAV, MacR, OM, IG and JM) which took the view that nobody should be the judge in their own cause, and while SMs may be appropriate to confirm CPOs from local authorities, they were

	not best placed to confirm orders made by TS. SCPA were strongly of the view that CPOs require to be confirmed by an independent, arm's length organisation. Several consultees pointed to the SMs overruling reporters' recommendations in relation to AWPR and the M74 Extension. The point was made that the SMs' procedures, reasoning and decisions must be transparent and public. SOLAR suggested the introduction of some form of "Expropriation Board" as an alternative form of confirmation. Many consultees (JRR, CC, WLC, RC, SOLAR, EAC, NG, ACES, SBC, S&W and LSS) felt that where a CPO had received no objections, or where all objections had been dealt with and removed, there was an argument for allowing the AA to "self-confirm." However, a number of others (SPF, GCC, SCPA, OM, DVS, DSS and SSE) were of the view that CP is such a draconian power that democracy requires checks and balances as well as transparency in the decision-making process; that ECHR rights require protection and independent scrutiny is required. SP and SPEN pointed out that CP acquisitions by statutory undertakers involve two stages: (1) making the CPO and (2) confirming the CPO by Ministers. They suggested that in straightforward cases a reporter could confirm the CPO, dispensing with the need for ministerial involvement. They agreed that in more complex cases the two-stage process should be retained.

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)

Respondent	
2. Antony C O Jack	**21**. … At **question 18** you mention current requirements for notices in reference to your Paragraph 5.42 [of the DP] reference to the first Schedule of the 1947 Act, as amended. I find this area totally confusing. Paragraph 3A, concerning lamp posts, etc., only seems to relate to personal real burdens, benefited property and owners associations, and the list of what shall done appears to be an 'or' list, ending up with paragraph 3A(d) "by such means as the acquiring authority think fit", which appears to give the promoter absolute discretion. Paragraphs 3(a) and (b) just refer to the two newspaper adverts and written notice to Owners, lessees, and occupiers. I have not found in your Paper's reference to Section 19(4) of the 1947 Act in terms unknown owners or untraced owners.

7. West Lothian Council	Bringing in provision for electronic communication of a notice would be appropriate, in addition to, but not instead of traditional methods of communication. Email is not a robust method of communication.
10. Renfrewshire Council	The cost of such newspaper notices can be considerable and perhaps other methods of advertisement should be considered, for example site notices and an online Council portal. However, in our view public notification by newspaper should continue in the meantime until some better form of universal notification is identified.
12. Society of Local Authority Lawyers and Administrators in Scotland	The need for 2 initial notices is also questioned, as is the necessity for these notices to be advertised in a local newspaper. The cost of such notices can be considerable. We understand that provision has developed over recent years for the intimation of public notices via an online portal. Whilst we appreciate that the issue of intimation of statutory notice by these methods may be beyond the scope of this discussion paper, we feel the use of online notification is worthy of investigation, especially in the smaller project CPOs.
13. Strutt & Parker LLP	We consider that should be a more comprehensive notification procedure. This may involve publishing details on an appropriate website and also emails to individuals, agents, or organisations who register.
14. John Watchman	6.3 Consideration should be given to a requirement that acquiring authorities should also post on their websites compulsory purchase order materials and that orders etc. should be accessible through the proposed 'Property and Land Information System'.
16. Scottish Compulsory Purchase Association	It is considered that generally speaking the current requirements for advertisement and notification of the making or confirming of a CPO are satisfactory but nevertheless consideration requires to be given to the modes of communication that are now available via advances in technology.
19. Odell Milne	Some of my answers to other questions provide further information with regard to the type of notification for different parties and the complexities and difficulties which arise. I have a concern that the balance between those parties entitled to personal notification and those who are only entitled to "lamppost notification" may not be fair and, as set out elsewhere, an example is the case of the owner from whom no land is acquired in comparison to those frontagers who have a small area of land taken and who are treated entirely differently under the law. I also have a concern with the different treatment of owners of lands as compared with those with different interests in land (such as rights of access, interests in the *alveus* which is essential for river flow for a hydro scheme etc.) where the value in "real terms" and the importance of being able to object and be heard, may be significant. However, this must be balanced

	against the burden on the acquiring authority to identify interests. Another issue which can arise is in relation to recorded delivery where recipients of notices choose not to accept them or, having been left a card, do not go to the delivery office to collect them. Perhaps a fall back procedure could be introduced so that, provided a recorded delivery notice and, say, an ordinary postal notice are served (and of course due diligence done in order to identify the parties to whom such notice should be served and where), notice could be deemed to have been given where the party either refuses to accept notice or apparently does not go to the delivery office to collect it. I do not consider that email or electronic communication should be sufficient notification.
20. SSE plc	We would suggest that where possible more use be made of electronic media. We recognise that there is a requirement for press advertisement and local deposits given that not everyone has the benefit of access to the internet.
21. District Valuer Services	Electronic notice is helpful and on site notices do get noticed by local residents and visitors. However as the local printed press declines serious thought needs to be given as to how statutory notices – CPO, planning, roads stopping up etc. are publicised in a locality. As well as being placed on the acquiring authority's website a nationwide register should be set up, possibly on the Scottish Government website.
22. Glasgow City Council	I think that electronic alternatives/ additions should be an option.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	There should be a more comprehensive notification procedure. This may involve publishing details on an appropriate website and also e-mails to individuals, agents, or organisations who register. It should be possible for all these parties to register for receipt of notification by e-mail but, especially with the difficulties of rural broadband in some areas, that should not be the only means of notification.
25. East Ayrshire Council	It would be useful for changes to be made to the process to reflect the "electronic age" and allow for email notification and publication on websites. However, notification (whether via post or via email) should perhaps be left to the acquiring authority's discretion.
26. National Grid plc	They are satisfactory but consideration should also be had to other methods for example notification by email and publication of notices on websites which would supplement traditional advertisement and notification methods. It may also be prudent for advertising and notification requirements to be contained in secondary legislation so that if necessary, to keep abreast of technology, the requirements

	can be updated.
27. South Lanarkshire Council	The Council would welcome the ability to use electronic advertising and notification of the making and confirming of CPOs. This would reduce costs and potentially improve accessibility of parties concerned to the relevant paperwork. However it is acknowledged that not all persons on whom notices require to be served will have access to the internet and therefore personal service may be still be required. The Council recommend that the current documents which need to [be] served on the various parties is reduced to allow a single notice to be served on them giving details of the website and address of where the CPO and Statement of Reasons can be accessed.
31. Association of Chief Estates Surveyors Scottish Branch	Increased focus on the use of digital media reflects public expectation.
32. Scottish Borders Council	The current requirement for advertisement and notification do remain helpful in terms of trying to inform the people of the confirmed CPO. However it would be helpful to have a requirement to have the confirmed CPO published both in the Ministers' and the acquiring authority's websites so that potentially more people see it.
35. Shepherd and Wedderburn LLP	No. We consider that while the obligation should remain to place the relevant information in hard copy form in an appropriate location should remain, that a further obligation to publish the information electronically should be imposed through the new legislation.
35. Scottish Power	*[From general comments on Advertisement]* We welcome improvements to the advertisement of CPO's but suggest this forms part of the land register process. We believe that this offers an effective and efficient way to consolidate this information.
38. MacRoberts LLP	The current requirements are satisfactory, although an obligation to advertise on a website may assist in publicising the CPO more widely.
39. Scottish Land and Estates	Broadly speaking the current requirements are satisfactory. If further electronic means are to be considered such as by e-mail or website, continuing lack of coverage and difficulties with rural broadband need to be considered.
40. Law Society of Scotland	We suggest that the pro forma advertisement and notice should be updated, otherwise the procedure is acceptable.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees with the Commission's suggestion that publication should be made on the acquiring authority's website.

	The Faculty considers that the methods of sending notice should be the same as those contained in the Title Conditions (Scotland) Act 2003.
44. Scottish Property Federation	Technology has clearly overtaken the existing requirements. However, we believe that a requirement to add notifications to appropriate websites (particularly local authority ones) should be additional to existing notification requirements.
45. Scottish Power Energy Networks Holdings Ltd	*[From general comments on Advertisement]* We welcome improvements to the advertisement of CPO's but suggest this forms part of the land register process. We believe that this offers an effective and efficient way to consolidate this information.
Further responses made informally or at engagement events	On the issue of notification of CP projects, it was stated that advertising in newspapers is expensive, the cost had increased in recent years because newspapers could no longer rely on a steady income from other advertising streams, and costs were particularly high in the large Central Belt-based newspapers. It was suggested that advertisements in newspapers could consist of a small amount of information, together with a link to the local authority's website for full details of the scheme. It was noted that such advertisements were not seen by many, given the increasing numbers using the internet as their primary source of media. It was noted that it would still be necessary to provide individual notices to those affected by the scheme where possible, and suggested that newspaper notices could act as a backup where individual notices failed. In terms of the notices which are currently served, it was stated that the complex language used can make it hard to see precisely what is being taken, and what rights the landowner may have.
Analysis	
Explanation of question	This question asked whether stakeholders considered the current requirements for adverts and notification of the making of a CPO to be satisfactory. If not, it asked what changes stakeholders believed to be necessary**.**
Summary of responses and analysis	There were 27 responses to this question. The majority were happy with the current system but many (WLC, S&P, JE, SSE, DVS, GCC, CAAV, MacR, FoA, SPF, EAC, SthLC, ACES, SBC & S&W) wanted to see greater use of electronic communication. There was agreement that email itself is not sufficiently robust without a hard copy, but many wished to see

	publication on the AA's website in addition to other methods. AJ found the current requirements to be confusing.

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

(Paragraph 5.46)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, a promoter should be able to revoke a CPO subject to the payment or out of pocket expenses. Owners and occupiers, having been through this experience, are entitled to a degree of certainty so a time limit of say 5 years before any new order is made would seem reasonable, perhaps with provision for Ministers to agree a shorter limit in exceptional circumstances.
2. Anthony C O Jack	See answer to question 20.
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker	Yes, but if this occurs it would be reasonable for the acquiring authority to pay any affected party for its costs and time not only in respect of loss arising out of the CPO but also for opposing the Order.
16. Scottish Compulsory Purchase Association	This proposal is supported on the basis that the revocation occurs after the CPO has at least been confirmed. Further, it is considered that if this happens then a minimum period of five years requires to elapse prior to any similar CPO being re-instigated.
19. Odell Milne	An acquiring authority should be able to revoke a confirmed CPO if it becomes apparent, for reasons of practicability or affordability, they can no longer proceed with the development. In some situations, early revocation is preferable to leaving the CPO "on the books" for landowners, since it gives them certainty. However, revocation does

	not deal with the impact of blight. I am aware that blight is outwith the remit of this consultation but the impact of revocation does need to be dealt with whether this is by way of an introduction of a "quasi blight provision" or in some other way.
20. SSE plc	We would agree that this should be an option available to an acquiring authority. The possibility of revocation is in the interest of all parties.
21. District Valuer Services	This proposal is supported on the basis that the revocation occurs after the CPO has at least been confirmed. Further, it is considered that if this happens then a minimum period of five years should elapse prior to any similar CPO being re-instigated.
22. Glasgow City Council	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes, but if this occurs it would be reasonable for the acquiring authority to recompense any affected party for their costs and time not only in respect of loss arising out of the CPO but also those in opposing the Order. The net effect of the revocation is that the affected people have been put to trouble, effort and cost, usually for years, for something that did not happen. A responsible body revoking an Order would recognise that outcome but proper treatment of such cases needs to be clear in law.
24. Shona Blance	Subject to appropriate compensation being paid to the landowner for any actions taken to mitigate loss as a result of the CPO.
25. East Ayrshire Council	Agree that an acquiring authority should be able to revoke a CPO if required for reasons set out in the discussion paper.
26. National Grid plc	Yes.
27. South Lanarkshire Council	The Council supports the proposal as it gives clarity to all parties in the event that the CPO is not to proceed.
29. Brodies LLP	It would seem sensible for an acquiring authority to be able to revoke a CPO but such a power must be introduced subject to constraints which prevent authorities pushing forward with schemes in the knowledge that revocation is possible. This power should therefore be linked to the proposal at 25 below that a CPO should only be confirmed if there is a reasonable prospect of it proceeding.
30. Isobel Gordon	Yes, but if this occurs it would be reasonable for the acquiring authority to pay any affected party for its costs and time not only in respect of loss arising out of the CPO but also for opposing the CPO. A revoked CPO causes loss to the landowner and the threat of this should be minimised. In our case Ofgem in their price review process penalised NG for not cancelling the pipeline, when it knew the gas

	was to be landed elsewhere. At present if this had happened no compensation was payable to affected landowners, clearly that would not be fair and yet statute has no provision for this. So there is a need for revoke, but applied for to the granting body and there should be a severe penalty to the acquiring authority if it is found to have misled the decision maker in any way to discourage misuse.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Yes.
35. Shepherd and Wedderburn LLP	Yes.
38. MacRoberts LLP	Agreed. Given that the underlying purpose of such a power is to remove the potential for blighting of properties we would query whether there should be a duty to revoke a CPO should the acquiring authority conclude that they can no longer proceed with the underlying project. This would impose a more positive obligation while leaving the discretionary decision with the acquiring authority.
39. Scottish Land and Estates	We agree with this on the basis that the said authority meets the costs of time and expense of those affected by the CPO. We would also question whether this ability should be challengeable in certain circumstances.
40. Law Society of Scotland	We agree that this would be a sensible approach otherwise the CPO will be effective for a period of three years from the date of confirmation.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees that an acquiring authority should be able to revoke a CPO.
44. Scottish Property Federation	We accept that there should be an ability to revoke a CPO but appropriate compensation must be afforded to the landowner.
Further responses made informally or at engagement events	None.
Analysis	
Explanation of proposal	Proposal 19, question 20 and proposal 21 are all closely linked.
Summary of responses and analysis	There were 28 responses to this question, and all agreed that an AA should be able to revoke a CPO, but eight thought that the right to

	revoke should be subject to payments of costs and/or compensation. The question of costs is dealt with further at proposal 21. Three submissions wanted a time limit before a CPO could be put forward again, and this is dealt with in question 20.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, a promoter should be able to revoke a CPO subject to the payment or out of pocket expenses. Owners and occupiers, having been through this experience, are entitled to a degree of certainty so a time limit of say 5 years before any new order is made would seem reasonable, perhaps with provision for Ministers to agree a shorter limit in exceptional circumstances.
2. Anthony C O Jack	Authority of a Minister to resurrect an abandoned scheme, harks back to previous legislation, where a rest period of five years was given, after two CPOs, as I understand it [some repealed legislation is not available on the internet] …….The above mentioned guidance 42/76 advises at Paragraphs 25 and 26, the following: "Abandonment of compulsory purchase powers 25. By virtue of sections 19 and 20 of, and Schedule 7 to the 1975 [Community Land] Act authorities will be regarded, in certain circumstances, as having abandoned their compulsory purchase powers under section 15 of the 1975 Act and section 102 of the Town and County Planning (Scotland) Act 1972, for a period of 5 years. 26. Before serving a notice of intention not to acquire authorities should therefore review their own land requirements (including their slum clearance and redevelopment programmes) for at least 5 years ahead. The Secretary of State will not, without special justification, be prepared to confirm a compulsory purchase order made under any other powers within the 5 year period for land in respect of which the authority are precluded by sections 19 and 20 of the 1975 Act from making an order under section 15 of that Act or section 102 of the Act of 1972." It seems to me that the gist of the above advice is sound, and indeed given the very close relationship between the Scottish Government and [certainly] its local authorities, I believe any abandonment should have an absolute period of rest. I also wonder, and recollect seeing

	somewhere, a maximum of two CPOs without a period of respite. I am disturbed by the issue over expenses - I was able to afford to employ solicitors for an objection ….. The cost or representing myself without reimbursement at any Public Local Inquiry, should the Minister convene one, worries me. I also note that in the recent CPO that a hearing was held [rather than an inquiry] and the CPO was not confirmed. The affected party sought to recover costs from the promoter, but the Minister had no power to make an award of expenses. This seems unjust. Indeed I question whether any party to a CPO should be able to recover expenses, unless there has been manifest unreasonableness on their part.
7. West Lothian Council	Agreed. Removal of the ability to bring forward another CPO within 5 years of the revocation of a CPO should give a landowner some peace of mind. 5 years appears to be a reasonable balance between the rights of the landowner and the needs of the acquiring authority.
10. Renfrewshire Council	No.
12. Society of Local Authority Lawyers and Administrators in Scotland	It would seem reasonable to suggest some time limit, after revocation, within which an acquiring authority was prohibited from initiating the same CPO, albeit the availability of consent from Scottish Ministers may be an appropriate safeguard.
13. Strutt & Parker LLP	There is potential for blighting values of an affected property and a specified time limit introduced (say 10 years) in which a substantially similar scheme cannot be introduced (to avoid minor changes being made allowing a scheme to be reintroduced within any time limit).
16. Scottish Compulsory Purchase Association	Whilst it is unusual for a CPO to be revoked, it is considered that it would be not unreasonable for appropriate conditions to be able to be attached by The Scottish Ministers to any such revocation – these conditions which may be imposed should be not unreasonable in nature. In any event, it is suggested that the acquiring authority would not be able to initiate the same or similar proposal within a period of five years from the date of any such revocation.
19. Odell Milne	There should be provision whereby, if a CPO is revoked, the acquiring authority should not be entitled to promote a new CPO in relation to the same land or same scheme within a certain period. I would suggest an appropriate period would be 10 years. Any less than that will have an impact on value. It might also be appropriate for an acquiring authority revoking a CPO to pay compensation to any landowners who have incurred expenses or incurred losses in relation to the original CPO.
20. SSE plc	We are of the view that any decision taken to the effect that a CPO should be revoked would be made in good faith by an acquiring

	authority at the time of that decision, but it is not unknown for circumstances to subsequently change again, which might necessitate an order having to be made anew. We would suggest that attaching any condition to a revocation may restrict the ability of any acquiring authority to carry out their statutory obligations.
21. District Valuer Services	Whilst it is unusual for a CPO to be revoked, it is considered that it would be not unreasonable for appropriate conditions to be able to be attached by The Scottish Ministers to any such revocation – these conditions which may be imposed should be not unreasonable in nature. In any event, it is suggested that the acquiring authority would not be able to initiate the same or similar proposal within a period of five years from the date of any such revocation. [See also answer to question 19]
22. Glasgow City Council	This is difficult – a short period could be useful but on the other hand new circumstances may emerge and on the assumption that a subsequent statement of reasons would narrate the circumstances surrounding the earlier confirmed CPO and its revocation, if Ministers are minded to agree that the statement of reasons evidences sufficient justification of the promotion of the new CPO then that is probably sufficient to rely on. Separately, having such a period might simply result in the general practice that confirmed CPOs are not revoked.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The act of withdrawing a scheme (say, for a road improvement) does not remove the potential blight if it is perceived that the scheme might yet be revived (as often happens with road schemes). We propose that the default regime be that there is a specified time limit (say 10 years) in which a substantially similar scheme cannot be introduced (that qualification is needed to avoid the use of minor changes that would technically allow a scheme to be reintroduced within any time limit). Recognising that circumstances may mean that it could still be desirable and in the public interest for such a scheme to come forward, it could then only do so subject to stronger costs provisions, covering affected owners' costs in responding to the proposals and objecting to any CPO as well as a proportionate supplement on compensation payments if compulsory purchase is approved.
24. Shona Blance	Yes otherwise the landowner is left in a state of flux.
25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	No. We need to be able to react to changing priorities and requirements of Ofgem and any conditions could fetter that ability.
27. South Lanarkshire Council	The Council do not support including conditions limiting making a CPO for the same reasons within a certain period. There may be good commercial or other reasons why it would be appropriate to

	proceed with a fresh CPO. The Council would suggest that the Statement of Reasons for the new CPO should refer to the revoked CPO, its reasons for revocation and provide reasons for why it is appropriate to proceed with a new CPO for the same purpose at this time. The Council do not believe that the Scottish Ministers consent should be required as the new CPO will be submitted for confirmation to them at which point they can consider the reasons for making the CPO as part of that process.
28. Royal Town Planning Institute Scotland	RTPI Scotland considers that any revocation of a CPO should be accompanied by clear reasons for that revocation. A revocation should not be able to be requested by objectors, but be a duty on the acquiring authority.
29. Brodies LLP	Yes. Landowners cannot be left with a CPO potentially hanging over their land as it will inevitably affect value and plans to sell, refinance, refurbish or develop the property and any business carried on there. We would suggest both safeguards be put in place, i.e. a minimum period of for example, 10 years before the same proposal can be resurrected and then only with the consent of the Scottish Ministers.
30. Isobel Gordon	There is potential for blighting values of an affected property unless such a measure is introduced. We consider that a specified time limit introduced (say 15 years) in which a substantially similar scheme cannot be introduced (to prevent minor changes being introduced as a means of getting round such time limit).
31. Association of Chief Estates Surveyors Scottish Branch	This could have unexpected consequences and a general provision for Scottish Ministers to refuse confirmation may be sufficient safeguard.
32. Scottish Borders Council	Difficult to envisage a period that would both give adequate protection for third parties but also allow authorities to be able to address problematic property if the economic climate improved. If there was to be a condition attached to revocation perhaps it should just be specific consent of the Scottish Ministers as it would be the case of the Council having to set out its reasoning why they first had to revoke the CPO and why now they are seeking a fresh CPO to be made before they can proceed with it.
35. Shepherd and Wedderburn LLP	No. Provided an adequate compensation framework exists we do not believe there is a need for any such constraints.
38. MacRoberts LLP	No, we consider this to be unnecessary. It is likely that a confirmed CPO will be revoked only rarely. The initiation of a further CPO process will be rarer still. An acquiring authority will be aware that the effect of revocation is that the entire CPO process must be replicated, of the time and cost that will be incurred by the acquiring authority and other parties, and of the potential impact on affected parties. An acquiring authority will not

	lightly initiate a further CPO process. If a further CPO is initiated this is likely to be because of some substantial change in funding or some other matter and it should be for the acquiring authority (and ultimately the confirming authority) to determine whether this justifies a further CPO having regard to the overall test of public benefit. Public benefit could potentially be lost if the acquiring authority is prohibited from initiating a further CPO. A prohibited period or requirement for Scottish Ministers' consent could also have the effect of discouraging an acquiring authority from revoking a CPO and so prolonging the period of blight for affected properties.
39. Scottish Land and Estates	Yes, arguably ten years would be an appropriate minimum period of time. Terminology along the lines of the Community Right to Buy late application procedure could be used e.g. substantially the same area of land, in order to provide for minor changes.
40. Law Society of Scotland	We agree that some degree of control would be appropriate, so that owners do not find themselves the subject of repeated CPOs. However, we would suggest that this could not be unduly restrictive as it may give rise to difficulties if a scheme was being promoted by one particular administration and several changes of administration ensued. Also, there are occasions where a CPO is revoked because there is a funding problem for the development proposals which require the CPO. If the funding problems are resolved then the development proposals should not be so delayed.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Of the options outlined we would suggest the specific consent of Scottish Ministers. A restriction on the ability of an acquiring authority to make a further CPO order is attractive in the sense that the landowner will already have suffered from the making of the first CPO and will be blighted with the prospect of a second, but on balance it would appear to be too restrictive to propose an appropriate time interval before a second CPO could be laid. For example, it could be that the acquiring authority has genuinely discovered new information which led to the need for a CPO to be revoked in order for a more appropriate Order to be made.

Further responses made informally or at engagement events	None.
Analysis	
Explanation of question	Question 20 is closely linked to Proposals 19 and 21.
Summary of responses and analysis	There were 28 responses to this question. 19 responses favoured attaching conditions to a revocation so that AAs cannot initiate the same proposal within a certain period. Eight were opposed to attaching conditions and one (GCC) thought this was a very difficult issue. Of the 19 favouring conditions, four (SCPA, DVS, JRR and WLC) favoured a five year period, five (S&P, SLE, OM, Brodies and CAAV), favoured a 10 year period and IG favoured a 15 year period SOLAR, SB, EAC, LSS and FoA favoured some sort of time limit. AJ suggested that it should not be possible to re-initiate the same proposal. SOLAR, GCC, SBC, FoA and SPF suggested that the consent of SMs to a new CPO may be appropriate. The eight opposed to attaching conditions were RC, SSE, NG, SLC, ACES, S&W, MacR and SW. Some did not give reasons. S&W felt that if an adequate compensation framework existed, there was no need for extra conditions. MacR felt that a prohibited period or requirement for SMs' consent would reduce the likelihood of revocation and therefore prolong any blight. IG, on the other hand, felt that if the period was not long enough, property would suffer from blight. RTPI considered that revocation should be a duty on AAs, and should not be able to be requested by objectors.

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

(Paragraph 5.47)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, a promoter should be able to revoke a CPO subject to the payment or out of pocket expenses. Owners and occupiers, having been through this experience, are entitled to a degree of certainty so a time limit of say 5 years before any new order is made would seem reasonable, perhaps with provision for Ministers to agree a shorter limit in exceptional circumstances.
2. Anthony C O Jack	[See answer to question 20.]

7. West Lothian Council	Agreed. However, there may be other losses in addition such as property blight.
10. Renfrewshire Council	This would seem fair and reasonable.
12. Society of Local Authority Lawyers and Administrators in Scotland	This seems fair and reasonable.
13. Strutt & Parker LLP	'Out of pocket' expenses suggests only nominal expenses. The cost of a party opposing one junction on the AWPR reputedly amounted to £750,000. This proposal should be wider to include any objection to a CPO (see above). It would otherwise be unreasonable for an acquiring authority to put landowners to considerable expense etc. as a consequence of their proposal to exercise compulsory powers only to withdraw.
14. John Watchman	This proposal is supported.
16. Scottish Compulsory Purchase Association	This proposal is supported. However, the phrase "out-of-pocket expenses" implies that such expenses are of a modest nature. This may not necessarily be the case as one or more of the objectors (statutory or non-statutory) may have incurred significant expense with regard to objecting to the draft CPO which could include, amongst other things, the outlay on professional fees as well as time and expenses incurred with regard to the actual compulsory purchase process and consequent loss of profits as well as loss of control with regard to disposal as well as loss of control over any tax planning. Thus, it is suggested that in the rare situation where a CPO is revoked all affected parties would have the statutory right to claim compensation for all expenses and costs incurred as a direct consequence of the compulsory purchase process.
19. Odell Milne	Agreed - See [question] 20.
20. SSE plc	We would suggest that any claim should be limited to recovery of professional fees incurred in dealing with a CPO.
21. District Valuer Services	This proposal is supported. However, the meaning of the phrase "out of pocket" is vague and should not be used. It is suggested that in the rare situation where a CPO is revoked all affected parties would have the statutory right to claim compensation for all reasonable expenses and costs incurred as a direct consequence of the compulsory purchase process.
22. Glasgow City Council	Agreed.

23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	In such a case, such directly affected people should be able to recover their reasonable expenses incurred as a direct result of the compulsory purchase process, with no other qualification or limitation than that those expenses be reasonable. The use here of "'out of pocket" expenses suggests that only nominal expenses are being considered. One owner's costs in opposing one junction on the AWPR are understood to have amounted to £750,000. The scale of payment does not affect the point of principle here. As argued above, this proposal should be broadened to include any objection to a CPO. It would otherwise be unreasonable for an acquiring authority to put landowners to considerable expense and trouble by bringing forward a proposal to exercise compulsory powers, only to withdraw it.
24. Shona Blance	Essential - definition of out of pocket expenses crucial.
25. East Ayrshire Council	Agree that this seems to be reasonable.
26. National Grid plc	Yes; reasonably and properly incurred expenses should be recoverable.
27. South Lanarkshire Council	The Council would not support this proposal. Such costs are not recovered in the event that compensation is payable so the Council would not support in these circumstances.
29. Brodies LLP	Agreed.
30. Isobel Gordon	This should be wider to expressly include any objection to a CPO (see above). It would otherwise be unreasonable for an acquiring authority to put landowners to considerable expense etc. as a consequence of their proposal to exercise compulsory powers only for the authority to withdraw.
31. Association of Chief Estates Surveyors Scottish Branch	If out of pocket expenses would have been reasonably incurred at the time of revocation then they should be recoverable. This would not be commonplace until later in the process.
32. The Scottish Borders Council	It would be reasonable for parties affected by the revocation of a CPO to be able to recover their reasonable out of pocket expenses.
35. Shepherd and Wedderburn LLP	Yes.
38. MacRoberts LLP	Yes, although in practice this could potentially make an acquiring authority less likely to revoke a CPO rather than wait for the period of validity to expire.
39. Scottish Land and Estates	Yes, but we are concerned by the phrase "out-of-pocket" which suggests a peppercorn payment as a landowner might have incurred significant expenditure prior to the authority revoking the order and

	withdrawing.
40. Law Society of Scotland	We agree that it would be reasonable to allow for recovery of reasonable expenses where a CPO is revoked. Whilst the CPO is in force, there is the possibility of a blight notice and the recovery of compensation. This option would be removed if the CPO is revoked. Nevertheless, an affected person may have incurred expenses in expectation of the CPO being implemented (for example, professional expenses for potential relocation). It seems reasonable in principle for such expenses to be recoverable if the CPO does not proceed.
42. Scottish Water	No.
43. Faculty of Advocates	Yes, together with any damages suffered as a result.
44. Scottish Property Federation	We believe this is a fair suggestion.
Further responses made informally or at engagement events	None.
Analysis	
Explanation of proposal	This proposal is closely linked to proposal 19 and question 20.
Summary of responses and analysis	There were 27 responses to this proposal. 25 supported it and there was general agreement that such a proposal was fair and reasonable. SW opposed it without giving a reason. SthLC opposed it on the basis that such costs are not recovered if compensation is payable, so they would not support it in these circumstances. Several parties pointed out that recovering "out-of-pocket" expenses may not be sufficient. SCPA stated that "out-of-pocket" implied that these expenses were of a modest nature. However, objectors may incur significant expense including fees, time and loss of profit, as well as loss of control over tax planning. DVS suggested that in the rare situation where a CPO is revoked, all affected parties should have the statutory right to claim compensation for all reasonable expenses and costs incurred as a direct consequence of the CP process. MacRoberts, while agreeing with the proposal, said that such a provision may make an AA less likely to revoke a CPO, and may instead wait for the period of validity to expire. [Please see RTPI's comment to question 20 on providing for a duty to revoke]. SSE felt that any claim should be limited to the recovery of professional fees.

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

(Paragraph 5.50)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, promoters should be required to register CPOs in the Land Register. It would be desirable to avoid a multiplicity of registers.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	In principle the registration of CPOs seems appropriate but this area needs some careful consideration. Often CPOs are promoted over multiple property interests and once confirmed the parties proceed by way of a voluntary conveyance, in the interests of timing, project budget planning and in order to save on cost of advertising separate GVD notices. Requiring the registration of confirmed CPOs would remove this flexibility. That said if it is the case that the CPO is registered then revocation should be possible and capable of registration.
13. Strutt & Parker LLP	Revocation should be advertised and published in the same way as the CPO itself.
16. Scottish Compulsory Purchase Association	This proposal is supported.
19. Odell Milne	Agreed.
20. SSE plc	We would suggest that this is a sensible proposal.
12. District Valuer Services	Agreed.
22. Glasgow City Council	Again this is difficult to come to a position on – there are benefits from the perspective of a prospective purchaser to have access to information about all confirmed CPOs and the Land Register may be the appropriate place for this. The option to register the confirmed CPO already exists. However this doesn't really help prospective purchasers of interests other than those recorded in the Sasine/Land Register unless they carried out Sasine/Land Register searches. In addition, I would hope that registration of a confirmed CPO is not a trigger for first registration – the existence of this itself is only something of which those transacting should be aware. I assume that a sale/purchase contract (whether by standard missives or

	otherwise) puts a duty on the seller to disclose notices of this type. In practice, from the promoting authority's perspective the GVD often follows closely on from the confirmed CPO and the extent of interests in the GVD is often less than those in the confirmed CPO. Therefore I think that a requirement to register the confirmed CPO is overly onerous although the guidance could indicate best practice of registering a confirmed CPO within a reasonable period of the date of the confirmed CPO unless the GVD is in the interim registered, if that is thought to be best practice. Although the option to register in the Land Register should be retained, what would be helpful is for Scottish Ministers to maintain a record of all confirmed CPOs (with plans) and checking that could become part of the conveyancing diligence in respect of any transaction involving a land interest.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Revocation should be advertised and published in the same way as the CPO itself.
24. Shona Blance	Yes.
25. East Ayrshire Council	Agree that a central register of CPO's and revocations would be useful.
26. National Grid plc	Yes, reasonably and properly incurred expenses should be recoverable.
27. South Lanarkshire Council	The Council is of the view the CPOs and revocations of CPOs should be registered in the Land Register of Scotland. The Council do not believe that that the Keeper of the Land Register should be notified if not all the land acquired by CPO was required by the acquiring authority for the particular scheme/project.
29. Brodies LLP	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	This may be useful for public searches. However it may be difficult to link or add to the Land Register to show how an existing entry is affected. Consideration is needed of the value of a separate listing of CPO's and the plans.
32. Scottish Borders Council	Currently as a matter of practice I tend to register or record a CPO once it has been confirmed so that any party looking to acquire that title will at least be aware of it. I have no difficulty with this step being made compulsory, which to me would seem reasonable. There are

	neither excessive costs nor difficulty in doing this currently so I see no difficulty with the proposal. I would agree that if is a CPO is being revoked, this should also be registered. In terms of points at paragraph 5.50 where the acquiring authority doesn't need to utilise all land which may be affected by a CPO then I would concur with view that in theory it would be helpful if the Keeper is informed, however there is some difficulty with exactly how this is done. This may become slightly easier as everything transfers on to the Land Register. However I would have thought that technically speaking, unless revoked, all the land does remain affected by the CPO. What would actually be reflected in the Land Register would be the fact of what land has then been transferred/acquired either by way of General Vesting Declaration or otherwise by transfer of title. Clearly there would also be in respect of the remaining land the provision of a time constraint to use a CPO.
35. Shepherd and Wedderburn LLP	Yes.
38. MacRoberts LLP	Agreed, although there may sometimes be a potential practical issue in accurately identifying the relevant land. Perhaps the position can be developed in conjunction with the roll out of the reform of the Land Registration system under the 2012 Act.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree that this proposal would seem to be a sensible approach.
41. Judges of the Court of Session	**Question 22** We can see an advantage in requiring the registration of CPOs and their revocation in a central register, in view of the difficulties highlighted at paragraph 5.48 [of the DP].
42. Scottish Water	Yes.
43. Faculty of Advocates	Yes, the Faculty of Advocates considers that this would be a helpful development.
44. Scottish Property Federation	This is an appropriate measure and will help the Scottish Government to assess the use and application of the CPO power.
Further responses made informally or at engagement events	There was general agreement amongst attendees that AAs should be required to register CPOs.
Analysis	
Explanation of	This proposal is designed to deal with a perceived gap in the

proposal	Property Registers, to ensure that any CPO is highlighted to prospective purchasers, funders or other interested parties.
Summary of responses and analysis	There were 27 responses to this proposal. 26 agreed that there should be a requirement to register. GCC found the issue difficult and wanted to understand how this would work with the registration of a GVD. SOLAR stated that this would need careful consideration as it would remove flexibility when dealing with multiple property interests.

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

(Paragraph 5.50)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, promoters should be required to register CPOs in the Land Register. It would be desirable to avoid a multiplicity of registers.
7. West Lothian Council	Both.
10. Renfrewshire Council	A new Register of CPOs along the same lines as the Register of Community Interests in Land could be created in addition to Registration in the Land Register.
12. Society of Local Authority Lawyers and Administrators in Scotland	See comments above. The Land Register would seem capable of accommodating any new registered CPOs.
13. Strutt & Parker LLP	We agree that a register should be set up.
16. Scottish Compulsory Purchase Association	It is suggested that there should be a comprehensive Register of CPOs and that equally entry should be made in the Land Register for completeness. At present, entries are made on the Land Register before confirmation of the draft CPO and/or vesting which can lead to problems with satisfying purchasers in the intervening period. We can see the merit of early disclosure but in these circumstances the entry must be clear as to the land affected and the status of the CPO at the time of the entry.
19. Odell Milne	I do not think it would be a good idea to have a separate register for CPOs since the risk is that parties will not know that a search in that register should be made. However, I do understand the concern here as there have been cases where the existence of CPOs and GVDs affecting property is not noticed by solicitors acting for purchasers. This is more common where the acquisition is carried out under some other authority such as a Private Act. For a Private Act, there is no evidence on the Registers at all. If CPOs are be

	registered, it is suggested that any authorising statute or other orders such as a TAWS should also be registered so that it is clear to any party dealing with the land that there is a CP in contemplation.
20. SSE plc	We would suggest that there is no requirement for a separate register of CPO's.
21. District Valuer Services	It is suggested that there should be a comprehensive Register of CPOs and that equally entry should be made in the Land Register for completeness. At present, entries are made on the Land Register before confirmation of the draft CPO and/or vesting which can lead to problems with satisfying purchasers in the intervening period. We can see the merit of early disclosure but in these circumstances the entry must be clear as to the land affected and the status of the CPO at the time of the entry.
22. Glasgow City Council	I refer you to my response at proposal 22.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We agree that a register should be established. That could be supplemented by entries in the Land Register.
24. Shona Blance	Land Register, but I'm not sure how this helps the landowner however. A landowner who has had land acquired is left with, in some cases, an incomplete and inaccurate set of deeds.
25. East Ayrshire Council	A register would be useful, but what information would this include? Would it have details of the land and a plan so the land can be easily identified? If the register only has brief details, perhaps registration in the Land Register would be more appropriate. Whichever method is chosen should make clear what land is affected.
26. National Grid plc	The entry should be made both a new Register of CPOs and in the Land Register.
27. South Lanarkshire Council	The Council suggests that there should be an entry in the Land Register rather than a new Register of CPOs.
28. Royal Town Planning Institute Scotland	RTPI Scotland considers that information on land should be coordinated and monitored. The Scottish Government consultation on the Future of Land Reform in Scotland suggested that there should be better coordination of information on land, which would lead to better decision making for both the private and public sectors. Therefore we suggest that CPOs should be recorded as part of the Land Register, or another means of collating information on land rather than creating a new register for CPOs, which will be another

	document to monitor and update.
29. Brodies LLP	No. We would suggest that all matters relating to CPOs be registered in the Land Register. The Keeper of the Registers of Scotland has been charged by the Scottish Government with leading a steering group to explore the development of a central hub for information relating to property. The creation of another Register would simply add to the list of portals which would have to be brought together in such an exercise. Any deed which ultimately transfers ownership of the property will be registered in the Land Register. It would make sense for the CPO to be registered there, particularly if the proposals for temporary and new permanent rights under CPO are adopted and those new rights over land have to be registered. Those dealing with property, i.e. buying, selling, funding and leasing property would welcome the information relating to all of these being in the one place.
31. Association of Chief Estates Surveyors Scottish Branch	See comments on proposal 22
32. Scottish Borders Council	The chief benefits of there being a new register of CPO's: • firstly Check whether CPO has been made; and • secondly that each CPO would just need to be registered to this register regardless of how many different land certificates or sasine titles are affected, all of that could just be presumably listed within the entry on the register of CPO's. On one level this Register will just create another level of checks to be made and from an individual purchasers or sellers perspective having entry made in the land register might be simpler. However on balance my view would be that a new register of CPO's would be beneficial as it would be formed in such a way as to reflect the nature of CPO's, such as clearly stating the date at which the 3 year period of confirmed CPO commenced.
35. Shepherd and Wedderburn LLP	We do not believe there should be a new register of CPOs. We consider that details of the confirmed CPO should be registered in the Land Register.
38. MacRoberts LLP	There may sometimes be a potential practical issue in accurately identifying the relevant land and a Register may be more efficient than registering against numerous different titles.
39. Scottish Land and Estates	An entry should be made in the Land Register. This would fit with the Scottish Government's aim of improving and enhancing the Land Register and having information increasingly available in one place.
40. Law Society of Scotland	We suggest that if there is an appetite for a single register, then it would be more appropriate for the entry to be made in the Land

	Register. While professional searchers might know to look at a separate list, members of the public may not. To include the entry within the Land Register would help to ensure transparency and accessibility.
41. Judges of the Court of Session	**Question 23** While this question is a matter on which solicitors and others engaged in conveyancing are better qualified to comment, it appears to us that there is a considerable advantage in not increasing the number of public registers unnecessarily. For that reason, we are inclined to favour a system of making entries relating to CPOs in the Land Register. It is important, however, that appropriate procedures should be agreed with the Keeper of the Registers.
42. Scottish Water	There should be a new Register of CPOs.
43. Faculty of Advocates	The Faculty of Advocates considers that the Land Register would be preferable, to avoid a multiplicity of registers.
44. Scottish Property Federation	This is an encouraging proposal – but not all land is yet registered and therefore to make such a proposal statutory could cause additional procedures and expense for acquiring authorities that is not particularly the intent of the new Statute. We suggest that while this may become an attractive idea once the land register is more complete and once other forms of legislation begin to be embedded in the responsibilities of the Keeper then it may be a better time to call for a formal Register of CPOs with the Registers of Scotland. We would agree that eventually it should be the case that CPOs are registered and recorded within the national land register – this will help to move Scotland's Land Register more towards a Norwegian style National Land Information System. In time having CPOs and other information more centrally accessible will save costs for investors, government and individuals as it will make the process of land and property searches more up to date and efficient.
Further responses made informally or at engagement events	Different views were expressed on whether there should be a new Register of CPOs or an entry in the Land Register.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	There were 20 responses to this question. 12 favoured registration in the Land Register and these included those who require to regularly use the Register (LSS, FoA, JCoS, S&W, Brodies, RTPI, SLE, SthLC, SOLAR, OM, JRR and SB). Eight consultees (WLC, SCPA, DVS, CAAV, EAC, NG, ACES and

	SPF) favoured having both an entry in the Land Register and a new CPO Register. Five consultees (RC, S&P, SW, SBC and MacR) believed that a new register for CPOs should be set up. Officials of Registers of Scotland confirmed, at a meeting on 1 May 2014, that it would be possible to either set up a separate Register or proceed with an entry in the Land Register.

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

(Paragraph 5.59)

Respondent	
1. Professor Jeremy Rowan Robinson	It is the accumulation of the 3 years for implementing the CPO and 3 years for serving a notice to treat or GVD which in my experience is the main problem for owners and occupiers. I would support anything that can be done to reduce the cumulative period.
2. Craig Connal QC	No. The period is too long. A suggestion might be 18 months?
7. West Lothian Council	Agreed that the current three year validity period is reasonable.
10. Renfrewshire Council	Yes but the clock should be stopped in the event of challenge.
12. Society of Local Authority Lawyers and Administrators in Scotland	On balance, yes but there should be provision that you go back to Ministers to ask for it to be extended.
13. Strutt & Parker LLP	We believe that it is but acknowledge that there may be a need for some flexibility depending on the nature of the project. We consider that the time limit should be shortened to two years but that time should not run until any challenge is exhausted.
16. Scottish Compulsory Purchase Association	Arguably, the three-year validity period is too long and this should be reduced to two years. In some cases, the acquiring authority will wish to utilise its confirmed compulsory purchase powers as soon as practically possible but equally there are other situations where the acquiring authority delays (for legitimate reason) the formal acquisition process; in either event, it is the acquiring authority who is in control That delay can further exacerbate the situation as there may have been a considerable amount of time taken up with the draft CPO/objection process and the claimants to a CPO remain powerless to force acquisition and thus remain “in limbo”.

	Accordingly, there perhaps should be an option whereby where there is a confirmed CPO all the affected claimants to the CPO can formally request the acquiring authority to compulsory purchase their interest and on receipt of such a request the acquiring authority is obliged to acquire the interest and to enter into negotiations under the Compensation Code; further, the date of the making of such a request is the "vesting date" for entry/assessing the compensation due. This option then gives the claimants some control regarding disposal. However, the main problem that arises with the existing three-year validity period is that there is a six-week period between the date of the confirmation of the CPO within which a legal challenge to the CPO process can be made – initially to the Outer House of the Court of Session with a potential right of appeal to the Inner House and a further potential right of appeal to the Supreme Court. That legal challenge process can take up a considerable amount of time and at present runs in parallel with the three- year validity period – further adding to a sense of "limbo" for many claimants. The example of the Aberdeen Western Peripheral Route is germane as the relevant CPO was confirmed by The Scottish Ministers in mid-March 2010 and a timeous legal challenge thereto was raised to the Outer House with subsequent appeals to the Inner House and the Supreme Court. The Supreme Court's decision was announced in October 2012 (in the acquiring authority's favour) which only left the acquiring authority some four months within which to exercise its General Vesting Declaration. Indeed, it is understood that the appeals process was "fast-tracked" in order for the ultimate decision to be taken prior to the expiry of the three-year validity period. Thus, in the situation where a legal challenge is lodged then the two-year validity period should not commence until either the Supreme Court has issued its decision or the appeal has been formally settled or abandoned at some earlier stage.
19. Odell Milne	I consider that three years is at the limit of what is reasonable. As set out elsewhere in this response, there is a need for certainty for landowners and three years' uncertainty results in difficulty in managing businesses. The landowner does not know whether to sell; enter into contracts; obtain replacement land, grant leases etc. Perhaps consideration could be given to introducing a procedure for landowners affected whereby the acquiring authority can agree to an advanced purchase. Advanced purchase schemes have been used to good effect with some of the private railway schemes, such as the Airdrie to Bathgate railway and Borders Railway. Amongst other things, these advance purchase schemes can enable residential parties affected to find new homes to replace those which are to be demolished. Given the possible increase in compensation bill for a promoter at

	an early stage, particularly where there is no certainty that a scheme is to go ahead, there may be arguments against this. However, this should not be a common occurrence since, if a scheme has been found to be necessary in the public interest and has been properly budgeted, funds to pay compensation should be available by the date on which confirmation of the CPO is granted by the Scottish Ministers or, at the very least, the source of that funding should have been identified and there should be some certainty for the acquiring authority as to where and when that money will be available. However, I recognise that for any acquiring authority, budgets are tight and payments allocated in particular budget years cannot easily be moved into other years. A further issue arises during the six week "challenge period", and during the further period during which a right of appeal to the Inner House or Supreme Court could be pursued. Such a process can take many years, as the AWPR case shows. In such circumstances even a three year validity period can be tight. It could be provided that the three year validity period can be extended so that it does not start to run until the end of any legal appeal process. However, the disadvantage of that for a landowner is again the uncertainty during the intervening period and overall the current balance is perhaps the right one.
20. SSE plc	For certain acquiring authorities, certainty on availability of funding or the need for a project (where the project is required to facilitate other infrastructure for example) can be outwith their control and therefore it may be the case that certain investment decisions are not finalised within that 3 year period. We suggest that acquiring authorities should be able to make a case for the validity of a confirmed CPO to be extended on cause shown.
21. District Valuer Services	Yes – provided there is the possibility of "stopping the clock" where the scheme is delayed due to legal process to avoid the CPO needing to be resubmitted where GVD is prevented due to ongoing legal challenges (as almost happened with AWPR).
22. Glasgow City Council	I think that 3 year period is a reasonable balance. In some large phased developments 3 years may be too short for the later phases and so perhaps a longer period within which to make and to serve notice of the GVD in respect of parts of the CPO ought to be permitted. Similarly it may be that in CPOs of small interests with simple development anticipated a lesser period is reasonable. However, the introduction of flexibility on this will without doubt bring with it its own complexities.
23. Central Association of Agricultural Valuers and Scottish	We believe that it is reasonable but would propose that time should not run until any challenge is exhausted.

Agricultural Arbiters and Valuers Association	
25. East Ayrshire Council	3 years would seem to be reasonable.
26. National Grid plc	Yes.
27. South Lanarkshire Council	The Council acknowledges that the current 3 year validity period may lead to uncertainty for persons affected by the CPO. The Council expects to proceed to vesting as quickly as possible and until now this has been well within the 3 year period. However the Council acknowledges for some schemes/projects it may take longer before the acquiring authority is in a position to proceed to vesting. The Council would support shortening the 3 year validity period to no less than 18 months on condition that this period can be extended with approval of the Scottish Ministers.
28. Royal Town Planning Institute Scotland	RTPI Scotland suggests that a five year validity period of a confirmed CPO might be reasonable, with due consideration given to the current economic climate.
31. Association of Chief Estates Surveyors Scottish Branch	Recommend continue with the existing three years and add the provision to extend by approval of the Scottish Ministers.
32. Scottish Borders Council	In my view the three year validity period of a confirmed CPO is reasonable. Compulsory Purchased Land may in many cases only form one part of a project deliverable, time should be allowed for the acquiring authority to put all other aspects in place before implementing a CPO if that is what is required. Another factor for the three year validity period would be maybe that in the background to the CPO process, that acquisition by compulsory means has been ongoing and that in fact in more beneficial terms for all parties involved can be reached through this. In having these negotiations it is useful for the CPO to remain valid for a three year period other than something shorter and that might result in the negotiations having to be cut off at an early juncture due to the time constraints.
35. Shepherd and Wedderburn LLP	In major developments, for example offshore wind farms, the onshore compulsory purchase is likely to be one of a large number of consents/permissions required from various authorities/parties. Due to uncertainties around timescales for the CPO process, the developers require to promote a CPO early in the development process to ensure the scheme is not delayed due to lack of land rights. Therefore an up to 3 year period may be justified in certain circumstances. That said we recognise that without justification the 3 year period may be of concern to landowners. Accordingly we would be supportive of the Law Commission's proposal to reduce the time limit to 18 months with provision for the Acquiring Authority

	being entitled to include within their CPO a longer period to reflect any special circumstances of the scheme.
38. MacRoberts LLP	There is a strong case for introducing some flexibility into the period of validity. We agree that 3 years can be seen as excessive. However, in large infrastructure projects the 3 year period can be necessary. We support the approach adopted in the Planning Act 2008 whereby a prescribed period is set out in Regulations, and perhaps remains at 3 years, but the confirmed order may specify a longer or shorter period. It would be for the acquiring authority to justify the required period of validity should this attract objection.
39. Scottish Land and Estates	Generally speaking the three year validity period is in our view reasonable.
40. Law Society of Scotland	Yes.
42. Scottish Water	Yes
43. Faculty of Advocates	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.
44. Scottish Property Federation	On balance we think three years is appropriate.
Further responses made informally or at engagement events	Concerns were expressed that the three year period was too long but there was no general agreement as to how this could be shortened.
Analysis	
Explanation of the question	None required.
Summary of responses and analysis	There were 25 responses to this question. Of these, 14 agreed that the three year period was reasonable although some suggested qualifications. Only two submissions stated outright that three years was too long. Most acknowledged that it would be helpful to reduce this period but many pointed to the AWPR experience as evidence of a situation where the three years was almost not long enough. S&P and SCPA considered that the validity period could be cut down to two years but that the two years should not run until any challenge has been exhausted. RC, DVS and CAAV said that three years was reasonable but that the clock should be stopped in the event of challenge. SOLAR and ACES felt that three years was reasonable but that there should be provision for Ministers to extend that period.

	SthLC thought that the three year period should be cut to 18 months on condition it could be extended with approval from Ministers. S&W argued that in major developments e.g. offshore wind farms, a three year period was necessary to assemble all the consents. They would support a reduction to 18 months with provision for the AA to include a longer period in the CPO if there were special circumstances. RTPI wanted to extend the period to five years. MacRoberts supported the approach of the Planning Act 2008 whereby a prescribed period is set out in Regulations but the confirmed order may specify a longer or shorter period. It would be for the AA to justify the required period should this attract objection.

25. **Should there be a precondition that a CPO will only be confirmed where there is clear evidence that the project is reasonably likely to proceed?**

(Paragraph 5.59)

Respondent	
1. Professor Jeremy Rowan Robinson	It does not seem unreasonable to require that a CPO should only be confirmed where there is clear evidence that the project is reasonably likely to proceed. If it is not reasonably likely to proceed, I don't see how a confirming authority could properly confirm the order.
2. Antony C O Jack	**23.** … **Question 25,** relates to evidence of a project likely to proceed. It seems to me that this question hinges on the initial justification test – is the land really needed in the public interest. The likely hood of it preceding is surely part of the public interest balance justification. It seems that the issue of a project proceeding or not could be: funding; the will/strategy of the developer; and also may be political [or in terms of utilities other intervening events]. I suspect that any dilution of being able to sustain an objection on the fundamental test should be avoided. I am very concerned that I have been hampered in putting my Objections by a lack of transparency – most importantly the failure to disclose the partnership minute of agreement between the Developer and Authority. In these terms in the Winchester CPO case, a developer from the same stable [different fund] submitted plans for shops, affordable housing, bus station, car park etc. under an agreement – and once the CPO was confirmed, the bus station and affordable housing were apparently dumped [or commuted]. In these terms the 2014 CPO [2], the developer's applications have provided what I consider to be *compelling evidence of deliberate falsification of data* submitted to the Developer's partner, the Acquiring Authority. I do not understand how the Developer operates as there appears to be

	two strata of trustees, an unregulated fund, as well as parties involved that are regulated. If a developer's agents are deliberately falsifying information to an Acquiring Authority, is it reasonable to deduce that this apparent bad faith will not be isolated [acting in good faith will, one could deduce, be a condition in the secret partnership agreement, so how does such behavior affect that agreement]? Will those Developers have falsified information provided to the Acquiring Authority in relation to their ability to deliver the Scheme? Indeed is the £61.4m public contribution calculated on false data supplied by the Developer?
6. Craig Connal QC	Yes. All the material supporting this should be available for scrutiny and to enable potential challenge. As is illustrated in a number of sections of the Paper, this relatively simple point has a more complex incarnation where there are more significant issues over compensation. Particularly when viability may be an issue in commercially-based schemes, any step which materially increases compensation over that budgeted for may lead to the scheme being unable to proceed. In the context of traditional CPOs for roads, schools or whatever, these issues would not arise. It would simply be assumed that the relevant authority would pay whatever compensation had to be paid. That may not be true even for traditional types of schemes nowadays due to the strict need for budgetary constraints and the straitened economic climate. It will certainly not be true for any scheme which involves a back-to-back element or commercial redevelopment proposals as part or all of the scheme. Unfortunately, the processes for dealing with these matters are, because of their traditional origin, placed at a stage in a process well after the CPO is approved. Examples are for instance, severance - which might conceivably lead to a very substantial piece of property having to be taken because of material detriment - or procedure for CAADs which again could lead to a property having a very much higher than hoped - for compensatable value. The point goes further. On one view of the present law, any issue which relates to these points is not only not dealt with at inquiry but not relevant for consideration at the inquiry - yet it may be absolutely critical in a financial sense to whether the scheme proceeds. One could then have an extensive inquiry on the principle of a CPO which is, in the result, completely academic. A waste of time and effort because of one of the financial impacts. It may be difficult to create an elegant scheme to deal with the issue, but it does respectfully seem to me that it requires to be addressed so that these matters can be looked at early, if they have the capacity to materially impact on the likelihood of the scheme proceeding. Indeed, the question perhaps is not whether they should be, but how arrangements can be made for their compulsory examination early in process.

7. West Lothian Council	Agreed. However, consideration requires to be given as to what level of evidence would be required and this should be set out in the new statute.
10. Renfrewshire Council	Yes, but there would have to be clear guidelines at what would constitute "clear evidence," bearing in mind that if projects had to wait until funding was secured or committed before starting the CPO process this could introduce a potential delay at a crucial stage of the project. A balance is required to safeguard the interests of the landowner and needs of the acquiring authority.
12. Society of Local Authority Lawyers and Administrators in Scotland	No. For some of the reasons intimated in the discussion document, many projects can be several years in the gestation and contingent on funding sources and national policy developments (e.g. the National Planning Framework projects) Often land assembly is a sensible step in the forward planning of a project where many different agencies may be involved and, whilst able to part fund the compensation for land assembly from their own resources, are dependent on overall capital project funding from other sources. The flip side is that if these projects were to wait until funding was secured or committed before starting CPO this would introduce a potential delay at a crucial stage of the project.
13. Strutt & Parker LLP	This would create a measure of uncertainty. It should be a condition of any draft order that it can only be issued if the project is reasonably likely to proceed and the acquiring authority is able to demonstrate that finance is in place.
14. John Watchman	2.5 Compulsory acquisition of land must be justified in the public interest. There has to be an assessment of the impacts on the people affected and the public benefits (such as economic, environmental and/or social benefits) of compulsory acquisition (including compulsory purchase) and related projects. That assessment ought to be a fundamental part of the acquiring authority's Statement of Reasons (see section 5 below). 2.6 Will the new statute articulate the test or criteria by which the public interest of society as a whole can be tested against – and, if necessary, preferred to – the interests of individual citizens? What constitutes 'a compelling case for acquisition in the public interest'?
16. Scottish Compulsory Purchase Association	It is considered that there is no need for a precondition as there is a sufficient validity period after confirmation and, in any event, as stated under Proposal 19 an acquiring authority would have the power to revoke a CPO – provided, of course, that reasonable compensation is paid (see comments under proposal 21).
19. Odell Milne	I consider there should be a clear precondition to this effect. The promoting authority should be obliged to show that the project is

	necessary and in the public interest, and the interference with private rights which the acquisition involves is proportionate. In order to be satisfied of that, the acquiring authority must be certain that the project can be delivered. It seems to me that the compulsory taking of rights and land for a scheme that is only aspirational, cannot be justified as proportionate interference. In my view, this should not prove a problem for acquiring authorities since, in order to commence work on such a project, they must be satisfied that the project is capable of delivery. [See also answer to question 42.]
20. SSE plc	An acquiring authority does not undertake the making of a CPO lightly and in doing so has to set out its needs case and the confirmation of the Order will take into account consideration of that needs case. It has to be recognised that an acquiring authority will be acting in good faith in making an order and in doing so, it has a clear expectation that the project is reasonably likely to proceed so we do not see that there should be any separate precondition.
21. District Valuer Services	There should be no need for such a condition – the SG guidance is clear. However, it would do no harm to enshrine this in statute.
22. Glasgow City Council	This will already be inherent in the Statement of Reasons and in any subsequent Statement of Case and I think that that is sufficient.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	It should be a condition of any draft order that it can only be issued if the project is reasonably likely to proceed and the acquiring authority is able to demonstrate that finance is in place. There simply should not be speculative CPOs – ordinarily, that would be an abuse of the system and the remarkable powers given to acquiring authorities.
24. Shona Blance	Yes given the potential impact on the value of the land.
25. East Ayrshire Council	Not in agreement with this proposal. Although it is appreciated that there could be uncertainties as to whether a project will proceed, this should not form a precondition. However, if clear evidence was to be provided, what is envisaged would be required?
26. National Grid plc	It is unclear what is meant by the phrase “reasonably likely to proceed”. It could have different meanings in each case and therefore it would be difficult to enshrine this precondition in statute. In the case of regeneration project where there is a private developer involved, then in principle, such a test would be prudent. The current guidance deals with this and this is perhaps where should a test should be contained rather than in the new statute. For infrastructure projects where there is already a regulatory framework around approvals and funding in our view a test is not required nor

	appropriate.
27. South Lanarkshire Council	The Council does not consider that this is appropriate given the terms of the Scottish Government's guidance.
28. Royal Town Planning Institute Scotland	The Institute considers that this may be an unnecessary step which duplicates other procedures. There is already a set time period for a CPO, therefore the validity of the Order does not continue in perpetuity. Furthermore, the planning system in the preparation of Development Plans considers viability and deliverability of sites as a key consideration. The Action Programme sitting alongside each Development Plan is updated every two years, and monitors the delivery of the Plan, and the development set out within the Plan. Scottish Planning Policy (2014) sets a presumption in favour of development that contributes to sustainable development, and the viability of development is part of this.
29. Brodies LLP	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	No. This would add another layer of difficulty to the confirmation process. There may be land acquisition estimates but these are subject to affected parties making actual claims including for disturbance. The scheme design and therefore overall cost is often still indicative at CPO stage especially with alternative procurement routes possible. This could readily lead to challenge from unwilling owners wishing to frustrate the process.
32. Scottish Borders Council	No, in my view the guidance contained in the Scottish Government circular strikes the right balance to there being a reasonable prospect that the project will be able to succeed while recognising that in certain cases the authority may be able to justify acquiring the land although funding is not guaranteed. In my view going beyond this would be too restrictive of where the authority would be able to act.
35. Shepherd and Wedderburn LLP	No. We do not believe that there should be a legislative pre-condition that a CPO will only be confirmed where there is clear evidence that a project is reasonably likely to proceed. We consider that the guidance contained in the Circular is sufficient to cover this point.
36. Scottish Power Ltd	*[From general comments on Pre-Condition]* We have reservations about the proposed imposition of a pre-condition that a CPO would only be confirmed where there is clear evidence that the project is reasonably likely to proceed. On customer connections, SP Transmission Plc and SP and Distribution Plc are duty bound under their respective licences to

	ensure that any scheme with a contracted grid connection position is progressed to a fully consented position in accordance with the relevant delivery programme. Neither SP Transmission Plc nor SP Distribution Plc should be placed in a position of conflict with their licence obligations as a consequence of the delay in the confirmation of a CPO where that CPO is in fact the delivery vehicle for the consents which in turn allow programme certainty, contract placement and customer connection. On infrastructure projects, SP Transmission Plc and SP Distribution Plc must ensure their schemes are delivered economically and efficiently. Further, any infrastructure scheme proposed by SP Transmission Plc and SP Distribution Plc is subject to an approved needs case from OFGEM. On that basis, where SP Transmission Plc or SP Distribution Plc promote a CPO to deliver a infrastructure scheme having demonstrated an approved need it should be taken as a matter of fact that such a scheme will be delivered and any associated CPO should not be held back. *[from general comments on Timescales]* An acquiring authority has three years from the confirmation of a CPO to implement the CPO. Consent under the Electricity Act/Town and Country Planning Act can be extended to five years, with agreement of the determining authority. We believe that the CPO timeframe should now align with the other regimes. We would like to see the CPO implementation period extended to five years in order to support delivery of complex infrastructure projects, especially in light of the Contract for Difference regime.
38. MacRoberts LLP	Yes. It does not appear to be in the public interest that CPO powers be given if there is no certainty that a project is reasonably likely to proceed. We recognise that the concept of a reasonable likelihood may potentially be a difficult test to apply as a CPO may be promoted prior to the conclusion of funding. For this reason, acquiring and confirming authorities ought to be given much clearer and robust guidance on how they are to go about confirming the reasonable likelihood of development being delivered.
39. Scottish Land and Estates	There may be grounds for some form of condition whereby the acquiring authority has to evidence a business plan or suitable budget for the purposes of evidencing the ability to take forward the CPO.
40. Law Society of Scotland	The rationale behind this seems sensible but it may give rise to difficulties in practice. When is a project reasonably likely to proceed and who decides and on what criteria? In the absence of any evidence to suggest that the current mechanism is ineffective, then perhaps this does not need to be addressed. Viability is an issue which can currently be addressed within the

	context of the need for the scheme to be justified in the public interest. It is questionable where there would be a benefit in adding an explicit "likelihood of implementation" test. As the current Circular recognises, funding streams can be unpredictable and this is particularly the case for schemes involving housing associations where funding may be time-limited.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	While tempting to agree with this proposal it is likely that each proposal will need to be judged on its own merits. CPOs are a significant commitment by acquiring authorities and we doubt that such a process will be entered into without due cause for thinking the wider project will take place. However, if tied to a wider development project involving other partners, possibly from the private sector, there will be elements of uncertainty that may be difficult to completely eradicate. Therefore so long as the rights of compensation, including for 'blight' and of the 'offer back' principle (Crichel Down rules) can be securely prescribed in the new Statute and its subordinate legislation, we feel that again this might be a restriction too far for acquiring authorities and that it may deter local and other public authorities from making use of CPOs.
45. Scottish Power Energy Networks Holdings Ltd	*[From general comments on Pre-Condition]* We have reservations about the proposed imposition of a pre-condition that a CPO would only be confirmed where there is clear evidence that the project is reasonably likely to proceed. On customer connections, SP Transmission Plc and SP and Distribution Plc are duty bound under their respective licences to ensure that any scheme with a contracted grid connection position is progressed to a fully consented position in accordance with the relevant delivery programme. Neither SP Transmission Plc nor SP Distribution Plc should be placed in a position of conflict with their licence obligations as a consequence of the delay in the confirmation of a CPO where that CPO is in fact the delivery vehicle for the consents which in turn allow programme certainty, contract placement and customer connection. On infrastructure projects, SP Transmission Plc and SP Distribution Plc must ensure their schemes are delivered economically and efficiently. Further, any infrastructure scheme proposed by SP Transmission Plc and SP Distribution Plc is subject to an approved needs case from OFGEM. On that basis, where SP Transmission Plc or SP Distribution Plc promote a CPO to deliver a infrastructure scheme having

	demonstrated an approved need it should be taken as a matter of fact that such a scheme will be delivered and any associated CPO should not be held back. *[From general comments on Timescales]* An acquiring authority has three years from the confirmation of a CPO to implement the CPO. Consent under the Electricity Act/Town and Country Planning Act can be extended to five years, with agreement of the determining authority. We believe that the CPO timeframe should now align with the other regimes. We would like to see the CPO implementation period extended to five years in order to support delivery of complex infrastructure projects, especially in light of the Contract for Difference regime.
Further responses made informally or at engagement events	Concerns were expressed about this being a pre-condition in primary legislation.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	There were 32 responses to this question. 14 were of the view that there should be such a pre-condition, with 14 opposing such a pre-condition. The remainder saw arguments on both sides. FoA felt that such a pre-condition was essential and that a CPO should only be confirmed where the project is "almost certain" to proceed. CC gave a detailed explanation on why such a pre-condition was necessary; pointing out that one could have an extensive (and expensive) inquiry on the principle of a CPO which is, in the end, completely academic. He neatly encapsulated the difficulties of all CPOs being governed by the same rules. He drew the distinction between schemes which are wholly financed by the public sector and those which are "back-to-back" deals with involvement of the private commercial sector. OM stated her view that an AA should be obliged to show that the project is necessary, is in the public interest and that the interference with private rights which the acquisition involves is proportionate. She pointed out that in order to be satisfied of that, the AA must be certain that the project can be delivered. MacR agreed with this but stated that AAs ought to be given much clearer and robust guidance. NG felt that if there was a private developer involved then there should be such a pre-condition, whereas for infrastructure projects,

	where there was already a regulatory framework, no such test was needed. Both SP and SPEN pointed to their regulatory requirements being sufficient, and did not want legislation which would conflict with their licence obligations. Of those opposing, DVS thought there was no need for such a pre-condition as the SG guidance was clear, but then went on to say that it would do no harm to enshrine this in statute. SthLC, SBC and S&W believed that the SG guidance was sufficient to deal with this issue. SPF felt that each CPO needed to be judged on its own merits.

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)

Respondent	
7. West Lothian Council	Only if the replacement right of way is substantially similar to or better than the one being stopped up. There should be no substantial detriment to the users of the right of way.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	No, because the route may be issues regarding the suitability of the proposed replacement.
16. Scottish Compulsory Purchase Association	It is considered that any interference with any existing public/private property right requires an inquiry to be an option in the process.
19. Odell Milne	No, there should still be an inquiry since the replacement may not be suitable for various reasons and affected parties should have the chance to consider the proposed alternative and, if appropriate, object to it.
20. SSE plc	Whilst we have had no experience of this, we would suggest that this would be sensible.
21. District Valuer Services	Yes, if an alternative right of way is offered then the right to an enquiry should be removed. It may be necessary to apply a test of

	reasonableness.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No, because there may be issues regarding the suitability of the proposed replacement route as a right of way for its users and its effects on property owners and occupiers.
24. Shona Blance	Yes provided the alternative is a reasonable one.
25. East Ayrshire Council	If a right of way is to be replaced on more or less the same route as before, although the original right of way has been lost, a new right of way has been established therefore the public are not being deprived of that access. If the right of way is being replaced, it might mean that there would not be the same public objection compared to it being extinguished completely. It is agreed that the right to insist upon an inquiry be removed if a replacement right of way is proposed.
26. National Grid plc	Yes although Scottish Ministers would still have the ability to hold an inquiry if they considered it appropriate. Other methods for considering the matter, for example written submissions, a site visit and/or a hearing, should be considered as they may be more appropriate.
27. South Lanarkshire Council	Yes.
28. Royal Town Planning Institute Scotland	RTPI agrees that there should be the right to insist on an inquiry being removed if the acquiring authority provides an alternative public right of way in place of one which may be lost due to a development proceeding.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	In my view if the Authority is offering to replace the public right of way it would be appropriate for the right to insist upon an inquiry to be removed.
35. Shepherd and Wedderburn LLP	No. The nature of the alternative public right of way is a matter that we consider should be examined if objections to its relocation are made.
38. MacRoberts LLP	Yes, but should the Reporter consider that the proposed replacement raises issues requiring the hearing of evidence, an inquiry should remain an option.

39. Scottish Land and Estates	No, we do not think the right should be removed. The impact on landowners and occupiers of the land should be considered and the appropriateness of the replacement public right could be a significant issue.
40. Law Society of Scotland	Yes, however there should be some degree of scrutiny as to it being an appropriate replacement. We suggest that the procedure for replacement of a public right of way should be dealt with in similar procedural terms to a stopping up order with similar rights of appearance applying to both.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Yes – this is too prescriptive.
Further responses made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	There were 24 responses to this question. 17 thought that if an alternative right of way were offered, then the right to insist on an inquiry should be removed. However, of those in favour, four stated that the alternative must be reasonable and suitable. Seven were against this proposal, of which four raised issues about the suitability and appropriateness of the replacement route. MacR questioned whether the Reporter should consider whether the alternative route raised issues, and felt an inquiry should remain an option. WLC summarised the concerns clearly by stating that the replacement right of way must be substantially similar to, or better than, the one being stopped up. There should be no substantial detriment to the users of the right of way.

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)

Respondent	
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	If possible yes.
13. Strutt & Parker LLP	Yes.
16. Scottish Compulsory Purchase Association	It is suggested that such inquiries should indeed be combined.
19. Odell Milne	Yes, public inquiries should be combined if possible.
20. SSE plc	Again, whilst we have had no experience of this, we would suggest that this approach would be sensible.
21. District Valuer Services	Yes. It is suggested that such inquiries should indeed be combined.
22. Glasgow City Council	Possibly - but if there is a manifest need for the loss and if a substitute right of way is being offered the adequacy of the substitute and the consideration of alternatives might be the scope of what is considered at Inquiry.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. There is no point in duplicating processes, especially for inter-related proposals.
25. East Ayrshire Council	This seems to be reasonable.
26. National Grid plc	Yes.
27. South Lanarkshire Council	Yes this would seem a sensible approach which will allow consideration of the issues at the same inquiry. It would also minimise costs and delays to the project/scheme arising from having

	2 separate inquiries.
28. Royal Town Planning Institute Scotland	RTPI Scotland agrees that where there is to be an inquiry into the loss of a public right of way, this should be combined with any inquiry into the making of the related CPO.
31. Association of Chief Estates Surveyors Scottish Branch	If possible yes.
32. Scottish Borders Council	It seems sensible to me to deal with any issue of loss of public right of way by a combined Inquiry into making of the CPO. In planning hearings/Inquiries it is certainly common to deal with multiple topics under separate sessions within the same Hearing/Inquiry and this could easily also be done here.
35. Shepherd and Wedderburn LLP	Yes.
38. MacRoberts LLP	Yes. This would make the process more efficient. In practice the proposed extinguishment may be considered as distinct session or agenda point within the combined inquiry.
39. Scottish Land and Estates	Yes, we believe that this would make sense.
40. Law Society of Scotland	This would appear to be the most cost-effective way to deal with it, and it may be sensible to combine both processes, but there may be other practicalities which would make it inappropriate**.**
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	This could broaden the scope of the inquiry unnecessarily so we would suggest that if the inquiry is solely about the right of way then this is what it should stick to.
Further responses made informally or at engagement events	None.

Analysis	
Explanation of question	None required.
Summary of responses and analysis	There were 23 responses to this question, and 22 agreed that any inquiry into the loss of a public right of way should be combined with an inquiry into the making of the related CPO. Only SPF disagreed, suggesting that inquiry into the loss of the right of way could broaden unnecessarily the scope of the general inquiry.

28. **Are there any other aspects of the process for making or confirming a CPO upon which consultees wish to comment?**

(Paragraph 5.65)

Respondent	
9. David Strang Steel	The procedure for confirmation of CPOs by the Scottish Ministers has given rise to questions in our case. The Public Inquiry for the AWPR was presented with two alternative routes. The Reporter clearly recommended that the Scottish Ministers should consider carefully the compensation payable in respect of the AWPR preferred route, as against our Alternative. From evidence led at the LTS hearing, it appears that this recommendation was not followed when the Scottish Ministers confirmed the CPO.
13. Strutt & Parker LLP	A balance is required between speed and the property/human rights of affected parties. Any new legislation should contain express duty on any acquiring authority (and its agents and contractors) to have regard to the rights of affected parties, not only during the promotion but also the implementation. That duty should also extend to their contractors to reflect the design and build nature of many projects. We consider this is necessary to ensure that the acquiring authority properly considers alternative options prior to any scheme being eventually promoted. This would potentially negate the need for costly or lengthy Public Inquiries such as seem to have arisen from the failure of Transport Scotland to properly consider alternatives to their proposals for the AWPR. Such a duty would also avoid the conflicts encountered between affected parties and contractors in design and build schemes.
16. Scottish Compulsory Purchase Association	By its very nature, a CPO is a complex legal process which involves the compulsory appropriation of private property rights. Thus, a balance has to be struck between the need for speed in the acquisition system but set against the protection of the private and human rights of the affected parties thereto.

17. Lands Tribunal for Scotland	Clearly it is highly desirable that wholesale reform should be equally applicable to non-devolved matters where the UK Government is acquiring authority.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	A balance is required between speed and the property/human rights of affected parties. Any new legislation should contain an express duty on any acquiring authority (and its agents and contractors) to have regard to the rights of affected parties, not only during the promotion of the scheme but also during its implementation. That duty of care should also extend to their contractors to reflect the design and build nature of many projects. Many problems arise from the implementation of works by the acquirer's contractors with whom the affected parties have no legal relationship yet the acquirer, the contractors and sub-contractors all shuffle responsibility between them over issues that can include carelessness with livestock, damage to field drains and other property, or poor restoration of land for return to farming use. We consider the express imposition of this duty of care is necessary to ensure that the acquiring authority properly considers alternative options prior to any scheme being eventually promoted. This would potentially reduce or negate the need for costly or lengthy Public Inquiries such as seem to have arisen from the failure of Transport Scotland to properly consider alternatives to their proposals for the AWPR. Such a duty would also avoid the conflicts encountered between affected parties and contractors in design and build schemes. *Continued discussion from General Comments* **e) Time Taken in the CPO Process** We appreciate the aim of the proposals is to make the compulsory process clearer, fairer and faster. In so doing the process must also balance private property rights and public interest. Timeliness is frequently a problem in compulsory purchase. This is not only a concern to those promoting schemes but also an issue for affected landowners. This may be due, for example, to undue delays in the planning or appeals process leading up to confirmation of a CPO, or conversely acquirers finding themselves short of time and so take undue haste in taking entry. During the period between the announcement of a scheme and its implementation, property in the vicinity of the proposed works (and any alternatives) is effectively blighted. The practical impact of this period for affected parties has been extended by the much greater early activity of intrusive surveys when assessing possible routes and developing schemes. There are then considerable delays in the assessment and payment

	of compensation. Members report long delays in responses to submissions – a case just noted has not had a reply in over a year. The claimant has no effective means to accelerate this, beyond taking it to the LTS (as has already happened with a number of AWPR claims). **f) Claimant's Costs Incurred Before Confirmation of a CPO** The long procurement process and the tendency to consult on options, however desirable, leads to uncertainty for those property owners along the corridor of any scheme that is mooted. Such 'blight' on alternative corridors remains until the actual route is finalised but then still remains in respect of the scheme route until the vesting date. In the case of the AWPR, the uncertainty remained from the date of the announcement of the alternative route in 2006 until the vesting date in 2013. The 'roadshow' for improvements to the A96 has already 'blighted' properties along the route options. This will continue until the scheme is delivered. Any revised legislation should contain clear duties on an acquiring authority towards affected parties during the design, promotion and implementation of any CPO scheme.
37. J Mitchell	[From general comments] **Chapter 6 Challenging a (confirmed) CPO** Public schemes are frequently promoted by private companies. We have found them not to be willing to consider alternative proposals after they have selected a route or design, despite the fact that contact with us prior to that point was minimal. Private companies are not directly accountable to the community and are profit orientated. We therefore consider it important that there should be a clear statutory duty placed on acquiring authorities to carry out all work necessary leading to the preparation of a CPO such as in route selection or Environmental Impact Statements. There should be a clear duty of care towards affected parties to ensure a fair and equal assessment of route options. In their CPO application for the AWPR Transport Scotland relied upon work undertaken by Jacobs and the Scottish Agricultural Colleges (SAC). Much of that work appeared to have been insufficiently researched. Examples of this include: - 1. It was stated by SAC that remedy/offset measures for mitigation included compensation and it was upon this basis that Graham Kerr of SAC concluded that the Fastlink

	proposals of the AWPR would not affect the viability of any farm. (*EIA (CD) Chap 37 para 37.6.11 to 37.6.16*). In the AWPR EIA and in Mr Kerr's evidence in his supplementary evidence at Public Inquiry, Mr Kerr referred to his findings in the ES at 37.6 and to Appendix A37.2, but went on to say at 8.2 "…*no commercial agricultural units will have their viability affected*…". Mr Kerr suggested at the Public Inquiry that the impact of the Fastlink on our farming operations was LOW. The purpose of any EIA is to inform on a particular proposal which may lead to a CPO and to incorporate into the scheme measures to avoid or mitigate adverse impacts. The elimination of adverse environmental impacts or their reduction to an acceptable level is at the heart of the EIA process. We had always understood that one of the main purposes of an EIA is to ensure that potentially significant environmental effects of proposed projects are avoided or reduced as far as possible or practicable. Mr Kerr as part of the EIA, however, assumed that remedy/offset measures for mitigation ought to be <u>included</u> within the compensation. Therefore Mr Kerr's assessment was fundamentally flawed as it is not within the EIA remit to make any recommendations for offset or compensation. Proper consideration of alternatives was therefore not undertaken. Other witnesses for the Scottish Ministers referred to Mr Kerr's conclusion that no agricultural business would be unviable, as did the Reporter (see paragraph 10.242). Transport Scotland subsequently accepted our notice of severance and that our poultry business has now been terminated. We commissioned a specialist poultry veterinary report which concluded that the proximity of the AWPR presented an unacceptable threat to the biosecurity of the unit which would result in its closure. Transport Scotland/Jacobs refused to accept this and instructed SAC to provide a separate 'independent' veterinary report. This suggested tree planning to mitigate any hazard! Following meetings with the District Valuer they agreed to refer the matter to another specialist poultry veterinary expert whose evidence fully supported our original report. This illustrates the lack of proper investigation into route selection carried out on the AWPR. The process for selecting the Fastlink took 5 months and could not have been informed by any EIA which only appears to have been completed after the route was selected. It is no surprise therefore that much of the controversy over the AWPR centred on the Fastlink. Had the EIA been undertaken correctly and ahead of time, it would

	have afforded the opportunity to discuss and consider the route impacts further and could potentially still have been amended to potentially take account of our own business viability and also allowed the development of the long awaited supermarket in nearby Stonehaven. In effect those preparing EIA's are experts whose professional judgement has to be relied upon by any Reporter. Those promoting schemes must have properly informed, weighted and considered alternatives. Failure to do so can result in flawed schemes. In any new legislation there should therefore be a clear duty on any acquiring authority to carry out such an assessment leading to the implementation of a CPO with due care and diligence and there should be clear sanctions for noncompliance or failure to adhere to the guidance. If agents for an acquiring authority adopt a partisan approach in respect of such work leading to any CPO process or refuse to consider alternatives put forward, the likelihood of challenge and potential injustice increases. It is entirely reasonable therefore to ensure that in any new CPO legislation that there should be such obligations. It is also an important facet where private property rights are being overridden.
26. National Grid plc	It would be helpful if the process following an inquiry had clearer timescales albeit that we accept that the discretion of Scottish Minister cannot be fettered. Perhaps if there were target dates for Reporters to have submitted their report to Scottish Ministers and for Scottish Ministers then to consider and make a decision. This would give more transparency and certainty.
39. Scottish Land and Estates	The reason for recent Public Inquiries should be looked at as background to make certain that expensive and time-consuming Inquiries are avoided where possible.
46. Hendersons Chartered Surveyors	[From general response, page 3, paragraph 4] 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 Lands Tribunal referral then Statutory promoters will at least have an 'expert court' in which to examine their actions are consistent with the statutory principles from start to finish.

Further responses made informally or at engagement events	None.
Analysis	
Explanation of question	None required
Summary of responses and analysis	There were eight responses to this sweep-up question. DSS stated that the confirmation of CPOs by the SMs gave rise to questions in his family's case (*Strang Steel v Scottish Ministers*). The Reporter recommended that the question of the compensation payable under the two alternative routes should be carefully considered but this recommendation was not followed. S&P, SCPA and CAAV set out the need to strike a balance between speed and the protection of human rights. S&P, CAAV and JM wanted an express duty on AAs, not only during promotion, but also on implementation, of CPOs, to have regard to the rights of affected parties. CAAV and JM took the view that introducing a duty of care to consider alternative options properly prior to confirmation of the scheme, would lead to fewer costly public inquiries. JM gave a detailed explanation of the example of the AWPR Fastlink where he felt that there was a lack of proper investigation into route selection and a failure in the duty of care. SLE stated that the reasons for recent public inquiries should be looked at so as to avoid unnecessary ones, where possible, in the future. HCS stated that in the rural domain they are now expected to be a compensation surveyor but also 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 AA, along with the possible costs, in full, of the referral to the LTS, then the actions of AAs should, at least, be examined in an 'expert court', to determine whether they are consistent with the statutory principles from start to finish.

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?**

Respondent	
2. Antony C O Jack	**26.** It seems to me that if elected members of an acquiring authority, whom authorize the making of a CPO, are being misled by their officials in relation to seeking the elected members' authority to make a CPO, then there is a question of whether the CPO has been made in bad faith. **29.** Bad Faith. I have mentioned bad faith already. In terms of 'bad faith' that your Discussion Paper does not seek to define, but seemingly seeks to remove as a challenge at **question 29** . What I cannot get my head around, in terms of *Smith* and Lord Radcliffe's determination is: a) that CP can be disconnected from "good faith"; and b) Lord Radcliffe's assertion that "But, My Lords, no one can suppose that the order bears upon its face the evidence of bad faith". In answer to Lord Radcliffe – "Can one not?" If there is a presumption in law that – all things are presumed to be done in due form [as per the maxim o*mnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*]: just how much evidence is needed to disprove it? As stated in Example 1: where Order maps referred to in an Order omit a building; omit the site boundary; omits what ordinance level the maps are outside the Centre; has an implied crane programme that is effectively unworkable; and the airspace sought to be acquired [as written within the Schedule that is also referred to in the Order] is materially within and around an 'A' listed tenement – then I would reasonably suppose that bad faith can, in fact, be written large upon the fact of an Order. In these terms it might be a lesson not to make assumptions about human nature and its capacity to abuse. And in these terms it may be a lesson to ensure that Scottish subjects retain the ability to make a stand against the Government acting in bad faith. In terms of this particular example, but not on the face of the Order, the technical advice dated 13 August 2014 from the Scottish Government to the promoter's legal official, specifically mentioned "Outwith St James Centre – Datum Levels uncertain." It therefore seems that the Acquiring Authority's legal officers were given notice of part of the issue – and apparently did nothing to correct the matter, an apparent lack of diligence, that seems compatible with bad faith. *I am very concerned that objections on the basis of bad faith, on the behalf of those preparing the order, may be made not competent*. I also

	wonder firstly if the description of "those preparing the Order" is rather an ill-defined description, that may exclude those that made the Order; witnessed the making of the Order; advised on the preparation of the Order; etc. Secondly removing bad faith, as a ground, is virtually an invitation to a promoter to act in bad faith. This would be a very retrograde step. There is already a presumption in law that all things are presumed to be done in due form: that is enough of a hurdle.
6. Craig Connal QC	No. A similarly wide interpretation should be adopted as in planning. Most points should be allowable.
7. West Lothian Council	Agreed.
9. David Strang Steel	We would not support such a proposal given our concerns regarding the nature of EIA's prepared in support of CPOs.
10. Renfrewshire Council	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	We are concerned at such a proposal. There should be clear duties met in any new legislation on any acquiring authority in designing and implementing a scheme which could lead to a CPO. There suggestions that acquiring authorities are exercising CPOs on the basis of poorly researched and justified schemes. Transport Scotland, in their CPO application for the AWPR, relied upon work undertaken by Jacobs and the Scottish Agricultural Colleges (SAC). Much of that work appeared to have been insufficiently researched resulting in time being taken at Public Inquiry in respect of such matters. Work to justify the route selection for the Fastlink element of the AWPR was carried out between its announcement in December 2005 and May 2006 when the preferred route was announced. All the nine options were based on a link with the A90 at the Netherley junction at Stonehaven. The process could not have been informed by an EIA which only appears to have been completed after the route was selected. It is no surprise therefore that much of the controversy over the AWPR centred on the Fastlink. Issues arise in the failure of an acquiring authority to properly

	consider and evaluate alternatives. In respect of the AWPR, considerable time in the Public Inquiry revolved around alternative routes for the Stonehaven junction and to the north of the Don crossing. At the Public Inquiry these alternatives were not given a fair hearing because of the Reporter's concerns that it would delay the Scheme. In respect of the Fochabers Bypass it is noteworthy that the Reporter was unable to consider an alternative scheme which would not have affected the design landscape of Gordon Castle, a Grade A listed building. Concerns were raised about some of the work undertaken in support of the promoter's route (e.g. paragraph 3.23 of http://www.gov.scot/Publications/2005/03/20781/53845). Transport Scotland stated that an alternative crossing of the Spey to the south of Fochabers was not practicable; we note that the same crossing is now incorporated in proposals for the dualling of the A96! In another case currently before the LTS it would appear that Transco promoted a CPO for a gas pipeline before a Reporter notwithstanding the fact that, at the time of the CPO hearing, there were questions whether the rights sought were actually necessary. It would appear that Ofgem disallowed the pipeline as being unnecessary in their Transmission Price Control Review stating that NG, on the basis of their knowledge at the time, should have cancelled the scheme in early 2003. An obligation on acquiring authorities to properly consider alternatives in designing and promoting CPO schemes is likely to go a long way towards mitigating issues at Public Inquiry and the LTS.
16. Scottish Compulsory Purchase Association	It is suggested that the proposed new statute should make bad faith a legitimate ground for objection.
19. Odell Milne	I disagree with this proposal and do not see why bad faith on the part of those preparing an Order should not be a competent ground for objections. For compulsory acquisition constituting so great an interference with private property and ECHR rights, a right to object in a case of bad faith is essential and I do not consider that damages alone are sufficient.
20. SSE plc	We would agree that allegations of bad faith should not be competent as a ground of objection to a CPO. The DPEA will decide applications on their merits, and any applications made in bad faith will not pass the existing requirements in

	any event.
21. District Valuer Services	It is suggested that the proposed new statute should make bad faith a legitimate ground for objection.
22. Glasgow City Council	I have no experience of this and on balance the response is no (and if I read this again the response could easily be yes).
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We are concerned at such a proposal. No moral status is conferred by being an acquiring authority, rather the need is to understand throughout that the powers available to it should only be wielded properly, not capriciously. Insulating acquiring authorities from well-founded accusations of bad faith will not help them behave better. There should be a clear duty of care set out in any new legislation for acquiring authorities in designing and implementing a scheme which could lead to a CPO, in part to ensure that they do not do so on the basis of poorly researched and justified schemes. That treats all affected parties badly, whether they cannot afford an objection or whether they can and it leads to time being taken at Public Inquiry in respect of such matters. Further, proper procedure is not only a protection for affected parties who stand to lose their property, whether land, home or business, but also a protection for the taxpayer. Not only is it part of good government but allowing ill-founded schemes to proceed is likely to lead to a poor use of public money. Whatever the mix of economic, social and environmental goals, spending on infrastructure warranting compulsory purchase should go where it has the greatest public benefit. An obligation on acquiring authorities to properly consider alternatives in designing and promoting CPO schemes is likely to go a long way towards mitigating issues at Public Inquiry and the LTS.
24. Shona Blance	No.
25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	Yes.
27. South Lanarkshire Council	Yes.
30. Isobel Gordon	We are concerned at such a proposal. There should be clear duties in any new legislation placed

	upon any acquiring authority in the design and implementation of any scheme which could lead to a CPO. These are necessary so that any acquiring authority and its agents properly carries out appraisals for alternatives before promoting any scheme and properly assesses impact on affected parties. It is our experience that this is necessary because of the difficulties faced by an affected party at public inquiry in raising alternatives. Such a measure should ensure that at the stage of implementation only properly researched and developed schemes arise. In turn this is likely to mean that savings are likely in public inquiries etc. In our case it appears that NG promoted the CPO before a Reporter notwithstanding the fact that, at the time of the CPO hearing, there were issues regarding its necessity. The EIA was dated September 2003 a few months after the CPO Notice was given. Ofgem criticised the building of this pipeline in their Transmission Price Control Review (TPCR4), having commissioned a technical report by TPA Solutions; Efficiency Study and Forecast of the capital programme for the period 2002/3 – 2004/5. In their findings of September 2006 Ofcom stated:- • TPA believes that, whilst there was a Business Case in December 2002 for the £58m investment for the Aberdeen-Lochside pipeline, with a justification solely on the basis of avoiding buy-back costs in Summer 2005, within two months of the December 2002 Project Approval that case had been significantly weakened as a result of two developments in January 2003 – the absence of St Fergus auction signals and the decision to land Ormen Lange gas at Easington rather than St Fergus. TPA believes that National Grid should have raised these fundamental changes in assumption with Ofgem in Q1 2003 with an outcome that this project should have been cancelled and additional investment focused on Easington. • Further, it appears likely that the £169m capacity expansion programme to increase St Fergus peak capacity from 140-160 mcmd between 2002 and 2005 (St Fergus to Aberdeen pipeline, Aberdeen to Lochside pipeline, pipe uprating and 45 MW increase in power at Bathgate/Avonbridge) will have limited future utilization due to Ormen Lange landing at Easington and the forecast (at the time) decline of UKCS in the sector supplying St Fergus. The maximum flow of 145 mcmd was reached in 2004/2005 and this is still below the level of capacity,

	147.5 mcmd, prior to Aberdeen to St Fergus, Avonbridge (expansion part), Aberdeen to Lochside and associated uprating projects. • TPA believes that more consideration should have been given to the cancellation of this project in Q1 2003. It could have been cancelled at a cost of around £4m. TPA believes that National Grid and Ofgem should have discussed the issues associated with Ormen Lange and summer capacity / buy-back in February 2003 and the project probably should have been cancelled at that time. As a consequence of their findings in this regard Ofgem have disallowed the capital expenditure on this pipeline in respect of the gas pricing regime. The CPO was served by NG in July 2003 (Q3). Despite the issues identified by Ofgem in respect of the need for this pipeline set out above, the Board of National Grid took the decision in 2004 to pursue compulsory purchase powers against us in respect of rights over Clochnahill and asserted the necessity for the pipeline at the Public Inquiry at a time when the relevant industry regulator has found otherwise. There is evidence of acquiring authorities exercising CPOs on the basis of poorly researched schemes elsewhere. The Fochabers bypass was forced through a design landscape to the east of the town. As in our case when objections were raised to the scheme the Reporter was unable to consider alternatives. The fact that the alternative mooted to the west of Fochabers was practicable is clearly illustrated that it now forms part of the A96 improvements! The route selection for the Fastlink element of the AWPR was carried out between its announcement in December 2005 and May 2006 when the preferred route was announced. All the 9 options were based on a link with the A90 at the Netherley junction at Stonehaven. The process could not have been informed by an EIA which only appears to have been completed after the route was selected. It is no surprise therefore that much of the controversy over the AWPR centered on the Fastlink. It is therefore entirely possible that, had the acquiring authority followed proper route selection procedures, Stonehaven and the surrounding community would have had a supermarket and the Scottish Ministers would have saved the cost & time involved at public inquiry and in respect of the subsequent compensation dispute.

31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	No, In my view the wording of paragraph 15 of Schedule 1 to the 1947 Act should just be plain in terms of what it includes. Generally and in my view correctly legislation avoids attempting to explain what all it excludes as inevitably aspects would be missed. It would be appropriate for interpretation of this to remain with the Courts.
34. D J Hutchison	If those promoting a scheme have failed to properly address the requirements for an objective and independent EIA, it should be open to those affected to pursue them for damages.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	We would disagree with this proposal as there could be well-founded accusations of bad faith. Protecting acquiring authorities in this manner would not seem to us to be in the spirit of the legislation.
40. Law Society of Scotland	We do not consider that this is necessary and it might not be sensible to include such a provision.
41. Judges of the Court of Session	Questions 29 and 30 We think that the existing law is reasonably clear. In a case of bad faith, it is likely that one of the grounds set out in the well-known statement of the law by LP Emslie in *Wordie Property Co Ltd v Secretary of State for Scotland*, 1984 SLT 345, will be available. We do not see any reason for being over-prescriptive in this area of law; the existing principles are flexible and are readily capable of meeting the needs of individual cases.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	Concern was expressed in an informal response that any increase in the potential grounds of challenge could increase the potential for delay.
Analysis	
Explanation of question	This question is linked to questions 30 and 31. Paragraph 15(1) of the First Schedule to the 1947 Act allows a person aggrieved by a CPO to appeal within six weeks to the Court of Session on the ground that: • the authorisation of a CP is not empowered to be granted under the 1947 Act or other enactment mentioned in section 1(1) of the Act, or • any requirement of the Act, or a Regulation made under it, has not been complied with in relation to the order or certificate. The provision does not make any specific provision in relation to bad faith. Paragraph 16 of the First Schedule to the 1947 Act provides that, subject to paragraph 15, a CPO shall not, either before or after it has been confirmed or made, be questioned in any legal proceedings whatsoever. This question asked if the new statute should make it clear that objections to a CPO on the basis of allegations of bad faith on the part of those preparing the CPO, are **not** competent under whatever provision will replace paragraph 15(1).

Summary of responses and analysis	There were 27 responses to this question. 15 consultees answered "yes", 10 answered "no" and two were either undecided or unclear. Of those answering "yes", most simply agreed without explanation. SSE stated that the DPEA would decide applications on their merits, and any made in bad faith would not pass the existing requirements, in any event. Of those answering "no", four made comments on the basis that such a change to the existing law was not necessary as the existing law worked effectively. CC stated that the wide interpretation which applies in planning law should be applied here. LSS did not consider such a change to be necessary or sensible. JCoS stated that in a case of bad faith, an existing ground of challenge would be available. They saw no reason to be over-prescriptive as the existing legal principles are flexible and readily capable of meeting the needs of individual cases. FoA considered that the usual grounds of judicial review should be available to challenge a CPO. "Bad faith" may simply be a type of irrationality. Others answering "no" did so on the basis that if the change were to be made, this might somehow condone bad faith, and make it harder to challenge.

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)

Respondent	
2. Antony C O Jack	In terms of **question 30**, certainly there is no harm in ensuring the legislation sets out a subjects' rights.
6. Craig Connal QC	Not necessarily.
7. West Lothian Council	In the case of local authorities, any decision to pursue a Compulsory Purchase Order should be approved at Committee and be a decision of the Council rather than individual Officers. Any claims should therefore be against the local authority.
9. David Strang Steel	It seems to us that to protect the rights of those affected in any CPO procedure should be based on proper consideration of alternatives. If there has been a breach of the duty of care in preparing a CPO then there should be a right for affected

	parties to claim damages against those responsible.
10. Renfrewshire Council	No.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	There should be a clear duty on any acquiring authority to carry out its EIA etc. with due care and diligence and if this is not done then there should be a clear right to claim damages. Likewise an ability to claim damages against a confirming authority might lead to proper scrutiny during this process.
16. Scottish Compulsory Purchase Association	It is suggested that the proposed new statute should make it so clear and the right would apply equally to statutory as well as non-statutory objectors.
19. Odell Milne	Agreed. However, I do not consider damages alone to be sufficient, as noted above.
20. SSE plc	Firstly, we would assume that the word "applicants" in this question, should read "objectors". We would not agree that an objector should have a right to claim damages as we do not think that bad faith should be a ground of objection.
21. District Valuer Services	Yes – but not through the CPO process.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	There should be a clear duty on any acquiring authority to carry out its Environmental Impact Assessment and other scrutiny with due care and diligence and if this is not done then there should be a clear right to claim damages. EU regulation and public policy has not required these to be merely a routine but to identify whether there are genuine issues that can then be weighed as part of the process. Failing to do this properly demeans the whole process and sees the acquirer shirking its duties. The knowledge that there is an ability to claim damages against a confirming authority where this has not been done might encourage it to ensure proper scrutiny during this process.
25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	Yes but it may be difficult to quantify the level of damages.
27. South Lanarkshire	The Council does not consider that this is required. This is a

Council	remedy currently available.
30. Isobel Gordon	There should be a clear duty on any acquiring authority to promote any CPO with due care and diligence. There should be a clear duty on the authorities and any agents involved in a CPO scheme towards those affected by the Scheme and if not the correct procedures are not followed then there should be a clear right for affected parties to claim damages. [see also from general comments at start of response] The Scottish Ministers granted the CPO on 2nd June 2004 following the Inquiry in which the Reporter had found, in view of their evidence, that NG had "…demonstrated a clear and immediate need in terms of its licence obligations to increase the capacity of the existing system." This statement should be considered in the light of criticism of the need for the scheme by the industry regulator Ofgem shortly thereafter. In the event the pipeline was only built as far as Lochside near St Cyrus where that the pipe connects with an existing gas pipeline. The planned route further south was at some point cancelled by NG. NG had not acted in good faith and had both misled and misinformed the Reporter about an earlier decision by shippers to land the gas by a pipeline from Norway to England instead of Scotland which had been made well over a year before the Public Inquiry. The Scottish Ministers likewise failed to investigate such a key component to prove the need and would or should have had access to such strategic information; however we as landowners did not. The burden to prove a need for a scheme before confirmation of a CPO for taking of lands or rights over lands should be greater and a means to compensate in the event that a CPO scheme fails or is cancelled before entry is taken. We subsequently applied for planning consent for a reduced wind turbine project in May 2006 as a result of the constraints imposed by the pipeline. A positive CAAD was obtained in respect of the servitude strip, however the process was delayed by NG who wrote to the planners that they wished the planners to consider the CAAD decision after a planning appeal made to the DPEA. Once granted the CAAD itself was then subject of an appeal raised by NG which they later withdrew. The construction work on the wind farm commenced in Spring 2011 and the four Siemens SWT 1.3MW turbines were erected in January 2012 and came into production in March 2012. We are clearly entitled to compensation for losses arising out

	of the laying of the pipe and these fall to be assessed as at the valuation date (7th June 2004), being the date of entry. NG was fully aware of the proposed wind farm on Clochnahill as is evident from the Reporter's findings at the Public Inquiry yet they claim that they were unaware of the turbine issue.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	In my view this falls out with the issue of Compulsory Purchase Orders per se and it is not appropriate for it to be incorporated into the statute.
34. DJ Hutchison	Protection against failure (bad faith) should be covered by a right to claim damages.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes this should be the case. The availability of this right may help to focus minds and assist scrutiny.
40. Law Society of Scotland	If the existence of bad faith is not enough to invalidate the process then, we would suggest, there should be a right to claim damages and it would seem appropriate and prudent for that to be stated expressly. In the event that the acquiring authority has acted in bad faith we consider it important that a statutory right to claim damages, is available to affected parties. Defining "bad faith" may be difficult and will require careful consideration. It would, however, be important to impose a time limit for bringing such a claim for damages in order to bring certainty to the process.
41. Judges of the Court of Session	[See answer to question 29] - *therefore "No".*
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	It was stated that it would not be appropriate for a separate right in law to appear in the statutory code.
Analysis	
Explanation of question	This question is linked to questions 29 and 31, and asked whether there should be clear provision made for a right to claim damages from those responsible for the preparation of a CPO, if there has been bad faith.

	The conflicting case law referred to in paragraphs 6.36 and 6.38 of the DP indicates that the current position is not clear.
Summary of responses and analysis	There were 26 responses to this question. 20 consultees answered "yes", five answered "no" and one answered "not necessarily". Of those who answered "yes" and gave reasons, several (DSS, S&P, CAAV, IG) suggested that there should be a clear duty on the AA to promote any CPO with due care and diligence, including through any agents used by them, and that there should be a right for affected parties to damages from the AA if this is not done. Two of these also wanted to extend the right so that damages could be claimed against the confirming authority. LSS suggested that if the bad faith did not invalidate the process, there should be a statutory right to claim. However, it may be difficult to define "bad faith". They also suggested that a time limit for claiming damages should be imposed to bring certainty to the process. In contrast, FoA stated that there should be no time limit for claiming damages. Of those who answered "no", SSE thought there should be no right to damages as bad faith should not be a valid ground of objection. SthLC considered that this was not required as there is a remedy currently available. SBC considered that this issue fell out with the issue of CPOs. JCoS felt that existing provisions were adequate.

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

(Paragraph 6.39)

Respondent	
1. Professor Jeremy Rowan Robinson	The current grounds of challenge seem to me to be sufficiently wide.
7. West Lothian Council	The council is not aware of any issues with these provisions.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker	We increasingly question that the correct procedures are followed in

LLP	the process of arriving at a scheme and the consideration of alternatives.
16. Scottish Compulsory Purchase Association	These Paragraphs appear to work satisfactorily.
17. Lands Tribunal for Scotland	It is understood that the earlier and arguably more narrow approach by the courts to these paragraphs and their many equivalents in other legislation has now been superseded. The interpretation is now more analogous to a requirement to make out the familiar grounds for judicial review: see reasoning of Lord Carnwath at [108] et. seq. in *Walton v Scottish Ministers [2012] UKSC 44.* Clarity would be welcome.
19. Odell Milne	My concern is that whilst I consider the opportunity for challenge absolutely essential (indeed I consider that a challenge on the grounds of bad faith should also be competent), the effect on other parties can be just as severe as on the party challenging. Indeed in some cases it can be more so (the example of the AWPR CPO is a case in point). However, I do not think that this situation can easily be avoided and it is one of the situations where the right balance may have been drawn by the existing legislation.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Members increasingly express their concerns from experience as to whether correct procedures are followed in the process of arriving at a scheme and the consideration of alternatives.
25. East Ayrshire Council	East Ayrshire Council has no practical experience in this matter and cannot comment on whether paragraphs 15 and 16 of Schedule 1 to the 1947 Act operate satisfactorily.
26. National Grid plc	Yes.
27. South Lanarkshire Council	The Council is satisfied with the operations of these provisions.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	On the whole, these provisions do operate satisfactorily, although the effect of the 6 week ouster clause is not particularly well known out with those practising compulsory purchase or administrative law. We note that the six week ouster clause is consistent with many similar time limits in related legislation and has been imposed in order to provide certainty in decisions taken in the public interest.

42. Scottish Water	Yes.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	There was one preference expressed to keep the current grounds of challenge.
Analysis	
Explanation of question	This question is linked to questions 29 and 30, with some overlap with question 29.
Summary of responses and analysis	There were 15 responses to this question. 12 consultees responded "yes", either expressly or when taking into account any explanation provided. Three consultees responded negatively. Two of those responding negatively (S&P and CAAV) referred to being increasingly concerned about whether correct procedures were being followed in the process of arriving at a scheme and considering alternatives. The third (LTS) asked for clarity, as the courts have changed their interpretation from the earlier, arguably more narrow, approach. Of those responding positively, the view was that paragraphs 15 and 16 worked satisfactorily. LSS added that the effect of the six week ouster clause was not particularly well known outwith those practising in this area of law. They noted the time limit was consistent with other similar ones, with the purpose of providing certainty in decisions taken in the public interest. FoA considered that the usual grounds of review should be available, and the wide interpretation of the current statute should be retained. As there has been some dispute, it may be helpful to re-state the test to ensure the usual grounds of judicial review were available. They recommended that the Court should have a power similar to that in section 27A of the Court of Session Act 1988, to extend the period

	within 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)

Respondent	
2. Antony C O Jack	[In paragraph 30 of the response] In terms of **question 32**, the Paper does not define what it means by a "general challenge", as stated previously in terms of time limits, by the time of the six week limit comes into force, the case will be well known, and any challenge should be well understood and able to be submitted timeously. I do not understand why there should be a difference between one type of challenge and another, as long as the process is the same. Unless of course, in answer to **question 33**, the promoter or the Government have concealed information from the process, that later comes to light, upon which challenges can reasonably be founded. [In paragraph 12 of the response] At paragraph 6.5 of your Paper you state: "We consider four questions… the first is whether the [six week] time limit is too short." But curiously your Paper does not ask that specific question [that I can see]. There are several questions here, because it seems to me that there are a number of time limits within the procedure – the first being the, at the least, 21 days from the notice of making or the Order to submit an Objection. *If "residential occupiers and small business users" have had no prior engagement, 21 days to submit an objection appears: punitive, brutal, even abusive.* A standing start to produce a coherent document in defence of fundamental human rights on probably a new legal subject by a layperson, maybe with limited means and ability, who may be away on holiday/business, must surely be avoided. The procedural time limits for the Public Local Inquiry, as per Annex E of Scottish Development Department Circular 17/1998, give some 4 weeks to submit Statement of Case [and two weeks for any rebuttal statements, etc.] Yet six weeks is given under Paragraph 15 of the First Schedule of the 1947 Act, when it can be deduced that the applicant has previously: made an objection; maybe had opportunity to state his case any Public Local, albeit biased, Inquiry [or hearing]; had time space between the Inquiry and the Minister's decision, a copy of which will be served on him/her – then it seems to me that six weeks by that stage – when all the facts *should* be known and plenty time to mull over, does not seem to be unjust. I should add

	that examination of the DPEA web site shows that the Reporters' reports to the Minister appears to be revealed at the same time as the Ministers' decisions. I do not know whether there is opportunity for objectors to comment on the Reporter's reports, prior to a decision? In the case of Public Inquiries generally, affected people very often get opportunities to comment on a report. I only mention this as this period might be better used, in what can be a very tight process. What I am absolutely content about is that at least 21 days [we were given 26 whole days] for ordinary subjects, *with no prior engagement*, appears fundamentally unjust. There are two ways to go on this, either make prior engagement mandatory – i.e. a **must** do; or give longer; or preferably both.
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes but they should expand in detail as to why it is not ECHR compliant rather than just trigger an inquiry on basis that it's an alleged breach and guidance on this would be welcome. This is becoming a standard objection rather a detailed or reasoned one.
13. Strutt & Parker LLP	This would seem sensible.
16. Scottish Compulsory Purchase Association	It is considered that any such challenge should be made within the six-week period.
19. Odell Milne	Agreed – the six week period seems reasonable. There are attractions for both promoter and landowner in certainty.
20. SSE plc	We would agree that any objections on the grounds of incompatibility with the Convention should be raised within the 6 week period for general challenges so as to ensure that any appeal is transparent and the grounds of objection known to the acquiring authority at the outset. Acquiring authorities need certainty to ensure project delivery so it is not desirable that an objection can be made outwith the 6 week period.
21. District Valuer Services	It is considered that any such challenge should be made within the six-week period.
22. Glasgow City Council	Agreed.

23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	This would seem sensible and consistent with the wider law.
24. Shona Blance	This assumes that in carrying out the works the Convention rights will be complied with, where that is not the case those actions should be open to challenge. That is not a challenge to the CPO itself but to the means by which it is implemented by the agents of the acquiring authority.
25. East Ayrshire Council	This seems a reasonable approach as outlined in the discussion paper.
26. National Grid plc	Yes to provide certainty to the acquiring authority who are seeking to rely on and implement the CPO as soon as possible.
27. South Lanarkshire Council	Yes this gives certainty to all the parties involved and will reduce delays in the implementation of the scheme/project.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Yes.
35. Shepherd and Wedderburn	No.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Agreed.
40. Law Society of Scotland	This begs the question as to whether such strict time limits are compatible with the Convention. However, we believe that, provided that this requirement is in accordance with law and is necessary in a democratic society, then this should be Convention compatible. In addition, there is a public interest in the certainty generated by fixed deadlines. There will, however, be cases of hardship where parties suffer particular prejudice (i.e. loss of property) where they have failed to take a challenge within the six week period. This is a particular hardship where the party wasn't notified. Even if such a legal challenge is not taken, this does not affect in any way the potential claimant's right to compensation.
41. Judges of the Court of Session	Questions 32 and 33 We consider that any challenge to a CPO based on Convention rights should be treated in exactly the same way as any other challenge. If this is not done, affected parties who find themselves

	out of time for an ordinary challenge will contrive a challenge based on Convention grounds with a view to circumventing the time limit. We do not consider this desirable.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	This may not necessarily be required to be made clear on the face of the Bill but it could be helpful for Ministers to confirm during the legislative process (of the new Statute) that challenges on the grounds of the Convention should be made during the initial six week period for challenging confirmed CPOs.
Further responses, either made informally or at engagement events	There was a preference expressed for a six-week period for reasons of certainty.
Analysis	
Explanation of question	The question asked whether a challenge to a CPO on the grounds that it is incompatible with Convention rights, should have to be made during the six-week period available for other challenges to the CPO.
Summary of responses and analysis	There were 26 responses to this question. 24 consultees responded positively. One (S&W) responded "No." but with no explanation. One (SB) did not expressly answer the question but referred to the need to be able to challenge Convention rights which are not being complied with, at the later stage of carrying out the works. Many of the consultees who responded positively mentioned the need to reduce delays and for certainty for all parties. LSS considered that this strict time limit should be compatible with the Convention provided the requirement is in accordance with law and necessary in a democratic society. Even if this legal challenge is not taken, this should not affect the potential claimant's right to compensation.

33. **Are there circumstances in which such a challenge should be permitted to be made at a later stage?**

(Paragraph 6.45)

Respondent	
2. Antony C O Jack	In terms of question 32, the Paper does not define what it means by a "general challenge", as stated previously in terms of time limits, by the time the six week limit comes into force, the case will be well known, and any challenge should be well understood and able to be submitted timeously. I do not understand why there should be any difference between one type of challenge and another, as long as the process is the same. Unless of course, in answer to question 33, the promoter or the Government have concealed information from the process, that later comes to light, upon which a challenge can reasonable be founded.
7. West Lothian Council	No. The council cannot envisage circumstances in which such a challenge could not be formulated at the time the CPO is confirmed.
10. Renfrewshire Council	No.
12. Society Of Local Authority Lawyers And Administrators In Scotland	No.
13. Strutt & Parker LLP	We cannot envisage such circumstances.
16. Scottish Compulsory Purchase Association	It is envisaged that it would be rare where a late challenge would be permitted on the basis that the acquiring authority has undertaken due diligence in determining all statutory objectors. However, this may not be possible in all cases or an objector is "missed" or a statutory objector only becomes aware of the CPO at some later stage e.g. on receipt of the General Vesting Declaration. Thus, a late challenge could be regarded as fair and competent but there should be a heavy onus on the challenger to show why such a late challenge is valid.
19. Odell Milne	I would suggest that a late challenge could be permitted where the party challenging has not been notified and could not reasonably have become aware of the CPO until after the expiry of the six week period. However, whilst provision for a late challenge should be made, I consider that if land has been acquired, any court order should not seek to "wind back the clock" but should provide that compensation only should be paid. Otherwise a late challenge could prejudice other landowners whose land has been taken who have been paid compensation and have taken other steps (e.g. to buy other land). The unsatisfactory situation which has arisen following the decision of the Supreme Court in the case of *Salvesen v Riddell*, comes to mind, so a "cut-off date" after which the compulsory acquisition cannot be reversed but compensation only

	be payable is appropriate.
20. SSE plc	We do not agree that there would be any circumstances which would necessitate a challenge at a later stage.
21. District Valuer Services	No. Certainty is important. It can also become pointless after possession is taken, demolition, site-works, site re-configuration and even construction has started.
22. Glasgow City Council	Probably not.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The courts should have discretion if the circumstances are shown to their satisfaction that such a claim out of normal time should be made. The underlying interests of certainty require that this be a high hurdle to cross but it might be the only answer if evidence of, say, fraud could only have become evident later.
24. Shona Blance	Yes as complying with the CPO procedures is one thing, how the acquired land is occupied and used and particularly how the acquiring authorities' agents occupy and use the retained land has the potential to breach the Convention rights.
25. East Ayrshire Council	Not that we can think of.
26. National Grid plc	If any objector can prove that they were not notified and have only become aware of the CPO then they should be permitted to make a challenge at a later stage.
27. South Lanarkshire Council	No as this will reduce the certainty for all the parties concerned. In addition once the challenge period has expired the acquiring authority has the right to proceed to vesting, to take possession of the land and start work on the project/scheme and this should be without the right of legal challenge.
31. Association of Chief Estates Surveyors Scottish Branch	No.
32. Scottish Borders Council	No.
35. Shepherd and Wedderburn	No.
38. MacRoberts LLP	No.
39. Scottish Land and Estates	There should be discretion where appropriate.
40. Law Society of Scotland	Given that compulsory acquisition is proceeding in the public interest, which is argued to outweigh private interests, we have concerns if challenges could be made beyond the six week time limit period. Such a late challenge could potentially jeopardise major

	infrastructure projects.
41. Judges of the Court of Session	(Questions 32 and 33) We consider that any challenge to a CPO based on Convention rights should be treated in exactly the same way as any other challenge. If this is not done, affected parties who find themselves out of time for an ordinary challenge will contrive a challenge based on Convention grounds with a view to circumventing the time limit. We do not consider this desirable.
42. Scottish Water	No.
43. Faculty of Advocates	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).
44. Scottish Property Federation	There could be exceptional circumstances where an owner feels they have not been able to exercise their rights under the Convention's articles – possibly through some serious illness for example incapacitating the owner. Although unusual it may be necessary to at least leave the possibility of an opportunity to challenge a confirmed CPO at a later date than the six week period, albeit in the event of exceptional circumstances.
Further responses, either made informally or at engagement events	There was concern expressed that after the six-week period the CPO is likely to have taken effect, so quashing the CPO would be disproportionate.
Analysis	
Explanation of question	The question asks if there are any circumstances in which a human rights challenge should be permissible outwith the six-week period.
Summary of responses and analysis	There were 25 responses to this question. Nine consultees answered "yes" and 16 answered "no". Some of those answering "no" mentioned the need for certainty and that work may have commenced on the land. SthLC stated that this would reduce certainty for all parties concerned. LSS stated that a late challenge could potentially jeopardise major infrastructure projects.

	Several of those who answered "yes" mentioned that such late challenges should only be allowed in rare or exceptional cases circumstances, with a heavy onus on the challenger, such as where there has been a failure to serve notice on a statutory objector (SCPA and OM) or serious illness (SPF). OM favoured a "cut off" date after which the acquisition could not be reversed and only compensation could be claimed. FoA stated that six weeks was a very short period within which to make a challenge and there may be circumstances in which it would not be possible.

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)

Respondent	
2. Antony C O Jack	In terms of **question 34,** it seems to me that on occasion some applicants whom are prejudiced, have the means and/or will to take a matter to court, and the outcome can mean others are positively affected. If however, in a challenge to a CPO, only the applicant/s wrongs are redressed, this will not be in common interest of others affected. It seems to me that if a CPO/part CPO is successfully challenged, then that should be the end of the CPO/part CPO.
6. Craig Connal QC	Yes. This seems sensible.
7. West Lothian Council	Agreed. In some circumstances a re-hearing of the inquiry may be appropriate.
9. David Strang Steel	Yes, this would seem to accord with ECHR requirements.
10. Renfrewshire Council	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	Yes, judicial discretion would seem to accord with ECHR requirements.
14. Scottish Compulsory Purchase Association	It is considered that in such circumstances the Court should have discretion to grant an appropriate remedy.

19. Odell Milne	Yes, the court should have discretion in such circumstances.
20. SSE plc	We would suggest that the court should have a discretion to grant a remedy less than the quashing of the CPO. It could make an order suggesting that the process be reconvened from the point at which the procedural failure manifested itself. Such an option may allow for a more proportional response to the procedural failure, and avoid a situation where the acquiring authority is unduly penalised by a procedural failure which may have been outwith their control.
21. District Valuer Services	Yes. It is considered that in such circumstances the Court should have discretion to grant an appropriate remedy.
22. Glasgow City Council	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes, judicial discretion needs to be free to be exercised as is appropriate.
25. East Ayrshire Council	This seems a reasonable approach.
26. National Grid plc	Yes.
27. South Lanarkshire Council	Yes the Council would support the Court having more flexibility in the remedy it can grant in the event of an applicant being substantially prejudiced by a procedural failure. It would allow the Court to take account of the failure, its effect and when it occurred in the CPO.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. The Scottish Borders Council	Yes. It is reasonable for the Court to have the discretion to go ahead and grant a proportionate remedy.
33. DJ Hutchison	Yes, this would accommodate existing ECHR legislation and allow partial satisfaction to those affected.
35. Shepherd and Wedderburn	While on the face of it this is attractive, it is not clear to us what remedy would resolve the substantial prejudice that had been caused to the party in question. If a party has their interest acquired by virtue of a CPO which they did not have the opportunity to object to, they will still receive compensation for the loss based on the value of his land but it is difficult to see what further remedy would adequately compensate him for his true loss. A general provision allowing for damages may be insufficient since there will inevitably be arguments further down the line as to whether his objection

	would have made any difference and whether any damages should properly be payable.
38. MacRoberts LLP	Yes, in the case of a procedural failure. The courts are well equipped to make the judgement as to whether the seriousness of the failure and any attendant prejudice requires that the CPO is quashed or some other remedy is more appropriate.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	Yes, we see merit in the ability of the court to have a general discretion at its disposal in a successful challenge and in circumstances where the court has quashed a CPO in part only. For example, in relation to an un-notified party who should have been so notified, the court could order an inquiry or hearing in respect of that discrete interest, thus preserving the original CPO.
41. Judges of the Court of Session	We agree that, where an applicant has been substantially prejudiced by a procedural failure, the court should have a discretion to grant some remedy less than the quashing of the CPO, in whole or in part. We consider that flexible remedies are generally desirable, to enable the courts to meet the wide range of circumstances that may come before them in an appropriate way without being forced into artificial forms of reasoning. An element of discretion in the remedies that are available can be extremely helpful in individual cases.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Where the Court believes that the circumstances of the procedural failure, balancing the public interest of the CPO, expense to the taxpayer and the rights of the individual merit a remedy less than absolute quashing of a CPO then yes, we would accept this is a pragmatic proposal. The onus must be on the acquiring authority however to prove it is appropriate for the CPO to have another go at completing due process.
Further responses, either made informally or at engagement events	There was agreement expressed that there would be situations where lesser remedies would be more suitable than a full quashing of the CPO.

Analysis	
Explanation of question	None required.
Summary of responses and analysis	There were 27 responses to this question. 23 consultees answered positively, by agreeing that the court should have a discretion to grant a remedy less than quashing the CPO. One (S&W) did not specifically agree or disagree, stating that although this would be attractive on the face of it, they did not see what remedy could resolve the substantial prejudice. Three answered negatively, and did not believe that there should be any such discretion. AJ was concerned that such a provision might disadvantage applicants who do not have the means to challenge the CPO, but currently can benefit from action by others. FoA stated that if the appellant could prove "substantial prejudice", which was not an easy hurdle, then the CPO should not be allowed to proceed. Of those answering positively, several suggested that flexible remedies should be available to the courts. JCoS considered that flexible remedies are generally desirable, to enable the courts to meet the wide range of circumstances that may come before them in an appropriate way without being forced into artificial forms of reasoning. LSS suggested that an inquiry could be ordered in respect of a discrete interest, in the event of non-notification. SPF stated that the onus must be on the AA to prove it would be appropriate for the CPO to continue.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, the time period for the validity of a CPO should be extended pending resolution of a court challenge.
6. Craig Connal QC	No. This may affect other parties.
7. West Lothian Council	Agreed.
9. David Strang Steel	There has been discussion about objections 'stopping the clock' because of the situation that arose in the AWPR. We consider this to be unreasonable given the uncertainty that

	would result for affected landowners. In our case we were effectively 'in limbo' for some 6 years much of this as a consequence of the judicial challenge to the CPO. If such measures are introduced there will need to be a much clearer process for the service of blight notices.
10. Renfrewshire Council	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	There has been discussion about objections 'stopping the clock' because of the situation that arose in the AWPR but we consider this to be unreasonable given the uncertainty that would result for affected landowners. We believe that situations such as arose in the AWPR would not arise were the clear duties on acquiring authorities in arriving at any CPO scheme.
16. Scottish Compulsory Purchase Association	See the response to question 24. [Response to question 24] Arguably, the three-year validity period is too long and this should be reduced to two years. In some cases, the acquiring authority will wish to utilise its confirmed compulsory purchase powers as soon as practically possible but equally there are other situations where the acquiring authority delays (for legitimate reason) the formal acquisition process; in either event, it is the acquiring authority who is in control That delay can further exacerbate the situation as there may have been a considerable amount of time taken up with the draft CPO/objection process and the claimants to a CPO remain powerless to force acquisition and thus remain "in limbo". Accordingly, there perhaps should be an option whereby where there is a confirmed CPO all the affected claimants to the CPO can formally request the acquiring authority to compulsory purchase their interest and on receipt of such a request the acquiring authority is obliged to acquire the interest and to enter into negotiations under the Compensation Code; further, the date of the making of such a request is the "vesting date" for entry/assessing the compensation due. This option then gives the claimants some control regarding disposal. However, the main problem that arises with the existing three-year validity period is that there is a six-week period between the date of the confirmation of the CPO within which a legal challenge to the CPO process can be made – initially to the Outer House of the Court of Session with a potential right of appeal to the Inner House and a further potential right of appeal to the Supreme Court. That legal challenge process can take up a considerable amount of time

	and at present runs in parallel with the three- year validity period – further adding to a sense of "limbo" for many claimants. The example of the Aberdeen Western Peripheral Route is germane as the relevant CPO was confirmed by The Scottish Ministers in mid-March 2010 and a timeous legal challenge thereto was raised to the Outer House with subsequent appeals to the Inner House and the Supreme Court. The Supreme Court's decision was announced in October 2012 (in the acquiring authority's favour) which only left the acquiring authority some four months within which to exercise its General Vesting Declaration. Indeed, it is understood that the appeals process was "fast-tracked" in order for the ultimate decision to be taken prior to the expiry of the three-year validity period. Thus, in the situation where a legal challenge is lodged then the two-year validity period should not commence until either the Supreme Court has issued its decision or the appeal has been formally settled or abandoned at some earlier stage.
19. Odell Milne	It is with some reluctance (due to the uncertainty that this means for landowners) that I see no alternative but that the three year period of validity should start from the date of the court's decision. [See also response to question 24] I consider that three years is at the limit of what is reasonable. As set out elsewhere in this response, there is a need for certainty for landowners and three years' uncertainty results in difficulty in managing businesses. The landowner does not know whether to sell; enter into contracts; obtain replacement land, grant leases etc. Perhaps consideration could be given to introducing a procedure for landowners affected whereby the acquiring authority can agree to an advanced purchase. Advanced purchase schemes have been used to good effect with some of the private railway schemes, such as the Airdrie to Bathgate railway and Borders Railway. Amongst other things, these advance purchase schemes can enable residential parties affected to find new homes to replace those which are to be demolished. Given the possible increase in compensation bill for a promoter at an early stage, particularly where there is no certainty that a scheme is to go ahead, there may be arguments against this. However, this should not be a common occurrence since, if a scheme has been found to be necessary in the public interest and has been properly budgeted, funds to pay compensation should be available by the date on which confirmation of the CPO is granted by the Scottish Ministers or, at the very least, the source of that funding should have been identified and there should be some certainty for the acquiring authority as to where and when that money will be available. However, I recognise that for any acquiring authority, budgets are tight and payments allocated in particular budget years

	cannot easily be moved into other years. A further issue arises during the six week "challenge period", and during the further period during which a right of appeal to the Inner House or Supreme Court could be pursued. Such a process can take many years, as the AWPR case shows. In such circumstances even a three year validity period can be tight. It could be provided that the three year validity period can be extended so that it does not start to run until the end of any legal appeal process. However, the disadvantage of that for a landowner is again the uncertainty during the intervening period and overall the current balance is perhaps the right one.
20. SSE plc	We would agree that this should be the case. Whilst there have been efforts to speed up the judicial timetable, time can still be lost whilst formal proceedings are ongoing, and we would suggest that the time period of validity be extended pending the resolution of any court challenge. Such an approach may also serve to limit vexatious challenges which seek only to prevent a project through continued delay.
21. District Valuer Services	See response to Q24 – the "clock should be stopped" in these circumstances. [Response to question 24] Yes – provided there is the possibility of "stopping the clock" where the scheme is delayed due to legal process to avoid the CPO needing to be resubmitted where GVD is prevented due to ongoing legal challenges (as almost happened with AWPR).
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	While there has been discussion about objections 'stopping the clock' because of the situation that arose in the AWPR, we consider this to be unreasonable given the uncertainty that would result for affected landowners and occupiers. Situations such as arose in the AWPR should not arise were there clear duties of care on acquiring authorities in coming forward with a CPO scheme. [See also question 24 Response] We believe that it is reasonable but would propose that time should not run until any challenge is exhausted.
25. East Ayrshire Council	This would seem to be appropriate.
26. National Grid plc	Yes. However the ability to extend the period to implement a CPO where there has been a challenge or series of challenges should not

	automatically suspend the operation of the CPO. For example if we have promoted a CPO for land required to allow the reinforcement or replacement of damaged infrastructure there may be an urgent need to commence the works, and the developer may wish to implement part of the order pending the outcome of the challenge, either because only part of the order is affected by the challenge or because the acquiring authority believes that the challenge is without merit.
27. South Lanarkshire Council	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Yes. It seems highly reasonable the time period of validly of a confirmed CPO to be expressly extended pending the reservation of any court challenges to the CPO. This would discourage claimants from potentially deliberately adopting a strategy of raising court challenges to the order in order to run down the clock on the limit. It would also avoid the scenario where simply through court delays the confirmed CPO is no longer valid by the time the Court actually determines in favour of the acquiring Authority that the CPO has validly been made. Similar provisions to those implemented in Ireland would appear a reasonable step.
33. D J Hutchison	In our case we were effectively 'in limbo' for some 6 years much of this as a consequence of the judicial challenge to the CPO. If such measures are introduced there will need to be a much clearer process for the service of blight notices.
35. Shepherd and Wedderburn	Yes. We would suggest that the relevant period should start to run on the date of expiry of the challenge period or if a challenge is lodged the date of final determination of the challenge(s).
38. MacRoberts LLP	On balance, no. This is likely to be a relatively rare occurrence and would presumably also lead to extension of the period of validity for all other affected landowners as well as the litigant. This approach is not seen in other areas such as a legal challenge to a planning permission. We note that the answer may be different if the period of validity of a CPO is significantly reduced per proposal 24.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	If the CPO would otherwise lapse, then yes. Appeals can take a very long time, particularly if ECHR implications need to be considered in full.

42. Scottish Water	No.
43. Faculty of Advocates	Yes. The Faculty of Advocates considers that this is a fair proposal which will discourage any challenges seeking to 'run down the clock'.
44. Scottish Property Federation	We support the flexibility to 'stop the clock' for CPO validity where court challenges are invoked against the CPO.
Further responses, either made informally or at engagement events	It was stated that it would be useful for the AA to be able to seek for the court to suspend the CPO if there are other related challenges to be resolved. The issue of stopping the clock was discussed. Some felt that it was needed to prevent time delay being used as a tactic but others mentioned that if there had not been a clock continuing in AWPR, the Walton case would have taken much longer. The clock was needed to keep the pressure on, unless other sections of the legislation were changed to allow claims for compensation before the land was actually acquired.
Analysis	
Explanation of question	This question effectively asked whether the "clock should be stopped" on the time limit for the validity of the CPO, pending the resolution of any court challenge.
Summary of responses and analysis	There were 26 responses to this question. 18 consultees responded positively, that the time limit should be suspended pending the conclusion of court action. Eight consultees responded negatively, and did not believe that the time limit should be suspended. Three (SSE, SBC, FoA) of those who answered positively, mentioned the need to avoid claimants acting vexatiously to "run down the clock". Two (OM, S&W) suggested that the three years should run from the date of the final determination by the court. Four (DSS, S&P, SCPA and CAAV) of those who answered negatively, were concerned about the uncertainty for landowners if this were to be allowed, and referred to the fact that the delays in the AWPR would have been even greater without the three-year limit.

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)

Respondent	
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	We support such a proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported.
19. Odell Milne	Agreed – though some of these no longer apply.
20. SSE plc	We would agree that this would be a sensible proposal.
21. District Valuer Services	Agreed.
22. Glasgow City Council	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We support this.
25. East Ayrshire Council	Agreed.
26. National Grid plc	This is supported.
27. South Lanarkshire Council	The Council agrees with this proposal.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	Yes.

38. MacRoberts LLP	We concur.
39. Scottish Land and Estates	This would seem reasonable.
40. Law Society of Scotland	We agree. This will ensure consistency.
41. Judges of the Court of Session	We agree that any restatement of the law relating to compulsory acquisition should include provision along the lines of sections 6 to 9 of the 1845 Act.
42. Scottish Water	Yes.
43. Faculty of Advocates	Yes. The Faculty of Advocates is not aware of any practical problems caused by these provisions.
44. Scottish Property Federation	We agree with the proposal to restate these measures, modernised and enhanced as appropriate.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	Section 6 of the 1845 Act allows for purchase, by agreement, of land authorised to be taken, and of all rights and interests in such land. Sections 7 and 8 provide for persons with a legal disability to contract for, sell, convey, and dispose of land, and give the power to discharge such lands from any rent, payment, charge, or other real burdens etc. Section 9 provides for a procedure for any compensation to be paid under sections 7 or 8, to be valued and paid into a bank account.
Summary of responses and analysis	There were 23 responses and all agreed with the proposal to include similar provisions in the new statute. OM noted that some of the sections no longer apply, and SPF noted that the new measures should be modernised and enhanced as appropriate.

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

(Paragraph 7.15)

Respondent	
1. Professor Jeremy Rowan Robinson	I think it would be helpful for promoters with limited experience of using CPOs to list the interests.
7. West Lothian	Agreed. This would provide clarity and certainty.

Council	
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	We consider there should be a single standard CPO process for all affected rights and interest.
16. Scottish Compulsory Purchase Association	As will be discussed later on in this Response Paper, it is the view of SCPA that there should be a single standardised compulsory purchase system and that being exercised along the lines of the General Vesting Declaration process. Thus, notice to treat as an acquisition process would be removed. Nevertheless, it is considered that all affected rights and interests require to be compulsorily acquired and thus any new statute should list them.
19. Odell Milne	A complete list would be helpful in clarifying who is entitled. In particular it would help to make sure schemes are consistent. It is however essential that any such list includes provision for all possible interests (and therefore decisions will need to be made with regard to those with interests such as liferents, common interests in water, interest of sporting syndicates where title may be vest in a company and individual interests allocated under agreements which are not registered; trust, common property, fishing and other sporting interests, mineral interests etc.).
20. SSE plc	We would agree that such a move would give rise to procedural clarity which has to be welcomed for both acquiring authorities and affected parties.
21. District Valuer Services	Yes.
22. Glasgow City Council	Agreed that a list is a good idea but suggest that the capacity of Scot Gov to amend the list be provided for by way of secondary legislation.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We consider there should be a single standard CPO process for all affected rights and interests with no need to identify those that qualify.

25. East Ayrshire Council	This seems reasonable and should avoid any ambiguity. The list should be capable of extension/amendment by the Scottish Ministers if required.
26. National Grid plc	Yes, that would provide clarity.
27. South Lanarkshire Council	Yes this would be advantageous.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Given past experience of how quickly Compulsory Purchase has been reviewed it is likely that such a statutory list would have to be changed over time. In my view it would be more appropriate that a list of all the interests in respect of which notices to treat should be served should be contained in guidance to the legislation rather than the legislation itself.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes, although there ought to be flexibility to cater for new forms of interest created after the new statute comes into force.
39. Scottish Land and Estates	We support a single standard process which is clearly understood and transparent.
40. Law Society of Scotland	It is our understanding that notices to treat are rarely, if ever, used and on that basis we question whether this procedure should remain an option. If it is to be retained, then yes, the new statute should list all the interests on the basis that there can be full confidence that such a list could be certain of being complete. Any changes to the list of statutory objectors in response to question 12 should be considered in the context of this question.
41. Judges of the Court of Session	We can see advantages in a statutory list of all the interests in respect of which a notice to treat should be served. Nevertheless, we would defer to the views of those engaged in everyday practice in this area.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Yes it would be helpful for the new statute to specify the known persons to whom they should serve the Notice to Treat. It will also be helpful perhaps for the Scottish Government to clarify during the consultative/legislative process that lessees of less than one year are not required to be served with a Notice to Treat. The Statute

	should also enable Ministers to update the list as required from time to time by way of subordinate legislation.
Further responses, either made informally or at engagement events	At one event it was suggested that there should be a list of rights which can be acquired, but it was noted that omitting something from the list could lead to serious difficulties. It was stated that frustration was caused by not knowing who should be notified and, ultimately, who was entitled to compensation. Expenses could be incurred by those trying to determine whether or not they had a right to claim compensation. If it became clear later that there was no right, the expenses were not repayable.
Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure. This question asked whether all interests should be set out in the proposed new statute, in respect of which a NTT should be served.
Summary of responses and analysis	There were 24 responses to this question. 19 consultees responded "yes", with two suggesting that there should be a power for the SG to amend the list by secondary legislation (GCC and EAC). Five consultees responded "no" on the basis that the NTT procedure should not be retained. Of those, LSS stated that if it were retained, all interests should be listed in the statute, and that this list should be considered in the context of proposals for statutory objectors raised in question 12. CAAV stated that, for the new single procedure, there would be no need for a list to identify those who qualify. One consultee (SBC) answered "no" on the basis that the list would have to be amended over time, and the list of interests should be contained in guidance instead.

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)

Respondent	
7. West Lothian Council	Agreed. This would protect anyone not served with a notice to treat.
10. Renfrewshire Council	Agreed.

12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We are generally in support of this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported relative to a General Vesting Declaration process.
19. Odell Milne	Agreed.
20. SSE plc	We would suggest that this would be fair and ensure that there is no risk of a challenge once an order has been made.
21. District Valuer Services	Agreed.
22. Glasgow City Council	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes this is supported. The LTS would be the appropriate forum to consider such proceedings.
27. South Lanarkshire Council	The Council supports this proposal as it provides clarity for the parties.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agreed.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	We concur.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree that such a right should be made clear and an explicit provision should be included in the proposed new statute.
41. Judges of the Court of Session	We think that it would be advantageous if it were made clear that a person claiming to be the holder of an interest in the land who has not been served with a notice to treat has the right to raise

	proceedings to determine the right to compensation and the amount of such compensation.
42. Scottish Water	Yes.
43. Faculty of Advocates	Yes.
44. Scottish Property Federation	It is only fair that there should be a right for landowners to receive compensation in the event of a failure to serve a notice to treat. We agree with this proposal.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure. It is proposed that the new statute should make it clear that there is a right to claim compensation where there has been a failure to serve a NTT in relation to a qualifying interest.
Summary of responses and analysis	There were 23 responses to this proposal and 22 agreed with it, with some adding that this was necessary on grounds of fairness and clarity. NG suggested that the LTS would be the appropriate forum for such claims. SCPA also supported the proposal, but on the basis that it related to service of notice under the new single procedure.

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

(Paragraph 7.19)

Respondent	
7. West Lothian Council	Agreed. 6 months from becoming aware of the CPO appears appropriate.
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Yes.
12. Society of Local Authority Lawyers	A time limit would seem appropriate although this would have to be weighed against the category of the interest overlooked and how

and Administrators in Scotland	reasonable it would have been for the acquiring authority to have known of that interest.
13. Strutt & Parker LLP	We consider that any time limit should run for a period of 6 years from the completion of the project (based on rights acquired by peaceable occupation). There should be a duty on an acquiring authority to specify such a completion date and advertise this appropriately (i.e. in the same way as the original CPO).
16. Scottish Compulsory Purchase Association	As stated under question 37, it is the view of SCPA that notice to treat should be removed but on the basis of a General Vesting Declaration process, it is considered that there should be no time limit- on the basis that if a private property interest has been legitimately compulsorily acquired then there is a fundamental entitlement to claim compensation. It is appreciated that this proposal could cause accounting problems for acquiring authorities who would need to provide in their accounts for such potential provision. Please also refer to our responses later in this paper on the General Vesting Declaration process, especially question 148.
19. Odell Milne	I consider that there must be a time limit and it should be linked to the date on which the claimant became aware of the compulsory acquisition, or might reasonably have become aware of that. This is essential for promoters of schemes who must "close off their budgets". Such a time limit for raising proceedings could be qualified by a proviso that claims outwith it could be considered, say, with consent of the tribunal in exceptional circumstances.
20. SSE plc	We would suggest that a period of 3 months would be appropriate.
21. District Valuer Services	Yes – it should be the same as the six year time limit for referral to LTS
22. Glasgow City Council	Yes and with the trigger for the commencement of the period assumed to be the date which is the later of (i) the date which equates with the advertising of the Vesting (if a GVD is used or I suppose the date of entry under the Notice to Treat procedure) and (ii) such later date as the claimant can evidence that he first became aware of the Notice. This sort of arrangement is similar to the right to claim compensation.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Consistent with the wider law, any time limit should run for a period of 6 years from the completion of the project for claims based on rights acquired by peaceable occupation. There should be a duty on an acquiring authority to specify such a completion date and advertise this appropriately (i.e. in the same

	way as the original CPO).
25. East Ayrshire Council	It would seem appropriate for there to be a time limit but no strong views on what the time limit should be.
26. National Grid plc	Yes there should be a time limit. For consistency 6 years may be appropriate.
27. South Lanarkshire Council	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	A time limit would seem appropriate although this would have to be weighed against the category of the interest overlooked and how reasonable it would have been for the acquiring authority to have known of that interest.
32. Scottish Borders Council	Not having a time limit does not seem in keeping with other aspects of the legislation such as the validity of a confirmed CPO being three years, or six weeks for appeals to be made. For certainty of all parties it would be more appropriate for there to be a time limit and I would suggest three years.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
39. Law Society of Scotland	Yes, we agree such a right should be time limited. A period of between three to five years is suggested from the date on which the claimant became aware of the absence of service of the requisite notice to treat. Such a trigger should address circumstances where the claimant has previously been unaware of the existence of their interest giving rise to the need for service of a notice to treat.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	The important issue will be to determine whether there is a genuine claim for compensation or not. However, it may be that a generous time limit should be applied for the sake of closing off potential and unexpected liabilities for the acquiring authority.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure. This question is linked to proposal 38 and asked whether there should be a time limit within which to raise any proceedings in relation to an alleged failure to serve a NTT.
Summary of responses and analysis	There were 22 responses to this question. 20 consultees responded "yes" and two (SCPA and FoA) responded "no". For those suggesting that there should be a time limit, some stated that it should run from the date the claimant becomes aware, or should have become aware, of the scheme. The time limits suggested varied greatly. SSE suggested three months. WLC suggested six months from becoming aware of the CPO. SBC suggested three years, to create certainty for all parties. LSS suggested a period of between three to five years from the date the claimant became aware of the absence of service of the NTT. DVS suggested the time limit should be the same as the six year time limit for referral to the LTS. Three consultees (S&P, DVS and CAAV) suggested six years from the completion of the project, with two (S&P and CAAV) proposing that there should be a duty on the AA to specify and advertise the completion date. NG suggested that six years may be appropriate, for consistency. OM considered that the time limit should be linked to the date on which the claimant became, or might reasonably have become, aware of the compulsory acquisition. There could be provision, with the consent of the LTS, for raising proceedings outwith that time limit in exceptional circumstances. GCC considered that the trigger for the commencement of the time limit should be assumed to be (i) the date which equates with the advertising of the vesting (if a GVD is used) or (ii) such later date as the claimant can evidence that he first became aware of the notice. ACES believed that a time limit would be appropriate, although this would have to be weighed against the category of the interest overlooked, and how reasonable it would have been for the AA to have known about it. Of the two consultees who responded "no", SCPA suggested that

	NTT should no longer apply and that, under the new procedure, there should be no time limit. FoA did not consider that there should be a time limit, but if one were to be introduced, it should only run from the date the person first became aware that they had a right to make a claim.

40. **Should a notice to treat be accompanied by information as to how compensation may be claimed?**

(Paragraph 7.25)

Respondent	
1. Professor Jeremy Rowan Robinson	It would be helpful to claimants if a notice to treat was accompanied by information about how to claim compensation.
7. West Lothian Council	Agreed. This would provide clarity for members of the public.
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	We agree wholeheartedly with this proposal which should be extended to cover any taking of entry (e.g. in respect of ground investigation works also). Such information should be agreed with stakeholders and include details on rights to serve 90 day notices etc. as well as entitlement to professional advice.
16. Scottish Compulsory Purchase Association	It is considered that notice to treat should be removed but please refer to our response to proposal 8 [which refers to a standard compensation claim form].
19. Odell Milne	Whilst at first glance the provision of such information may appear to be an obvious way of making the process of claiming compensation simpler for claimants and providing the information necessary for claimants about their rights, there is a danger that it will only be able to provide very general information with regard to compensation. There is no "one size fits all" and there is a danger that, if a compensation guide is provided, the promoter who does not include details which would entitle some claimants to claim all

	they are entitled, might be faced with a claim that the parties affected were disadvantaged by the information provided by the promoter. It is not clear what indemnity or guarantee would "stand behind" the information provided. That concern must be weighed against the need for parties faced with complex legislation and the loss of private property rights and where, in almost all cases, the acquiring authority has greater resources to draw upon than the claimant (although there are exceptions to this). In these circumstances natural justice seems to require there to be information of some kind provided on compensation matters. Reimbursement of reasonable professional advice (legal and valuers) forms part of the disturbance element of a compensation claim, so simple guidance covering the basics could be provided referring to the entitlement to take legal and valuers' advice. There is a risk that claimants will seek advice from solicitors and agents who are not well versed in compulsory purchase compensation but their protection must lie in the Law Society Professional Indemnity Insurance and Guarantee Fund for providing advice where they are not appropriately qualified. Whether the Law Society might consider compulsory purchase law and compensation as an "accredited specialism" is something that could be looked into. If that were to be feasible, the simple CP compensation guidance issued by promoters could contain a reference to the availability of specialists as listed on the Law Society website. Even if the availability of specialists is brought to the attention of claimants, claimants will always be concerned that solicitors or agents may result in expenses being incurred and may not want to pay for those fees. This is particularly an issue if the ultimate compensation claim in money terms is low, as it may be difficult to recover and is genuinely an issue for recovery of valuers' fees since often acquiring authorities restrict these to Rydes Scale plus a small percentage uplift. This can leave claimants with large bills for professional fees which cannot not be recovered as part of the claim. Perhaps promoters could be asked to offer to pay for initial advice. Solicitors and agents would know that any fees charged over and above the "fixed fee" would need to be justified.
20. SSE plc	We would suggest that providing affected parties with information as to how compensation can be claimed would be a sensible proposal so as to allow them to take targeted advice as to their rights and heads of claim.
21. District Valuer Services	Yes. This would be helpful at several levels. It helps discharge the duties under human rights legislation. It clearly helps claimants as this may be the first documentation that they receive and it puts them on the right track and reduces some uncertainty and anxiety. It

	helps the acquiring authority by promoting timely, competent claims saving them time and money dealing with late or ill formulated claims.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. By no means is every claimant professionally advised at all stages of the process and so the acquirer should as part of a duty of care to those on whom it is imposing its scheme ensure that they are aware of their entitlements. This proposal should be extended to cover any taking of entry (e.g. in respect of ground investigation works also). Such information should be agreed with stakeholders and include details on rights to serve 90 day notices etc. as well as entitlement to professional advice.
24. Shona Blance	Yes.
25. East Ayrshire Council	This seems reasonable. Perhaps a pro-forma document could be prepared to be issued with a notice to treat which contains information about compensation.
26. National Grid plc	Yes. This information should be in a prescribed form for consistency.
27. South Lanarkshire Council	This would seem sensible.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	It would be considered good practice to provide such information, where appropriate. However I don't think that this should be a statutory requirement rather something that is recommended within guidance.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	Yes, we agree that notices to treat should be accompanied by such details and any contact details where further information and advice can be obtained.
42. Scottish Water	Yes.
43. Faculty of Advocates	Yes.
44. Scottish	Yes – we see this as a matter of best practice, particularly where

Property Federation	individual householders are concerned.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure. This question asked whether a NTT should be accompanied by information about how to claim compensation.
Summary of responses and analysis	There were 24 responses to this question. 21 consultees responded "yes" or in other positive terms. Of these, two (S&P and CAAV) suggested extending the proposal to cover any taking of entry. EAC proposed using a pro forma document and NG a prescribed form. Of the three who responded negatively, SCPA replied that NTT should be removed, but referred to their suggestion in the response to question 8 that a standard compensation claim form should be introduced under the new single procedure. OM expressed concern that it would only be possible to provide very general information in a "one size fits all" document. She also indicated that natural justice seemed to require some kind of information to be provided on compensation matters. SBC favoured giving such information in guidance rather than by statute.

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

(Paragraph 7.29)

Respondent	
7. West Lothian Council	The council is unable to confirm whether this provision operates satisfactorily in practice as the council has used the General Vesting Declaration procedure rather than the notice to treat procedure.
10. Renfrewshire Council	Yes.

11. NHS Central Legal Office	Generally yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes, as far as we are aware.
13. Strutt & Parker LLP	We note that the notice to treat procedure is now rarely used. This suggests it is considered not to operate satisfactorily.
16. Scottish Compulsory Purchase Association	It is the experience of many members of SCPA that the notice to treat system has a number of major flaws (most of which have already been exposed to the Courts over the years) and as a consequence the notice to treat procedure has rarely been used in Scotland for some time now. Further, it is considered that in order to streamline and simplify the compulsory purchase system there should be a single standardised compulsory purchase process.
19. Odell Milne	This provision does not work well in practice but there is a need for a provision of this type. The key issue in my experience is where there is a significant delay between the notices of the making of the CPO and issue of the actual notice to treat or notice of making of the GVD. An example is the AWPR where many landowners threatened with compulsory purchase were left in a very difficult position. They were at risk of being found to have intentionally increased their claim by activities that would in normal circumstances have been perfectly sensible business activities. The provision should work so that such actions are not found to have been undertaken with a view to obtaining increased compensation. However, it is not always clear and a landowner faces a difficult decision about continuing normal business operations following his becoming aware of an upcoming compulsory purchase. For example, if a landowner is considering erecting a new farm building or wind turbine - there could be an opportunity to obtain a commercial advantage which might be lost if the landowner waits. The landowner has to weigh the risk of losing that commercial advantage against the risk of expenditure on a project which at a later date could be found to have been [un]reasonably undertaken with a view to increasing compensation.
20. SSE plc	We have no experience of paragraph 7 of Schedule 2 to the 1947 Act.
21. District Valuer Services	Yes although we believe that a single process would be preferable (CPNT for example).
22. Glasgow City Council	No comment because of no experience.
23. Central	We note that the notice to treat procedure is now rarely used. This

Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	suggests it is considered not to operate satisfactorily or is no longer relevant.
25. East Ayrshire Council	East Ayrshire Council has no practical experience in this matter and cannot comment on whether Paragraph 7 of Schedule 2 to the 1947 Act operates satisfactorily in practice.
27. South Lanarkshire Council	Yes.
38. MacRoberts LLP	We do not have sufficient experience of this issue to offer a view.
40. Law Society of Scotland	The provisions of Paragraph 7 of Schedule 2 of the 1947 Act are rarely invoked.
42. Scottish Water	Yes.
43. Faculty of Advocates	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 [of the DP].
44. Scottish Property Federation	The intentions of the Schedule are clear enough but it will require robust interpretation to make a fair assessment of the landowner's actions.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure. Paragraph 7 of the Second Schedule to the 1947 Act provides that, in valuing the interest in land, or any enhancement by reason of erecting buildings, work done or improvements made, no account shall be taken of any increase in value due to work which was not reasonably necessary and was done with a view to obtaining compensation.
Summary of responses and analysis	There were 18 responses to this question. Five consultees stated that they had no experience of the provision. Six consultees answered "yes", with some qualifying that this was so far as they were aware. DVS answered "yes" but believed that a single process would be

	preferable. Four consultees answered that the provision did not work well in practice. S&P and CAAV noted that NTT procedure was rarely used, suggesting that it did not operate satisfactorily. SCPA referred to the experience of many of their members that the NTT process had a number of flaws, and should be replaced by a single process. OM stated that although the provision did not work well, there was a need for a provision of this type. She referred to problems where there was a significant delay between the notice making the CPO and the notice of the NTT or notice of making the GVD. In these circumstances, claims should be allowed for increased compensation which was due to sensible business activities. Landowners threatened with CP under the AWPR were at risk of being found to have intentionally inflated their claims by activities which would be regarded, in normal circumstances, as sensible business activities. LSS noted that the provisions were rarely invoked. FoA was not aware of practical problems caused by the provisions, and agreed with the suggestion that it would not be reasonable to prevent sensible use of the land if there appeared to be no prospect of a development proceeding.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	No, the mischief is the attempt to increase the burden of compensation and that should be ruled out whether it happens before or after the service of the notice to treat.
7. West Lothian Council	Compensation should be payable in relation to any alterations made before service of a notice to treat.
10. Renfrewshire Council	No, any action taken or alterations made after the Initial notice of the making of the CPO should however not be taken consideration when reaching a valuation.
11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	No actions taken or alterations made after the service of a notice to treat should be taken into consideration.

13. Strutt & Parker LLP	See comment above. [We note that the notice to treat procedure is now rarely used.]
16. Scottish Compulsory Purchase Association	As it is considered that notice to treat should be removed, please refer to our responses to this issue under the responses for the General Vesting Declaration process.
19. Odell Milne	I do not think the difference is necessarily justifiable in fairness terms. Clearly in legal terms the position after service of the notice to treat could be considered to be different since the notice to treat fixes the interests. Any provision needs to take account of the possibility of a long delay.
20. SSE plc	In general, we would suggest that any actions taken or alterations made after service which have the effect of increasing the value of land should be viewed as being in bad faith. We consider that wording following the general principles of that of paragraph 7 of Schedule 2 to the 1947 Act should continue to be appropriate.
21. District Valuer Services	Yes. The current rules are reasonable. The date of Notice To Treat is a reasonable date to use and no new interests after that date should qualify for compensation.
22. Glasgow City Council	No comment because of no experience.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	There should not be any power to unwind changes in interests before the service of a notice to treat.
26. National Grid plc	No because at both points the claimant would have been aware of the CPO.
27. South Lanarkshire Council	This would depend on whether the owner was aware of the Acquiring Authority's interest in acquiring their land rather than whether or not a notice to treat had been served. If the owner was aware of the proposed CPO, i.e. through discussions regarding voluntary acquisition prior to a decision being made to proceed with a CPO, it would seem sensible to deal with the actions taken or alterations made prior to service of a notice to treat in the same way as such actions taken or alterations made after such service. However if the owner has not been aware prior to the making of the CPO of the Acquiring Authority's interest in acquiring the land then there could be a case for treating actions taken or alterations made prior to service of a notice to treat in the same way as such actions taken or alterations made after such service.

32. Scottish Borders Council	In terms of pre-notice to treat it would simply be on the balance of evidence available at that point in time, what land owners intention. Post Notice to Treat I would suggest it be presumed to be for the purpose of obtaining increased compensation and to be for the party seeking compensation to prove otherwise.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	Yes, because in the first scenario there is no certainty that the land is to be acquired. It is only after that notice to treat has been served, that the acquiring authority's intentions are certain. However, the detail of how this would operate in practice will require careful and detailed consideration. Also, it may be foreseeable that where there is substantial delay on the part of the acquiring authority and an affected party acts in good faith to prevent deterioration in trading levels or takes other action which would be considered reasonable, appropriate consideration should be taken.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	This will depend upon the circumstances and we refer to our previous answer to proposal 41 – some works may be necessary for maintenance purposes but it will be important to guard against moves to enhance value and consequently compensation levels.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of

	consultees favoured adopting a new single procedure, which would replace the NTT procedure. This question asked whether, when fixing interests in land, there should be any difference in treatment between action taken or alterations made: • before service of a NTT • after service of a NTT.
Summary of responses and analysis	There were 21 responses to this question. Five consultees answered "no", with some giving reasons. Of those, JRR stated that the provision targeted an attempt to increase compensation, which should not be allowed whenever it happens. RC took the view that nothing that was done after the initial notice of the making of the CPO, should be taken into consideration. NG stated that, at both points, the claimant would have been aware of the CPO. OM did not believe that the difference was necessarily justifiable in fairness terms, with any provision needing to take into account the possibility of a long delay. Nine consultees answered "yes". Of these, WLC, SOLAR, SSE and DVS stated that no consideration should be given to action taken after service of the NTT. LSS stated that in the period before service of the NTT, there was no certainty that the land will be acquired. They also stated that where the AA substantially delayed, and an affected party acted in good faith, appropriate consideration should be given. FoA supported compensating improvements made after the NTT, if incurred in the ordinary course of managing the land. S&P and SCPA indicated that the NTT procedure should be replaced by a new single procedure. GCC had no experience of the issue. CAAV stated that there should be no powers to unwind changes in interests before the NTT. SthLC indicated that the issue was whether the owner was aware of the AA's interest in the land, rather than whether or not a NTT had been served. SBC indicated that pre-NTT, the issue should be decided on balancing the evidence of what the owner's intention was. Post-NTT, there should be a presumption, which could be overturned, that such

	action was for the purpose of increasing compensation. SPF stated that some works may be necessary for maintenance, and so be compensated, but that it would be important to guard against moves to enhance value.

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

(Paragraph 7.40)

Respondent	
1. Professor Jeremy Rowan Robinson	See my answer to Q.24. [Answer to question 24 - It is the accumulation of the 3 years for implementing the CPO and 3 years for serving a notice to treat or GVD which in my experience is the main problem for owners and occupiers. I would support anything that can be done to reduce the cumulative period.]
7. West Lothian Council	The council is unable to confirm whether the three year time limit on the validity of the notice to treat works satisfactorily in practice as the council has used the General Vesting Declaration procedure.
10. Renfrewshire Council	No comment as Renfrewshire in recent years had not served notices to treat but has used the GVD procedure to acquire entry and title.
11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	See comment above. [We note that the notice to treat procedure is now rarely used. This suggests it is considered not to operate satisfactorily.]
16. Scottish Compulsory Purchase Association	As stated above, it is considered that notice to treat should be removed.
19. Odell Milne	In my view, the three year time limit on validity of the notice to treat is too long as it leaves landowners in a position of uncertainty where they cannot proceed with their business, or do not know whether to

	look for a new home. They have no certainty as to when they will receive payment, which means that they cannot contract for purchase of another property. They have no certainty as to their possible tax liabilities and/or for farmers how to manage their obligations under the CAP scheme. Whilst clearly some flexibility must be allowed to promoters, I cannot see why such a long delay is necessary. I appreciate that sometimes the delay is unexpected (as was the case with the AWPR) and not due to any action or inaction by the promoter. However, in normal circumstances it should not be difficult to comply with a provision that requires a promoter to proceed within a shorter timetable than 3 years and, if there is uncertainty as to whether the land is required, it should not have been included in the CPO. Furthermore, if there is uncertainty as to delivery of the scheme (e.g. because there is uncertainty as to availability of budget or just dependent on some other permission being obtained), then the scheme should not have been authorised. If the delay is due to unexpected delay such as the need for additional environmental surveys or ground investigation works, or something being discovered which had not been foreseen, in all but a very few cases, the promoter whilst affected by delay can probably make an informed decision as to whether or not the delay is going to prevent the project going ahead at all or simply delay its delivery. If the latter, there is no reason why the promoter cannot take ownership of the land and then make it available to the landowner until it is required either by renting it or on some other basis. If there is a delay as a result of a third party appeal or challenge, it is more difficult to strike the right balance. However, the promoter is likely to be more able to bear the burden of the delay than the individual and I would think that the legislation should be drafted so as to minimise the risk of delay which interferes with the private individual's ability to manage his business etc. Since such alternatives must be considered reasonably by the promoter, it would not be fair to penalise the promoter for the delay resulting from that. However, for the parties who were faced with the original scheme or whose land may not be required because of the change, the uncertainty does result in unfairness.
20. SSE plc	We would agree that it does.
21. District Valuer Services	See response to Q24. [Response to question 24 Yes – provided there is the possibility of "stopping the clock"

	where the scheme is delayed due to legal process to avoid the CPO needing to be resubmitted where GVD is prevented due to ongoing legal challenges (as almost happened with AWPR)]
22. Glasgow City Council	No comment because of no experience.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	It is needed for certainty for all involved.
25. East Ayrshire Council	East Ayrshire Council has no practical experience in this matter.
26. National Grid plc	Yes.
27. South Lanarkshire Council	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
38. MacRoberts LLP	We do not have sufficient experience of this issue to offer a view.
40. Law Society of Scotland	We understand that notices to treat are rarely, if ever, used and refer to our comments at question 37 above. [Response to question 37 It is our understanding that notices to treat are rarely, if ever, used and on that basis we question whether this procedure should remain an option.]
42. Scottish Water	Yes.
43. Faculty of Advocates	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. Scottish Property Federation	Three years appears to be appropriate, subject to particular circumstances (such as agreements or on-going tribunal or legal processes).
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of

	consultees favoured adopting a new single procedure, which would replace the NTT procedure.
Summary of responses and analysis	There were 21 responses to this question. 11 consultees answered "yes", with the majority of these giving no reason. Of those who gave reasons, CAAV stated that the time limit was needed for certainty for all involved, and FoA was not aware of any practical problems caused by the three year period. Four consultees answered "no". Of those, S&P and SCPA considered that the NTT procedure should be removed. JRR referred to the need to reduce the cumulative period of three years for implementing the CPO and three years for serving a notice to treat or GVD. OM took the view that the three year period was too long as it left landowners in a position of uncertainty. Five consultees did not give a view on the time period due to their experience of using only the GVD procedure, and not the NTT procedure.

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

(Paragraph 7.51)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, promoters should be able to withdraw a notice to treat within, say, 4 weeks of receiving a claim for compensation. The promoter will need time to take advice on the claim.
7. West Lothian Council	Agreed that this should be competent. Withdrawal of a notice to treat within six weeks of delivery of a notice of claim by the holder of a relevant interest appears to be reasonable.
10. Renfrewshire Council	Yes and agree there should be a time limit but have no definite view on what this limit should be.
11. NHS Central Legal Office	Yes. 12 months.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Subject to comments below at [question] 45, it should be competent to withdraw a notice to treat within 6 weeks of delivery of a notice of claim by the holder of a relevant interest or of the determination of compensation by the LTS, whichever is the later. The fact that entry may have been taken is an issue which the LTS may take into

	consideration in its assessment of any compensation claim.
13. Strutt & Parker LLP	Whilst the comments above should be noted, we do not consider there to be a difficulty here for any acquiring authority. Any EIA for the CPO should have identified the potential for development and therefore the level of compensation payable.
16. Scottish Compulsory Purchase Association	As with our responses above, we consider that the notice to treat process should be removed.
19. Odell Milne	Withdrawal of a notice to treat has the consequences of uncertainty and unfairness for landowners which have been mentioned in other responses above. However, from a promoter's point of view, there may be genuinely unforeseen circumstances. I would suggest that the promoter is the party most able to bear the costs arising from the uncertainty as to whether or not the land is to be needed. I do not consider this is unreasonable since promoters should carry out appropriate investigations and checks to enable them to budget for compensation. In circumstances where the uncertainty relates entirely to promoters being faced with a larger than expected bill for compensation, I do not consider an acquiring authority should be able to withdraw a notice to treat. However, for those situations where there has been a genuine unforeseen circumstance, there may be thought to be more justification. However, on balance, I think the impact on the landowner arising from the uncertainty or impact on his business is so severe that the promoters should bear the risk.
20. SSE plc	We would agree that allowing an acquiring authority to withdraw a notice to treat would be a sensible proposal as it would give more certainty to affected parties.
21. District Valuer Services	Yes, if done so within the three year period mentioned above and any reasonable expenses incurred by the claimant should be reimbursed.
22. Glasgow City Council	Yes and I suggest 1 year.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Whilst the comments above should be noted, we do not consider there to be a difficulty here for any acquiring authority. Any EIA for the CPO should have identified the potential for development and therefore the level of compensation payable.
25. East Ayrshire Council	It should be competent for an acquiring authority to withdraw a notice to treat.
26. National Grid plc	Yes, it should be competent for an acquiring authority to withdraw a notice to treat. They should be entitled to do so any time prior to the

	notice to treat ceasing to have effect.
27. South Lanarkshire Council	Yes – 6 weeks as currently provided for.
29. Brodies LLP	If authorities were to be permitted to withdraw a notice to treat, it would have to be within a short period of time and before they have taken entry to the land. The owner of the land may still need to be compensated in such circumstances and consideration should be given to preventing the authority resurrecting such a scheme within a certain period of time.
31. Association of Chief Estates Surveyors Scottish Branch	No - seems unfair - but authorities normally use GVD route.
32. Scottish Borders Council	Yes, the current period is three years and appears reasonable.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes, within three months.
40. Law Society of Scotland	It may be considered reasonable, in principle, that the acquiring authority should be entitled to withdraw a notice to treat, but the circumstances in which it is competent to do so should, in our view, be restricted.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	The acquiring authority and landowner both need certainty. In the case of the authority then if the valuation of compensation exceeds estimates to an unviable level then they need to withdraw, with appropriate compensation made to the landowner. The landowner also deserves the opportunity to assess and appropriately identify the true value of their land based upon a successful CAAD (or simply strong valuation). If this exceeds the acquiring authority expectations and the authority then withdraws it is only right that appropriate compensation is made for the opportunity-cost of the time taken by the authority in blighting the land in question through CPO.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure. Under section 39 of the 1963 Act, a NTT can be withdrawn within six weeks of delivery of a notice of claim. This question asked whether it should be competent to withdraw a NTT, and within what period.
Summary of responses and analysis	There were 24 responses to this question. 18 consultees answered that it should be competent for an AA to withdraw a NTT. Some of those suggested time periods, which varied considerably. JRR suggested four weeks from the AA receiving the claim. Three consultees (WLC, SthLC and FoA) favoured retaining the current six week period. SOLAR suggested six weeks from the claim or the determination of compensation by the LTS, whichever is later. MacR suggested three months. NHS and GCC suggested 12 months. DVS suggested three years and that any reasonable expenses incurred by the claimant should be reimbursed. SBC also favoured three years. Brodies stated that if it were possible to withdraw a NTT, this should be within a short period, and before entry onto the land. NG thought this should be possible at any time before the NTT ceased to have effect. Five consultees responded that it should not be competent for an AA to withdraw a NTT. Of the four who gave reasons, S&P and CAAV both suggested that any Environmental Impact Assessment for the CPO should have identified the potential for development and the level of compensation. OM could see arguments both ways, but, on balance, favoured the landowner having certainty, so that the AA should bear the risk. ACES thought that withdrawing a NTT would be unfair. One consultee (SCPA) responded that the NTT procedure should be removed.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	No, I don't see any case for this.
7. West Lothian Council	It would appear reasonable to allow an acquiring authority to withdraw a notice to treat after they have entered onto the land where the acquiring authority fully compensates the land owner for the period during which the authority has entered onto the land and for any damage caused by the acquiring authority.
10. Renfrewshire Council	Yes but only on the condition that any damage to the land is rectified, or compensation paid.
11. NHS Central Legal Office	No.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes but only where the land can be restored to the owner in substantially the same condition. It may be that circumstances have changed in a way which the acquiring authority could not have expected to be aware of (such as the obtaining of a CAAD in circumstances outlined at para 7.42 of the discussion paper) Any objection to that "late" withdrawal of the Notice to Treat may be referable to the LTS
13. Strutt & Parker LLP	There may be but this entitlement should include a provision that in so doing the acquiring authority is liable not only for any losses but also any costs incurred in objecting to the proposed scheme (but see comments above).
16. Scottish Compulsory Purchase Association	See our previous comments with regard to notice to treat which should be removed.
19. Odell Milne	No, I cannot think of any circumstances where this would be reasonable.
20. SSE plc	We would suggest that there may be circumstances where entry is taken and land might be found to be unsuitable for the purpose of the order due to ground condition etc. If so, we would suggest that the acquiring authority should be able to withdraw the Notice to Treat but subject to a possible requirement to pay compensation for surface damage.

21. District Valuer Services	Only by mutual consent, and again subject to payment of claimants' reasonable expenses.
22. Glasgow City Council	Yes - but subject to compensating the proprietor for the loss of use and reinstating the land to the condition it was in prior to taking entry (reserving the right to the parties to negotiate alternative terms if they want to). Guidelines on good practice in this circumstance would be helpful.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Such circumstances seem possible and withdrawing the notice to treat would then be a way of showing that the affected owner or occupier was no more adversely affected than need be – in effect, pre-empting any need to consider Crichel Down. However, such an action should see the acquiring authority liable not only for any losses but also any costs incurred in objecting to the proposed – and now abortive - scheme.
25. East Ayrshire Council	Yes, for instance if the acquiring authority have not started development/operations on the land and they decide they don't actually need the land, then the notice to treat could be withdrawn.
26. National Grid plc	Yes there may be circumstances, particularly where CPOs are promoted by statutory undertakers, where an acquiring authority may be required to withdraw a notice to treat after they have entered on to the land. These are likely to be rare. In such a case, there should be an obligation on the acquiring authority to make good any damage caused and/or pay compensation.
27. South Lanarkshire Council	No.
29. Brodies LLP	If authorities were allowed to withdraw notice to treat after taking entry to land, this could leave owners in a very difficult position if they have been proactive and found new homes or business premises.
31. Association of Chief Estates Surveyors Scottish Branch	No – this seems unfair given the concept of taking the land by compulsion and paying compensation.
32. Scottish Borders Council	The 1996 UK case you refer to clearly demonstrates why the Local Authority should be able to withdraw from notice to treat after they have entered onto the land, provided they have not commenced any work. It is acknowledged that if you entered the land and have commenced work without resolving the issue of compensation then the Council is accepting that withdrawal is no longer possible.
35. Shepherd and Wedderburn	No.
38. MacRoberts LLP	No.
40. Law Society of	We suggest that any such entitlement should be restricted in order

Scotland	to ensure that the landowner is not prejudiced by the withdrawal of a notice to treat. For example, although the landowner may have made alternative arrangements as a consequence of the acquiring authority having taken entry, the landowner may be agreeable to the withdrawal of the notice to treat subject to compensation. That is less likely where works have been undertaken and could depend on the nature of the property.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Taking our response to proposal [question] 44 further, it would seem to us that there must be the flexibility to allow the authority to withdraw where they have begun works, but that the costs of compensation outweigh the cost of not completing the development in question.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure.
Summary of responses and analysis	There were 24 responses to this question. 10 consultees responded "no", that there were no circumstances which should permit an AA to withdraw a NTT after entry onto the land. 13 consultees responded "yes", with nearly all of those referring to the need to pay compensation for damage and/or rectify any damage. WLC and GCC referred to compensating loss of use of the land. S&P and CAAV added that provision should be included to require the AA to pay any costs incurred in objecting to the scheme. EAC suggested that a NTT could be withdrawn if the AA had not started operations and they decided that they no longer needed the land. One consultee (SCPA) responded that the NTT procedure should be removed.

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

(Paragraph 7.67)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, that would seem reasonable.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	On balance yes. It is difficult to envisage any situation where the urgency is so great that it cannot be delayed by an extra 14 days.
13. Strutt & Parker LLP	See comments above. [We note that the notice to treat procedure is now rarely used. This suggests it is considered not to operate satisfactorily.]
16. Scottish Compulsory Purchase Association	See our previous comments with regard to notice to treat which should be removed.
19. Odell Milne	Yes. In some cases even 28 days may be too short – for example for farmers who need to make provision for stock or to harvest or sow crops etc. or businesses who need to make alternative provision for their business needs. Balancing this with the position of the promoter, who may have faced delay through a Public Local Enquiry and who is up against a delivery timetable (for example for an event such as the Commonwealth Games or the Ryder Cup), further delays could seriously impact up on delivery of the project. Therefore 28 days is a reasonable compromise but there may be scope for a provision whereby landowners can serve a counter notice suggesting an alternative date which the promoter should be bound to agree to unless there is good reason for insisting on entry within 28 days. I think probably that is what happens in practice.
20. SSE plc	We would suggest that a 28 day period would be more appropriate.
21. District Valuer Services	Yes.

22. Glasgow City Council	This seems reasonable but I don't know whether in an urgent situation 28 days might just be too long. Again I have no direct experience of this.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	14 days is too short but we prefer proposal [question] 47.
25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	No we believe that the period should remain unchanged. The ability to enter on to the land within 14 days is sometimes critical to the delivery and reinforcement of infrastructure.
27. South Lanarkshire Council	This would seem sensible as it is consistent with the timescales allowed in other parts of the CPO legislation.
31. Association of Chief Estates Surveyors Scottish Branch	28 days is reasonable and allows consistent approach.
32. Scottish Borders Council	No. Notice to Treat and Notice of Entry tend to be used by Authorities in Scotland only in cases where urgent entry is required, therefore general vesting declaration procedure takes too long. In my view it would not be reasonable to extend the period from two weeks to 28 days, delaying matters further and potentially jeopardising a project.
38. MacRoberts LLP	No.
40. Law Society of Scotland	Yes. Although that may cause some delay in urgent cases, the acquiring authority should be able to accommodate this in their project in the vast majority of cases. It will also serve to allow an owner of e.g. a residential property a more reasonable period within which to obtain advice.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	The discussion paper is clearly dissatisfied with the idea of an individual homeowner having only two weeks to decide upon a counter-notice. It could be that the new Statute could allow an extended period of Notice of Entry while retaining the ability to

	submit a two week notice for entry in urgent circumstances only.
Further responses, either made informally or at engagement events	It was generally agreed that 14 days was a very short period within which to require a landowner to leave their property, although it was suggested that this would only happen in exceptional circumstances. However, delays by AAs or their agents sometimes resulted in short time limits being imposed, when matters became urgent.
Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure. This question asked whether the period after which entry can proceed should be extended, and is an alternative to the suggestion in question 47.
Summary of responses and analysis	There were 22 responses to this question. 16 consultees agreed that the current period (of 14 days) is too short, and the majority of those agreed that 28 days would be appropriate. GCC were unsure whether there might be a situation in which 28 days would be too long. SPF suggested that the new statute could allow for an extended period of notice, but also allow for 14 days in urgent cases only. CAAV agreed that 14 days was too short but they preferred the option in question 47. OM discussed situations where 28 days might be too short, but stated that it was a reasonable compromise. FoA regarded questions 46 and 47 as policy matters, but preferred the option set out in question 47, as it would allow the AA access in urgent cases but also would place the financial risk on them. Two consultees (S&P and SCPA) stated that the NTT procedure should be removed. Three consultees (NG, SBC and MacR) did not wish the period to be extended. NG stated that the ability to enter the land within 14 days was sometimes critical to delivery and reinforcement of infrastructure. SBC stated that NTT tended to be used only where urgent entry was required, so it would not be reasonable to extend this to 28 days, potentially jeopardising a project.

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)

Respondent	
7. West Lothian Council	Not applicable.
10. Renfrewshire Council	No.
11. NHS Central Legal Office	No.
12. Society Of Local Authority Lawyers And Administrators In Scotland	A 21 day time limit for service of a counter notice is suggested.
13. Strutt & Parker LLP	See comments above.
16. Scottish Compulsory Purchase Association	The answer to this question is yes but under explanation that under the present legislation there are two different mechanisms (under two different Acts of Parliament) which deal with Material Detriment/Counter-Notices/Notice of Objection to Severance. Whilst the thrust of these Notices is the same i.e. to request (not to be able to force) an acquiring authority to compulsorily purchase not just the part of the land/property required for the public work but the whole property, the mechanisms and, indeed the types of property involved, vary considerably. Further, the ability of a landowner to serve a successful Notice is dependent on the type of property – in essence agricultural property and/or residential or industrial property. It is considered that the current legislation is flawed inasmuch as Material Detriment can have a detrimental effect on all different types of property and thus any new statute should be on the basis that Material Detriment can be adopted in respect of any type of property. Further, it is considered that, dependent upon the circumstances, all landowners in part-only acquisitions should have right to request the acquiring authority to compulsorily purchase either all or a designated part of the retained land on the basis of material detriment- whilst case law on the definition of material detriment exists it would be helpful for some guidelines to be produced, although each case would require to be decided on its own merits/circumstances. In assessing material detriment, consideration requires to be given to not just the extent of the land-take but also the overall effect of the public work on the retained

	land. However, the difficulty arises that in many disputed cases, the decision on material detriment is taken prior to the public work commencing, never mind having been completed and "the dust having settled". Further, at present the service of the appropriate Notice requires to be undertaken within a very short timescale after the General Vesting Declaration has been issued by the acquiring authority – although in most circumstances it would be hoped that the landowner would already be aware of the opportunity of serving such a Notice and the timescales for so doing. Thus, in light of the suggestion that Material Detriment should cover all different property types then it is further suggested that there is a three-month period following the issue of the General Vesting Declaration within which a "Material Detriment Notice" can be served on the acquiring authority. Whilst the concept of Material Detriment exists, it is not particularly well understood although there have been a number of Lands Tribunal cases and decisions in respect of this matter: indeed, the case law is continuing to develop (Morrison v Aberdeen City Council 2014). Further, it is recognised by SLC that much of the compulsory purchase /compensation legislation is out-of-date relative to modern times and thus does not recognise the development of different types of properties over the course of the last one hundred years. This equally has led to difficulties with regard to the proper interpretation of land that does fall within the Material Detriment provisions within the existing legislation (see Emslie v Transport Scotland 2013) which primarily dealt with the proper definition and interpretation of agricultural land within the meaning of the 1973 Act.
19. Odell Milne	Answered in [question] 46. [Answer to question 46 … there may be scope for a provision whereby landowners can serve a counter notice suggesting an alternative date which the promoter should be bound to agree to unless there is good reason for insisting on entry within 28 days. I think probably that is what happens in practice.]
20. SSE plc	We suggest that any counter notice should be served within 14 days of the notice of entry only but not after entry has been taken.
21. District Valuer Services	Yes. This is unlikely to happen often and the acquiring authority may reasonably be expected to factor in that risk that the counter-notice will be served to acquire the whole.
22. Glasgow City Council	Perhaps this is an alternative if there is evidence of the use of a very

	short period in urgent circumstances being necessary.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We prefer this proposal, subject to a reasonable time limit such as three months and available for all types of property.
25. East Ayrshire Council	No comment on basis of answer to question 46. [Answer to question 46 This would seem to be reasonable.]
26. National Grid plc	No any counter-notice should be served prior to the acquiring authority taking entry to the land.
27. South Lanarkshire Council	The Council would not support this proposal as it leads to uncertainty for the acquiring authority.
31. Association of Chief Estates Surveyors Scottish Branch	Before approach preferable to post entry approach.
32. The Scottish Borders Council	While not ideal, in my view it should remain competent for a landowner to serve a counter-notice within a set time limit following service of a notice of entry, regardless of whether the acquiring authority has entered on to the land, I suggest that this be standardised to 28 days or perhaps six weeks, this would provide is reasonable time for the landowner to obtain legal advice on the issue and to then serve notice if they so choose.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	We believe that this appears to be the less desirable of the options.
42. Scottish Water	No.
43. Faculty of Advocates	As above. [Answer to question 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.]
44. Scottish Property Federation	Yes – there could be a number of reasons for the acquiring authority not to have entered the land which will have nothing to do with the landowner. Subject to time constraints therefore yes we believe it is right for a landowner to be able to issue a counter-notice under

	certain circumstances where an acquiring authority has not entered the land in question. In relation to our previous answer to proposal 46 therefore it seems to us that there are good grounds for enabling both approaches and that guidance from Scottish Ministers should establish the circumstances relevant to these different approaches to safeguarding the rights of the landowner while enabling the acquiring authority the ability to proceed with their purchase effectively.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure. This question sets out an alternative to introducing the 28-day time limit suggested in question 46.
Summary of responses and analysis	There were 21 responses to this question. Nine consultees answered "no", some by implication when taking their comments into account. OM, WLC and EAC did so as they preferred the suggestion in question 46. NG stated that any counter-notice should be served prior to taking entry. SthLC suggested that it would lead to uncertainty for the AA. Ten consultees answered "yes", with a variety of time limits suggested. SOLAR suggested 21 days to serve any counter-notice. SSE suggested that any counter-notice should be served within 14 days of the notice of entry, but not after entry. GCC suggested this option as an alternative to the suggestion in question 46 if a very short period was necessary. FoA and CAAV preferred this option to question 46, and CAAV suggested three months and for it to be available for all property types. SBC suggested 28 days or 6 weeks, as providing reasonable time for the landowner to obtain legal advice and serve notice, if necessary. SCPA answered on the basis of GVD procedure. SPF believed that, subject to time constraints, counter-notices should be competent prior to entry on the land. They felt that there were good reasons to provide for the approaches in both questions 46 and 47, with guidance from SMs. For the remaining responses, S&P wanted the NTT procedure to be

	removed and ACES stated that the before-entry approach was preferable to the after-entry approach.

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

(Paragraph 7.73)

Respondent	
1. Professor Jeremy Rowan Robinson	Provision should be made for a notice of entry to lapse if it is not implemented within, say, 28 days. Promoters should not serve a notice of entry unless they are ready to move in.
7. West Lothian Council	Six months.
10. Renfrewshire Council	We agree there should be a time limit but what is reasonable may depend on the nature and circumstances of the land being acquired.
11. NHS Central Legal Office	28 days.
12. Society Of Local Authority Lawyers And Administrators In Scotland	This is an area for discussion but somewhere in the region of six months would seem reasonable. Reference is made to para 7.72 of the discussion paper and the practice in Australia.
13. Strutt & Parker	We note that the commentary at paragraph 7.78 to the effect that an acquiring authority does not need to serve a GVD notice in relation to a short tenancy – which is defined as a tenancy for a year, or from year to year or any lesser interest. This would seem to cover a number of 1991 Act tenancies where the tenancy was for a period and then from year to year. Thus it might be that they do not need to be served notice (subject to general comments above re notice to treat).
16. Scottish Compulsory Purchase Association	See our previous comments regarding notice to treat which should be removed.
19. Odell Milne	I would suggest this should be for no longer than six months and, if possible, for a shorter period. For any longer period, promoters should be obliged to provide good cause for an extension.
20. SSE plc	A notice of entry should remain valid for 2 months to allow for any delays in mobilisation of contractors due to delays for weather or other events.
21. District Valuer Services	2 months.

22. Glasgow City Council	Not having real experience of this, I am not sure.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We note that the commentary at paragraph 7.78 to the effect that an acquiring authority does not need to serve a GVD notice in relation to a short tenancy – which is defined as a tenancy for a year, or from year to year or any lesser interest. That raises particular issues for agricultural units as the standard form for tenancies, whether under the Agricultural Holdings Act 1991 or also progressively under the Agricultural Holdings Act 2003 is for the form of the tenancy to be for a period and then from year to year – even though those Acts (especially the 1991 Act) operate to give much more robust immunity from termination. Yet, it might be that the law does not require them to be served notice for a GVD which is perverse.
25. East Ayrshire Council	It is agreed that there should be a time limit but no strong views on how long this should be.
26. National Grid plc	It would be unusual for entry not to have been taken as soon as permitted. However there may be circumstances where entry is not taken at that time. We would suggest that a notice of entry remains valid for 3 months.
27. South Lanarkshire Council	The Council is of the view that it is difficult to set a fixed period that would be appropriate for all circumstances. There may be circumstances where the owner needs to find alternative accommodation for himself/his business which may need a longer period of time but in other cases the land being acquired may already be vacant. The Council would suggest a minimum of 14 days and maximum of 3 months may be appropriate with the Scottish Government having the power at the request of the Acquiring Authority to extend this period where necessary in the particular circumstances of the case.
32. Scottish Borders Council	I do not take issue with the suggestion that if the local authority do not take possession of the land within specified period that the notice should lapse and that a further notice should be required to be served before entry can be taken. This appears reasonable in terms of giving Landowners some certainty on what is happening. I suggest that Notice of Entry only remains valid for a period of 28 days from the date on which the notice states that entry can be taken.
38. MacRoberts LLP	Thirty days.
39. Scottish Land and Estates	We are aware of the reference from year to year or short tenancies. It should be borne in mind that many agricultural tenancies after the initial period continue from year to year and we would assume those

	should be served with a notice for a GVD.
40. Law Society of Scotland	Any restriction in the period of validity is likely to be of some benefit to the affected owner as it would remove a degree of uncertainty. As for the acquiring authority, it should not be prejudiced by such a restriction provided the notice of entry can be reissued and remain in effect. This raises the question of whether there should be an overall restriction on the number of times a notice may be re-served, or whether there should be an overall restriction in the period of time such notices may remain effective.
42. Scottish Water	One year.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Under particular circumstances the notice of entry will lead to uncertainty and distress for a householder or business – therefore it should not be left open indefinitely. That said there must be a reasonable period of time allowed where an acquiring authority suffers unforeseen delays to their ability to enter the land. We believe that further consultation around the draft Bill will inform the SLC/Scottish Government about the appropriate length of time for a notice of entry to remain in force before it lapses. We suspect a reasonable period of time may be longer than 28 days however.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 37 to 48 are relevant if the current notice to treat (NTT) procedure is retained in some form. However, the majority of consultees favoured adopting a new single procedure, which would replace the NTT procedure.
Summary of responses and analysis	There were 22 responses to this question. Three consultees (RC, EAC and LSS) agreed there should be a period set, without suggesting what it should be. LSS asked whether there should be an overall restriction on the number of times a notice may be re-served, or an overall restriction in the period of time such notices may remain effective. 14 consultees suggested time periods, ranging from 28 days (JRR,

	NHS, and SBC) to one year (SW). SCPA stated that the NTT procedure should be removed. Four consultees did not directly answer the question or had no experience.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, this would seem tidier.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	No, it may be difficult in all cases to ascertain who the affected parties are.
11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Although in practice this is likely to make very little practical difference for diligent acquiring authorities we would not favour introducing this as a requirement, given that some of these potential qualifying interests may be ad hoc and difficult to ascertain. The current limitation of this duty is adequately explained in Rowan Robinson and Farquharson-Black's book section 3-27.
13. Strutt & Parker LLP	We agree that there is no reason to exclude such short term tenancies.
16. Scottish Compulsory Purchase Association	It is considered that for completeness an acquiring authority should serve notice of intention to make a GVD on all interests that have been identified within the CPO.
19. Odell Milne	I am not sure if this is a good idea since it places a significant burden on an acquiring authority. That said, affected parties would be severely impacted by acquisition therefore to provide that notification is <u>not</u> required does seem to be unfair and does not reflect the reality of the interests of those parties. In practice I think many acquiring authorities serve notice on these parties, considering them to be tenants with a tenancy of more than a year, although strictly speaking the continuance of the tenancy is based on statute rather than the tenancy itself. Tenants of short tenancies

	or long tenancies with less than a year to run will need to vacate their properties and therefore giving them notice seems reasonable. Considering amendments to the notice procedure whereby, if parties do not collect recorded delivery items and at least two attempts to serve by recorded delivery have been made, requirement to notify might be deemed to have been complied with. This does of course run the risk of opening the door to promoters not taking all reasonable steps to ensure notification is completed.
20. SSE plc	We would suggest that this is a requirement as although there is a limited duration left of the tenancy, the tenant still has a subsidiary right to the property and should be notified.
21. District Valuer Services	Yes.
22. Glasgow City Council	I think in the case of a long tenancy (Sasine/Land Registered) with less than a year to run this is fine but in relation to short tenancies I am not inclined to agree because often with the informality of some arrangements it can be extremely difficult to identify the occupancies and the tenancies and it could be very difficult to implement this if it were a requirement. To make this an option rather than a requirement is useful.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes – especially in the light of the position of agricultural tenancies just described. There is no reason to exclude short tenancies.
25. East Ayrshire Council	If the acquiring authority served notice on holders of a short tenancy or a long tenancy with less than one year to run, then all parties would be aware of the acquiring authority's proposals, although it is accepted that it may be simpler to let these tenancies expire at the end of their term.
26. National Grid plc	The acquiring authority should serve notice on all parties identified in the CPO. Even where an inquiry authority has made all diligent inquiries, it may still not be possible to identify holders of short tenancies.
27. South Lanarkshire Council	The Council supports the proposal.
29. Brodies LLP	Yes. A short tenancy may be a residential Short Assured Tenancy which the tenant is assuming will continue and a tenant nearing the end of a long lease similarly may be expecting to stay in the same premises. In the case of a long lease, it may take some tenants some time to relocate.
31. Association of Chief Estates	Service of Notice can give the recipient an expectation of

Surveyors Scottish Branch	compensation.
32. Scottish Borders Council	It does not appear unreasonable for the Authority to have to give notice to these parties as well as all the others are already provided for.
35. Shepherd and Wedderburn	Yes
38. MacRoberts LLP	Yes (if the tenant under the short tenancy can be identified – short leases are not registrable at the Land Register and therefore can be "invisible" to the acquiring authority)
39. Scottish Land and Estates	We would draw your attention to the comments made above in respect of proposal 48. [Comments made for proposal 48 We are aware of the reference from year to year or short tenancies. It should be borne in mind that many agricultural tenancies after the initial period continue from year to year and we would assume those should be served with a notice for a GVD.]
40. Law Society of Scotland	Yes. In both of these situations the law will imply a continuation if neither party takes steps to terminate. This will ensure that all legitimate, affected parties receive proper notice of the GVD. If the tenant was not aware of the existence of a potential CPO, this may cause prejudice.
42. Scottish Water	No.
43. Faculty of Advocates	The Faculty of Advocates considers this is a policy matter and has no comment.
44. Scottish Property Federation	The effect of a GVD upon a short leaseholder or a long leaseholder with less than a year to remain is nonetheless the same as for a longer term leaseholder or property owner - they are required to quit the premise and relocate. We do not see the justification for their exclusion therefore. On practical grounds we would allow that for lessees of less than 12 weeks tenure then it would be inefficient to require notification however, bearing in mind the process of the GVD and Notice of Entry.
Further responses, either made informally or at engagement events	A query was raised about whether, where a tenancy becomes a long tenancy because it is protected by statute, and not because it is, in and of itself, a long lease; this counts as a long lease for the purposes of CPO legislation?

Analysis	
Explanation of question	This question is related to proposal 68 and question 173. Proposal 68 suggested that the AA may serve a NTT on any tenant and extinguish the tenant's right under the lease in return for compensation. Question 173 asked if section 114 of the 1854 Act works satisfactorily. S114 provides for compensation to be paid to tenants of no more than one year, or from year to year, and states they shall be entitled to compensation for the value or the unexpired term or interest, and for any just allowance which ought to be made to them by any incoming tenant, and for any loss or injury they may sustain, by the lands being severed or otherwise injuriously affected.
Summary of responses and analysis	There were 25 responses to this question. 17 consultees responded "yes", that such notice should require to be served. Four consultees responded "no". Of those who responded "yes", SPF qualified this for lessees of less than 12 weeks, as it would be inefficient to require notification to them. GCC agreed in the case of long tenancies with less than a year to run, but not for short tenancies as some are informal, making it difficult to identify the relevant parties. They suggested that serving notice should be an option, rather than a requirement. In addition, SCPA and NG stated that the AA should serve notice on all parties identified in the CPO. MacR stated that notice should only be served if the tenant under a short tenancy can be identified, as these are not registrable at the Land Register, so can be "invisible" to the AA. Of those who responded "no", RC believed it might be difficult to ascertain in all cases who the affected parties were. SOLAR were concerned that some potentially qualifying interests may be *ad hoc* and difficult to ascertain. OM was not sure it was a good idea as it would place a significant burden on AAs.

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)

Respondent	
7. West Lothian Council	The council has not encountered this situation in practice. However, the council agrees that the current provisions appear to be a reasonable balance between the landowner's and acquiring authority's interests.
10. Renfrewshire Council	We are not aware of any difficulty in applying the current provisions
11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	We are not aware of any difficulty in applying the current provisions.
13. Strutt & Parker LLP	We consider the 28 day notice period for severance to be tight.
16. Scottish Compulsory Purchase Association	See our response to questions 46 and 47. [Question 47 The answer to this question is yes but under explanation that under the present legislation there are two different mechanisms (under two different Acts of Parliament) which deal with Material Detriment/Counter-Notices/Notice of Objection to Severance. Whilst the thrust of these Notices is the same i.e. to request (not to be able to force) an acquiring authority to compulsorily purchase not just the part of the land/property required for the public work but the whole property, the mechanisms and, indeed the types of property involved, vary considerably. Further, the ability of a landowner to serve a successful Notice is dependent on the type of property – in essence agricultural property and/or residential or industrial property. It is considered that the current legislation is flawed inasmuch as Material Detriment can have a detrimental effect on all different types of property and thus any new statute should be on the basis that Material Detriment can be adopted in respect of any type of property. Further, it is considered that, dependent upon the circumstances, all landowners in part-only acquisitions should have right to request the acquiring authority to compulsorily purchase either all or a designated part of the retained land on the basis of material detriment- whilst case law on the definition of material detriment exists it would be helpful for some guidelines to be produced, although each case would require to be decided on its own merits/circumstances. In assessing material detriment, consideration requires to be given to not just the extent of the land-take but also the overall effect of the public work on the retained

	land. However, the difficulty arises that in many disputed cases, the decision on material detriment is taken prior to the public work commencing, never mind having been completed and "the dust having settled". Further, at present the service of the appropriate Notice requires to be undertaken within a very short timescale after the General Vesting Declaration has been issued by the acquiring authority – although in most circumstances it would be hoped that the landowner would already be aware of the opportunity of serving such a Notice and the timescales for so doing. Thus, in light of the suggestion that Material Detriment should cover all different property types then it is further suggested that there is a three-month period following the issue of the General Vesting Declaration within which a "Material Detriment Notice" can be served on the acquiring authority. Whilst the concept of Material Detriment exists, it is not particularly well understood although there have been a number of Lands Tribunal cases and decisions in respect of this matter: indeed, the case law is continuing to develop (Morrison v Aberdeen City Council 2014). Further, it is recognised by SLC that much of the compulsory purchase /compensation legislation is out-of-date relative to modern times and thus does not recognise the development of different types of properties over the course of the last one hundred years. This equally has led to difficulties with regard to the proper interpretation of land that does fall within the Material Detriment provisions within the existing legislation (see Emslie v Transport Scotland 2013) which primarily dealt with the proper definition and interpretation of agricultural land within the meaning of the 1973 Act.]
19. Odell Milne	One issue which arises in relation to paragraphs 19 to 29 of the Schedule is that, given the stage in the CP process when such a notice is served, a promoter may have little choice but to accept the notice of objection to severance and acquire all the land. This can have a significant impact on promoters who have not budgeted for such an acquisition. Promoters are in a difficult position. In determining which land to acquire, they are obliged to minimise land take as far as possible to minimise the interference of private property rights. That means drawing lines across properties rather than drawing lines which take in the whole property. Promoters will have determined that they do not need the additional land or they would have included it in the compulsory acquisition plan. When faced with a notice of objection to severance at the stage of GVD, promoters may be at a stage where obtaining the land in order to deliver the scheme is urgent; contractors may have been engaged and procurement exercises complete (the contracts with contractors may include penalties payable by the acquiring authority for any delay in commencement of works). Even if contractors are not yet

	engaged, the timetable for completion of schemes may have become tight due to delays at an earlier stage e.g. in PLI. Therefore promoters may not have time to refer the matters to the Lands Tribunal where further period of uncertain duration can hold up delivery of the land. Having assessed the land at the stage of CPO, they would not have included it if it was not needed for the scheme. Therefore the option of removing the land is unlikely to be available to them. Therefore, the only real option available to promoters in my experience is to acquire the whole property and pay the additional cost. Perhaps this cannot be dealt with in any other way but consideration could be given to an equivalent notice arrangement exercisable at the stage of notification of the making of the CPO, whereby a party receiving notice of the CPO is asked to indicate, at that stage, if the land included in the CPO is to be acquired, they intend to serve a notice of objection to severance. If such a notice was served at that time, the promoter would have time within the programme to refer the matter to the Lands Tribunal; or consider a variation of the scheme to allow the land to be excluded. By the GVD stage, it is not possible to add in alternative land to replace the land in respect of which the notice of objection to severance was served since, unless such land is made available voluntarily by a third party. Acquiring the replacement land would require a fresh CPO process. Notice at the CPO stage would mean that, if neither removal of the land nor referral to the Lands Tribunal is attractive, at least the promoter obtains information at a comparatively early stage. From a landowner's perspective this is an important provision which I consider must remain. However, whilst the courts may have determined that houses, factories etc. should all be treated similarly, perhaps that test could be looked at again. Removal of a small part of a commercial site may be inconvenient or result in the need for rearrangement of accesses, deliveries, parking etc. but may not cause real material detriment to the business. The argument would be that, if that is the case, it would not be found to be material detriment by the Lands Tribunal. However, that fails to take account of the issues set out above that at the stage of the notice, the promoter may not have time for such a referral. Moreover, any detriment caused can be compensated. In comparison, loss of a piece of land forming part of a garden of a house may be more likely to cause material detriment to the owner. Essentially as the stage of the notice is so late, the practical result may often be that a party serving a notice of objection severance is required to satisfy the Lands Tribunal that there is indeed material detriment caused. Reconsideration of the test, perhaps so that it is different for different types of property (commercial/residential), or the limit with regard to the size of the land acquired in comparison with the area of the land remaining which is the subject of the counter-notice is changed; or whether the entitlement could be restricted where the

	land owner concerned has a property of over a certain size remaining, the process is subject to a higher test, might improve the position.
20. SSE plc	We have no experience of this in practice so have particular view on this matter.
21. District Valuer Services	The answer to this question is yes but under explanation that under the present legislation there are two different mechanisms (under two [different Acts of Parliament)], depending on whether the subjects are agricultural or non-agricultural. Whilst the thrust of these Notices is the same i.e. to request (not to be able to force) an acquiring authority to compulsorily purchase not just the part of the land/property required for the public work but the whole property, the mechanisms and, indeed the types of property involved, vary considerably. Further, the ability of a landowner to serve a successful Notice is dependent on the type of property – in essence agricultural property and/or residential or industrial property. It is considered that the current legislation is flawed and thus any new statute should be on the basis that the same Counter Notice procedure can be adopted in respect of any type of property. Further, it is considered that, dependent upon the circumstances, all landowners in part-only acquisitions should have right to request the acquiring authority to compulsorily purchase either all or a designated part of the retained land on the basis of material detriment. Whilst case law on the definition of material detriment exists it would be helpful for some guidelines to be produced, although each case would require to be decided on its own merits/circumstances. In assessing material detriment, consideration requires to be given to not just the extent of the land-take but also the overall effect of the public work on the retained land. However, the difficulty arises that in many disputed cases, the decision on material detriment is taken prior to the public work commencing, never mind having been completed and "the dust having settled". Further, at present the service of the appropriate Notice requires to be undertaken within a very short timescale after the General Vesting Declaration has been issued by the acquiring authority – although in most circumstances it would be hoped that the landowner would already be aware of the opportunity of serving such a Notice and the timescales for so doing. Thus, in light of the suggestion that the same Counter Notice procedure should cover all different property types then it is further suggested that there is a three-month period following the issue of the General Vesting Declaration within which a Counter Notice can be served on the acquiring authority. Also, the tests differ depending on whether the subjects of the Counter Notice are a park or garden, on the one hand, or a "house,

	garden or factory", on the other. There seems to be no good reason for this distinction, and the test should be the same.
22. Glasgow City Council	Addressing the prospect of severance earlier in the process than at vesting is suggested.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The 28 day notice period for severance is a tight limit in these circumstances. In replying to question 47 we suggested three months.
25. East Ayrshire Council	East Ayrshire Council has no practical experience in this matter.
27. South Lanarkshire Council	The Council do not believe any amendments to the process are required.
31. Association of Chief Estates Surveyors Scottish Branch	Not aware of any difficulty in applying the current provisions.
38. MacRoberts LLP	We do not have sufficient experience of this issue to offer a view.
40. Law Society of Scotland	It is important for the landowners to retain the right to serve a notice of objection to severance.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates considers that the current provisions adequately safeguard the interest of the acquiring authority and the landowner.
44. Scottish Property Federation	Ideally, the acquiring authority and landowner will have effectively communicated ahead of such a notice being required – but the Statute cannot depend on this of course. We believe the counter notice for severance is effective for the landowner but we have reservations about the timescale of 28 days. This is a short time to secure appropriate advice and to lodge the relevant notice for severance. This period of notice is limited somewhat by the two month notice of the GVD. Possibly a six week period for a severance notice to be made to the acquiring authority is a reasonable compromise.
Further responses, either made informally or at engagement events	One participant wondered whether a right to confer rights on others could be incorporated into GVDs. Rather than compensation with money, you could grant an alternative access. It was agreed that this was a sound proposal. Another noted that while a lesser interest may be acceptable to the current owner of a property, when they come to sell, such a lesser

	right can make the property harder to sell. For example, many are left with a roads order, but for a sale they will need a deed of servitude. It was wondered where, procedurally, new rights were to be set out. Would it be in a new or different procedure? It was noted that, in terms of a Special Act, an interest in land could be compulsorily vested in someone, with obligations, for instance to maintain a right of way, regardless of whether that person agreed to the rights being vested in them. Looking at material detriment and part-only acquisitions, it was noted that, for severance, the current system was two-tiered such that notice for agricultural land had to be served within three months, whereas notice for residential land, parks or gardens had to be served within 28 days. One system should be introduced. There was an issue with valuation in that, if land would have had development value but was acquired under Notice of Severance, then the AA acquired this at agricultural value only. It was often not clear in most CPO documentation that Notice of Severance was available.
Analysis	
Explanation of question	Paragraphs 19 to 29 of Schedule 15 to the 1997 Act provide for objection to severance in relation to GVDs. Where a GVD applies to part only of a house, building or factory, or of a park or garden belonging to a house, any person able to sell the whole house etc. can serve (within 28 days of notice of the GVD) a notice of objection to severance, requiring the AA to purchase their whole interest. This question asks whether the above provisions adequately safeguard the interests of the AA and landowner, or whether alterations should be made.
Summary of responses and analysis	There were 19 responses to this question. Six consultees answered that the current provisions are adequate, or that landowners should retain the right to object to severance. Six consultees answered that they had no experience of the provisions or that they were not aware of any difficulties. Seven consultees suggested alterations. Of those, SCPA referred to the two different procedures which currently exist: for counter-notices/material detriment in relation to

	agricultural property under section 49 of the 1973 Act and notice of objection to severance under the 1997 Act. They suggested that there should be a single procedure to require the AA to purchase the whole property, and material detriment should cover all property types. They further suggested that there should be a three month period following the issue of the GVD within which a "Material Detriment Notice" could be served on the AA. DVS made similar suggestions. OM referred to the problems caused for AAs when faced with a notice of objection to severance at the GVD stage, when the timetable may be very tight and there is no time to refer matters to the LTS. She suggested consideration of an equivalent notice procedure on notification of the making of the CPO, where a landowner could be asked if they intended to object to severance, which would give the AA more time to refer to the LTS or consider varying the scheme. However, from a landowner's perspective she stated that some provision of this type must remain, but that the test might be different for different types of property (commercial/residential) or by size of land taken compared to land remaining. GCC suggested addressing severance earlier in the process. S&P considered that 28 days was too short. CAAV suggested three months to serve notice of severance as 28 days was too short. SPF had reservations about the 28 day period and suggested six weeks as a reasonable compromise.

51. **Should a GVD be available in all circumstances?**

(Paragraph 7.89)

Respondent	
1. Professor Jeremy Rowan Robinson	I do not see any case for limiting the circumstances in which a GVD can be used.
2. West Lothian Council	Agreed that a GVD should be available in all circumstances.
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Yes as this allows title to be taken without the agreement of the Landowner.
12. Society Of Local Authority Lawyers	Yes.

And Administrators In Scotland	
13. Strutt & Parker LLP	We suggest a single CPO system be adopted by way of GVD.
16. Scottish Compulsory Purchase Association	It is suggested that there be a single compulsory purchase system which would reflect the current procedure of a General Vesting Declaration and thus it is considered that such a procedure should be available in all circumstances.
19. Odell Milne	I consider that a GVD should be available for all major projects since delivery of all land at the same time in order to promote such a project (e.g. a linear project or major town centre scheme) is essential. It is not so clear that a GVD is the appropriate method where there are less interests to be acquired. However, introducing a provision that makes a GVD available in some circumstances and not in others, seems to me to be difficult to put in place. Projects where there are more than 50 landowners may be no more difficult to deliver than a project where there are 20 landowners where one of them is particularly difficult to work with, so on balance I think a GVD should be available in all circumstances. From a promoter's perspective a GVD has the benefit of simplicity. Provided the procedures have been complied with, from a landowner's perspective, if his land is to be acquired, the actual procedure that is done may not be of great importance. More important is the date on which entry is to be taken and the date on which compensation is paid. Therefore looking more carefully at the provisions which provide for entry and payment may be more important to landowners than the procedure being used.
20. SSE plc	We would suggest that a GVD should be available in all circumstances.
21. District Valuer Services	Yes – in practice most recent CPOs in Scotland have used GVD satisfactorily
22. Glasgow City Council	Yes.
24. Shona Blance	No.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes, as we suggest adopting a single system for implementing compulsory purchase along the lines of a GVD.
25. East Ayrshire Council	There doesn't appear to be any reason why a GVD should not be

	available in all circumstances.
26. National Grid plc	Yes.
27. South Lanarkshire Council	The Council is of the view that a GVD should be available in all circumstances.
29. Brodies LLP	Yes subject to a single procedure being adopted below.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Yes.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes, if a single system for effecting CPOs is implemented.
40. Law Society of Scotland	Yes.
42. Scottish Water	Yes.
44. Scottish Property Federation	There should be appropriate direction and guidance from UK and Scottish Ministers to acquiring authorities on the appropriate method of implementing a CPO. This should act to counter the concerns raised by the discussion paper on the relatively short length of timescale involved with a GVD.
Further responses, either made informally or at engagement events	The general consensus was that it would be preferable to have a single procedure.

Analysis	
Explanation of question	None required.
Summary of responses and analysis	Of the 24 consultees who responded to this question, 23 were in favour, and only one (SB) replied "no". Five of those in favour stated that this was on the basis that a single procedure should be adopted. OM considered that GVD should be available for all projects, both major and those where fewer interests are acquired, as smaller projects can be just as difficult to deliver. SPF considered that there should be appropriate direction and guidance from Ministers to AAs on the appropriate method of implementing a CPO, to alleviate concerns about short timescales involved with GVDs.

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

(Paragraph 7.89)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, they seem to be.
7. West Lothian Council	Agreed that the time limits are satisfactory.
10. Renfrewshire Council	No, they should be shortened.
11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	No, they should be shortened to 4 weeks.
13. Strutt & Parker LLP	We consider that these are satisfactory.
16. Scottish Compulsory Purchase Association	It is considered that the time limits for implementing a GVD are satisfactory.
19. Odell Milne	The time limits for implementing a GVD are tight but reasonable. Extending them any further for a promoter's benefit could leave landowners in a difficult and uncertain position. There is one aspect of the procedure which appears to allow a delay that can be used by a promoter who wants to delay actual acquisition. The availability of this period may be a good thing since it provides time for the promoter to look into the possibility of minimising land take. For example, with the landowner's agreement, additional investigatory work can be carried out to see whether retaining walls or structures could reduce or avoid land take; or realignment could achieve the desired end without land take at the stage of the CPO, insufficient design detail is available to be certain with regard to some of these matters and so land may be included which further investigation shows is not required and therefore this period can be of value to promoters and landowners alike. The period to which I refer is the period between the notice of intention to make a GVD and its execution – that does not need to be at the end of the two month period. Promoters can delay

	executing the GVD for some months. There should be a cap on the length of this period, to give landowners certainty. However, I am well aware of the benefit of this period to promoters and landowners alike in some circumstances. The danger is that the delay is used for some other purpose rather than with a genuine view to improve the impact on landowners.
21. District Valuer Services	Yes.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	The existing time limits appear to be satisfactory.
26. National Grid plc	Yes.
27. South Lanarkshire Council	The Council consider the time limit for implementing a GVD to be satisfactory. The timescales give clarity to the parties and for the acquiring authority it has the benefit of allowing the GVD to take affect quickly allowing early entry and possession.
31. Association of Chief Estates Surveyors Scottish Branch	Generally yes.
32. Scottish Borders Council	In general terms they are satisfactory but it would be helpful if they could be shorter. Although through GVD acquire both title and take entry the 12 weeks is somewhat long when compared with entry being possible after 14 days under Notice to Treat. Given that there can be urgency issues for time the CPO is finally confirmed would be helpful if the period for GVD to take effect and for entry title to be given could be brought down to a period of eight weeks in total from confirmation of the CPO. In our view this would still allow adequate periods for each part of the GVD process.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes, as far as we aware.
40. Law Society of Scotland	Yes.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates considers the time limits are acceptable.

44. Scottish Property Federation	In our answer to proposal 51 we suggest an amended timescale for implementing a GVD – on this basis our answer must therefore be 'no'.
Further responses, either made informally or at engagement events	General comments were made about the need for a balance between efficiency and speed, and to speed up the process overall, but no general consensus emerged about how this could be done, and which time limits could be safely shortened.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	22 consultees responded to this question, with 17 answering that the time limits were satisfactory. One further consultee (OM) stated that the time limits were tight but reasonable, but suggested that there should be a cap on the period between giving notice of intention to make a GVD and its execution, to give certainty to landowners. Four consultees considered that the time limits were unsatisfactory, and stated that they should be shortened. SBC suggested reducing the period for the GVD to take effect to eight weeks in total from confirmation of the CPO. SOLAR suggested four weeks.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
7. West Lothian Council	Agreed.
9. David Strang Steel	We accept the basis of this proposal subject to concerns about losses incurred prior to this date as a consequence of delays between any draft order and the GVD. In respect of the AWPR 6 years elapsed between the draft order and the vesting date. During that time our planning application for a supermarket in Field 52 could not be determined.

	Statutory interest is linked to the Bank of England Base rate and does not reflect the commercial rates on interest incurred by claimants which are much higher rates and compound rather than simple, District Valuers currently refuse disturbance claims based on overdraft costs on the grounds of the statutory interest provisions.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	We accept the basis of this proposal subject to concerns about losses incurred prior to this date as a consequence of delays between any draft order and the GVD. In respect of the AWPR six years elapsed between the draft order and the vesting date. During that time any planning application for land required along the route could not be determined. In Strang Steel –v- Scottish Ministers issues arose about the probability of planning at the relevant dates. The LTS found that "there was no reason to doubt that the Council would have granted planning [for a retail store and petrol filling station]…in the no scheme world" (Paragraph 102). They went on to state "on the balance of probability [planning consent] would have been granted on or before 2009" (Paragraph 109). Had this been the case the landowner would have purified the missives for a sale of the site to Sainsbury's for £10.25M. In the event he was awarded only £1.7M. Had the scheme not affected Field 52, the landowner would have sold the site for the highest figure. It is difficult to escape the injustice of this situation which arises out of the working of the current legislation. The basis for payment of interest is wholly inadequate. The statutory rate is set at 0.5% below the Bank of England base rate which, since March 2009, means that the statutory rate is 0%. As set out below, acquiring authorities have no incentive to settle claims while affected parties, many incurring commercial overdraft rates of 3% over base, (together with other bank charges) are severely disadvantaged. In addition the current calculation is based on simple interest whereas the real market operates on compound interest.

16. Scottish Compulsory Purchase Association	This proposal is supported with there being a sufficiently high rate of interest established and a minimum rate of interest- which should always be positive. At present, the statutory rate of interest is linked to the Bank of England Base Rate and is set at 0.5% below Base Rate. Since March 2009 when an "emergency" base rate of 0.5% was introduced by the Bank of England it can be appreciated that the statutory rate of interest since that time has been nil. Whilst the statutory rate of interest should continue to be linked to Bank of England Base Rate, it is suggested that the linkage should be within an appropriate range above Base Rate. Further, statutory interest is calculated on a simple interest basis and it is suggested that the basis should be that of compound interest.
19. Odell Milne	Agreed. However, where statutory interest rates are low the obligation to pay interest does not work as an incentive to pay compensation or advance payment and there is no method by which acquiring authorities can be forced to pay compensation other than by referral to the Lands Tribunal. Whilst the provisions governing Advanced Payments provide for a time limit for payments, there is no penalty if the acquiring authority fails to pay within the 90 day period. Historically, payment was made promptly by acquiring authorities in times of high interest rates since they have an incentive to do so. Therefore landowners can be faced with long delays and no simple remedy. Perhaps provision could be made that provides that, where compensation is payable or an Advance Payment is requested, compensation must be paid within a set period or an automatic penalty on the acquiring authority is imposed. This may help encourage early payment.
20. SSE plc	We would agree that compensation should be assessed as at date of vesting.
21. District Valuer Services	This proposal is supported subject to there being a sufficiently high rate of interest established and a minimum rate of interest - which should always be positive. At present, the statutory rate of interest is linked to the Bank of England Base Rate and is set at 0.5% below Base Rate. This has meant that since March 2009 when an "emergency" base rate of 0.5% was introduced by the Bank of England the statutory rate of interest has been nil. Whilst the statutory rate of interest should continue to be linked to Bank of England Base Rate, as suggested in the current DCLG consultation. Further, statutory interest is calculated on a simple interest basis and it is suggested that the basis should be that of compound interest.
22. Glasgow City Council	Agree.

23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We accept the basis of this proposal subject to concerns about losses incurred prior to this date as a consequence of delays between any draft order and the GVD. In respect of the AWPR six years elapsed between the draft order and the vesting date. During that time any planning application for land required along the route could not be determined. In Strang Steel –v- Scottish Ministers issues arose about the probability of planning at the relevant dates. The LTS found that "there was no reason to doubt that the Council would have granted planning [for a retail store and petrol filling station]…in the no scheme world" and that "on the balance of probability [planning consent] would have been granted on or before 2009". Had this been the case the landowner would have purified the missives for a sale of the site to Sainsbury's for £10.25M. In the event he was awarded only £1.7M. Had the scheme not affected Field 52, the landowner would have sold the site for the highest figure. It is difficult to escape the injustice of this situation which arises out of the working of the current legislation. The basis for payment of interest is wholly inadequate whether as a reflection of reality or as discipline on the acquirer who could see delay as a cheap means of easing the financing the project. That inadequacy lies in: • The statutory rate being set at 0.5% below the Bank of England base rate which, since March 2009, means that the statutory rate is 0% when borrowing costs that affected parties may incur are several per cent above base (with other bank charges) and Government prescribes 8 per cent over base for late payment. • Interest being paid on a simple and not, as everywhere else, on a compound basis.
25. East Ayrshire Council	This proposal appears reasonable but if the acquiring authority cannot agree an acquisition price with the owner who may be considered to be acting unreasonably and the matter is referred to the Lands Tribunal for consideration then the extent of interest payable will be greater than if agreement had been reached by negotiation. Perhaps in these circumstances the Lands Tribunal should have powers to determine the date when interest should become payable which could be dependent upon the merits of the case and the reasonableness of both parties. If this proposal was considered to be valid then the statement No 53 [proposal 53] would require to be amended to reflect this change.
26. National Grid	Yes.
27. South Lanarkshire Council	The Council agrees with this proposal as it clarifies the position for

	all the parties.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agreed.
33. DJ Hutchison	We accept that claims be assessed at the date of vesting so long as provisions are made for losses prior to this. As a consequence of delays between any draft order and the GVD, 6 years elapsed for the AWPR. During that time our business was in a state of limbo. Statutory interest is linked to the Bank of England base rate and does not reflect the commercial rates on interest incurred by us under overdraft facilities with compound rather than simple interest rates. The DV is refusing to consider a disturbance claim based on overdraft costs because of the statutory interest provisions set out in current legislation.
38. MacRoberts LLP	We concur.
39. Scottish Land and Estates	We agree with this proposal, although are mindful of any losses incurred in advance of this date as a result of delays between any draft order and the GVD.
40. Law Society of Scotland	In our view, this would appear to be reasonable.
41. Judges of the Court of Session	Propositions 53 and 54 We agree with both of these propositions. The law as developed in *Birrell Ltd v Edinburgh District Council*, 1982 SC (HL) 75, appears to us to be, as indicated at paragraph 7.97, a principled position that accords with general standards of fairness.
42. Scottish Water	Yes.
43. Faculty of Advocates	Subject to proposal [question] 56 the Faculty of Advocates agrees.
44. Scottish Property Federation	We agree – no further comments.
Further responses, either made informally or at engagement events	Many comments were made about the current rate of statutory interest (nil), so there was no incentive on an AA to pay. Suggestions were made for rates of 3 or 4% or even 8% above base rate. All agreed that interest should be compound, rather than simple. The most recent English proposal is for a rate of 8% above base rate (Consultation issued by the Department for Communities and Local Government on further reform of the compulsory purchase

	system in March 2016).
Analysis	
Explanation of proposal	This proposal suggested that compensation should be assessed at the date of vesting, and that interest should run from that date. It is linked to proposals 54 and 55 and question 56, which all deal with the dates from which compensation and interest should be calculated.
Summary of responses and analysis	26 consultees responded to this proposal. 16 agreed without further explanation. 10 agreed, with some further explanation. Of those, five (DSS, S&P, CAAV, DJH and SLE) expressed concerns about losses incurred prior to vesting due to delays between the draft CPO and the GVD. They, along with SCPA and DVS, noted that statutory interest, as currently linked to the Bank of England base rate, does not reflect commercial rates of interest incurred by claimants, which are much higher and are compound interest. They suggested statutory interest should remain linked to, but be above, base rate, and should be amended to compound interest, rather than simple interest. OM confirmed that low statutory interest rates were no incentive to pay compensation or advance payments. She suggested providing that, where compensation is payable, or an advance payment is requested, payment must be made within a set period or an automatic penalty would be imposed. EAC referred to a situation where an AA cannot agree an acquisition price with an owner who is acting unreasonably. The LTS should have powers to determine the date from which interest becomes payable. (See question 55). The most recent interest rate proposed for England is 8% above base rate (DCLG Consultation 2).

54. W**here 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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
7. West Lothian Council	Agreed. This is reasonable.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	See comment above. [We accept the basis of this proposal subject to concerns about losses incurred prior to this date as a consequence of delays between any draft order and the GVD.] Compensation for temporary occupation (together with interest) should run from the date of that occupation.
16. Scottish Compulsory Purchase Association	In light of the comments above, it is considered that there should be a single compulsory purchase system by way of the General Vesting Declaration procedure. Thus, compulsory acquisition would take place on a specific date. However, this does not preclude the possibility of the acquiring authority agreeing to compulsorily acquire property in advance of the scheme/CPO and in that circumstance it would be up to the respective parties to agree a specific date of entry as well as ensuring that the assessment of compensation is under the Compensation Code and that statutory interest applies from and after the agreed date of entry. In addition, a date requires to be established in the situation where temporary entry is taken for initial investigation works prior to any formal scheme being in place.
19. Odell Milne	Agreed, but with the above comments with regard to payment of interest being taken into account.
20. SSE plc	We would agree with this.
21. District Valuer Services	Yes to both questions.
22. Glasgow City Council	Agree.

23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. Where taken compulsorily, compensation for temporary occupation (together with interest) should run from the date of that occupation.
25. East Ayrshire Council	This would be applicable if entry to the land is taken prior to the date of vesting but the comments referred to under proposal 53 would equally apply to this proposal.
26. National Grid plc	It is difficult to see how entry would be taken early before vesting under a GVD unless a voluntary agreement has been reached which allows early entry. As part of that agreement it is likely that compensation or some form of payment would have been agreed. So in our view compensation and any interest should run from the date of vesting. If there were statutory powers allowing entry prior to vesting then in principle compensation and interest should run from the date of entry.
27. South Lanarkshire Council	This seems a sensible approach to adopt.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agreed, but subject to provision being made for the acquiring authority seeks to withdraw after entry but prior to any works.
38. MacRoberts LLP	We concur.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	Again, this seems reasonable**.**
41. Judges of the Court of Session	Propositions 53 and 54 We agree with both of these propositions. The law as developed in *Birrell Ltd v Edinburgh District Council*, 1982 SC (HL) 75, appears to us to be, as indicated at paragraph 7.97, a principled position that accords with general standards of fairness.
42. Scottish Water	Yes.
43. Faculty of Advocates	Subject to proposal 56 the Faculty of Advocates agrees. [Question 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? Answer - "Yes."]
44. Scottish Property Federation	We agree - no further comments.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	This question is linked to proposals 53 and 55 and question 56, as they all deal with the dates from which compensation and interest should be calculated. This question asked if compensation should be assessed at, and interest should run from, the date of entry, where the AA enters on to the land before vesting.
Summary of responses and analysis	There were 24 responses to this proposal. 19 consultees responded "yes" without significant qualification. Two consultees (SCPA and NG) queried how entry could be taken early, before vesting, under a GVD. SCPA noted that this would not preclude the parties agreeing to early acquisition. A date would also be required for compensation purposes, when temporary entry is taken for initial investigation works prior to any formal scheme. NG stated that, as part of the voluntary agreement, payment would have been agreed for the temporary occupation, so compensation for the land should run from the date of vesting. S&P confirmed that compensation for temporary occupation (together with interest) should run from the date of that occupation. SBC agreed, subject to provision being made for where the AA seeks to withdraw after entry but prior to any works. FoA agreed, subject to the LTS having discretion to fix a different valuation date, where it appears to the LTS to be in the interests of justice.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	We do not support this proposal and note that it could be much earlier than any GVD (which in the case of the AWPR was January 2013. In respect of an equivalent reinstatement claim on the AWPR, reinstatement commenced in autumn 2010 and was completed in 2012. In respect of the Aberdeen International School building commenced in 2006 and completed in 2010. The GVD was 2013.
16. Scottish Compulsory Purchase Association	This proposal is supported. Rule 5 claims are rare but, where they exist, re-instatement work can happen either before or after the vesting date dependent upon circumstances (usually dictated by the ability of the claimant to secure an alternative site and all appropriate consents and warrants). It is normal practice for the acquiring authority to create a bank "float" from which the claimant can draw down the relevant monies to pay the contractor who usually requires to be paid monthly on a staged payment basis. The relevant monies to be paid can be scrutinised/checked by the acquiring authority. In addition, the acquiring authority should take steps to ensure that any compensation monies paid to the claimant are only used to pay the contractor.
19. Odell Milne	Agreed.
20. SSE plc	This proposal would seem satisfactory.
21. District Valuer Services	This proposal is supported. Rule 5 claims are rare but, where they exist, re-instatement work can happen either before or after the vesting date dependent upon

	circumstances (usually dictated by the ability of the claimant to secure an alternative site and all appropriate consents and warrants). It is normal practice for the acquiring authority to create a bank "float" from which the claimant can draw down the relevant monies to pay the contractor who usually requires to be paid monthly on a staged payment basis meaning that interest payments are not necessary. The relevant monies to be paid can be scrutinised/checked by the acquiring authority. In addition, the acquiring authority should take steps to ensure that any compensation monies paid to the claimant are only used to pay the contractor.
22. Glasgow City Council	Agree. Does rule 5 allow for the condition of the existing property and the benefit of having an improved property as part of the compensation calculation?
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No. This becomes problematic when there is a scheme with long timescales (as experienced with the AWPR and even more with the High Speed Rail schemes) when the date could be much earlier than any GVD. In respect of an equivalent reinstatement claim on the AWPR, reinstatement commenced in autumn 2010 and was completed in 2012. In respect of the Aberdeen International School building commenced in 2006 and completed in 2010. The GVD was 2013.
25. East Ayrshire Council	This proposal appears to be reasonable.
26. National Grid plc	This is supported.
27. South Lanarkshire Council	The Council supports this proposal.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
38. MacRoberts LLP	We concur.
40. Law Society of Scotland	We agree, this seems reasonable.
41. Judges of the Court of Session	We agree that a situation falling within section 12(5) of the 1963 Act should form an exception to the two previous propositions, for the reasons stated at paragraph 7.99.
42. Scottish Water	Yes.
43. Faculty of Advocates	Subject to proposal 56 the Faculty of Advocates agrees.
44. Scottish Property Federation	To be consistent with proposals 53 and 54 we believe this is the

	correct approach.
Further responses, either made informally or at engagement events	There was some discussion of the recent use of the "equivalent reinstatement" rule in section 12(5) of the 1963 Act, including in relation to the Aberdeen International School, where huge sums were involved, so clear rules would be essential. There have been cases involving junior sports stadiums where the Social Club has also had to replaced, as the club would not be viable without it. It was agreed generally that provision should continue to be made.
Analysis	
Explanation of proposal	This proposal is linked to proposals 53 and 54 and question 56, as they all deal with the dates from which compensation and interest should be calculated. This proposal suggested that there should be an exception to the two previously suggested provisions, in the circumstances where the property being acquired is of such a nature that there is no general demand or market for it.
Summary of responses and analysis	22 consultees responded to this proposal, with 20 agreeing with it. Of those, SCPA and DVS stated that although such claims are rare, they do occur, and re-instatement work can happen either before or after the vesting date, depending upon the circumstances. Two consultees (S&P and CAAV) disagreed with the proposal as they had had experience of the current provision in a situation where lengthy delays had occurred. In that case the reinstatement occurred three years before the GVD.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	No, not unless you can envisage circumstances in which such a discretion might be required. It will introduce uncertainty.
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. This would provide flexibility.
10. Renfrewshire Council	Yes.

11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	It is difficult to see how this would work in practice. Would it apply to all claims or only in respect of claims lodged before the LTS?
16. Scottish Compulsory Purchase Association	It is considered that the LTS should have discretion on the basis that there would be a single compulsory purchase system involving a specific vesting date but see the response to question 55 above.
17. Lands Tribunal for Scotland	In practice there are potentially three important dates; namely (1) the date for fixing interests in land, i.e. ownership of potential claimants (2) the date for fixing planning and physical assumptions and (3) the valuation date. As our comments to this paragraph and elsewhere seek to illustrate, many complex land cases involve seeking to quantify what can be seen as a loss of a development opportunity. In many cases it is possible to identify in broad terms that a party has sustained a loss because of a compulsory purchase order. But if one applies a strict approach to dates, whether or not a loss can in fact be established may be fortuitous depending upon various timings in a lengthy process over which a claimant may have no control. There is a strong potential for what will be perceived as injustice, which cannot be cured by the principle of equivalence. We would therefore welcome an approach which seeks to make it clear whether or not the interests of certainty in fixing dates for the assumptions should take priority over the interests of justice and, in particular, the principle of equivalence or "full compensation." One solution would be to provide for a range of dates which can be applied for the assumptions, bearing in mind proper principles and the interests of justice. We think that the suggestion contained in Q56 merits serious consideration. The following is a particular example. There are cases where compensation is particularly sensitive to the valuation date. The "shadow" period between the initial blighting (i.e. "blighting" used in non-technical sense) effect (e.g. the date of the draft order but could be earlier) and the vesting date (or, if relevant, the settlement date) can be many years. In that time the market could move against the claimant and benefit the authority. The opposite can of course happen to the benefit of the claimant. However, in the former case if the claimant can show he would have sold when the market was good, but did not do so because the CPO had blighted his property,

	he has sustained a loss which he would not have suffered otherwise. In such a situation there would be a case for a discretion as to the choice of valuation date. At present this type of loss would have to come under the heading of disturbance, but may be difficult to establish. A relevant principle would be if the depreciation in value was solely because of the likelihood of a CPO, then that depreciation would not be taken into account: c.f. section 16 of the 1963 Act. Clarity as to how this type of scenario falls to be dealt with under the new regime would be welcome. See also comments below on date for planning and physical assumptions. [See also joint answer to questions 87, 100 – 104; 109, 110, 111 – Planning Assumptions and Dates.]
19. Odell Milne	This is more difficult since to allow such discretion brings in uncertainty for both promoter and landowner. However, there could be circumstances where this may be in the interests of justice and I therefore wonder whether a very tightly drawn provision where there is a high test to overcome might be appropriate. I do have a concern though that, if such a procedure were to be used often, this would make it very difficult for promoters to budget since they would not know at what possible date land might be valued. It could also make it difficult for those advising landowners. I consider that an acquiring authority in these circumstances should be able to use a GVD in respect of all the land and register that GVD in the Land Register. However, I think in practice this may be possible anyway.
20. SSE plc	We would suggest that this proposal might take account of any circumstances where there is the possibility of hardship to a landowner.
21. District Valuer Services	Yes.
22. Glasgow City Council	Only if there is a need for this arising from actual situations - otherwise it may introduce unnecessary uncertainty.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	While reluctant to fetter allowing discretion in the interests of justice, we are cautious about how this might work in practice. Presumably, it would in the first instance at least only apply to claims lodged before the LTS requesting a different date, rather than all claims.
24. Shona Blance	Yes.
25. East Ayrshire Council	It would seem to be reasonable to allow the LTS discretion in such matters.
26. National Grid plc	No an acquiring authority needs certainty for budgeting and

	affordability purposes. Compensation should run from the date of vesting. National Grid is also concerned that such a discretion would encourage a greater number of LTS references in which the valuation date is disputed due to the potential to gain advantage from changes in market conditions if a different valuation date is used. National Grid considers that the public interest lies in certainty as to how claims should be valued.
27. South Lanarkshire Council	The Council do not agreed that the LTS should have a discretion as this may lead to lack of certainty among parties as to when the valuation.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Agree.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	Yes, but in limited circumstances and the presumption should be that the valuation date is the date of vesting. However, the circumstances in which such discretion might be available need careful consideration. No examples or instances are provided. What, if any, parameters would apply? Would consideration need to be given to substantial prejudice? There would be practical difficulties in claimants and acquiring authorities not knowing the date of valuation in advance of bringing proceedings before the LTS.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees.
44. Scottish Property Federation	Yes.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	This question is linked to proposals 53, 54 and 55 as they all deal with the dates from which compensation and interest should be calculated. It asked whether the LTS should have a discretion to fix different dates, if required in the interests of justice.
Summary of responses and	Of the 25 consultees who responded to this question, 15 answered

analysis	"yes" without qualification. Three consultees answered "yes" subject to qualification. SCPA stated that the LTS should have discretion on the basis that there would be a single CP system with a specific vesting date, except in the "equivalent reinstatement" situation set out in proposal 55. OM was concerned about the uncertainty produced by allowing such a discretion, but suggested that there could be a very tightly drawn provision with a high test, to be used only rarely. LSS stated that it should only be used in limited circumstances, with a presumption that the valuation date is the date of vesting. Two consultees (NG and SthLC) answered "no" on the basis that allowing the discretion would lead to uncertainty. Two consultees (JRR and GCC) were concerned that this should only be introduced if specific circumstances could be envisaged that it was actually necessary. Two consultees (S&P and CAAV) were concerned about how it would work in practice and that it should only apply to claims before the LTS, rather than to all claims. LTS noted that there are potentially three important dates, (1) for fixing interests in land (ownership), (2) for fixing planning and physical assumptions, and (3) the valuation date. LTS would welcome an approach which seeks to make it clear whether or not the interests of certainty in fixing dated for assumptions should take priority over the interests of justice, especially equivalence or awarding "full compensation".

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)

Respondent	
7. West Lothian Council	Agreed. This would provide clarity.
10. Renfrewshire Council	Agreed.
11. NHS Central	Agreed.

Legal Office	
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported as it will be pivotal for any acquiring authority to ensure that it has properly compulsorily acquired all relevant lands and interests prior to any public works being undertaken thereon.
29. Odell Milne	If the acquiring authority has title to the land concerned, that title is already registered in either the Land or Sasine Register. Since an acquiring authority cannot acquire land from itself, including the land in the GVD will not change the position. It cannot legally be acquired and therefore it will not be acquired. However, registering a GVD in relation to land which that authority already owns may not change the ownership of the land but may change the nature of the acquiring authority's title i.e. a Sasine or other title will be replaced by a modern title sheet. Whether in practice this has any negative implications, is something I have not considered in detail. On the face of the Register the landowner is the acquiring authority and that is the position in fact. However, this may not be fair where the original title on which the acquiring authority held title was in some way qualified or burdened. If it was, then it is not correct for that land to appear unburdened in the title sheet which follows upon the GVD (unless any third parties benefiting from those burdens have been compensated). However, in almost all cases of this type, the acquiring authority will be acquiring all other interest in the land concerned or will be utilising the provisions set out in the 2003 Act section 106, and so the end result seems to be the same. Therefore in practice this may not be an issue although for the legislation to state that such a procedure is competent might avoid uncertainty. The downside is that the GVD is stated to be "acquiring land from the acquiring authority" which it cannot do. Perhaps one way of dealing with that would be simply to say that where land owned by an acquiring authority is included in a GVD, the GVD does not change the ownership nor does it invalidate the GVD. A benefit of such a provision is that it is sometimes difficult to determine whether land is or is not owned by an acquiring authority. In particular, in city centres where there have been changes over

	many years and where the local authority may have title based on an old borough charter or similar. There is a need to obtain all land which is not owned by the Council and the precise boundaries cannot be determined. It is quite possible that land which is owned by acquiring authorities is included in a GVD where there is uncertainty as to precise boundaries and its inclusion is often not challenged nor is it questioned by Registers of Scotland.
20. SSE plc	We would agree as this allows for securing land required for project delivery and allows certainty for acquiring authorities.
21. District Valuer Services	Yes.
22. Glasgow City Council	Agree.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	a) Yes. b) Yes.
27. South Lanarkshire Council	The Council supports this proposal.
29. Brodies LLP	Yes but provided there is a mechanism for anyone whose land is captured by the GVD to retrospectively claim compensation. Such an owner may not discover that a piece of their land is missing until they come to sell, develop, lease or fund their property. In order to protect such persons, compensation for any land affected by a GVD for which no owner could be traced should be available for up to 10 years after the land has vested in the authority.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.

35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	We concur.
39. Scottish Land and Estates	Yes, we think is reasonable.
40. Law Society of Scotland	Yes.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We concur with this proposal which we believe is important in the context of completing the land register as well as necessary and effective for the acquiring authority.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	24 consultees responded to this question, with 21 answering "yes" without expressing any concerns. OM was concerned that an AA registering a GVD in relation to land which they already owned, may not change the land's ownership, but may change the nature of their title. This may not be fair if the AA's original title was in some way qualified or burdened, unless any affected third party is compensated. She suggested that the statute could provide that, where land owned by an AA is included in a GVD, the GVD does not change ownership, nor does this invalidate the GVD. Brodies replied "yes", provided that there is a mechanism for anyone whose land is captured by the GVD to claim compensation, retrospectively for up to 10 years after the land has vested. FoA could see some utility in the provision in exceptional

	circumstances, but it should not be a substitute for extensive title searches or seeking the court's authority in relation to common good land.

58. **The provisions of sections 84 to 86 of the 1845 Act should be repealed and not replaced.**

(Paragraph 7.114)

Respondent	
7. West Lothian Council	Agreed. These provisions are not required. The GVD procedure currently available allows authorities to enter land without paying compensation.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed – they are not used.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported.
19. Odell Milne	I am not aware of this procedure having been used in recent years.
20. SSE plc	Whilst we have no practical experience of this, we can see where it would be of use. We would suggest that any repeal is resisted and carefully considered.
21. District Valuer Services	Yes.
22. Glasgow City Council	Agree unless evidence emerges of it having been used in the absence of any other option being an equally good alternative.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters	Yes.

and Valuers Association	
25. East Ayrshire Council	Agreed. If these provisions are not used they should not be retained on the statute books.
26. National Grid plc	Yes we would support this.
27. South Lanarkshire Council	The Council has no opposition to this proposal.
Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
38. MacRoberts LLP	We concur.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	The sections of the 1845 Act referred to in the proposal provide for implementing of CPOs by a "third procedure", as follows:- (a) section 84 - AAs can enter on lands before purchase, on making a deposit by way of security and giving bond, (b) section 85 - the deposit must be paid into a bank, and the cashier must give a receipt, and (c) section 86 - the deposit must remain as a security, and be applied under the direction of the court.

	It was proposed that the provisions be repealed and not replaced.
Summary of responses and analysis	21 consultees responded to this proposal, with 19 agreeing without qualification. One consultee (GCC) agreed, unless evidence emerged that this third procedure had been used, and there was an absence of any available equally good alternative. One consultee (SSE) disagreed, and suggested that any repeal should be resisted and carefully considered, as they could see where it would be of use.

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)

Respondent	
7. West Lothian Council	The council has not experienced any issues with the time limits involved in implementation of a CPO and therefore does not propose any alterations.
10. Renfrewshire Council	Time limits for implementation should be shortened.
11. NHS Central Legal Office	Reduce the timescales.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Time limits for implementation should be shortened.
13. Strutt & Parker LLP	On balance a time limit may be of assistance. We envisage this being based on the date of opening. There may be different dates for various parts of a scheme (cf the declared opening dates for the M8 to trigger part 1 claims). These dates must be advertised etc. in the same manner as the original CPO.
16. Scottish Compulsory Purchase Association	The main consideration here is whether or not there should be a time limit between the last date for the service of an objection to a draft CPO and the setting up of a Public Local Inquiry or similar. There are advantages for and against setting a prescribed time limit but on balance if we wish to attempt to speed up the CPO process then a time limit would be of assistance. Further, it is considered that there should also be a formal date of the commencement of the operation of the public work- this would assist in situations where

	the public work becomes operational in portions particularly with regard to Part 1 claims.
19. Odell Milne	Time limits are difficult for both sides since landowners want certainty but they also want time to put their affairs in business in order. Promoters also want certainty but they also want flexibility, at certain stages. Delay between the making of a CPO and land acquisition can have a serious negative effect on landowners (landowners affected by AWPR or the shops on Leith Walk threatened with the tram line, are perhaps the most obvious examples in recent years). The key issue is that the uncertainty with which landowners are faced, combined with provisions which mean they cannot take steps which might be considered to have been intended to increase their compensation, may have an unfair impact on their businesses or homes. Whilst it may be possible to tighten up some of the time limits, I am not sure that much can be done to deal with this issue. Setting a time limit between the last date of serving an objection to the unconfirmed CPO and the date for a Public Local Inquiry may be a provision that would provide a reasonable balance. Whilst it might be said a time limit of this type prevents ongoing consultation and work to agree changes and provisions with the landowners, there is no reason why that type of process cannot carry on right up to and even during the initial stages of such an inquiry and, indeed, a fixed time limit might "focus the minds" on such matters. However, I am aware that the availability of reporters and constraints on the time of officials makes fixing such time limits difficult. In my experience the Assessor's Hearing for the Airdrie to Bathgate railway appeared a much speedier procedure for the consideration of most aspects of the private Bill in comparison with the consideration of the private bill by the full committee which took place for the Edinburgh tram line Bills. Therefore, perhaps provisions which make for a simpler procedure (which would be of attraction to many landowners as well as acquiring authorities) rather than a full PLI may make processes simpler and fairer and indeed even more accessible.
20. SSE plc	We are of the view that timescales should be as compact as possible having regard to the formal processes required for notifications and land registration requirements.
21. District Valuer Services	The main consideration here is whether or not there should be a time limit between the last date for the service of an objection to a draft CPO and the setting up of a Public Local Inquiry or similar. There are advantages for and against setting a prescribed time limit but on balance if we wish to attempt to speed up the CPO process then a time limit would be of assistance. Further, it is considered that there should also be a formal date of the commencement of the operation of the public work- this would assist in situations where the public work becomes operational in portions particularly with

	regard to Part 1 claims.
22. Glasgow City Council	Not in any material way because I think that the existing time limits achieve a balance between the competing interests and the degree of flexibility which is required.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Time limits must be short enough to keep the process moving but long enough to allow for reasonable advice and consideration, given that people can be ill and on holiday.
25. East Ayrshire Council	No strong view on time limits.
27. South Lanarkshire Council	The Council believe the time limits are appropriate subject to:- 1. a time frame for referring cases to the DPEA. This is on the basis that they are not too long (provided there is a time frame established for referring cases to the DPEA) to cause difficulty to the Acquiring Authority and not too short to prevent owners objecting to the CPO and making alternative arrangements if the CPO proceeds. 2. The current voluntary periods which the Scottish Government work to in making a decision on whether to confirm a CPO are made mandatory.
31. Association of Chief Estates Surveyors Scottish Branch	Streamlining to allow faster process but keeping parties reasonable rights to make representations.
32. Scottish Borders Council	In respect of the GVD process I would submit that the period after confirmation that a GVD can be made should be reduced from the two months to the six weeks in line with the period for challenge to the Court. In terms of the GVD itself I would submit that in line with the period where notice to treat /notice of entry takes effect that 14 days would be adequate given the authority already has to give notification to the public when they publish confirmation of the CPO of the intention to use the GVD powers. This shortened 8 week total period would still provide adequate protection to the parties that the land is being acquired from, whilst enabling the acquiring authority to more quickly finally obtain the land.
39. Scottish Land	We have no specific comment to make other than the obvious statement that the process needs to be sufficiently flexible to

and Estates	accommodate absences through vacations and illness, but also timeous to keep the overall procedure moving along.
40. Law Society of Scotland	We are satisfied with the current time limits.
42. Scottish Water	None.
43. Faculty of Advocates	The Faculty of Advocates considers this a policy matter but sees no particular difficulties with the current time limits.
Further responses, either made informally or at engagement events	General comments were made about the need to balance the need for speedy decisions while ensuring fairness to landowners.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	19 consultees responded to this question. Six consultees suggested no alterations. Of those, WLC had not experienced any issues with the time limits for implementing a CPO. GCC thought that the existing time limits achieved a balance between competing interests and the degree of flexibility needed. Four consultees (SSE, CAAV, ACES and SLE) made general comments about the need for the timescales to be compact, but also allowing reasonable time for the process. Seven consultees suggested that time limits for implementation should be generally shortened. On balance, three consultees (S&P, SCPA and DVS) were in favour of time limits, to speed up the CPO process. They noted that there were different dates for various parts of the scheme and they raised the issue of Part 1 claims. They suggested a formal date for the commencement of operation of the public works so that the time limits for claims may be adhered to, especially in the case of staggered or sectional completion of works. SthLC believed that most time limits were appropriate, subject to two suggested additional time limits: 1. to refer cases to the DPEA, and 2. for the SMs to decide whether to confirm a CPO. OM was concerned about the effect of time limits for both landowners and AAs. She suggested setting a time limit between the last date of serving an objection to an unconfirmed CPO and the date for a Public Local Inquiry (PLI). She also suggested that a simpler procedure,

	rather than a full PLI, might make processes fairer and more accessible.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, unless there is convincing evidence that a faster process is sometimes necessary. I am not aware of such evidence.
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. A single method of implementation would provide clarity.
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	We would welcome a single implementation procedure.
16. Scottish Compulsory Purchase Association	It is considered that there should be a single compulsory purchase system similar to the existing expedited procedure involving a General Vesting Declaration and vesting date.
19. Odell Milne	I may be a lone voice here in considering that there is a benefit in there being two systems. The GVD procedure is simple, easy and effective and acting for promoters, and I would almost always recommend that it be used to ensure complete seamless title with no "gaps" for delivery of a large scheme. However, there are situations where only a few landowners or parties are affected, and where the notice to treat procedure could deliver title to land more quickly and provide more flexibility for landowners (for example including negotiation with regard to entry and even with regard to suitable accesses or perhaps substituted sites). Using a notice to treat followed by a notice of entry where there are

	only a few landowners can be a comparatively cheap, quick and efficient procedure. In comparison the GVD process is complex and expensive and can rarely be completed in less than six months given the need for advertising and complex notification processes. Such delays and expenses can be avoided for a small scheme and I therefore believe that a notice to treat "type" procedure should remain available as an alternative.
20. SSE plc	The proposals put forward by the Commission would seem to promote a sensible procedure and we would welcome a single statutory procedure for the making and confirming of CPO's but it should be recognised that this should not be applied in relation to separate statutory processes already in place under the Electricity Act 1989, and certain other legislation as outlined in our response to question 9.
21. District Valuer Services	It is considered that there should be a single compulsory purchase system similar to the existing expedited procedure involving a General Vesting Declaration and vesting date.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes - a single implementation procedure is desirable.
25. East Ayrshire Council	One method may make matters clearer and be in keeping with the thinking behind a new Act. There would hopefully be less ambiguity and it would be a more straightforward process if only one method of implementation was available.
26. National Grid plc	No we think that, while the new method may be preferable to the current GVD method, the notice to treat method should be retained.
27. South Lanarkshire Council	The Council would support a single method of implementing a CPO.
29. Brodies LLP	Simplifying the procedures for CPO would be attractive to many.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders	In my view a new combined method which transfers title whilst still

Council	giving entry quickly would indeed be useful. I would observe that in terms of the current process envisaged this could result and title entry having being passed prior to the six week period that currently exists for the court challenge to be made having expired, which could pose difficulties. In addition in certain case 6 weeks could be too long a delay post confirmation of the CPO. It would remain useful to have the notice to treat option.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes, a single method of implementation would be welcome.
40. Law Society of Scotland	We refer to our comments at question 37 above. [Question 37 It is our understanding that notices to treat are rarely, if ever, used and on that basis we question whether this procedure should remain an option. …]
42. Scottish Water	Yes.
44. Scottish Property Federation	It appears to us that the separate methods of implementing a CPO have arisen as a result of multi-various legislation intended to deliver compulsory purchase. The opportunity of a new Statute intended to clarify and codify the CPO process seems to us to be an ideal opportunity to take the best features of the two processes and to weld them into a streamlined and better understood process. We support this key proposal therefore.
Further responses, either made informally or at engagement events	The new procedure was discussed in general terms, and it was suggested that there should be further consultation once more details had been set out on how it would operate in practice.
Analysis	
Explanation of question	Questions 60 and 61 are linked. Paragraph 7.119 of the DP proposed a new procedure, to replace the current GVD and NTT procedures, which would be similar to the current GVD procedure, but with the time limits which apply to the current NTT procedure. (The notice period of four weeks suggested in the DP, after which the notice would operate as a registrable transfer of the land, would require to be no shorter than six weeks, to

	meet time limits for challenge.)
Summary of responses and analysis	25 consultees responded to this question. Of the 22 who answered "yes", SSE qualified their response, by stating that the change in procedure should not affect the separate statutory processes already in place under the Electricity Act 1989, etc. OM considered that there would be a benefit in retaining both systems, as in situations involving only a few landowners, the NTT is quicker, cheaper and more flexible. NG believed that the proposed change was preferable to the current GVD procedure, but wished to retain the NTT. SBC believed that a new combined method to transfer title whilst giving entry quickly would be useful, but also wished to retain the NTT.

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

(Paragraph 7.120)

Respondent	
6. Craig Connal QC	I suggest that as part of a more radical approach a single method of obtaining title should be adopted. The justifications for having more than one do not seem strong. The issue of material detriment and the timing at which that must be considered are matters dealt with above. The logic of having an enormous process to confirm a CPO, a battle over material detriment and then discover that the developer pulls the plug when they discover the cost seems weak.
10. Renfrewshire Council	It would be helpful to have an overarching ability for the both acquiring authority and affected party to agree a vesting date notwithstanding the provisions of the statutory notice
12. Society Of Local Authority Lawyers And Administrators In Scotland	It would be helpful to have an overarching ability for the both acquiring authority and affected party to agree a vesting date notwithstanding the provisions of the statutory notice.
13. Strutt & Parker LLP	See our comments in respect of proposal 8. [Comments on proposal 8 We agree that there should be a single standard procedure. This

	procedure should entail: - a) Promotion of draft CPO b) Time for objections c) Hearing or Inquiry d) Procedure for confirmation/modification/rejection of draft CPO e) Vesting (include a requirement to provide broad details of any claim) f) Date for declaring formal completion of the scheme.]
16. Scottish Compulsory Purchase Association	See response for question 60.
19. Odell Milne	In my view the two systems should remain and therefore the features for each would be different since they both have benefits for particular circumstances. Provisions to tighten up notice periods etc. and to provide more certainty and clarity should be made with regard to both procedures. Perhaps guidance should be put in place with regard to the availability of the processes but I would think too restrictive an approach (such as to say that a notice to treat is not to be used for sites with more than ten owners) may be unduly restrictive in practice.
21. District Valuer Services	See response to Q60.
22. Glasgow City Council	The triggering of the obligation to pay compensation needs to be clear and this should probably not be the date of advertising/serving notice of the confirmation of the CPO since in practice there can be a significant difference between the subjects of the confirmed CPO and the subjects ultimately acquired by CPO procedure. In advance of the creation of a new process and timeline it would be good to see the whole draft proposal and from that work out where there might be difficulties instead of reviewing it on the basis of these bullet points only. Sometimes there is a need not to move onto the next stage in the CPO process with haste because of other dependencies and therefore a timescale of as short as 4 weeks should be a minimum and not perceived as an expectation. I think there needs to be clarity on what registrable transfer means in the context of new interests being created and also in the context of short leases/licences etc.
23. Central Association of Agricultural Valuers and Scottish Agricultural	[In answer to question 60] See our comments in respect of question 1.

Arbiters and Valuers Association	
26. National Grid plc	See our response above.
27. South Lanarkshire Council	Clarity is requested on whether it is a notice to each affected person or a single notice served on all affected persons that is being proposed. The Council would suggest a single notice covering all the land to be acquired.
32. Scottish Borders Council	I would suggest the court challenge period would need altered to 4 weeks to accord with the 4 week period between publishing confirmation and the new process taking effect.
38. MacRoberts LLP	Must be map based.
40. Law Society of Scotland	We refer again to our comments at question 37 above. Question 37 It is our understanding that notices to treat are rarely, if ever, used and on that basis we question whether this procedure should remain an option. …
44. Scottish Property Federation	Our only comment at this point is to highlight the issue of severance as an important point to be considered as part of the new procedures at the implementation stage.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 60 and 61 are linked.
Summary of responses and analysis	There were 15 responses to this question. Several consultees referred to their answer to question 60, where they had already made suggestions. CC suggested that a single method of obtaining title should be adopted. He queried the logic of having an enormous process to confirm a CPO and a battle over material detriment, only for the developer to withdraw when the costs were discovered.

	RC and SOLAR suggested that it would be helpful to have an overarching ability for the AA and the affected party to agree a vesting date, notwithstanding the provisions of the statutory notice. OM confirmed her view that two systems should remain. She suggested provisions should be introduced to tighten notice and provide more certainty for both processes. GCC suggested that the triggering of the obligation to pay compensation needed to be clear and this should probably not be the date of advertising/serving the notice of confirmation of the CPO since there could be a significant difference between the subjects of the confirmed CPO and what was ultimately acquired. There should be full consultation and consideration of a draft new process and its time line in advance of introduction. Clarity was needed on what registrable transfer meant in the context of new interests being created and short leases/licences etc. SthLC requested clarity on whether it was proposed to introduce a notice to each affected person or a single notice to be served on all affected persons. They suggested a single notice covering all the land to be acquired. SBC suggested that the court challenge period would need to be altered from four weeks [now agreed that it should be six weeks] between publishing and the new process taking effect. MacR suggested that the process must be map based. SPF commented that the issue of severance was an important point to be considered as part of the new procedures at the implementation stage.

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)

Respondent	
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And	Agreed.

Administrators In Scotland	
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported.
17. Lands Tribunal for Scotland	There have been cases where the relevant instrument has not make it clear that the disposal is under the shadow of a CPO and that compensation has not been agreed, leading to problems as to whether the disposal was simply a "voluntary" act. We would suggest that the legislation provides a style disposition reserving parties' rights to go to the LTS where compensation is not agreed.
19. Odell Milne	Agreed.
20. SSE plc	If the affected party is willing to grant a Disposition then we would suggest that this could be used to register the acquiring authority's interest in the land acquired.
21. District Valuer Services	Agreed
22. Glasgow City Council	The retention of this is probably not contentious. I have no experience of this. In recent times only the GVD process has been used by us.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed. This seems to be reasonable.
26. National Grid plc	Yes this should be a valid method for transferring the land.
27. South Lanarkshire Council	The Council would support this approach but is unlikely to be used by the Council who will be more likely to continue to use a GVD or the new single statutory method of transferring title (if implemented).
29. Brodies LLP	Agreed. It could be useful as an alert to those examining title to give the Disposition a name under the CPO legislation and for a note to be added to the Land Register for future purchasers.
31. Association of Chief Estates Surveyors Scottish	Agreed.

Branch	
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	We concur.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree with this proposal.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	None.

Analysis

Explanation of proposal	As well as the various statutory methods which are available for acquiring title in the context of compulsory purchase, it is possible simply to use an ordinary disposition. This proposal suggested that this should continue to be the case.
Summary of responses and analysis	24 consultees addressed this proposal, and 23 agreed with it. LTS suggested a minor adjustment. 19 agreed without providing further comment. Two (GCC and SthLC), while supporting this approach, noted that they were likely to continue using the GVD to transfer title. LTS said that there had been disposals under the shadow of a CPO where compensation had not been agreed. This had led to problems in deciding whether the disposal was a "voluntary" act. They suggested that a style disposition should be included in the legislation reserving parties' rights to go to the LTS where compensation has not been agreed. Brodies stated that it could be useful to give the disposition a name under the CPO legislation, and for a note to be added to the Land Register, to alert those examining title for future purchasers.

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)

Respondent	
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	We agree.
16. Scottish Compulsory Purchase Association	It is agreed that the current rules on transfer of the land should continue as set out above.
19. Odell Milne	Agreed.
20. SSE plc	We would agree with this.
21. District Valuer Services	Agreed
22. Glasgow City Council	Agree.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.

25. East Ayrshire Council	If the GVD procedure is retained, the current rules should continue.
26. National Grid plc	a) Yes. b) Yes.
27. South Lanarkshire Council	The Council agrees with this approach if the GVD procedure is retained.
29. Brodies LLP	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	Yes, we agree that, if the GVD procedure is retained, the current rules on transfer of the land should continue as set out in (a) and (b) above. However, we do note that the Land Registration (Scotland) Act 2012 does not in its terms state that registration confers a real right.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees that if the GVD procedure is retained the current rules on transfer of the land should continue.
44. Scottish Property Federation	See our response to proposal 64. [The underlying objective must be to inform the Land Register – accordingly we agree that if Notice to treat and GVDs remain as distinctive options for CPO implementation then we agree that CPNT should be considered.]
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	None required.
Summary of responses and analysis	24 consultees addressed this question and there was unanimous agreement to both parts of it. 22 agreed without comment. LSS noted that the 2012 Act does not in its terms state that registration confers a real right. SPF said that the underlying objective must be to inform the Land Register.

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)

Respondent	
7. West Lothian Council	Agreed. This would simplify the process.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported on the basis that the issue of the General Vesting Declaration is in effect a deemed notice to treat.
19. Odell Milne	As suggested above I think there is scope for two different procedures and therefore a need for two different methods of taking title. [OM subsequently agreed in light of the overwhelming agreement from the other consultees that the existing two methods be replaced with a single procedure]. Perhaps a "Compulsory Purchase Notice of Title" could be set out in a schedule and worded so that it can be used in both schemes. I would envisage that such a notice would be similar to a

	GVD.
20. SSE plc	This would seem like a sensible proposal.
21. District Valuer Services	Yes.
22. Glasgow City Council	A unitary method is a good idea if that can be accommodated as part of a single process which is effective and flexible enough to respond to the various scenarios (e.g. Agency CPOs, new rights, temporary rights, emergency access requirement).
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	This seems to be reasonable for the reasons set out in the discussion paper.
26. National Grid plc	Yes that would simplify matters.
27. South Lanarkshire Council	The Council believes this to be sensible approach as it will rationalise and update the current approach where a notice to treat is used.
29. Brodies LLP	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and	We agree.

Wedderburn	
38. MacRoberts LLP	We concur.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree with this proposal.
42. Scottish Water	Yes.
44. Scottish Property Federation	The underlying objective must be to inform the Land Register – accordingly we agree that if Notice to treat and GVDs remain as distinctive options for CPO implementation then we agree that CPNT should be considered.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of proposal	None required.
Summary of responses and analysis	All 23 consultees addressing this proposal agreed with it. Of these, SCPA supported the proposal on the basis that the GVD is in effect a deemed notice to treat. GCC considered that a unitary method was a good idea if it could be accommodated as part of a single process which was effective and flexible enough to respond to various scenarios e.g. Agency CPOs, new rights, temporary rights and emergency access requirements.

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)

Respondent	
6. Craig Connal QC	Yes.

7. West Lothian Council	Agreed. This would simplify matters.
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	We agree.
16. Scottish Compulsory Purchase Association	This is agreed.
19. Odell Milne	I am not sure that a "one size fits all" method is necessarily the best way but, provided that a Disposition is always available, it may be possible to agree such a single statutory method. I am not sure how this proposal deals with the fact that there is a suggestion, in an earlier paragraph, that a GVD might be capable of including an acquiring authority's land. Moreover it seems to me that a GVD may not be the best way of taking title to smaller sites where detailed provision, for example with regard to accesses, needs to be included. Therefore availability of an ordinary disposition or conveyance is essential. Whether or not there is a unitary procedure, I see no need for there to be different statutory methods of transferring title provided that the provision which allows for use of a disposition remains.
20. SSE plc	Again, we would agree with this.
21. District Valuer Services	Yes.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers	Yes.

Association	
25. East Ayrshire Council	Agreed. This would make matters less complex and avoid any ambiguity.
26. National Grid plc	Yes.
27. South Lanarkshire Council	Yes.
29. Brodies LLP	Agreed. The single method will lend itself to making things more straightforward and efficient and in turn less expensive. That said, flexibility must be provided for to allow for the creation of the new rights referred to above if such new rights are to be taken in isolation and to deal with situations where only temporary powers are to apply.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Difficult to say with any certainty on this point until the unitary procedure is fully worked out.
35. Shepherd and Wedderburn	Yes.
36. Scottish Power Ltd	We support the GVD process but recognise that further improvements can be made. In this respect, we highlight an opportunity to introduce a single statutory process for transferring the land to the acquiring authority.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree with this proposal.
42. Scottish Water	Yes.
43. Faculty of Advocates	Yes.
44. Scottish Property Federation	We agree.
45. Scottish Power Energy Networks Holdings Ltd	We support the GVD process but recognise that further improvements can be made. In this respect, we highlight an opportunity to introduce a single statutory process for transferring the land to the acquiring authority
Further responses, either made informally or at	At one event a participant noted that there was a different procedure for acquiring securities than there was for acquiring leases and suggested that a single procedure for both should exist. He also

engagement events	wondered whether restrictions, such as real burdens on a person's interest could be imposed without the need to add specific power to the CPO.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	27 consultees responded to this question. 26 answered "yes" and this view was confirmed at the engagement events. SBC thought that it was a difficult question to answer until the unitary procedure had been fully worked out. Three (WLC, EAC and Brodies) noted that this would simplify the process, with Brodies further noting that this would make it less expensive. OM commented that having a unitary method may not be sufficiently flexible, but considered that if a disposition would also be available, a unitary procedure could be introduced. She argued that an ordinary disposition or conveyance must still be available as it is better than the GVD for taking title to smaller sites where detailed provision, such as relating to access, needs to be included.

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)

Respondent	
7. West Lothian Council	Agreed. This would provide certainty.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	We support this proposal.

16. Scottish Compulsory Purchase Association	This proposal is supported.
19. Odell Milne	Agreed.
20. SSE plc	Acquisition of a valid title is essential to ensure that the acquiring authority has all the land or rights in land that it needs to deliver a project and we would agree with this suggestion.
21. District Valuer Services	Yes.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. The Order should ensure certainty as to the purchase, whatever may be the weaknesses in the title of the affected party.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Agreed.
27. South Lanarkshire Council	The Council agrees with this proposal. It is of particular importance if the Council is to transfer ownership of the land at a future date.
29. Brodies LLP	Agreed, provided that compensation is payable to an owner whose land has been acquired and who was not given the opportunity to participate in the CPO process. We would trust that such an event would be a rare one as the acquiring authority will be under a duty to carry out all proper due diligence on the ownership of any land affected by their plans.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	We concur.

39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree with this proposal, provided that those who are entitled to compensation remain entitled following transfer, including those who may have lost the benefit of attached title burdens and conditions which have been extinguished at the point of transfer.
42. Scottish Water	Yes
44. Scottish Property Federation	Yes.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of proposal	None required.
Summary of responses and analysis	There was unanimous agreement with this proposal from the 23 consultees making a submission. Two (SSE and CAAV) noted that this would provide the certainty required for the AA to deliver the project. Two (Brodies and LSS) agreed with the proposal, subject to compensation being payable to the owner whose land has been acquired. LSS wanted to ensure that the entitlement to compensation included those who may have lost the benefit of attached title conditions that have been extinguished at the point of transfer. SthLC commented on the importance of the AA receiving a good title if the AA is to transfer ownership of the land at a future date.

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)

Respondent	
7. West Lothian Council	Agreed. This would provide clarity for members of the public.
10. Renfrewshire Council	Yes.

11. NHS Central Legal Office	Yes.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Yes.
13. Strutt & Parker LLP	This may assist in subsequent conveyancing. Identifying the fact that the acquisition was compulsory would imply that burdens would have been extinguished which might not have happened in a 'normal' transaction. Thus someone checking would be in a better position to know the position regarding the extent of Title.
16. Scottish Compulsory Purchase Association	It is considered that the Keeper should so add a note.
19. Odell Milne	Agreed.
21. District Valuer Services	Yes.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	That seems likely to be helpful with any subsequent conveyancing. Identifying the fact that the acquisition was compulsory would imply that burdens would have been extinguished which might not have happened in a 'normal' transaction. Thus someone checking would be in a better position to know the position regarding the extent of Title.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
27. South Lanarkshire Council	Yes. The Council believes that this should be done. It gives any party examining the title fair notice of the fact that the land had been acquired by CPO and the effect that has on burdens, servitudes, securities etc.
29. Brodies LLP	Yes. This would be very helpful for those who are dealing with the land at any future point to establish the position as far as burdens and servitudes are concerned. If the proposals here come to pass, they can also be certain that title passed to the acquiring authority free of any defects.
31. Association of Chief Estates	Yes.

Surveyors Scottish Branch	
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes for clarity and consistency this would be welcome.
40. Law Society of Scotland	Yes, we agree with this proposal. We suggest that where the title is acquired by compulsory purchase, the Keeper should also be required to remove from the title sheet any rights etc. extinguished by s106 and s107 of the 2003 Act, and s194 of the 1997 Act, without the need for the applicant to expressly request their removal.
42. Scottish Water	Yes.
43. Faculty of Advocates	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 title has been acquired by compulsory purchase.
44. Scottish Property Federation	Yes – this could be important for wider reasons including the introduction of Community Right to Buy / possible introduction of compulsory sales of land through the Scottish Land Reform Bill. In addition to the general need for an accurate record of land transfer, if the Crichel Down rules are to be made statutory as asked by this discussion paper proposal 160, then it will be important for appropriate records of compulsory purchase to be retained with the Keeper.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	None required.
Summary of responses and analysis	23 consultees responded to this question and unanimously agreed that the Keeper should be required to add a note on the Land Register stating that the title has been acquired by CP. Six (WLC, S&P, CAAV, SthLC, Brodies and LSS) commented that this would clarify the position, and most believed this would assist in subsequent conveyancing. Brodies noted that those dealing with the land in the future would know title had passed to the AA free of any

	defects. SPF noted that this could be important for wider reasons such as the introduction of Community Right to Buy and possible introduction of compulsory sales of land through the Land Reform (Scotland) Bill (now Land Reform (Scotland) Act 2016). Furthermore, they stated that if the Crichel Down Rules are made statutory, as proposed in the DP at proposal 160, then it would be important for appropriate records of CP to be retained with the Keeper. LSS suggested that the Keeper should also be required to remove from the title sheet any rights etc. extinguished by s 106 and s 107 of the 2003 Act and s 194 of the 1997 Act, without the need for the applicant to expressly request their removal.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes. An acquiring authority could still allow a tenancy to continue to its normal expiry date in appropriate cases.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	We support a single CPO system as previously set out.
16. Scottish Compulsory Purchase Association	It is considered that there should be a single compulsory purchase system whereby all interests that require to be compulsory acquired are so acquired by way of a General Vesting Declaration with a specific vesting date; as a consequence of such compulsory acquisition, there would then be the opportunity for all affected parties to claim compensation.

19. Odell Milne	This would be helpful. However, the availability of acquiring the Lease may be something that should remain available as an option since there could be some circumstances where the acquiring authority wishes to acquire that interest.
20. SSE plc	We would agree with this – all subsidiary rights should be extinguished to ensure certainty and validity of titles obtained by acquiring authorities.
21. District Valuer Services	Yes.
22. Glasgow City Council	Yes – this should be retained as an option.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No. We support a single CPO system.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
27. South Lanarkshire Council	The Council supports this proposal as it streamlines and standardises the effect of compulsory purchase on leases.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	We concur.
40. Law Society of Scotland	We agree. However, the change in approach (i.e. the lease being extinguished rather than acquired) should not adversely affect the compensation rights of those deriving title from the extinguished lease.
42. Scottish Water	Yes.

43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	At one event a participant referred to the situation where a tenancy becomes a long tenancy because it is protected by statute, rather than because it is, in and of itself, a long lease, and wondered whether this made it a long lease for the purposes of CP legislation?
Analysis	
Explanation of proposal	Under the current law a notice to treat allows the AA to acquire the lease. This proposed that the AA should be able to extinguish the lease instead.
Summary of responses and analysis	23 consultees addressed this proposal. 19 agreed with it, three confirmed their support for a single CPO system and one considered this to be a policy matter. Of those who agreed with the proposal, JRR explained that an AA could still allow a tenancy to continue to its normal expiry date in appropriate cases. OM commented that the availability of acquiring the lease may be something that should remain as an option. SSE believed that all subsidiary rights should be extinguished to ensure certainty and validity of titles obtained by AA. SthLC noted that this would streamline and standardise the relevant law. LSS agreed with the proposal on condition that the change would not adversely affect compensation rights. Three consultees (S&P, SCPA and CAAV) supported a single CP system where all interests to be compulsorily purchased, would be acquired via a GVD. FoA agreed that the current law on this point was unduly complex, but considered this a matter of policy and had no further 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)

Respondent	
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	We support a single CPO system.
16. Scottish Compulsory Purchase Association	This proposal is supported and is consistent with previous responses with regard to the General Vesting Declaration procedure that all interests require to be compulsorily acquired and that a right to claim compensation arises in all cases.
19. Odell Milne	Agreed. In my experience consideration needs to be given to the treatment of fiars. The interest of fiars may be dependent on the fiar surviving the liferenter, and therefore the argument may run that, at the vesting date, there is no legal interest which should be compensated. However, even if the fiar does not survive the liferenter, the fiar's successor may do so, therefore consideration should be given to the parties entitled to notification - even if the compensation is in practice payable to the liferenter. I consider that for a liferent, the liferenter should receive notification and compensation is paid to the liferenter for the liferent's interest. For the true fiar, that fiar does have an interest in land as set out in the title and therefore should be entitled to notification, but not to compensation. However, whether or not it is appropriate to give notice to the fiar should be clearly set out together with clarification as to the position with regard to entitlement to compensation. It is clear that, for a testamentary liferent, the intention was that the fiar receive the capital value of the land. If however compensation to the liferenter means that the capital value of the land is going to the liferenter instead of the fiar as intended by the testator, that may seem to be unfair. While tax treatment, make such a payment “tax neutral”, there are circumstances where such a payment may interfere with valid tax planning exercises or succession planning exercises. Therefore some flexibility if the liferenter and fiar agree may be appropriate here.

20. SSE plc	We would agree with this – all subsidiary rights should be extinguished to ensure certainty and validity of titles obtained by acquiring authorities.
21. District Valuer Services	Yes.
22. Glasgow City Council	Agree.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. The regime should cover all affected interests which must then be eligible for compensation.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
27. South Lanarkshire Council	The Council supports this proposal.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	We concur.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees for the reasons set out in paragraph 8.57 [of the DP].
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of proposal	None required.
Summary of responses and analysis	21 consultees addressed this proposal. 20 agreed that the AA should be able to serve a notice to treat on any liferenter and bring the liferent to an end in return for compensation. One consultee (S&P) simply stated their support for a single CPO system. OM considered that fiars (i.e. landowners of land subject to a liferent) should be entitled to notification, but no compensation. She noted that compensation was, in practice, paid to the liferenter and suggested that the fiar should be notified that the liferenter has received compensation for the liferent's interest. It should be clearly set out whether it is appropriate to give notice to the fiar, together with clarification as to the entitlement to compensation, particularly in the case of a testamentary liferent where it had been the intention for the fiar to get the capital value of the land. She also addressed the issue of tax and succession planning, with which the CPO may interfere, and suggested that there should be some flexibility to make alternative arrangements where the liferenter and fiar agree. SSE stated that all subsidiary rights should be extinguished to ensure certainty and validity of titles obtained by AAs. CAAV said that the regime should cover all affected interests which must then be eligible for compensation. SCPA supported the proposal and a single CPO system, whereby a GVD would be used to acquire all interests to be compulsorily acquired, with a right to compensation in all cases.

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)

Respondent	
7. West Lothian Council	Agreed. This would provide certainty.
10. Renfrewshire Council	Agreed. The provisions on heritable securities in the context of CPO are confusing and require clarification.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed. The provisions on heritable securities in the context of CPO are confusing and lend themselves to clarification.

13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported. The Registers should be updated to record the discharge.
19. Odell Milne	Agreed. But see below with regard to the procedure for dealing with compensation which currently leaves promoters and solicitors acting for borrowers in a difficult position due to uncertainty.
20. SSE plc	We would agree with this for the reason stated in question 69.
21. District Valuer Services	Yes.
22. Glasgow City Council	Agree - the provisions re the settlement of the debt need to be clear as also provisions re negative equity where the compensation due for the heritable interest is less than the debt as also provisions re ranking amongst secured creditors.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed. The current position is complex and the position should be made clear.
26. National Grid plc	Yes on registration of the GVD or the acquiring authority's title, the Keeper should remove the standard security from the register and in effect extinguish it.
27. South Lanarkshire Council	The Council supports this proposal as it clarifies the position.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	We concur.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree, provided the security holder has been alerted at an earlier stage to the prospective compulsory purchase, has been given the opportunity to object, and will be compensated for the loss of the security.

42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees for the reasons set out in paragraphs 8.64 and 8.65 [of the Discussion Paper].
44. Scottish Property Federation	It will be important to purify the title, with appropriate compensation to the security holder – we agree.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	None required.
Summary of responses and analysis	There was unanimous agreement from the 23 consultees addressing this proposal. Three (WLC, OM and GCC) believed this would provide certainty. GCC further considered that there needed to be more clarification on various provisions such as the settlement of the debt, negative equity where the compensation due for the heritable interest was less than the debt, and ranking amongst secured creditors. Two (RC and SOLAR) argued that this would be useful as the provisions on heritable securities in the context of CPO are confusing and require clarification. OM commented on the issue with the procedure, which currently left promoters, and solicitors acting for borrowers, in a difficult position due to uncertainty. LSS agreed, provided that the security holder has been notified, is given the right to object to the CPO and is entitled to compensation. SPF believed that it was important to purify title with appropriate compensation for the security holder.

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

(Paragraph 8.75)

Respondent	
7. West Lothian Council	The Discussion Paper highlights that there may be doubt as to what is required to satisfy section 107 (as to whether the authority merely has to have compulsory purchase powers or whether it must show that it could have obtained a confirmed compulsory purchase order

	in the specific circumstances). This should be clarified.
10. Renfrewshire Council	We are not aware of any compelling case for reform, although a restatement of the provisions of the relevant statutory provisions in the proposed new act would be helpful.
11. NHS Central Legal Office	No.
12. Society Of Local Authority Lawyers And Administrators In Scotland	We are not aware of any compelling case for reform, although a restatement of the provisions of the relevant statutory provisions in the proposed new act would be helpful.
13. Strutt & Parker LLP	Both should be retained.
16. Scottish Compulsory Purchase Association	It is considered that both Sections should be retained.
19. Odell Milne	I note the SLC's view that the intention of section 107 is that it can also apply where an acquiring authority could have obtained a CPO, but did not. In my view, if that is the correct interpretation, it is a cause for concern. An interest in land such as a private right of way or other servitude can be of significant value. To be deprived of such a right, without an opportunity of objecting, seems to me to remove the appropriate balance between public interest and private interest which the compulsory purchase regime should protect. The provision of an opportunity to apply to the Lands Tribunal for renewal of variation of the servitude does not appear to me to be equivalent to the CP requirement for consultation and a need for the acquisition to be in necessary in the public interest and proportionate and for those affected to be given the opportunity to object and be heard. I am not sure if the Lands Tribunal is the right forum to consider such issues and in any event it seems to me unfair that parties who are having rights of access acquired (which may be equally or even more valuable that someone who is having a small piece of land acquired) should not receive equivalent and fair treatment under the law. It seems to me that to allow this procedure to be used where an acquiring authority has CPO powers but is not obliged first to use those powers in order to make and confirm a CPO does not place a sufficiently onerous burden on the acquiring authority to satisfy itself that the acquisition is necessary, in the public interest and proportionate and does not contain an appropriate opportunity for the confirming authority to challenge that decision or an opportunity for objection and to be heard. For those reasons it has always been my view that the intention of this provision is that it is to be used where an acquiring authority has obtained a CPO but chooses not to use it because a negotiated agreement has been reached. Considering the position as set out in the SLC's discussion paper, I can only assume that I am in the minority in that opinion. However, I think it is a view that may be

	worth further consideration for the reasons set out above. There is a risk otherwise that this process can be used without appropriate checks and balances and, as mentioned above, what is acquired could be of significant value and constitute a serious interference with ECHR rights. In answer to question 71, if this procedure is available in situations where a CPO has not been confirmed, the provisions need to be qualified by appropriate checks and balances which ensure that this is not a "back door way" of interfering with private interests without appropriate procedures including an opportunity to object and be heard and a requirement that the local authority utilising the procedure has not first checked that the acquisition is necessary in the public interest and proportionate, and, if appropriate, that there should be some provision for confirmation or appeal.
21. District Valuer Services	Yes
22. Glasgow City Council	A mixture of reform and consolidation.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Both should be retained.
25. East Ayrshire Council	It would be useful take this opportunity to deal with the issues as detailed in the discussion paper. No strong views as to whether this is done via reform or consolidation.
26. National Grid plc	These sections should be consolidated. It should be clear that where a CPO is used all burdens are extinguished unless the CPO provides otherwise.
27. South Lanarkshire Council	The Council do not consider that the provisions should be consolidated as S194 of the 1997 Act applies to land acquired for planning purposes and is more extensive in its application. The Council considers that no changes are required to the provisions.
29. Brodies LLP	The explanatory notes to Section 107 say that it can apply where compulsory purchase powers could have been used. It needs to be made clear when Section 107 applies. Does the authority have to go through the procedure for obtaining a CPO even though it ultimately does not rely on it or is it sufficient that the authority has CPO powers?
31. Association of Chief Estates Surveyors Scottish Branch	No.

35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	No.
39. Scottish Land and Estates	We are content for these to be retained.
40. Law Society of Scotland	We would suggest that clarification of when s.107 of the 2003 Act applies in practice would be helpful. We note that Paragraph 8.73 of the Discussion Paper states *"It has been suggested to us that it is perhaps unclear when section 107 will apply in practice. [Does s.107 apply where] (a) an acquiring authority could have obtained a CPO but did not, or (b) where a CPO was in place but was not used because a negotiated agreement was reached, or does it apply in both scenarios? In our view it is clear that when section 107 is contrasted with section 106, and when the relevant part of the Report on Real Burdens, on which the provisions are based, is considered, the answer is both."* In our view, it should not be necessary to refer back to this Discussion Paper for a view as to when section 107 should apply.
42. Scottish Water	No.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	At one event a participant stated that they often used section 107 of the 2003 Act to clear the Land Register of real burdens where the land was already owned by them or was being acquired voluntarily – i.e. not as part of a CPO – and as yet had had no objections.
Analysis	
Explanation of question	Sections 106 and 107 of the 2003 Act and section 194 of the 1997 Act deal with extinguishment of existing title conditions etc. such as servitude rights of way. This question asked whether these provisions needed to be either reformed or consolidated.
Summary of responses and analysis	21 consultees responded to this question. 12 agreed that either reform or consolidation should occur. Nine did not believe that the current provisions required to be changed. Five consultees (WLC, OM, NG, Brodies and LSS) believed that reform or consolidation would provide necessary clarification. The particular concern about s 107 of the 2003 Act was the issue of whether the AA (1) merely has to have CP powers available to it, or (2) must show that it could have obtained a confirmed CPO in the specific circumstances. OM argued that if the first scenario was correct, it would remove the appropriate balance between public and private interests that the CP procedures are meant to protect. LSS

	argued that it should not be necessary to refer back to the SLC's Report on Real Burdens to obtain clarification of s 107. Two consultees (RC and SOLAR) agreed with consolidating the provisions in a new Act, but did not recommend reform. Four consultees (S&P, SCPA and CAAV and SLE) argued that the sections should be retained. SthLC did not consider that the provisions should be consolidated as s 194 of the 1997 Act applies to land acquired for planning purposes and is more extensive in its application.

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

(Paragraph 8.81)

Respondent	
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed.
11. NHS Central Legal Office	Agreed.
12. Society Of Local Authority Lawyers And Administrators In Scotland	Agreed.
13. Strutt & Parker LLP	Please note our response to proposal [question] 3.
14. John Watchman	[See answer to question 3.]
16. Scottish Compulsory Purchase Association	This proposal is supported; please also refer to the responses earlier with regard to the creation of new rights.
19. Odell Milne	Agreed.
20. SSE plc	We would agree that the ability for an authority to acquire subordinate rights would be desirable.
21. District Valuer Services	Yes.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers	Please note our response to question 3.

Association	
25. East Ayrshire Council	Agreed. This can be done at present and there doesn't appear to be any reason why the ability to do so should not be continued.
26. National Grid plc	Yes for example, leases, servitudes and wayleaves.
27. South Lanarkshire Council	The Council supports this proposal. The Council have in previous CPOs and subsequent GVDs acquired new rights of servitude access at the same time as land itself. It would seem sensible for this to be able to done in a single deed.
29. Brodies LLP	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	We concur.
40. Law Society of Scotland	If CPO authorises acquisition of a lesser right, it seems sensible that there should be a system to record and register that acquisition quickly and easily. If the acquiring authority has to obtain the burdened proprietor's signature then this could cause delays in updating the register and enforcing any lesser rights required. Projects may depend on those rights and they shouldn't be subject to potential ransom opportunities from signatories. The Compulsory Purchase Notice of Title seems a practical solution.
42. Scottish Water	Yes.
44. Scottish Property Federation	This proposal, if enacted by Parliament, will enhance the flexibility and consequently the effectiveness of the CPO process. We agree strongly with this proposal therefore.
Further responses, either made informally or at engagement events	At one event participants wondered whether a right to confer rights on others could be incorporated into GVDs. For example, rather than monetary compensation the AA could provide alternative access. Participants noted that while a lesser interest may be acceptable to the current owner of a property, when they come to sell, such a lesser right makes the property harder to sell. For example, many are left with a roads order, but for a sale they will need a deed of servitude. Participants wondered, procedurally, where new rights were to be set out. Would it be in a new or different procedure?

	Participants noted that, in terms of a Special Act, an interest in land could be compulsorily vested in people, with obligations, for instance to maintain a right of way, regardless of whether that person agreed to the rights being vested in them.
Analysis	
Explanation of proposal	Many consultees, in answering this proposal, referred to their responses to question 3, which asked whether it should be possible to create new rights or interests over land. This proposal addressed the possible conveyancing process for any potential new rights.
Summary of responses and analysis	There were 23 responses to this proposal. 18 agreed it should be competent to acquire new rights subordinate to ownership by means of a CPNT or GVD or equivalent. This was supported at the engagement events. NG proposed that this should be available for leases, servitudes and wayleaves. Two consultees (LSS and SPF) agreed that this should be allowed as it would provide a more effective CPO process. LSS argued that this would prevent projects being delayed by the prospective burdened proprietors having potential ransom opportunities. SPF argued that this would enhance the flexibility of the CPO process. EAC indicated that this was already available to AAs and should continue to exist. SthLC agreed, stating that they had acquired new servitude rights of access at the same time as the land itself in previous CPOs and subsequent GVDs and it would be sensible to be able to do this in a single deed.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, it is an esoteric area but I am not aware that the provisions create problems and they seem to serve a purpose.
7. West Lothian Council	Agreed that provisions along the lines of the Code should be included in the proposed new statute. The council's suggestion would be that the wording is in plain English.
10. Renfrewshire Council	Yes. We cannot think of any additions or deletions which should be made.

11. NHS Central Legal Office	Yes, the broad status quo should remain.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes. We cannot think of any additions or deletions which should be made.
13. Strutt & Parker LLP	We support a single CPO process [which would include the mining code].
16. Scottish Compulsory Purchase Association	It is considered that there should be a single, unifying system covering all compulsory purchase situations [which would include the mining code].
19. Odell Milne	A mining code equivalent is an important part of compulsory purchase legislation. It is unlikely that a promoter will wish to pay compensation for minerals which may never be worked at the date of acquisition and the current procedure means that, should they be worked in the future, the minerals owner is entitled to compensation. This is in the interest of the public purse and does not treat the owner of the minerals unfairly. However, simplified procedures would be better which do not require reference to a version of a 1923 Act in its original form. I do not think a new version of the Mining Code should be included "automatically" in all compulsory purchase situations. There may be some circumstances where the acquiring authority wishes to acquire the minerals and should be able to do that and pay appropriate compensation. However, an issue arises from Registers of Scotland's procedures. In many cases, ownership of minerals is not clear from examination of the Land Register. This is because a disposition which is "silent" as to minerals will "carry the minerals" but a disposition which specifically refers to them will result in the Keeper excluding warranty in relation to minerals unless there is evidence that they have been worked. Therefore conveyancing practice has grown up whereby dispositions are "silent" in order to carry minerals. This means that on the face of the title sheet or Land Certificate, it is not clear who is the proprietor of the minerals. This will pose a serious burden on promoters who need to notify mineral owners and, at a later date landowners seeking to prove entitlement to compensation due to ownership; and indeed at that later date the owner of the public scheme who is seeking to acquire or interfere with the minerals at that later date who will not know on whom to serve notice. Therefore perhaps in the proposed note to be entered by the Keeper on the Register to the effect that the land was acquired by CP, it may be possible to add a note that the land was acquired using the "new mining code" so it is clear whether minerals were acquired or not.

	This will at least alert people to the issue if minerals have been reserved, however, how in practice it will be possible to identify mineral owners, is a different problem but not one that is unique to compulsory purchase. There is one aspect of the situation where I think provision should be made to improve the landowner's position and that is in relation to proving title to minerals in claiming compensation at a later date. If a landowner has a title that is habile to include the minerals, that should be sufficient to entitle that landowner to compensation without there being a need for the landowner to prove that title is registered or that minerals have been worked.
20. SSE plc	We would agree that there should be an option for the acquiring authority to decide whether or not it wishes the code to apply.
21. District Valuer Services	Yes although it should be made clear that the code allows authorities to acquire the minerals as well as to exclude them. This can be helpful in avoiding confusion where the minerals are just below the surface and may be useful in the construction of the scheme. If minerals are considered to be useful to the scheme it may be appropriate for the acquiring authority to acquire them (using the mining code) and pay compensation accordingly.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes, to be incorporated into a single CPO process.
25. East Ayrshire Council	Agreed that the provision along the lines of the Code should be included in the new statute.
26. National Grid plc	Provisions along the lines of the Mining Code should be included in the proposed new statute.
27. South Lanarkshire Council	Given the intention of the new Act is to consolidate, update and simplify the law on compulsory purchase it seems appropriate to include the Code in the new Act. The Council would suggest any disputes over compensation arising from the application of the Code should be determined by the LTS not arbitration.
28. Royal Town Planning Institute Scotland	Consideration should be given not only to mining works, but also to other intrusive workings such as fracking, coal bed methane extraction and carbon capture and storage procedures.
31. Association of Chief Estates	Yes.

Surveyors Scottish Branch	
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes, if a single procedure is to be established, this should be part of that.
40. Law Society of Scotland	Yes as suggested in the modified version. It is worth examining the effect of these provisions on shale gas. While not minerals, we suggest that other subsurface activities may also need to be considered, for example geothermal energy and ground water abstraction.
42. Scottish Water	Yes.
Further responses, either made informally or at engagement events	Participants asked whether, if provisions along the lines of the Mining Code were included, it would remain optional to opt in or out of these. They raised the point that contractors sometimes use minerals from the ground to build the road on which they are working. SLC confirmed that the intention was that it would remain optional. Participants asked whether it would be possible to take certain rights, e.g. quarrying rights, but leave other rights, so that in essence they could pick and choose the rights required for the project. SLC stated that this was the intention. All the rights required for the project could be set out and acquired using a CPO. In an informal response, it was stated that issues could arise because the Mining Code does not set out a specific depth for digging or mining, below which the AA has to offer to buy the minerals. It was alleged that the AWPR route was chosen with a view to obtaining the best rock and gravel, but without paying for the minerals.
Analysis	
Explanation of question	Section 1(3) and paragraph 6 of the Second Schedule to the 1947 Act, make provision for AAs, if they so wish, to incorporate with the legislation authorising the purchase, what is generally referred to as the mining code (referred to in Chapter 9 of the DP as "the Code"). If the Code is not incorporated, the minerals lying under the land being acquired are included in the purchase, and compensation may be payable for their development potential.
Summary of responses and analysis	20 consultees answered this question, and all agreed that such provision should be included. Three (OM, SSE and DVS) considered it should be made clear that

	the AA has the ability to include or exclude the application of the Mining Code (the Code) and that it should not be included automatically in all cases of CP. Two (RTPI and LSS) considered that it would be worth examining the Code in relation to other subsurface activities such as fracking, coal bed methane extraction, carbon capture and storage procedures, geothermal energy and ground water abstraction. WLC commented that the Code should be restated in plain English. SthLC suggested that disputes over compensation arising from application of the Code should go the LTS and not to arbitration. OM raised a serious issue with the Registers of Scotland which has arisen due to Scottish conveyancing practice. It is not always clear on the face of the Land Register who is the proprietor of the minerals. This creates a burden on promoters of a CPO who need to notify mineral owners, and on owners of minerals trying to prove entitlement to claim compensation. She suggested that if the Keeper is going to note on the Register when an area of land is purchased by way of a CPO, she could at the same time note that the land was acquired using the "new mining code" so it would be clear whether minerals were acquired or not. In addition, OM suggested that landowners should be entitled to claim compensation if their title was habile (able) to include the minerals, without any need for the landowner to prove that the title was registered, or that minerals have been worked. Four consultees (S&P, SCPA, CAAV and SLE) considered that there should be a single CPO process and that the Code should be included. In an informal response, it was alleged that the AWPR route was chosen with a view to obtaining the best rock and gravel, but without paying for the minerals, as the Code does not set out a specific depth for digging or mining, below which the AA must offer to pay compensation for the minerals.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, the concept of value to the seller should continue to reflect factors that might restrict the value of land in the market.

7. West Lothian Council	Agreed.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	The basis of assessing the value of property acquired should be derived from the concept of open market value as per RICS standards but on the basis of a no scheme world and excluding any blight arising from the scheme. Any additional value arising from special purchasers should be included.
16. Scottish Compulsory Purchase Association	It is considered that the basis for assessing compensation for the loss of heritable property should be derived from Market Value as defined by RICS (RICS Valuation – Professional Standards January 2014, as amended January 2015). Accordingly, the adoption of such a basis would thus, in the first instance at least, reflect the price that would be paid in the open market as at the date of valuation i.e. the date of vesting as between a willing seller and a willing purchaser; equally, that valuation would reflect all the advantages of such a property as well as its disadvantages. It is considered that this element of compensation forms the back-bone of many compensation claims and its relationship to the practicalities of market conditions should be incorporated and there should be a lack of artificiality. Further, such a valuation/assessment of compensation will require, of course, to be undertaken "the no-scheme world" – as further discussed in this Response Paper. An outline definition is set out below:- "The compensation to be paid for a heritable interest in a property that is compulsorily acquired is its market value at the relevant date of valuation and is the estimated amount which the interest should exchange for on the valuation date as between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties have each acted knowledgeably, prudently and without distress or compulsion; further, the compensation should reflect the highest and/or best use of the interest that maximises its productivity and that is possible, permissible and financially feasible; lastly, the compensation should have regard to a special purchaser and/or synergistic value. In assessing such market value, no regard should be taken of any advantageous or disadvantageous effects that underlie the scheme of acquisition."
19. Odell Milne	Agreed.
20. SSE plc	We agree with this position and compensation should continue to be based on the value to a willing seller whilst taking account of any restrictions which would if the subjects were to be disposed of by

	means of a voluntary sale rather than under compulsion.
21. District Valuer Services	Yes, value to seller is the right approach. The compensation should take into account any restrictions affecting the land.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The basis of assessing the value of property acquired should continue to start from the basis of the well-understood and longstanding concept of market value with which the valuation world is familiar with conventional definitions in both European Valuation Standards (EVS) and International Valuation Standards (IVS - as adopted by the RICS). Thus, EVS1 defines Market Value as: "The estimated amount for which the asset should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion." The nature of compulsory purchase then requires additional or varied assumptions which should still be applied as a consistent basis for compulsory purchase compensation. The principal ones are: • the assumption of a no scheme world • the exclusion of any blight arising from the scheme • the recognition of any value (special value) arising from the existence of any special purchasers. The basis and principles of this valuation approach should be expressly stated on the face of the legislation to ensure certainty and in a way that allows reference to the accumulated body of case law on these points. The uplift we have proposed above would be applied to the assessment made under these principles.
24. Shona Blance	Not where factors, which would limit the value, have been imposed by other statutory means and in a disproportionate manner e.g. the imposition of presumptions against development for an entire area covered by a road improvement scheme inevitably impact in the negative on CAAD applications.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	Yes – the basic expectation should be Market Value.
35. Shepherd and Wedderburn	Yes.

36. Scottish Power Ltd	We consider that the current six Rules of Valuation should be retained as the core valuation principles.
38. MacRoberts LLP	"If the seller of their own volition sold the property tomorrow on the open market, what would they reasonably expect to get for it" is a sound starting point. If the new starting point were to be (and known by those affected to be) value to the seller plus a premium to reflect compulsion, that could from the off make the process seem less aggressive towards the "seller", and would set a better tone for subsequent discussions. To what extent under current law do those affected enter this process assuming that they are going to have to fight for every penny?
39. Scottish Land and Estates	Scottish Land & Estates is of the opinion that only by a percentage addition to open market value for all acquisitions can the following issues be addressed:- • a sale under CPO will be at a time not of the owner's choosing, with inevitable losses for investors and owners generally; • any form of CPO inevitably involves a measure of blight during the period between the launch of the scheme and payment of compensation; • land has a particular value to the existing owner - we would suggest that the apparent willingness of affected parties to spend time, energy and money on professional fees in order to try to resist CPO would imply a relatively large premium could properly be justified, valuation is an art form, not a science, and there is no "correct" answer to the value of a property, only a margin of error. When added to the relative risks and costs of a reference to the Land Tribunal, which puts the claimant at a disadvantage in negotiations from the outset, it can be seen that Open Market Value will not of itself properly compensate the owner for his loss. Moreover, in most cases, the actual sum paid is at greater risk of being below OMV. Claimants often find it almost impossible to enforce prompt payment of compensation including advance payments and fees. Most businesses require settlement of accounts within 30 days and apply penalties after that. A similar provision should be made for agreed compulsory purchase compensation.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
44. Scottish Property Federation	We agree.

45. Scottish Power Energy Networks Holdings Ltd	We consider that the current six Rules of Valuation should be retained as the core valuation principles.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	"Value to the seller" reflects the price that would be achieved by a willing seller, and not the price which would be paid by a willing buyer. In a voluntary sale the willing seller is entitled to sell at the best price. However this value of the property to a willing seller, is subject to any factors which would limit the price on the open market, e.g. title conditions restricting use. This proposal suggested that the valuation of land should continue to reflect such factors.
Summary of responses and analysis	22 consultees responded to this proposal. 21 agreed that the concept of "value to the seller" should continue to reflect any factors which might limit the price which the seller could expect to receive on a voluntary sale. MacR qualified their answer and SLE provided an alternative perspective. One consultee (SB) disagreed. MacR qualified their agreement to the concept of "value to the seller", by suggesting that the compensation received should be supplemented by the payment of a premium, in addition to open market value (OMV), to reflect the compulsory nature of the acquisition. They considered that this would set a better tone for subsequent discussions and make the process seem less aggressive towards the owner. SLE considered that the relative risks and costs of a reference to the LTS, put the claimant at a disadvantage in negotiations from the outset. Receiving OMV would not compensate them for their loss and in most cases the actual sum paid was at risk of being below OMV. SB answered "no" where there were factors which would limit the value and which had been imposed by other statutory means and in a disproportionate manner. She gave the example of the imposition of a presumption against development for an entire area covered by a road improvement scheme, which would inevitably have a negative impact on CAAD applications. Three consultees (S&P, SCPA and CAAV) offered more in their submission than was addressed in this proposal. S&P suggested that the basis of assessing the value of property acquired should be derived from the concept of OMV as per RICS standards, but on the basis of a no-scheme world and excluding any blight arising from the scheme. Any additional value arising from special purchasers should

	be included. SCPA stated that no regard should be taken of any advantageous or disadvantageous effects that underlie the scheme. CAAV added that the basis and principles of valuation should be expressly stated on the face of the legislation to ensure certainty and allow reference to the accumulated body of case law.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
7. West Lothian Council	No.
10. Renfrewshire Council	Yes, if the acquired land adversely affects the value of the retained land this should be compensated.
13. Strutt & Parker LLP	We agree with this proposal but have concerns re the wording of this proposal because of the interlinking of injurious affection, severance and disturbance. The two main methods under Rule 2 are: - "Before and after" (the "before" being under the no scheme world and the "after" the "blighted" value). Value on an OMV basis the land acquired and, separately, the diminished value of the retained land. Both should be retained and a flexible approach adopted. [This is also an answer to proposal 113, which states that 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.]
16. Scottish Compulsory Purchase Association	The answer to this question is yes and, in practice, there are two main methods by which the Rule 2 element of compensation in a part-only compulsory acquisition is assessed. Firstly, on a "before" and "after" basis whereby the "before" value is the unblighted open market value of the whole subjects as at the date of vesting: the "after" value is the open market value of the subjects reflecting both the part acquired as well as the diminished value of the retained land. The alternative approach is to specifically value on an open market value basis the land acquired and then add on the

	diminished value of the retained land which is the favoured approach adopted by the Lands Tribunal. It is considered that as a variety of approaches may be legitimate dependent upon the circumstances of the acquisition, any new legislation should not be proscriptive in nature thus allowing flexibility in assessing the compensation due. An example of the former approach would be in respect of a dwelling-house where part of the garden ground was compulsorily acquired and in this situation the principle of assessing the compensation is relatively straightforward i.e. "before" and "after" valuations are undertaken (what these values are of course will be subject to negotiation). An example of the latter approach would be the part-acquisition of a large area of land where the land acquired was used for different purposes and/or had potential for development for different uses. [See also the answer to proposal 113.] As stated in response to question 75, it is considered that there are (at least) two recognised approaches to the assessment of Severance and Injurious Affection and flexibility of approach should not be restricted by any new legislation.
17. Lands Tribunal for Scotland	We agree that the value of the acquired land should be its value before such depreciation occurs. See also Q113 below. [Answer to proposal 113] Concurrent or "before and after" approach We would prefer the statute not to be prescriptive. We agree there is merit in the before and after approach in appropriate cases such as where, in reality, the same assumptions fall to be applied to the taken land as well as the retained land. Equally we believe there may be cases where the before and after approach could achieve an unrealistic result.
19. Odell Milne	Yes.
20. SSE plc	The overall valuation should ascertain values of the whole and the part in order to ensure a balanced assessment. It should also ensure that the claimant is no worse and no better off, and that the principles of equivalence apply.
21. District Valuer Services	Yes. Although the value of the land being acquired should ignore any impact of the scheme – positive or negative – case law such as the *Abbey Homesteads* case suggest that severance compensation should be paid only in respect of the retained land, and this may result in a claimant receiving compensation less than the full loss suffered. It does however need to be valued as part of the larger

	landholding rather than in isolation and in practice we consider this is what happens. CPO plots are often relatively small with unusual shapes but in practice are valued on the same basis as the entire holding – this is a practical solution which should continue by clarifying the legislation as necessary. The value of the land acquired should still be market value in accordance with Rule 2 and valuing it as if it were part of the whole should achieve this. The impact of removing the land acquired from the retained land should be reflected separately in the claim for injurious affection in line with current practice.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We are concerned about the way in which this proposal is expressed as it appears to risk confusion with the issues of injurious affection, severance and disturbance and so the assessment of the acquired land with effect of the compulsory purchase on retained land. The framework of the law should support careful analysis of the issues in case, avoiding both double counting and omission of items of claim while, with the variety of properties and circumstances that are met, leaving the valuers involved with the discretion to adopt the approach most suitable to each case in hand. It would be conventional to value the land taken on a market value basis and then separately assess any diminution in the value of the retained land (injurious affection) and the effects of retained land being severed (severance) and the costs imposed (disturbance). An alternative approach within Rule 2 (market value) is to undertake a “before and after” valuation of the whole property, taking acquired and retained land together, with the “before” valuation being on the no scheme world assumption and the “after” valuation being on the basis of the “blighted” value. The new law should leave the professional valuer with the necessary discretion to address each case in its own circumstances, able to adopt either approach. [See also the answer to proposal 113. We are concerned about the drafting of such a provision. While the payment for acquired land should be on open market basis (i.e. ignoring the circumstances of the claimant), the principle of equivalence suggests that the circumstances of the actual claimant must form part of the assessment of a claim for severance and injurious affection as well as disturbance. The drafting of the provisions here should allow the valuers the opportunity to take the appropriate approach to each case, whether

	that is an assessment of capital values or of lost profits or on some other basis. Injurious affection losses can sometimes be best considered by a Discounted Cash Flow (DCF) type approach to profits expected to be lost on retained land as a consequence of a CPO scheme.]
24. Shona Blance	Yes if the purpose is to try and compensate fairly the landowner.
26. National Grid plc	The land should be valued on the basis of a no scheme world.
31. Association of Chief Estates Surveyors Scottish Branch	Yes – using before and after approach. [See also the answer to proposal 113. Before and After should be used as it is easily understood and achieves fair results but other approaches should be allowed provided they can be justified.]
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes, but only to the extent that any effect of severance on the assessment of compensation in relation to the retained land does not already reflect that depreciation.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	On the basis of the iniquitous position identified in paragraphs 11.33 and 11.34 [of the DP] we consider that there is a case for the depreciation of the value of the acquired land caused by severance from retained land to be taken into account when assessing its value.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates considers that for the reasons set out in paragraph 11.33 [of the DP] depreciation of the value should be taken into account when assessing the value of the acquired land.
44. Scottish Property Federation	It should be acceptable for the valuation of the acquired and retained land to be taken on the basis of the whole land which may have been previously and explicitly assembled by the landowner for the purpose of development as a whole. The landowner may well be subject to various financial covenants predicated on the value of the land as a whole and it would be unjust for a valuation to fall short of this on the grounds of severance.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	When the land now being acquired by CP originally formed part of a parcel with the retained land, its value may have been higher. This question asked whether any resulting depreciation in value of the land acquired by CP, caused by the severance of the acquired land from the retained land, should be taken into account when assessing its value.
Summary of responses and analysis	20 consultees responded to this question. Many consultees also discussed the basis on which the assessment of compensation for severance or injurious affection should be carried out, which is considered in proposal 113. 16 consultees agreed that depreciation of the value of the acquired land, caused by severance from the retained land, should be taken into account when assessing its value. Three consultees (CAAV, SSE and NG) adopted a different approach to the question. WLC disagreed without giving reasons. Of those who agreed, RC stated that if the acquired land adversely affected the value of the retained land, this should be compensated. SCPA, while answering "yes" to the question, pointed out that there were two main methods by which compensation in a part-only acquisition was assessed. They considered that new legislation should not be proscriptive, but should allow flexibility in assessment of compensation. LTS agreed that the value of the acquired land should be its value before such depreciation occurred. MacR answered "yes" but only to the extent that any effect of severance on the assessment of compensation in relation to retained land, did not already reflect that depreciation. DVS also answered "yes" and stated that the land being acquired needed to be valued as part of the larger landholding rather than in isolation, and considered this did happen in practice. SPF said it should be acceptable for the valuation of the acquired and retained land to be taken on the basis of the whole land, which may have been assembled by the landowner for the purpose of development as a whole. As the landowner may be subject to various financial covenants based on the value of the land as a whole, it would be unjust for a valuation to fall short of the total value on the grounds of severance. S&P and CAAV had concerns about the wording of this question, due to the interlinking of injurious affection, severance and disturbance.

	Of the three consultees (NG, SSE and CAAV) adopting a different approach, NG considered the land should be valued on the basis of a no-scheme world. CAAV stated that the framework of the law should support careful analysis of the issues, avoiding both double-counting and omitting items. The new law should leave the professional valuer with the necessary discretion to address each case in its own circumstances. SSE stated that the overall valuation should ascertain values of the whole and the part, to ensure a balanced assessment, and also to ensure that the claimant was no better and no worse off and that the principles of equivalence applied.

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

Paragraph 11.42)

Respondent	
1. Professor Jeremy Rowan Robinson	As you point out, negative equity arises as a result of market conditions and is not caused directly by the compulsory purchase. However, other things being equal, an owner would not choose to sell at a time when he is experiencing the effects of negative equity. If he/ she can hold on until market conditions change, there is no hardship. So in a real sense, the compulsory purchase is creating the hardship by forcing a sale at the time when no owner in his or her right mind would choose to sell. That being so, there is an argument for giving recognition to the hardship.
7. West Lothian Council	Agreed that the current law does take account of negative equity satisfactorily.
10. Renfrewshire Council	It is important to remember that negative equity can arise out of the operation of the market and not as a result of the CPO scheme itself. Although unfortunate for the affected owner, it does not seem appropriate that the public purse should plug the gap for either the owner or the security holder, although home loss, disturbance and rehousing options should be explored thoroughly. The provisions relating to security holders' compensation rights as they relate to their existing relationship with the owner (borrower) should be clarified for the benefit of all parties concerned. It should be clarified that any existing heritable security over a CPO property will be extinguished and that any arrangements to address the negative equity portion of the outstanding borrowing should be between the security holder and the owner. Clarification is also needed on how to treat the interrelationship between the competing compensation claims of an owner and

	security holder in respect of an affected property and the extent to which the acquiring authority can discharge its obligations to both.
12. Society of Local Authority Lawyers and Administrators in Scotland	It is important to remember that negative equity can arise out of the operation of the market and not as a result of the CPO scheme itself. Although unfortunate for the affected owner, it does not seem appropriate that the public purse should plug the gap for either the owner or the security holder, although home loss, disturbance and rehousing options should be explored thoroughly. The provisions relating to security holders' compensation rights as they relate to their existing relationship with the owner (borrower) should be clarified for the benefit of all parties concerned. It should be clarified that any existing heritable security over a CPO property should be extinguished and that any arrangements to address the negative equity portion of the outstanding borrowing should be between the security holder and the owner. Clarification is also needed on how to treat the interrelationship between the competing compensation claims of an owner and security holder in respect of an affected property and the extent to which the acquiring authority can discharge its obligations to both.
13. Strutt & Parker LLP	We consider that it does not. Where there is a situation of negative equity compensation would be on the basis of market value; the basis of equivalence. This does however fail to recognise that an owner subject to a CPO is unlikely to sell in such circumstances but is forced to do so. We respectfully refer the Law Commission to the DCLG paper [Technical consultation on improvements to compulsory purchase processes, March 2015] recommending that any mortgage should be transferable to prevent any negative equity situation developing.
16. Scottish Compulsory Purchase Association	The purchase of property is not without risk and purchasers thus require to take appropriate professional advice prior to any purchase; they also need to recognise that values may fall or rise. In addition, it is recognised that in many cases in order to assist such a purchase a mortgage will be sought from a lender. Equally, it is considered that it is the lender's responsibility to undertake diligence both with regard to the property under which security will be taken as well as the appropriate financial background checks on the potential borrower. In addition, it also has to be recognised that the property market will fluctuate (as has been clearly evidenced over the course of the last ten years) and property owners require to accept this reality. However it requires to be appreciated that, in normal circumstances, the property owner will have control over whether or not he/she wishes to sell at any particular point in the market cycle and would not willingly sell in the knowledge that

	negative equity will occur- the mortgage lender may also have a voice in this matter. Nevertheless, the Rule 2 element of compensation should not take account of the issue of negative equity. However, as later discussed in this Paper, it is considered that in addition to receiving the "no scheme-world" open market value of the heritable interest (and disturbance) there should be (a) a premium payable as well (b) an occupier's loss payment to take account of the fact that the acquisition is compulsory in nature. These additional payments should as a by-product help to alleviate the issue of negative equity. In addition, reference is made to the draft DCLG paper [Technical consultation on improvements to compulsory purchase processes, March 2015] in England which also deals with this issue.
17. Lands Tribunal for Scotland	Again the example shows how injustice can work where there are timing issues at the point when a loss is crystallised, over which a claimant has no control. We think the law would be unsatisfactory if it did not permit a claim to be made, perhaps under the heading of disturbance, that but for the acquisition an owner might have been able to trade out of negative equity. See also the example we give at Q56. [Example given in answer to question 56 … There are cases where compensation is particularly sensitive to the valuation date. The "shadow" period between the initial blighting (i.e. "blighting" used in non-technical sense) effect (e.g. the date of the draft order but could be earlier) and the vesting date (or, if relevant, the settlement date) can be many years. In that time the market could move against the claimant and benefit the authority. The opposite can of course happen to the benefit of the claimant. However, in the former case if the claimant can show he would have sold when the market was good, but did not do so because the CPO had blighted his property, he has sustained a loss which he would not have suffered otherwise. In such a situation there would be a case for a discretion as to the choice of valuation date. At present this type of loss would have to come under the heading of disturbance, but may be difficult to establish. A relevant principle would be if the depreciation in value was solely because of the likelihood of a CPO, then that depreciation would not be taken into account: c.f. section 16 of the 1963 Act. Clarity as to how this type of scenario falls to be dealt with under the new regime would be welcome.] The principle of equivalence and full and fair compensation might also help to cover this point.
19. Odell Milne	It is difficult to see how any provision can be justified which effectively means that more compensation is paid to somebody who has incurred borrowings than to another who has not. However, in

	some cases negative equity prevents acquiring authorities progressing a scheme which could leave people who are living in owner occupied homes with negative equity. Therefore it might be appropriate to put in place a scheme which acquiring authorities can use where faced with issues of this type. I am aware of an estate where council house tenants who purchased properties originally erected by the council were placed in a difficult position when the houses were found to be of such a construction that they became unsellable. The properties owned by the council could be vacated but those which had been purchased by the tenant were still occupied because the purchasers had found themselves in a negative equity position. The acquiring authority could not pay compensation sufficient to enable these owners to redeem their loans.
20. SSE plc	We believe that the concept of negative equity has certainly become a more prominent concern than perhaps has generally been the case in the past. A willing seller would be highly unlikely to voluntarily divest a property in negative equity and therefore any compensation claim must not leave the seller with any additional financial burden as a consequence of market recession. However on no account should a willing seller be allowed to increase the debt ratio on a potential CPO asset in order to leverage any financial betterment. The difficulty of drafting rules to adequately cover all scenarios in a way which is fair to all parties means that whether it is appropriate to legislate on this point should be given careful consideration.
21. District Valuer Services	The current law does not take account of negative equity satisfactorily. We are of the view that the SLC should considering adopting the proposals contained in the current DCLG consultation [Technical consultation on improvements to compulsory purchase processes, March 2015].
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No. The assumption of a willing seller is perhaps more than ordinarily unrealistic where negative equity exists, as it fails to recognise that an owner subject to a CPO is unlikely to sell in such circumstances but is being forced to do so. However, rather than change the common assumptions for assessing compensation (and the distortions that might result from doing so) practical discussion of the issue here generally concludes that measures to make the relevant mortgages transferrable is the way forward. The affected party can take his negative equity elsewhere. This has most recently been canvased in the March 2015 Treasury/DCLG consultation paper on compulsory purchase in England [Technical consultation on improvements to compulsory

	purchase processes, March 2015].
25. East Ayrshire Council	It would appear that the current law is satisfactory.
26. National Grid plc	Compensation should not take account of the issue for negative equity.
31. Association of Chief Estates Surveyors Scottish Branch	Whilst recognising the owners financial position the basic position has to be Market Value.
35. Shepherd and Wedderburn	Yes. Although we can see the difficulties involved for individuals in this situation, the general principle that compensation should be based on equivalence should continue to apply.
38. MacRoberts LLP	No. In the example of Mr Kerr, in reality Mr Kerr would not put his property on the market while it was in negative equity, so the "value to the seller" on the open market is not a fair reflection of equivalence, and the acquiring authority should not be permitted to take advantage of an economic circumstance not of Mr Kerr's making. Mr Kerr did not strike a bad deal; he just struck it in the wrong place at the wrong time. Where the acquiring authority is acting in support of a private venture, the inequity is greater, because the private entity is obtaining the land at a discount and taking advantage of Mr Kerr's misfortune. Perhaps the "rule" for negative equity is that the minimum compensation payment should be that which leaves the "seller" with no debt to any lender(s) with a heritable security over the property?
39. Scottish Land and Estates	An owner whose land is subject to a CPO is unlikely to sell in those circumstances, but is being compelled to do so and the assumption of a willing seller is therefore artificial if not downright unrealistic. Arguably there should be provision for transfer of the negative equity and we understand that this might have been reviewed in England recently.
40. Law Society of Scotland	Whilst we recognise the potentially harsh effects when property is compulsorily acquired on a descending then rising market, it is difficult to envisage what changes could be realistically made to the current position.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates has concerns that the current law does not take account of negative equity satisfactorily.
44. Scottish Property Federation	There appears to be some uncertainty on this matter of compensation in the circumstances of negative equity. It is possibly an area where the discussion paper encroaches upon a matter of public policy for it would be UK and Scottish Ministers who will

	ultimately need to take a view on the right approach to compensation in these circumstances. Clearly there is a question of fairness whereby a property owner, who happens to be in negative equity because of fluctuations in the property market and economy, is compulsorily purchased and therefore potentially left in severe financial hardship because of the actions of the acquiring authority. The law appears to be somewhat deficient in this area. One view could be that the landowner and security holder should be protected from financial loss caused by the timing of a CPO unless there is an overwhelming public interest not to do so.
47. The Royal Bank of Scotland plc	[From paragraph 3 of the general response – also noted at question 175] The second area where we feel that there is a need for change is in relation to payments of compensation amounts which are insufficient to repay the borrower's outstanding loan. As discussed, situations do arise where customers whose properties are subject to a CPO do not receive sufficient compensation to enable them to repay their outstanding loan in full. The result of this is that the customer and the bank are left in an unsecured position. We obviously work with our customers to find the best outcome for this situation, however, it can in theory lead to litigation, an adverse credit entry for customers and a potential loss for the bank. These outcomes can have a major bearing on customers and their future financial position. This appears inequitable for all parties. As the intention of compensation in respect of compulsory purchase is to replace the loss that the landowner has suffered we see no reason why borrowers should be left in this unenviable position through no fault of their own. We would, therefore, welcome a change in law to avoid this unfair situation of customers, solely as a result of their property being subject to a compulsory purchase order, facing major financial issues which they otherwise would not have faced.
Further responses, either made informally or at engagement events	An attendee noted that negative equity had not seemed to be a big issue until the recent DCLG consultation which stated that there were 150,000 houses in the UK which were in negative equity. The problem was that the CPO caused the mortgage or standard security to crystallise and left the claimant with a large unfunded debt to repay, causing financial hardship and severely eroding credit-worthiness. The DCLG wanted the parties to reach voluntary agreement with their lenders and for the Financial Conduct Authority to allow the "porting" of mortgages between properties. Possible solutions were considered. Burnley Council in England had set up purchase assisted loans of up to £40,000. The Scottish Government had started New Supply Shared Equity Schemes

	where purchasers normally only had to fund between 60 to 80% of the purchase. This would allow them to port their mortgage and to buy a new property of roughly the same value. An attendee questioned whether it would be possible to share the burden differently, for example by insurance. Another attendee did not think so, arguing that it would not help as only some affected owners would be insured, so this would not be sufficient (and noting that even with car insurance, which is a legal requirement, there are many drivers without it). SLC noted that insurance law is reserved but the law on standard securities is devolved. It was suggested that in negative equity cases compensation could be offered which was the greater of either market value or the purchase price which had been paid within the last, say, three to five years. It was argued that property was simply a risky asset and if someone chose to invest in it then they should have to take the downside. It would not be appropriate to be wading in with social values, and risk should remain with owners. Many in negative equity have been at fault (due to risky loans, not meeting monthly payments, or not maintaining the property). People are in negative equity for various reasons and AAs should not have to bail them out. An attendee pointed out that in the case of CP, the AA has crystallised the debt with the CPO, so the problem is caused by the timing of the scheme, and not the fault of the owner. The majority of houses are purchased by owner occupiers, as a roof over one's head rather than a great investment desire. In that situation the negative equity position seemed particularly harsh. There was a discussion about whether genuine owner occupiers should be treated differently to speculative property investors, but this would be very difficult to achieve. It was noted that it was not just residential owners who suffered, but also commercial owners, as businesses could also be in negative equity. One attendee discussed the Airdrie to Bathgate railway line and the Deans Housing Estate where it had transpired that there was a structural problem with the houses on the Estate. These had been built as council houses and many tenants had acquired ownership with no knowledge of the structural problem. When the Council then came to acquire the houses under a CPO, the value had dipped because of the structural problem. In this case the Council was sensible and tried to rehouse owners, or replace the houses through a registered social landlord, although this was unusual and there was no legal requirement for them to do so.

Analysis	
Explanation of question	Negative equity occurs when the value of a debt secured over a property is higher than the value of the property. Currently, under the principle of equivalence, the owner is entitled to the market value of the property, which will not necessarily cover the full value of the debt. This question asked whether the current law deals with negative equity satisfactorily, and if not, what changes should be made.
Summary of responses and analysis	22 consultees responded to this question. 15 consultees believed that the current law did not take account of negative equity satisfactorily and this view was supported at the engagement events. Six consultees believed it did and one consultee did not state a fixed view. Seven consultees (JRR, S&P, SCPA, SSE, CAAV, MacR and SLE) considered that while negative equity is often caused by fluctuations in the property market, the CPO causes the hardship by forcing a sale at a time when no owner would choose to sell. Despite this, SCPA did not believe that the rule 2 element of compensation (see paragraph 11.21 of the DP) should take negative equity into account. They considered that introducing other proposals, such as a premium to reflect that the acquisition was compulsory, and an OLP, would, as a by-product, alleviate the issue of negative equity. LTS suggested that the law would be unsatisfactory if it did not permit a claim to be made, which might be under the heading of disturbance. The principle of equivalence, and full and fair compensation, might also help cover this point. S&P, DVS, CAAV and SLE referred to the proposals on negative equity in the (then current) DCLG consultation (DCLG Consultation 1) and agreed with the recommendation that it should be possible to transfer negative equity. SSE commented that while claimants should not be left with an additional burden as a consequence of market recession, they should also not be allowed to increase the debt ratio on a potential CPO asset to leverage financial betterment. They were concerned that careful consideration should be given to whether it was possible to legislate in a way that would be fair to all parties. MacR argued that paying open market value to the seller while the property was in negative equity, was not a fair reflection of equivalence and that the AA should not be permitted to take advantage of economic circumstances which were not of the owner's making. Where the AA was acting in support of a private venture, the inequity was greater, because the private entity was obtaining the land at a discount and taking advantage of the owner's misfortune. They

	suggested introducing a rule that the minimum compensation payment should be a figure that would leave the "seller" with no debt to any lender(s) with a heritable security over the property. RBS noted that, as a result of a CPO during negative equity, borrowers were unable to pay their outstanding loan in full, which could lead to litigation, an adverse credit entry for customers and a potential loss for the bank. While they worked with customers to find the best outcome to avoid this having a major bearing on customers' future financial positions, the law appeared to be inequitable for all parties. Borrowers were placed in this position solely as a result of the CPO. SPF considered that the landowner and security holder should be protected from financial loss caused by the timing of a CPO unless there was an overwhelming public interest not to do so. RC and SOLAR noted that negative equity could arise due to the operation of the market, and not as a result of the CPO scheme itself. Therefore the public purse should not plug the gap for either owner or the security holder, although home loss, disturbance and rehousing options should be fully explored. They also sought clarification that any existing heritable security over a property being compulsorily purchased, would be extinguished, and any arrangements to address the negative equity portion should be between the owner and security holder. Clarification was also needed on how to treat the competing claims of an owner and security holder, and the extent to which the AA could discharge its obligations to both. OM stated it was difficult to see how any provision could be justified which would mean that more compensation is paid to somebody who had incurred borrowing than to another who had not. She referred to cases where negative equity had prevented some AAs from progressing a project and stated it might be appropriate for a scheme to be put in place to would allow AAs to deal with such issues. Six consultees (WLC, EAC, NG, ACES, S&W and SW) considered that the current law took account of negative equity satisfactorily. S&W stated that compensation should be based on equivalence but conceded that there could be difficulties for individuals. LSS recognised the potentially harsh effects when property was compulsorily acquired in a descending, then rising, market, but could not envisage what changes could realistically be made. For ease of reference the relevant paragraphs of the UK Government's Response to the DCLG consultation, referred to in some submissions, are set out below. Technical consultation on improvements to compulsory purchase

	processes - Government response to consultation by the DCLG, October 2015 Transferring mortgages to avoid negative equity 83. A compulsory purchase order causes any negative equity to 'crystallise' and leaves the claimant with a large unfunded debt to repay, causing them financial hardship and severely eroding their credit worthiness. The consultation sought views on working with mortgage lenders and the Financial Conduct Authority to secure a voluntary agreement on porting mortgages of compulsory purchase claimants that are in negative equity and thereby avoid the debt materialising. Summary of responses 84. Respondents were overwhelmingly supportive of a voluntary agreement by lenders. Respondents agreed with the principle of addressing these unintended consequences of the compulsory purchase process. However, several respondents (most notably from the finance industry) acknowledged this was a very complex area and there are a number of challenges that would need to be addressed. 85. Again respondents overwhelmingly agreed to implementing protections through legislation should a voluntary solution not be possible in practice. Government response 86. The government is committed to making the system fairer for all and a fundamental part of this is ensuring that the compulsory purchase regime does not unfairly impact on claimants' credit worthiness. Responses indicate that cases are rare, but can have adverse consequences for affected parties. The government acknowledges the strong support for pursuing a voluntary solution and will work with lenders and regulators to achieve this. If this is not successful, the government will seek a remedy through legislative means.

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

(Paragraph 11.53)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
7. West Lothian Council	Agreed. This appears to be fair and reasonable.

10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We believe so. There were two equivalent reinstatement cases on the AWPR. The complexity and cost of equivalent reinstatement means that an acquiring authority deliberately avoids any likelihood of a Rule 5 claim. There is an issue with regard to Rule 5 and that is in regard to case law which provides that where the premises are too big for the particular purpose, reinstatement is based on something more suitable. The District Valuer resisted the reverse being applied in respect of one of the AWPR Rule 5 claims where business was such that expansion should have taken place. This merits consideration.
16. Scottish Compulsory Purchase Association	This proposal is supported.
19. Odell Milne	Agreed.
20. SSE plc	We believe that the current Rules 2, 4 and 5 should be included in the proposed new statute on the following grounds: Rule 2 provides that the value of land shall be taken to be the amount which the land is sold in the open market by a willing seller. Any willing seller would always seek to maximise its sale price if selling the asset voluntarily and therefore this premise should stand in the case of a forced disposal. Rule 4 ensures that the value of land must recognise the lawful use of the asset and the case of the 10 year rule whereby planning enforcement can't be served must be recognised. However a certificate of lawful development should not be deemed necessary in order to prove the case for established use but the onus must fall on the willing seller to evidence and indeed warrant that the ongoing operations had indeed taken place over the ten years. Rule 5 should continue to be included within the statute and the onus on any claimant to demonstrate compliance with the following criteria must be included within the statute: (1) the property must be devoted to a particular purpose; (2) there must be no general demand or market for land for that purpose; and (3) there must be a bona fide intention to reinstate the property in some other place.
21. District Valuer Services	Yes.
23. Central	Yes. Again, these have the merit and sanction of long practical

Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	experience in responding to the varied circumstances that can be found. Equivalent reinstatement is a necessary, if occasional, option to do justice to some affected parties in special positions though increasingly demanding building regulations and licensing requirements may make it a little more common in future. We understand that it was needed twice for particular situations affected by the AWPR. In England, the long run in to the HS2 project has brought sharply into focus the problem faced by many claimants who intend to replace buildings or premises which will be acquired for the scheme. Farmers, in particular, will often have suitable land on which they could site replacement buildings to allow the business to continue, but they face costs and delays when the local planning authority resists an application for planning consent. It would be helpful if planning guidance was issued which highlighted this problem and advised planning officers to take a positive approach to assisting those affected in re-locating buildings to a suitable site. A practical problem with equivalent reinstatement is that case law indicates that where the premises are too large for the particular purpose, reinstatement is based on something more suitable but does not provide for the alternative position where they can be shown to be too small.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes, agreed.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of proposal	The six rules are currently set out in section 12 of the 1963 Act. Rule 2 provides: "The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise." Rule 4 provides: "Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account." Rule 5 provides: "Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbiter is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement". The proposal was that similar provisions should be included in the proposed new statute.
Summary of responses and analysis	18 consultees responded to this proposal and unanimously considered that provisions along the lines of rules 2, 4 and 5 should be included. S&P and CAAV had both encountered a practical problem with equivalent reinstatement in a situation where the current premises were too small, and expansion would have taken place. Case law only dealt with premises which were too large for the particular purpose, where reinstatement must be based on something more suitable. They stated that the statute should also provide for the alternative position, where the premises could be shown to be too small. CAAV referred to issues in England in the long run-in to the HS2 project, where farmers wished to site replacement buildings but faced costs and delays when the local planning authority resisted applications for planning consent. It would be helpful for planning guidance to be issued to highlight this problem, and to advise planning officers to take a positive approach to assisting those affected in re-locating buildings to a suitable site.

	SSE stated that rule 4 ensured that the value of the land must recognise the lawful use of the asset, and it must take into account any rule setting out a time period within which planning enforcement cannot be served. Although a certificate of lawful development should not be necessary to prove established use, the onus must fall on the willing seller to evidence and warrant that the ongoing operations have taken place over the relevant period.

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

(Paragraph 11.55)

Respondent	
1. Professor Jeremy Rowan Robinson	This is a difficult question. If land is not devoted to a purpose for which there is no general demand or market, it presumably has, or may have, a market value and Rule 5 would not apply. I think the English Law Commission's proposal more properly reflects what Rule 5 is trying to achieve. [Law Com 165 Paragraph 5.54 Proposal 6: Equivalent reinstatement (1) Subject to (2), where (a) the subject land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and (b) reinstatement in some other place is genuinely intended, compensation shall (at the option of the claimant) be assessed on the basis of the reasonable cost of equivalent reinstatement. (2) Compensation on this basis may be refused by the Tribunal, if satisfied that it is in all the circumstances unreasonable, having regard to the cost to the authority and to the likely benefit to the claimant). (3) Compensation on the equivalent reinstatement basis shall, at the election of the claimant, be paid in the circumstances set out in 1973 Act, s45 (dwellings especially adapted for the disabled).]
7. West Lothian Council	Agreed that this test should be retained.
10. Renfrewshire Council	Yes – Any CPO should only be promoted for a devoted purpose, albeit it could be for the better wellbeing of the area without being

	too specific.
13. Strutt & Parker LLP	This should be retained.
16. Scottish Compulsory Purchase Association	It is considered that such a test should be retained.
19. Odell Milne	Agreed.
20. SSE plc	We believe that the wording “devoted to a purpose” and “normally used” should be maintained to accord with the extant position within England.
21. District Valuer Services	Yes, the phrase is well understood by the courts, Tribunals and agents. We do not see any advantage in replacing it with the alternative discussed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	In agreement with the Law Commission’s [for England and Wales] proposal of “adapted and normally used”.
26. National Grid plc	As this is the test in England this would retain consistency and the “devoted to a purpose” test should be retained.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	Yes.
36. Scottish Power Ltd	We believe that the ‘Devoted to Purpose’ test should be retained.
38. MacRoberts LLP	Yes, although some softer version might be better, e.g. the "adapted and normally used" wording. What about cases where property is not "devoted" to a purpose, but still has no general demand or market? Of course, such cases may be so vanishingly rare that there is no need to distinguish.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	There seems to be merit in adopting the Law Commission’s [for England and Wales] proposals to replace this with the “adapted and normally used” test but we should wish to know why that was not accepted in English legislative reform. We believe that there is a

	difference between “adapted” and “devoted”.
42. Scottish Water	Yes.
44. Scottish Property Federation	We would resist the temptation to be overly specific in designing the test to be incorporated into the new Statute. The paper notes the Law Commission’s suggestion of ‘adapted and normally used’ – this appears to allow a better interpretation than ‘devoted to a purpose’.
45. Scottish Power Energy Networks Holdings Ltd	We believe that the ‘Devoted to Purpose’ test should be retained.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	This question is linked to proposal 77 and questions 79 and 80 as the “devoted to a purpose” test is one of the three criteria in rule 5. It has been taken to mean that the land must be “given up wholly or exclusively” to a particular purpose at the date of notice to treat (*Vaughan v Cardiganshire Water Board* at page 199). This question asked whether, if a provision along the lines of rule 5 is included in the proposed new statute, the test should be retained.
Summary of responses and analysis	20 consultees responded to this question. 16 agreed that a test along the lines of the “devoted to a purpose” test should be retained. Four preferred a different test. Of those who agreed, SSE believed the wording “devoted to a purpose” and “normally used” should be maintained to accord with the current position in England. DVS could see no advantage in replacing the current phrasing of the test, as it was well understood by the courts, tribunals and agents. MacR agreed with retaining the current test but also wondered whether a softer version, such as “adapted and normally used”, might be better at providing for difficult situations where the property had no general demand or market and was not “devoted” to a purpose. Four consultees (JRR, EAC, LSS and SPF) supported the proposal of the Law Commission for England and Wales (Law Com 286, paragraph 4.53) to use the “adapted and normally used” test. JRR argued that that proposal more properly reflected what rule 5 was trying to achieve. He noted that if land was not devoted to a purpose for which there was no general demand or market, it presumably had, or may have, a market value, and rule 5 would not apply anyway. LSS believed that there was a difference between “adapted” and

	"devoted" and thought there was some merit in the Law Commission's proposal, but wished to know why it had not been accepted in English legislative reform. SPF wanted to avoid an overly specific test in the new statute.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, this seems reasonable. Presumably, this is the sort of consideration that would influence the Tribunal in deciding whether to exercise its discretion to award Rule 5 compensation.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	No. Equivalent reinstatement is only used in cases where there is no open market available. It could transpire that market value (and disturbance) would offer an increased level of compensation (albeit not in most circumstances) as equivalent reinstatement normally proves the more costly.
13. Strutt & Parker LLP	On the route of the AWPR; the Aberdeen International School and Parkhill Cattery & Equestrian Centre gave rise to claims under Rule 5. The rebuild of the School was reputed to have cost £51M and the Cattery and Equestrian Centre £3M. In both cases the costs of reinstatement were substantially greater than market value because of the cost of complying with modern building regulations in respect of any new build. The need for Rule 5 in both the AWPR cases would have been avoided with fairly minimal route adjustment (50 [metres] in respect of the equestrian centre). This emphasises the importance of acquiring authorities properly evaluating route options and having regard to the effect of their proposals. In respect of paragraph 11.60 [of the DP] we agree that any claimant for equivalent reinstatement should not be required to '*demonstrate that the cost of equivalent reinstatement would not be unreasonably disproportion at to the public or social value of the building in question and the activity carried out therein*.' This seems to be an overly harsh test. In respect of paragraphs 11.61–65 [of the DP] it is noteworthy that elsewhere the equivalent reinstatement might be reduced by the amount by which the value of the property might be improved. The

	problem, however, is that both the AWPR instances the owners might not be in a position to pay this 'top-up', and do not need a new building anyway, the current one being entirely satisfactory for their purposes. Were it not for the scheme, reinstatement would be unnecessary. We therefore have difficulty in regard to this proposal given that the equivalent reinstatement principle means that there is no market value *per se*. A claim for extinguishment following various LTS cases is 4-5 times profit. In such circumstances, it might be difficult for the claimant to show that any compensation assessed under a Rule 2 situation would be insufficient.
16. Scottish Compulsory Purchase Association	In principle, in compensation claims the onus is on the claimant to prove loss and secondly the extent of that loss. In many cases of equivalent reinstatement, it is quite clear that Rule 5 should apply but there will also be a number of grey areas and in such circumstances the onus requires to rest with the claimant to demonstrate that Rule 5 is more appropriate than Rule 2 although it is recognised that it can be very difficult to determine a market value where no market is perceived to exist.
19. Odell Milne	Agreed, the onus should rest on the claimant to prove that the test is satisfied.
20. SSE plc	We believe that the proposed legislation should require the claimant to prove the case of equivalent reinstatement.
21. District Valuer Services	In principle, in compensation claims the onus is on the claimant to prove loss and secondly the extent of that loss. In many cases of equivalent reinstatement, it is quite clear that Rule 5 should apply but there will also be a number of grey areas and in such circumstances the onus requires to rest with the claimant to demonstrate that Rule 5 is more appropriate than Rule 2.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes – the onus should, in principle, be on the claimant to demonstrate that Rule 5 should be applied. The practical issue in that is that acquirers should consider premises likely to merit Rule 5 as part of the design of the scheme, especially where they are high value ones, since redesign or accommodation works may prove the more sensible answer. We agree that (as said in paragraph 11.60 [of the DP]) claimants for equivalent reinstatement should not be required to 'demonstrate that the cost of equivalent reinstatement would not be unreasonably disproportionate to the public or social value of the building in question and the activity carried out therein' as this seems to be an overly harsh test.

	Once proven, this approach should not be subject to any reduction by the amount by which the value of the property might be improved by the reinstatement. That would be contrary to the purpose of Rule 5 while the owners might not be in a position to pay that sum and might not have needed a new building but for the scheme. Were it not for the scheme, reinstatement would be unnecessary.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Perhaps the onus should be shifted to the acquiring authority to defend its valuation as being sufficient to resume the activity elsewhere. It is the acquiring authority who is inconveniencing the claimant, so requiring the claimant to make the running, possibly at some cost to them, e.g. for an independent valuation, seems unfair, and may serve to reinforce a perception that the process is adversarial.
39. Scottish Land and Estates	Farms and other rural businesses often find that compensation in cash terms fails to meet their needs, particularly where farm buildings and houses may be taken by the project, or physically cut off from the farm so they are no longer viable or significantly less valuable. The market value of farm buildings may be low but these buildings will often be essential to the running of the business. Reform should recognise that provision should be made for the replacement cost where essential buildings have been taken. A further issue arises in relation to farm and other buildings located in the greenbelt and other protected areas: planning policy may stop the replacement of farm or other rural buildings and, in particular, replacement dwellings in the countryside.
40. Law Society of Scotland	We believe that there is merit in this proposal.
42. Scottish Water	Yes.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	This question is linked to proposal 77 and questions 78 and 80. If provisions along the lines of rules 2 and 5 are included in the proposed new statute, this question asked whether the claimant should have to show that compensation on the basis of market value (and disturbance, where appropriate) would be insufficient and that valuation under rule 5 would be necessary for the activity to be resumed on another site.
Summary of responses and analysis	17 consultees responded to this question. 13 answered "yes". Three (RC, S&P and MacR) disagreed and one (SLE) raised two related issues. Of those answering "yes", JRR considered this was reasonable and would be the type of consideration which would influence the LTS in deciding whether to exercise its discretion to award rule 5 compensation. SCPA and DVS noted that in compensation claims the onus was on the claimant to prove loss and the extent of that loss. While in many cases it was clear that rule 5 should apply, there were grey areas, where the onus required to rest with the claimant to demonstrate that rule 5 was more appropriate than rule 2. However, it could be very difficult to determine a market value where no market was perceived to exist. CAAV agreed that the onus should be on the claimant but stated that the practical issue was that AAs should consider whether there were any premises likely to merit rule 5, as part of the design of the scheme. Of those who answered "no", RC argued that equivalent reinstatement should only be possible if there was no open market available. S&P were concerned that it might be difficult for claimants to show that compensation assessed under rule 2 would be insufficient as there was no market value. MacR considered that the onus should be shifted to the AA, as the instigator of the process causing the inconvenience, to establish that their valuation was sufficient to allow the claimant to resume the activity elsewhere. As a result this might reduce the perception of an adversarial process. SLE noted that farms and other rural businesses often found that the compensation in cash terms failed to meet their needs. In particular, farm buildings and houses might be taken by a project or physically cut off, making them no longer viable or significantly less valuable, and while the market value for them was low, they could still be essential to the business. Any reform should recognise the replacement costs where essential buildings had been taken. There

	was also the issue of buildings located in greenbelt and other protected areas, as planning policy might stop replacement of farm or other buildings and, in particular, the replacement of dwellings in the countryside. Both S&P and CAAV agreed with paragraph 11.60 of the DP, which suggested that a claimant should not be required to "demonstrate that the cost of equivalent reinstatement would not be unreasonably disproportionate to the public or social value of the building in question and the activity carried out therein". SCPA and CAAV noted the issue whereby the compensation received under the rule for equivalent reinstatement was reduced by the amount by which the value of the property was improved. They considered that the owners might have been entirely satisfied with their current building and may not be in position to pay for this improvement. CAAV considered this contrary to the purpose of rule 5, as reinstatement would have been unnecessary without the scheme.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	It has always been the case with Rule 5 that there must be a bona fide intention to reinstate so it would not be unreasonable to impose such a condition. However, if the condition is breached, you may need to spell out the alternative measure of compensation? The land is devoted to a purpose for which there is no market so Rule 2 cannot apply.
7. West Lothian Council	Agreed. The purpose of compensation is to put the individual into the position they were in before the loss or damage occurred.
10. Renfrewshire Council	Yes. Equivalent reinstatement compensation should be such that once agreed the applicant must use the compensation to properly reinstate.
13. Strutt & Parker LLP	This seems to be a reasonable condition. It is our experience that in the AWPR Rule 5 claims Transport Scotland paid in instalments based on certification by project managers of the actual costs of reinstatement. We see no reason that the LTS or an Acquiring Authority should not be entitled to impose similar restrictions.

16. Scottish Compulsory Purchase Association	It is considered that the LTS should be so entitled. Please refer to the responses to earlier questions on this topic.
17. Lands Tribunal for Scotland	We are aware of cases where an acquiring authority voluntarily carry out the reinstatement on behalf of the claimant. In such situations there may be a case for tying any additional compensation to the *de facto* use of the new property by the claimant for the original purpose recognised under Rule 5. But we think there will be considerable difficulty in providing compensation only when the reinstatement takes place, since in many cases the claimant will be unable to acquire and build on new land without the compensation first.
19. Odell Milne	Agreed.
20. SSE plc	We believe that the LTS should be entitled to impose conditions on the payment of equivalent reinstatement in order that any compensation is appropriately used for reinstatement. Furthermore the claimant should be subject to full auditing and/or reinstatement payments made on a stage basis when evidence of any expenditure can been satisfactorily proven.
21. District Valuer Services	Yes, see response to Q55. It should be noted that under current law the claimant may ask for the money up front, and the acquiring authority might have no option but to pay it out. It therefore makes sense for conditions to be able to be imposed. However, in practice, it would be the acquiring authority who would be dealing with the acquisition and it should be for them to set the conditions, subject to appeal to the LTS. [Response to proposal 55 This proposal is supported. Rule 5 claims are rare but, where they exist, re-instatement work can happen either before or after the vesting date dependent upon circumstances (usually dictated by the ability of the claimant to secure an alternative site and all appropriate consents and warrants). It is normal practice for the acquiring authority to create a bank “float” from which the claimant can draw down the relevant monies to pay the contractor who usually requires to be paid monthly on a staged payment basis meaning that interest payments are not necessary. The relevant monies to be paid can be scrutinised/checked by the acquiring authority. In addition, the acquiring authority should take steps to ensure that any compensation monies paid to the claimant are only used to pay the contractor.]

23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	No. We agree with the views expressed in the Discussion Paper in paragraphs 11.64 and 11.65.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	In line with the 'good faith' requirements for this particular provision, we consider it important for the LTS to exercise a degree of control to ensure that the compensation awarded is applied to equivalent reinstatement.
42. Scottish Water	Yes
Further responses, either made informally or at engagement events	None.

Analysis

Explanation of question	This question is linked to proposal 77 and questions 78 and 79.
Summary of responses and analysis	17 consultees responded to this question. 16 answered "yes", of which two raised further issues. One (S&W) answered "no". Of those agreeing, JRR considered that it would not be unreasonable to impose conditions to ensure compensation was properly used for reinstatement, but noted that if the conditions were breached, there might need to be an alternative measure of compensation, as rule 2 could not apply where there was no market. WLC and RC considered that the purpose must be to ensure that the claimant uses the compensation to reinstate them to the position they were in before the loss or damage occurred. S&P and SSE considered that the LTS should be entitled to impose conditions to ensure that payments were made by instalments based on certification, which was the method applied by TS in AWPR cases. S&P also considered AAs should be able to impose such conditions. SSE considered that the LTS should be able to impose conditions on

	the payment of equivalent reinstatement to ensure that the compensation was appropriately used for reinstatement, with the claimant being subject to full auditing. DVS noted that, under the current law, if requested by the claimant, the AA may need to pay compensation up front, so that imposing conditions on such payment conditional would be beneficial. They stated that, in practice, it would be the AA which was dealing with the acquisition and it should be for them to set the conditions, subject to an appeal to the LTS. LTS stated that they were aware of cases where AAs had voluntarily carried out the reinstatement on behalf of the claimant, and therefore there may be a case for tying any additional compensation to the *de facto* use of the new property. However, they believed that there would be considerable difficulty in providing for compensation to be paid only at the time when reinstatement takes place, since in many cases the claimant would be unable to acquire and build on new land without receiving the compensation first. S&W answered "no", but did not directly answer the question, referring instead to paragraphs in the DP which discussed whether claimants should be responsible for additional costs.

81. **How should the "scheme" be defined?**

(Paragraph 12.78)

Respondent	
1. Professor Jeremy Rowan Robinson	[Answer to questions in Chapter 12] These are the most difficult questions in the whole paper and it will be a brave person who attempts an answer. I am going to duck the questions and state what in my view should be the approach to answering the questions. In general terms, my view is that any re-formulation should try and keep as close as possible to the principle of value to the seller in the open market. In other words, if a person selling in the open market would benefit from an uplift in value as a result of what has been done or is proposed to be done by a public authority, then that is the basis on which compensation should be assessed. If a public body then finds itself paying a price inflated by its own efforts, that is unfortunate. Betterment of that sort is really a matter for national or local taxation and it is unfair to deny that value to an owner simply because his or her land is being compulsorily acquired. Of course, logic suggests that the converse in terms of reflecting a downturn in value should also apply. It is only increases and decreases in value which would not be reflected in the market which should be disregarded when assessing compensation. In other words, the scheme would not be something that affects wider

	market values but only the value of the subject land. I realize that this is a bit simplistic!
6. Craig Connal QC	[Answer to questions in Chapter 12] These are difficult questions to which I do not pretend to have the answer. The logical starting point ought to be that one should aim to come as close as possible to true value. In addition the fewer artificialities about that process, including artificial assumptions, the better. While an artificial situation is being considered the closer that resembles reality, the better.
7. West Lothian Council	A wide definition of scheme would be preferred.
10. Renfrewshire Council	The scheme is the purpose for which the Council is acquiring the subject property, e.g. regeneration, new road, new school etc. As is the practice the valuation should be based on the no–scheme world.
13. Strutt & Parker LLP	The issues arising in *Spirerose* [*London –v- Spirerose* [2009] 1 W.L.R. 1797] can be seen in respect of *Strang Steel –v- The Scottish Ministers* [2015 S.L.T. (Lands Tr) 81]. It is hard not to feel that the consequence of the present legislation in that case was unjust. We agree that reform is overdue.
16. Scottish Compulsory Purchase Association	The scheme should be defined as the relevant Compulsory Purchase Order which has been instigated by an acquiring authority in connection with the provision of a public work which is the statutory responsibility of that acquiring authority: if that Compulsory Purchase Order is one of several Compulsory Purchase Orders being implemented to undertake the assembly of land then all such related Compulsory Purchase Orders should be considered as forming the scheme.
17. Lands Tribunal for Scotland	[Answer to questions in Chapter 12] There are genuine valuation problems caused by not being able to define the scheme, particularly when it is, say, phased over a long time (e.g. a new town), but for most cases it should be clear. We think there should be some flexibility in any definition since a common sense approach (as in *Waters* discussed at [paragraph] 12.50 [of the DP]) could be prevented by over prescriptive language.
19. Odell Milne	I consider that the "Scheme" should be defined as the relevant CPO but if there are several CPOs being promoted to assemble land (such as is the case for the A9), then all related CPOs should be considered to form "the Scheme".
20. SSE plc	The scheme should be defined as the works/project set out by the acquiring authority as defined in the CPO notice.

21. District Valuer Services	The provisions in the Localism Act 2011 could be incorporated into the law in Scotland. The new sub section (5) of Section 14 of the 1961 Act [Land Compensation Act 1961] deals with definition of the scheme in a simple way, and subsection (8) deals with any event of disagreement over this, which can be dealt with by the LTS in Scotland.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Accumulating case law on the difficulties thrown up in practice by the present legislation suggests that reform is overdue. We simply suggest that the scheme should be defined by the relevant Compulsory Purchase Order (or where there are several connected Orders assembling land, all those Orders).
26. National Grid plc	The definition of scheme will require to be considered on a case by case basis. It should be defined with reference to the CPO and the statement of reasons.
31. Association of Chief Estates Surveyors Scottish Branch	Normally this should be the relevant CPO but it should be recognised that there could be a wider scheme such as when the CPO is being used to complete land assembly. Use of planning unit might be more useful definition.
35. Shepherd and Wedderburn	This is a very difficult question to answer clearly and concisely. We believe however that "the scheme" should be considered broadly and not just be reference to an individual compulsory purchase order which clearly forms part of a much larger project
36. Scottish Power Ltd	We consider that the Scheme should be defined along the lines of "*the purpose for which the land is being compulsory acquired*".
38. MacRoberts LLP	Carefully. The judgement in *Waters v Welsh Development Agency* [[2009] 1 WLR 1797] provides some good guidelines, perhaps. [See discussion in the DP, paragraphs 12.50-12.59.]
39. Scottish Land and Estates	We will leave this for others to provide detailed comment, suffice to say that the scheme should be defined by the relevant CPO.
40. Law Society of Scotland	The scheme is the project underpinning the CPO and there are difficulties and uncertainties in a clear cut statutory rule that requires the effects of the scheme to be disregarded in the assessment compensation. We would support a statutory mechanism to disregard the scheme.
41. Judges of the Court of Session	[General Comments] Considerable case law exists, and it is true that litigation involving compulsory purchase comes before the courts on a regular basis. Nevertheless, the function of the judges is to apply the statutory

	scheme and to ensure that that scheme works in practice in a fair and efficient manner. That will normally involve a purposive and contextual interpretation of legislation, and we think that it is important that the fundamental policies underlying legislation should be made as clear as possible. Provided that this is done, we have little doubt that the judges of the Court of Session can continue to apply the statutory scheme in an appropriate way. [Answer to Chapters 10-17 on Compensation and Valuation] While the courts are frequently called upon to adjudicate on questions relating to compensation and valuation, the task that they perform generally involves interpretation of the legislation together with the application of general principles of judicial review.
42. Scottish Water	The scheme should be defined in terms of the proposed development, including any phased additions.
44. Scottish Property Federation	The discussion paper is uncomfortable with the status of rule 3 and its basis in public policy. We do not comment here and suggest that until the views of Ministers are known on what is and is not acceptable grounds for compensation as a result of the scheme in question, then it seems to us to be difficult for the SLC to make firm proposals to achieve the level of transparency in the new Statute that would be deemed to be welcome by improving on the current status of Rule 3.
45. Scottish Power Energy Networks Holdings Ltd	We consider that the Scheme should be defined along the lines of "*the purpose for which the land is being compulsory acquired*".
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	The DP demonstrated how difficult it had been for valuers to carry out the valuation process when the legislation and the case law had not produced a clear structure or a clear definition of the scheme. This question sought views on how the scheme should be defined.
Summary of responses and analysis	22 consultees addressed this question. 12 suggested that the scheme should be defined as the purpose for which the AA is acquiring the subject property contained in the CPO. Seven consultees preferred a wider definition of the scheme, incorporating the definition of the subject property contained in the CPO but also including any other property contained in CPOs being promoted for the underlying scheme. S&W believed that the scheme should be considered broadly and not just by reference to an

	individual CPO if it clearly formed part of a much larger project. ACES suggested that it should normally be based on the relevant CPO but it should be recognised that there could be a wider scheme, such as when the CPO was being used to complete a land assembly. They suggested that the use of a planning unit might be more useful in these circumstances. NG said that the definition of the scheme would require to be considered on a case by case basis but that it should be defined by reference to the CPO and the statement of reasons. LTS considered that although there could be genuine problems with defining the scheme, e.g. where it was phased over a long period, the extent of the scheme would usually be clear. However, there should be some flexibility to allow a common sense approach, such as in *Waters* (discussed in paragraphs 12.50 to 12.59 of the DP), which might be prevented by introducing over-prescriptive language. DVS suggested that the relevant provisions in the 2011 Act should be incorporated into Scots law. They argued that under the new provisions inserted into the English 1961 Act, s 14(5) defined the scheme in a simple way and s 14(8) set out how to deal with any disagreements, which, in Scotland, could be addressed in the LTS. S&P considered that the current legislation produced unjust consequences, using the example of *Strang Steel v The Scottish Ministers,* and argued that reform was overdue. MacR suggested using the guidelines from *Waters v Welsh Development Agency*. There have also been recent proposals in England which are relevant to this issue. Paragraphs 17 and 18 of DCLG Consultation 2 referred to a proposal to extend the definition of 'the scheme'. Some regeneration schemes only become viable due to public expenditure on transport infrastructure projects. However the transport projects themselves cause an increase in the value of the land. The consultation sought views on broadening the definition of the scheme, to be able to deem that the transport scheme also forms part of the regeneration project, meaning that it should be disregarded, along with the resulting increases in land value which it has caused. The land for the regeneration project would then be acquired at pre-transport scheme values, which would often result in less compensation being paid.

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?**

Respondent	
1. Professor Jeremy Rowan Robinson	[Answers to questions in Chapter 12] These are the most difficult questions in the whole paper and it will be a brave person who attempts an answer. I am going to duck the questions and state what in my view should be the approach to answering the questions. In general terms, my view is that any re-formulation should try and keep as close as possible to the principle of value to the seller in the open market. In other words, if a person selling in the open market would benefit from an uplift in value as a result of what has been done or is proposed to be done by a public authority, then that is the basis on which compensation should be assessed. If a public body then finds itself paying a price inflated by its own efforts, that is unfortunate. Betterment of that sort is really a matter for national or local taxation and it is unfair to deny that value to an owner simply because his or her land is being compulsorily acquired. Of course, logic suggests that the converse in terms of reflecting a downturn in value should also apply. It is only increases and decreases in value which would not be reflected in the market which should be disregarded when assessing compensation. In other words, the scheme would not be something that affects wider market values but only the value of the subject land. I realize that this is a bit simplistic!
6. Craig Connal QC	[Answers to questions in Chapter 12] These are difficult questions to which I do not pretend to have the answer. The logical starting point ought to be that one should aim to come as close as possible to true value. In addition the fewer artificialities about that process, including artificial assumptions, the better. While an artificial situation is being considered the closer that resembles reality, the better.
7. West Lothian Council	No. This would involve looking into the future. It is not appropriate to include a potential increase in value should a scheme go ahead.
10. Renfrewshire Council	No increase in the land being acquired should be taken account, as the authority should not require to pay increased compensation as a result of its proposals.
13. Strutt & Parker LLP	This is the concept of betterment. In our experience betterment is used by acquiring authorities to try to reduce compensation payable; often on the flimsiest of evidence. In the AWPR it is our experience that some DVs have argued betterment to provide a £nil in response to a claim for advance payment despite having been unable to speak to planning

	authorities. It seems to be unreasonable for a landowner with no land take to enjoy the full fruits of a scheme but an immediate neighbour whose land is being taken should have betterment deducted from his compensation. It suggests that a landowner who is affected by a scheme bears a disproportionate cost of its implementation.
16. Scottish Compulsory Purchase Association	As stated previously within this Response Paper, it is considered that open market value/market value is the appropriate basis for assessing heritable compensation. However, open market value/market value requires to be assessed in the hypothetical "no-scheme world"- whereby the underlying scheme of acquisition i.e. the public work is disregarded for valuation/assessment of compensation purposes. In the majority of cases, it is likely that the underlying scheme of acquisition will have blighted marketability and value over a period of time and thus it is considered, in equity, that such blighting effects should be ignored in assessing the heritable compensation. Thus, it also follows that in cases where an underlying scheme of acquisition enhances value e.g. a regeneration scheme or the acquisition (and only the acquisition) creates a specific enhanced special value of the land then that enhancement should also be disregarded. It is appreciated that the legislation should be as clear and unambiguous as possible but it has to be recognised that each case has to be decided on its own merits set against the above-stated principles.
19. Odell Milne	I do not consider that an increase in value of the land which results from the scheme should be taken into account for the purpose of assessing compensation. However, nor do I consider that the compensation should necessarily be discounted to reflect "betterment" since such a provision may unfairly treat those whose property is increased in value and against whom any loss is "set off" in comparison with those who do not suffer any set off but who have equally benefited from the scheme.
20. SSE plc	We believe that any increase in value of the acquired land as a result of the scheme must be excluded. Recourse should be had to the principle of equivalence – i.e. the landowner shall not be financially better off as a result of the scheme.
21. District Valuer Services	It should be ignored for reasons stated in *Pointe Gourde*. This is important in terms of the principle of equivalence. The market value requires to be assessed in the "no scheme world". This is the case with either enhancement or depreciation due to the scheme. The new Section 14 (5) of the 1961 Act introduced by the Localism Act 2011 addresses the *Pointe Gourde* principle.
23. Central Association of	Betterment is a more problematic concept in practice than it sounds.

Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Disregarding betterment arising from the scheme seems the correlative of disregarding blight arising from the scheme. A further issue is the equitable treatment of affected persons who have land taken when betterment may be offset against other compensation but it is not withdrawn from those who gain from the scheme but do not lose land. They might be competing with neighbours, yet the affected landowner bears a disproportionate cost of the scheme's implementation. It is a cause of concern that acquirers, naturally arguing their corner, can put undue stress on betterment in seeking to reduce liabilities when there may be no real case for that.
24. Shona Blance	Not unless you also explore and consider how Development Plans and the use of presumption against development impact, in the negative, on the position and value of the land acquired when it comes to development value for a CAAD.
25. East Ayrshire Council	No.
26. National Grid plc	No the scheme should be disregarded.
31. Association of Chief Estates Surveyors Scottish Branch	Market Value should be the expectation – there should be clear rules for dealing with cases where the uplift in value arises from the scheme. This should include Hope Value considerations.
36. Scottish Power Ltd	We believe that the 'no scheme world' valuation environment should be preserved.
38. MacRoberts LLP	On the whole, yes, albeit subject to some equitable limitation which does not cause the total compensation bill to become so expensive that the scheme cannot be pursued.
39. Scottish Land and Estates	Caution needs to be exercised here. It would be invidious for the acquiring authority to place undue emphasis on betterment to minimise their liability if this cannot be fully demonstrated or evidenced. A landowner may also bear a disproportionate cost from implementation of a CPO, but other neighbours might also share the overall "betterment". [Response dated 15 June 2016 We note that the acquiring authority will usually reduce the amount of any compensation received by the cost of any accommodation works which the acquiring authority carries out. It would seem in that regard that the effect of a scheme is being considered and so conversely it would be consistent for any increase as a result of the

	scheme to be taken into account.]
40. Law Society of Scotland	No, because that would lead to owners receiving more than fair compensation. Value should be assessed on value to the owner and not value to the purchaser. This could also frustrate projects by importing excessive compensation.
42. Scottish Water	No, this would be contrary to the principle of market value.
45. Scottish Power Energy Networks Holdings Ltd	We believe that the 'no scheme world' valuation environment should be preserved.
Further responses, either made informally or at engagement events	None.

Analysis

Explanation of question	Currently, when assessing compensation for compulsory acquisition of a defined parcel of land, no account is taken of an increase in value of that parcel of land if the increase is entirely due to the scheme involving the acquisition. This question asked whether the current position should continue.
Summary of responses and analysis	20 consultees responded to this question. 14 consultees did not agree that an increase in value of the land as a result of the scheme should be taken into account for the purpose of assessing compensation. Three consultees agreed that any increase should be taken into account. Three consultees (S&P, CAAV and SLE) discussed the pros and cons of betterment. The responses on betterment have been moved to Chapter 15. The three consultees (JRR, CC and MacR) who agreed that any increase should be taken into account, argued that compensation should be assessed at the value to the seller in the open market. CC argued that where it was necessary to examine an artificial situation, the closer that resembled reality, the better. MacR advised that there should be some equitable limitation to ensure that the compensation bill did not stop the scheme being pursued. SLE argued that as, when calculating compensation, the AA takes account of some effects of the scheme (such as by deducting the cost of accommodation works) then, conversely, it would be consistent for any increase in costs, as a result of the scheme, to be taken into account. 14 consultees (WLC, RC, SCPA, OM, SSE, DVS, SB, EAC, NG, ACES, SP, LSS, SW and SPEN) answered "no". WLC argued that it

	would not be appropriate to consider a future potential increase if a scheme proceeded. RC argued that AAs should not be required to pay more compensation as a result of their proposals. SCPA requested clear and unambiguous legislation that would assess compensation in a no-scheme world, but would allow for each case to be decided on its own merits. DVS supported the changes in England which were introduced by the amendment to s 14(5) of the 1961 Act, and which addressed the *Point Gourde* principle.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	[See answer to question 81.]
6. Craig Connal QC	[See answer to question 81.]
7. West Lothian Council	It should be disregarded entirely.
10. Renfrewshire Council	As per [question] 82 the authority should not be required to pay compensation as a result of increased value through its promoted scheme.
13. Strutt & Parker LLP	See [answer to question 82] above.
16. Scottish Compulsory Purchase Association	See our response to question 82 above.
19. Odell Milne	See [answer to question] 82.
20. SSE plc	Please refer to the statement in proposal 82. Again, we do not believe that the increase in value on adjacent land should be taken into account.
21. District Valuer Services	As Q82 response
23. Central Association of Agricultural Valuers and Scottish	Completely. If it is to be recognised, there should be some threshold for that.

Agricultural Arbiters and Valuers Association	
24. Shona Blance	If the purpose is to fairly compensate then it should be. Relates to the above point and the extent to which presumptions against development and the extent of the area covered by those, disadvantage unfairly the landowner.
25. East Ayrshire Council	No increase in a "no scheme world".
26. National Grid plc	It should be disregarded.
36. Scottish Power Ltd	We consider that this effect should be totally disregarded.
38. MacRoberts LLP	It should be disregarded in the (perhaps unlikely) event that there is a discounting effect on the value.
39. Scottish Land and Estates	There should be some form of test established or at the least a threshold.
40. Law Society of Scotland	Any increase in the value of the land in these circumstances should be disregarded. We refer to our comments at question 82.
42. Scottish Water	100%.
45. Scottish Power Energy Networks Holdings Ltd	We consider that this effect should be totally disregarded.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	This question is linked to question 82, and asked whether an increase in the value of the land being acquired, as a result of the effect of the scheme on other land being acquired, should be disregarded.
Summary of responses and analysis	19 consultees responded to this question. 18 answered that any increase should be disregarded. One (MacR) disagreed. Nine consultees (JRR, CC, RC, S&P, SCPA, OM, SSE, DVS and LSS) referred to their answer to question 82, namely that it should be disregarded. Eight consultees (CAAV, WLC, EAC, SP, NG, SW, SPEN and LSS)

	believed any increase in value in land should be completely disregarded. CAAV and SLE commented that if regard is to be taken of the other land, then there should at least be a form of test or threshold to decide this issue. SB considered that any increase should be disregarded if the purpose was to fairly compensate. Taking the contrary view, MacR argued that any increase should only be disregarded in the (perhaps unlikely) event that there was a discounting effect on the value.

84. **Should any such disregard be limited by reference to the time elapsed since the adoption of the scheme or, if not, on what alternative basis should or might it be limited?**

(Paragraph 12.78)

Respondent	
7. West Lothian Council	In the event that the scheme is to be adopted in such a short period of time that it would not be reasonable to disregard its effect on the valuation of the land that could be considered, but it would be difficult to make provision for this. However, any disregard should be applied to limit compensation on the basis of speculative or theoretical elements of value.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	Blight can occur from the date of announcement of a scheme. In respect of the AWPR the sale of a house on the revised route fell through the day the Minister announced the Fastlink proposal. Recent announcements of various proposed routes for the improved A96 have created uncertainty for property owners along the proposed route corridors.
16. Scottish Compulsory Purchase Association	As stated above, it is much more common for CPOs (and even the mere threat of compulsory purchase) to generate blight on property values and such blight can arise prior to the promotion of the draft CPO- the promotion only tends to confirm the market's perception and gives rise to reality. More unusually, public work can enhance value. Thus, disregard of the scheme is necessary in either scenario and, on balance, such disregard should kick in at the date of the promotion of the draft CPO.

17. Lands Tribunal for Scotland	[See answer to question 81.]
19. Odell Milne	I do not consider that the relevant period is the time elapsed since the adoption of the scheme, rather than the stage at which the Scheme became widely known e.g. at the pre-CPO or earlier stage when a planning authority commences feasibility studies or allocates land for a scheme in a local development plan.
21. District Valuer Services	No, it would have to be matter of judgement. Any such insertion into the compensation code could lead to pressure on acquiring authorities to bring schemes forward or to locate them away from other schemes to minimise compensation payments.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	All assessments should be of the prospects as perceived as at the date of entry.
25. East Ayrshire Council	See answer to proposal 83.
26. National Grid plc	No there should be no limitation to any disregard.
31. Association of Chief Estates Surveyors Scottish Branch	Any value clearly attributable to the scheme should be disregarded – if a date is needed this should be the promotion of the draft CPO.
40. Law Society of Scotland	Such a time elapsed limitation of a disregard appears equitable.
42. Scottish Water	No, as it is very rare that a scheme would have been possible without the input of statutory powers. This is a separate issue from the acquisition of the property.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	This question follows on from question 83, which asked whether an increase in value of adjoining land being acquired should be disregarded. This question asked whether there were any circumstances under which the disregard might be limited or qualified.

Summary of responses and analysis	13 consultees responded to this question. Nine consultees (RC, S&P, SCPA, OM, DVS, EAC, NG, ACES and SW) believed that there should be no limitations. DVS considered this to be a matter of judgement and that such measures could put pressure on AAs to bring schemes forward or to locate them away from other schemes to minimise compensation. S&P stated that blight could occur from the date of announcement of a scheme. OM considered that the relevant period should be from the date at which the scheme became widely known, e.g. when a planning authority commenced feasibility studies or allocated land in a local development plan. CAAV stated that all assessments should be of the prospects as perceived as at the date of entry. WLC and LSS considered possible limitations of the disregard. WLC stated that it might not be reasonable to disregard the effect on valuation where a scheme was to be adopted within a short period, but it would be difficult to make provision for this. However, any disregard should be applied to limit compensation on the basis of speculative or theoretical elements of value. LSS argued that a time-elapsed limitation of a disregard would be equitable. LTS commented that any limitation or qualification should be flexible to allow a common sense approach in cases where there were genuine valuation problems.

85. **Should the statutory planning assumptions apply to land other than the land which is compulsorily acquired?**

(Paragraph 13.14)

Respondent	
1. Professor Jeremy Rowan Robinson	The purpose of the assumptions is to try and bring the claimant as close to the open market position as possible. The application of the assumptions to land other than the land which is being compulsorily acquired would help to fulfil that purpose but I can see that it could raise difficulties in practice.
6. Craig Connal QC	Yes. This reflects reality.
7. West Lothian Council	No. The statutory planning assumptions should only apply to land which is compulsorily acquired.
10. Renfrewshire Council	Yes. When valuing an interest some guidance as to the likely planning consent that may or could be issued is required to assist the determination of the appropriate value of the subjects.
13. Strutt & Parker	We consider that the statutory planning assumption should apply to

LLP	other land on the basis that the other land is the retained land in a part-only CPO.
16. Scottish Compulsory Purchase Association	It is considered that the statutory planning assumptions should apply to other land on the basis that the other land is the retained land in a part-only compulsory purchase. Reference is made to Section 232 of the Localism Act 2011.
19. Odell Milne	I consider that statutory assumptions should apply to other land where that land is retained land in a part only compulsory purchase.
20. SSE plc	We believe that uniformity should exist for both England and Wales and for Scotland therefore cognisance of section 14 of the 1961 Act, pertaining to England and Wales, should be replicated for Scotland.
21. District Valuer Services	It is considered that the statutory planning assumptions should apply to other land on the basis that the other land is the retained land in a part-only compulsory purchase. Reference is made to Section 232 of the Localism Act 2011.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The statutory planning assumptions should be applied to other land where it is retained by an affected party.
25. East Ayrshire Council	No.
26. National Grid plc	No it should be for a claimant to provide evidence as to whether the assumptions should apply.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed
35. Shepherd and Wedderburn	Yes. The purpose of the section is to allow the affected proprietor to obtain the value he would have done in no scheme world. It seems to us artificial to look at the prospect of obtaining Planning Permission for the acquired land in conjunction with other land. The Landowner can, of course, apply for Planning Permission over land which is partly outwith his control. The Planning Permission itself does not necessarily enhance the market value of that party's land which might not increase to any great extent, depending on the particular factors of the case (e.g. the number of additional Landowners that would be required in order to make up the development site that benefited from the Planning Permission).
38. MacRoberts LLP	It should perhaps at least be considered where any value arising from statutory planning assumptions applied to land other than the

	land which is compulsorily acquired would accrue at the time of valuation, but not if the increase in value is merely speculative or hope value.
39. Scottish Land and Estates	Yes, where the other land is retained by the landowner.
40. Law Society of Scotland	We do not consider that the statutory assumptions should apply to "other land" as that may well lead to additional complexities and confusion. However, we do understand that in practice it is sometimes difficult to grapple with the application of planning assumptions attributable to an acquired plot in isolation from what would otherwise be a larger development.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Insofar as this feeds into the deemed market price, then yes.
Analysis	
Explanation of question	The statutory planning assumptions are contained in sections 22-24 of the 1963 Act, as amended. Equivalent sections for England and Wales were contained in the 1961 Act. However the 2011 Act amended the 1961 Act, to provide that the statutory planning assumptions should also apply to land other than the land which was being valued for compensation purposes. No equivalent amendment has been introduced in Scotland. This question asked whether the statutory planning assumptions should also apply to land other than the land which is being valued for compensation purposes.
Summary of responses and analysis	20 consultees responded to this question. 15 were in favour of the assumptions applying to other land, four (WLC, EAC, NG and LSS) were against this, and one (MacR) agreed that this should be considered. Of those who were against, WLC stated that statutory planning assumptions should only apply to land which is compulsorily acquired. NG stated that it should be for the claimant to provide evidence as to whether assumptions should apply. LSS considered that the assumptions should not apply to "other land" as it may lead to complexities and confusion, but understood that, in practice, it is sometimes difficult to grapple with the application of planning assumptions attributable to an acquired plot in isolation from what

	would otherwise be a larger development. Of those who were in favour, SCPA, SSE, DVS and FoA all pointed to the merits of the position in England and Wales. SSE referred to section 14 of the Land Compensation Act 1961, which was inserted by section 232 of the 2011 Act, to which both SCPA and DVS referred. S&P, SCPA, OM, DVS, CAAV and SLE all referred to the fact that the assumptions should apply where the "other land" is the retained land in a part-only CPO. JRR acknowledged that applying the assumptions to other land could raise difficulties in practice. MacR suggested that it should perhaps at least be considered, where any value arising from statutory planning assumptions applied to land other than the land which is compulsorily acquired, would accrue at the time of valuation, but not if the increase in value is merely speculative or hope value.

86. **Any existing planning permission should continue to be taken into account in assessing the value of the land to be acquired.**

(Paragraph 13.19)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. This appears to be reasonable.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported but only such permission achieved after 1963.
19. Odell Milne	Agreed, any existing planning permission should continue to be taken into account.
20. SSE plc	We agree that as planning runs with the land it is reasonable that

	the value of any extant permission should be considered.
21. District Valuer Services	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. This is a necessary part of the equitable treatment of an affected party.
25. East Ayrshire Council	Agreed.
26. National Grid	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	We agree.
36. Scottish Power Ltd	We are of the view that existing planning consents should be taken into account when valuing land to be acquired.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Yes, we agree with this proposal and is only fair.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees that existing planning permissions should continue to be taken into account.
44. Scottish Property Federation	We agree this should form part of the consideration.
45. Scottish Power Energy Networks Holdings Ltd	We are of the view that existing planning consents should be taken into account when valuing land to be acquired.
Analysis	
Explanation of proposal	None required.
Summary of responses and analysis	There were 23 responses to this proposal and all agreed that any existing planning permission should continue to be taken into account in assessing the value of the land to be acquired. SCPA added that this should only relate to permission achieved after 1963.

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

(Paragraph 13.22)

Respondent	
1. Professor Jeremy Rowan Robinson	It is neater and simpler if the date for applying planning policies and considering physical factors is the same and that would suggest the date on which the interests in land are taken to be fixed (i.e. the date of the notice to treat or deemed notice to treat). But I can see that might be harsh if there is a long delay between that date and the valuation date and planning policies change or land values rise or fall significantly in the meantime so there is something to be said for the date of valuation. If the latter date is close to the date on which interests are fixed, there is no problem. If there is delay, the date of valuation more closely reflects the position at the time when compensation is assessed. Of course, that may not always benefit a claimant. And see the answer to Q.100 below.
6. Craig Connal QC	The vesting date - but later planning permission would come into value in any event in a real valuation.
7. West Lothian Council	This should be the same as the relevant valuation date.
9. David Strang Steel	There are considerable issues here with the existing legislation which requires to be addressed. Firstly the very existence of a scheme may involve an element of protection in respect of any planning application on the affected land. The route for the AWPR was protected meaning that any planning application could not be determined as would have been the case in a no scheme world. It was for this reason that our planning application was not determined and we were unable to conclude our sale to Sainsbury. It is difficult to see why such planning protection should be allowed to continue. A landowner is prevent from exercising his normal property rights and has no means of obtaining compensation for any losses arising until the GVD, when market factors may have changed only due to the time delay. We are aware of a situation in Angus where a potential acquiring authority has used general planning conditions regarding protection of potential infrastructure to object to a planning application purely to reduce its exposure to compensation <u>even although no draft orders are in place.</u> We note your deliberations in respect of a Notice to Treat at [paragraphs] 7.26-7.29 [of the DP]. If a planning restriction is to be placed over affected land to protect land which might be subject to a CPO then it would seem reasonable that that should trigger compensation from the promoting authority.

10. Renfrewshire Council	There is a current 3 year rule to apply planning consent once obtained. However, I would not limit planning permission to this period, as it may be possible to obtain a new consent.
13. Strutt & Parker LLP	There are considerable issues here with the existing legislation which requires to be addressed. Firstly the very existence of a scheme may involve an element of protection in respect of any planning application on the affected land. The route for the AWPR was protected meaning that any planning application could not be determined as would have been the case in a no scheme world. It is difficult to see why such planning protection should be allowed to continue. A landowner is prevented from exercising his normal property rights and has no means of obtaining compensation for any losses arising until the CPO is implemented. Example 1: The situation pertaining in *Strang Steel –v- Scottish Ministers*. In this case a new route was chosen for the AWPR in 2006 and given protection by the planning authority. The route affected a field (known as Field 52) which was promoted for a supermarket. In a subsequent compensation claim the LTS found that "there was no reason to doubt that the Council would have granted planning [for a retail store and petrol filling station]…in the no scheme world" (Paragraph 102). They went on to state "on the balance of probability [planning consent] would have been granted on or before 2009" (Paragraph 109). Had this been the case the claimant could have sold the site to Sainsbury's for £10.25M. By the time of the GVD the potential sale price had fallen to £8M. In the event the landowner was only awarded £1.7M based on hope value Example 2: In a recent case in Angus (Angus planning reference 14/00428/FLUM) *Seagreen*, a body promoting an offshore windfarm, sought to use general planning policy to attempt to derail an application for a solar farm on land they wished to use as a substation for the windfarm notwithstanding the fact that no draft CPO was even in place. Their objection was on the grounds that it would increase the cost of their scheme! We note the Law Commission deliberations in respect of a Notice to Treat at [paragraphs] 7.26–7.29 [of the DP]. If a planning restriction is to be placed over affected land to protect land which might be subject to a CPO then it would seem reasonable that that should trigger compensation from the promoting authority. On balance we consider that any new legislation should provide that a landowner is free to act on his land as he sees fit until the CPO is implemented. If safeguarding is an issue in the refusal of any planning consent then a landowner should be able to require the

	authority promoting the scheme to purchase the property at market value (ignoring the effect on the value of the scheme).
16. Scottish Compulsory Purchase Association	On the basis of previous responses within this Response Paper, i.e. there should be a single compulsory purchase system involving a General Vesting Declaration then it is considered that the relevant date for determining existing planning permission would be the vesting date or if a positive CAAD had been achieved earlier, then that earlier date (see also question 99).
17. Lands Tribunal for Scotland	**Q87, 100 – 104; 109, 110, 111 – Planning Assumptions and Dates** We think it is fair to say that the less flexible is the relevant date for the fixing of planning and factual assumptions, the greater the certainty of rights but the greater risk of injustice. As we suggest at Q56 above there may be merit in a stated policy aim whether the fixing of relevant dates should prevail over the right to "full" compensation and equivalence, and whether a range of dates should be specified within which a discretion to fix compensation should exist. We illustrate the point with reference to hope value, but illustrations could no doubt be made in other types of claim: A difficult question is the date for fixing hope value. Hope value may exist in land even where there is no reference to it in a statutory or evolving development plan. But the value is date sensitive. Assume there is no CAAD issue, and also assume the site is not an allocated development site in the adopted development plan. The tortuous provisions of ss 22 – 30 of the 1963 Act do not directly apply. In this scenario it is by no means certain what is the correct date to fix the *planning assumptions* for assessing hope value. Arguably it is the same date as the *valuation* date. Without going into a lengthy discourse on what was said *obiter* in cases such as *Spirerose* (p226 of Discussion Paper 14.54) and others we do not think there is clear judicial guidance on how far back section 16 [of the 1963 Act] (no depreciation in value on account of knowledge of the scheme) allows the Tribunal to consider what would have happened in the no scheme world as regards the evolution of planning issues. The legislation is unsatisfactory. As we said at Q56 many difficult case involve an assessment of the value of a lost opportunity in the shadow period. The opportunity may have been transient. Planning is a dynamic process. For example, development sites come in and out of the development plan during what can be a lengthy process of the plan's formation. If the site is in the draft plan on a supposed "relevant date", that may be fortuitous for the claimant in the assessment of hope value. It would be equally unfortunate if the relevant date was say a year later by which time the site had been removed.

	There is then the complication if the site is seen less favourably by the planners (and the market*) because* of the risk or need for a CPO. If the development site was removed from the draft local plan at a particular date because of a possible CPO, e.g. because a "better" non-blighted site emerged, there would be injustice if the planning assumptions in the no scheme world have to be fixed at a later date. This then gives rise to the issue how far the back the Tribunal should look to attempt to ascertain the no scheme world at the valuation date. The principle of equivalence and full compensation might require that to be a very long time in some types of case. In reality, a piece of land can be "blighted" (in the non-technical sense) well before even a draft order stage. The site of some future infrastructure is often "safeguarded" from the date of its being entered in a draft local plan. From that point on the planners and market know there is a risk of a CPO, so the site is likely to be treated differently. From then on it has poor prospects of securing a valuable allocation in the plan or a consent, but still well before the making of the CPO. (There are of course procedures to require the planning authority to buy land if not capable of reasonably beneficial use, but that is a different issue, and for present purposes it is assumed there is an adequate existing use. It is also assumed that the strict requirements for a blight notice have not been met.) A loss is incurred well before the making of the CPO, prior to the deemed cancellation of the scheme, and that loss can only be ascertained by looking at the planning picture in existence well before the CPO was made. It may be the example we have given would be considered to be too remote to give rise to a recoverable loss. There was no scheme in existence to be hypothetically cancelled. Nevertheless, it illustrates just how fortuitous circumstances can be in regard to timings and the incidence of a loss. We therefore suggest consideration of an approach which allows flexibility in selecting dates to consider planning issues in the no scheme world. In other words there could be an approach where the selection of one particular date may have to yield to the interests of justice. Consistent with this approach we note that *in South Lanarkshire Council v Lord Advocate 2002 SC 88* the Lord President at [11] said it was permissible for a CAAD to specify what would have been granted planning permission at a date after the relevant date because of a change in circumstances. He went on to say that a flexible approach would advance the aim of the system to assist in determining the appropriate level of compensation. Whatever date is to be relevant for establishing planning assumptions and deemed cancellation of the scheme, consideration should be given for providing the same date for assumptions to be

	applied for the fixing of hope value. Or is hope value to be fixed at the valuation date, assuming there has never been a scheme? Clarity would be of assistance. We note that under existing law a negative CAAD does not prevent the assumption of hope value. Although we do not endorse the existing legislation we would point out that it achieves a proper aim namely to reflect market behaviour where there may be hope value in some cases even where a planning application would have been refused at a particular time. Separately, we note there is the anomaly, central to *Spirerose*, that absent a CAAD where the LTS consider that a development *would*, on balance of probability have been given planning permission, it cannot award full development value but only a value discounted for uncertainty.
19. Odell Milne	I think the relevant date must be the date of vesting or, if a positive CAAD has been obtained earlier, then that earlier date.
20. SSE plc	We believe that the relevant date is determined by the date the notice is served which would reduce any move by the claimant to artificially increase the value of the land between the date of service of the notice and the confirmation of the order.
21. District Valuer Services	It has to be the relevant date of valuation otherwise matters become confused and take us even further away from the real world.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The nature of the planning restrictions that accompany many developing schemes mean this is in practice linked to the issue of Certificates of Appropriate Alternative Development (CAADs). Thus, there should be latitude as to the relevant date, whether the date of the draft order or of the notice of entry. The very existence of a proposed scheme may involve an element of protection in respect of any planning application on the affected land. For example, the route for the AWPR was protected meaning that any planning application could not be determined as would have been the case in a no scheme world. This a further limitation on property rights in such corridors – but with no means of seeking compensation for any losses arising until the CPO is implemented. This serves to freeze affected parties' lives and businesses in the cause of a scheme that has not crystallised. The new legislation should provide that a landowner is free to act on his land as he sees fit until the CPO is implemented. If safeguarding is an issue in the refusal of any planning consent then a landowner should be able to require the authority promoting the scheme to purchase the property at market value (ignoring the effect on the value of the scheme).

	If a planning restriction is placed over affected land to protect land which might be subject to a CPO, that should trigger the possibility of compensation from the promoting authority.
25. East Ayrshire Council	The date when planning permission is granted.
26. National Grid plc	The date of vesting.
30. Isobel Gordon	There are considerable issues here with the existing legislation which requires to be addressed. A new route was chosen for the AWPR in 2006 and given protection by the planning authority. The route affected land (known as Field 52) which was promoted for a supermarket. In a subsequent compensation claim the LTS found that "there was no reason to doubt that the Council would have granted planning for a retail store and petrol filling station]…in the no scheme world" (paragraph 102). They went on to state "on the balance of probability [planning consent] would have been granted on or before 2009" (paragraph 109). Had this been the case the claimant could have sold the site to Sainsbury's for £10.25M and the local community would have the benefit of a supermarket. By the time of the GVD the potential sale price had fallen to £8M. In the event the claimant was awarded only £1.7M based on hope value and we still do not have an adequate supermarket. It is difficult to see why such planning protection should be allowed to continue. In this context we note the Law Commission deliberations in respect of a Notice to Treat at [paragraphs] 7.26 – 7.29 [of the DP]. A landowner is prevented from exercising his normal property rights and has no means of obtaining compensation for any losses arising until the CPO is implemented. We note the Law Commission deliberations in respect of a Notice to Treat at [paragraphs] 7.26 – 7.29 [of the DP]. If a planning restriction is to be placed over affected land to protect land which might be subject to a CPO then it would seem reasonable that that should trigger compensation from the promoting authority. On balance we consider that any new legislation should provide that a landowner is free to act on his land as he sees fit until the CPO is implemented. If safeguarding is an issue in the refusal of any planning consent then a landowner should be able to require the authority promoting the scheme to purchase the property at market value (ignoring the effect on the value of the scheme). We consider that there should be a single mechanism and the valuation date should be the vesting date or in the case of Notice to Treat, the date of entry, or if a positive CAAD is granted, then the date of this.

31. Association of Chief Estates Surveyors Scottish Branch	In order to have clarity it is preferred to have the vesting date or date of entry if earlier.
***34.* DJ Hutchison**	The promotion or mere consideration of a future scheme may involve an element of protection in respect of any planning application on the affected land. The route for the AWPR was protected meaning that any planning application could not be determined as would have been the case in a no scheme world. Such planning protection should not be allowed to continue. A landowner is prevented from exercising his normal property rights and has no means of obtaining compensation for any losses arising until the GVD, when market factors may have changed only due to the time delay.
35. Shepherd and Wedderburn	We consider that the relevant date should be the same as the relevant valuation date in the 1961 Act.
38. MacRoberts LLP	The date of vesting/entering into possession.
40. Law Society of Scotland	We note that there is frequently a discrepancy between the relevant date for planning assumptions and the date of the valuation. We consider that the appropriate date should be the relevant valuation date as has been amended in the parallel Land Compensation Act 1961 as amended.
43. Faculty of Advocates	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.
44. Scottish Property Federation	This should be considered in the context of a unitary approach to CPO implementation. However, where a planning permission is successful in the short period between a GVD or Notice to Treat being submitted and their effective date, then the successful planning permission ought to be taken into account for it represents the material loss suffered by the landowner for which he may have invested considerable resource to achieve.

Analysis

Explanation of question	As much can change between the date of the notice to treat and the actual valuation date, this question asked what date would be most appropriate for determining whether there is existing planning permission over the land to be acquired. Currently, in terms of section 22(2) of the 1963 Act, the relevant date is the date of the service of the notice to treat.
Summary of responses and analysis	22 consultees responded to this question. The answers evidenced a clear battle between the interests of certainty and the interests of

	justice. LSS and S&W referred specifically to the "relevant valuation date", as defined in section 5A of the 1961 Act, which was inserted by the Planning and Compulsory Purchase Act 2004. These provisions apply in England and Wales but not in Scotland. Section 5A sets the valuation date, or "relevant valuation date" as, in the case of a notice to treat, the earlier of the AA taking possession and the date of the actual assessment. In the case of a GVD, the relevant valuation date is the earlier of the date of vesting and the date of the actual assessment. WLC and DVS agreed that the date should be the relevant valuation date, while not referring directly to the 1961 Act. JRR, CC, SCPA, OM, NG, ACES and MacR all proposed that the relevant date for determining whether planning permission exists, should be the date of vesting. However CC pointed out that later planning permission would be taken into account in a real valuation. SPF stated that if planning permission is granted between a Notice to Treat/GVD being submitted and its effective date, then it should be taken into account. RC pointed out that planning permission is generally only valid for three years, although they would not limit it to that period, as it may be possible to obtain a new consent. DSS, S&P, CAAV, IG and DJH stated that there were considerable issues with the existing legislation. They pointed to the fact that the existence of a scheme will include an element of protection by a planning authority over the areas of land where they are aware that a CPO is under discussion or consideration. Such protection prevents a landowner from exercising their normal property rights, without any means of obtaining compensation. Examples given were *Strang Steel v Scottish Ministers* and *Seagreen*. They argued that if such protection or safeguarding is to be provided for in the new statute, the landowner should be entitled to require the AA to purchase the property at market value, ignoring the effect of the scheme. LTS set out the issues in considerable detail and requested clarity and flexibility. They suggested that a range of dates should be specified within which a discretion to fix compensation should exist. They referred to the lack of clear judicial guidance on certain aspects and stated that the legislation was unsatisfactory. They made a similar point to that made by DSS, S&P, CAAV, IG and DJH that, in reality, a piece of land can be "blighted" (in the non-technical sense) well before even the draft order stage. LTS quoted the Lord President in *South Lanarkshire Council v Lord Advocate*, saying that a flexible approach would advance the aim of the system to assist in determining the appropriate level of compensation. They also asked for clarity in the

	setting of dates for the fixing of "hope value". SSE thought that the relevant date should be the date the relevant notice is served. EAC thought it should be the date when planning permission is granted. FoA thought that it should be the date when the AA enters on to 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)

Respondent	
1. Professor Jeremy Rowan Robinson	No, I agree with the English Law Commission. A person selling in the open market could not make such an assumption. At best it would be reflected in hope value and that is as it should be.
6. Craig Connal	Yes.
7. West Lothian Council	No. This could lead to complication in assessing value.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	This assumption should be retained.
16. Scottish Compulsory Purchase Association	It is considered that such a statutory assumption should be retained.
19. Odell Milne	I think this is necessary. The rule is complicated and I am not sure if it can be simplified, but it must be recognised that there may be situations where a landowner might have obtained planning permission independently of the Scheme. For example, a farm shop or café might have been feasible in any event but the acquiring authority's new infrastructure might increase footfall. The landowner may have had a successful business anyway therefore both rules are needed to preserve the position.
20. SSE plc	We believe that no account should be taken of any increase in value as a result of the acquiring authority's scheme on the end use of the land resulting from the CPO.
21. District Valuer Services	Yes – see Section 232 of the Localism Act 2011.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters	Yes. This assumption should be retained.

and Valuers Association	
25. East Ayrshire Council	Presumably the acquiring authority will not proceed with the CPO unless planning permission for the development proposals is obtained.
28. Royal Town Planning Institute Scotland	RTPI Scotland agreed that there should 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.
31. Association of Chief Estates Surveyors Scottish Branch	Yes this should continue.
35. Shepherd and Wedderburn	No.
36. Scottish Power Ltd	We consider that there should continue to be statutory assumption that planning would have been granted for the land being acquired in relation to the acquiring authority's proposals.
38. MacRoberts LLP	Yes. Perhaps it should be coupled with an assumption that the development can actually be carried out. That is, if the acquiring authority's proposals could only be carried out by the authority, the assumption would not apply. This would allow for some valuation uplift in the case where an acquiring authority is acquiring on behalf of a private entity, while not acting against the interests of any publicly beneficial projects.
39. Scottish Land and Estates	Yes, this ought to be retained.
40. Law Society of Scotland	We agree. [Answer to question 89 We are in agreement with this statement. However, in answer to this question, and question 88 above, there is of course the position whereby, although the statutory assumption that planning permission would have been granted is taken into account, the valuation requires to be assessed in a no-scheme world.]
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees with the Scottish Law Commission, and the English Law Commission, that this assumption is an unnecessary complication.
44. Scottish Property Federation	The difference in context for the private landowner and the acquiring (public) authority are important here. We suspect in most cases the relevance of assuming planning permission for the acquiring authority proposals will be unhelpful to the landowner seeking

	compensation for their land. But this may not always be the case. We suspect the answer for the new statute will be to find a mechanism for accepting the planning permission assumption where appropriate for the landowner, in order to protect their rights but to be able to disregard the assumption where this would infringe upon the rights of a landowner.
45. Scottish Power Energy Networks Holdings Ltd	We consider that there should continue to be statutory assumption that planning would have been granted for the land being acquired in relation to the acquiring authority's proposals.
Analysis	
Explanation of question	Section 23 of the 1963 Act, for Scotland, and section 15 of the 1961 Act, for England and Wales, both provide that planning permission is to be assumed for the proposals of the AA. The DP agreed with the recommendation of the Law Commission for England and Wales, in Law Com 286, that this assumption is needless and unwarranted. This question asked whether the current statutory assumption should continue.
Summary of responses and analysis	22 consultees responded to this question. 16 stated that there should continue to be a statutory assumption that planning permission would have been granted for the proposals of the AA if it were not for the CP. Five (JRR, WLC, SSE, S&W and FoA) disagreed and SPF did not come down on one side or the other. Of those who disagreed, JRR stated that a person selling in the open market could not make such an assumption, and that, at best, it would be reflected in hope value, which was how it should be dealt with. Both WLC and FoA thought this assumption could lead to unnecessary complications in assessing value. However the majority suggested that the assumption should remain. OM noted that the rule was complicated and wondered whether it could be simplified, but stated that it must be recognised that there may be situations where a landowner might have obtained planning permission independently of the scheme. MacR suggested that it could be coupled with an assumption that the development can actually be carried out, so that if the AA's proposals could only be carried out by the AA, the assumption would not apply. This would allow some valuation uplift in the case where the AA was acquiring on behalf of a private entity, while not acting against the interests of any publicly beneficial projects. SPF suspected that the relevance of assuming planning permission for the AA's proposals would usually, but not always, be unhelpful for the landowner seeking compensation. They suggested that there should be a new mechanism for accepting the planning permission where appropriate for the landowner in order to protect their rights but

	also to disregard it where it would infringe upon those rights.

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)

Respondent	
6. Craig Connal QC	Yes.
7. West Lothian Council	N/A.
10. Renfrewshire Council	a) Yes. b) Yes.
13. Strutt & Parker LLP	This proposal is supported subject to any CAAD process.
16. Scottish Compulsory Purchase Association	In the assessment of compensation these limitations should apply but without prejudice to any CAAD that may be sought and achieved
19. Odell Milne	I think that such planning permission should be limited to planning permission which might reasonably be expected to be granted to the public and the Pointe Gourde Principle should be retained, but restated, since I think use of the term is unhelpful for people who are not familiar with CP legislation and I believe in plain English!
20. SSE plc	We believe that any increase in value due to the overall scheme should not be taken into account and the valuation should be carried out assuming the existence of any valid planning permission unrelated to the scheme, but disregarding the effect of the scheme.
21. District Valuer Services	Yes but the legislation should also note that planning permission by itself does not necessarily create value – this only happens where there is market demand for such use. The changes made by the Localism Act to Sections 14 and 15 of the 1961 Act are very helpful.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes, subject to the existence and detail of the CAAD process.
25. East Ayrshire Council	See note under proposal 88. [Answer to question 88 Presumably the acquiring authority will not proceed with the CPO unless planning permission for the development proposals is

	obtained.]
28. Royal Town Planning Institute Scotland	RTPI Scotland agrees that this should be limited to planning permission which might reasonably be expected to be granted to the public, and by the Pointe Gourde principle.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
35. Shepherd and Wedderburn	N/A.
38. MacRoberts LLP	No. Or perhaps only if the result is positive in relation to the value.
40. Law Society of Scotland	We are in agreement with this statement. However, in answer to this question, and question 88 above, there is of course the position whereby, although the statutory assumption that planning permission would have been granted is taken into account, the valuation requires to be assessed in a no-scheme world.
42. Scottish Water	Yes.
43. Faculty of Advocates	See above. [FoA answered no to question 88 so this question is N/A].
44. Scottish Property Federation	We have no further comments to our answer to proposal 88. [Answer to proposal 88 The difference in context for the private landowner and the acquiring (public) authority are important here. We suspect in most cases the relevance of assuming planning permission for the acquiring authority proposals will be unhelpful to the landowner seeking compensation for their land. But this may not always be the case. We suspect the answer for the new statute will be to find a mechanism for accepting the planning permission assumption where appropriate for the landowner, in order to protect their rights but to be able to disregard the assumption where this would infringe upon the rights of a landowner.]

Analysis

Explanation of question	Consultees who responded positively to question 88 were then asked this two part follow up question. On the basis that there is a statutory assumption as set out in question 88, should this be limited in the two ways set out in this question?
Summary of responses and analysis	18 consultees responded to this question. Three of these had responded negatively to question 88, so their answer was simply "N/A".

	13 agreed that the assumption should be limited in these two ways. LSS agreed that there should continue to be a statutory assumption that planning permission would have been granted, but also pointed out that the valuation still requires to be assessed in a "no scheme" world. SSE stated that any increase in value due to the overall scheme should not be taken not account. MacR thought that the assumption should either not be limited in the ways suggested, or should only be limited if the result was positive in relation to value. SPF expected that a mechanism would be found for accepting the assumption where appropriate for the landowner to protect their rights, but to disregard the assumption where this would infringe upon their rights.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	I agree.
7. West Lothian Council	Agreed. Otherwise a windfall could be received by a claimant due to value attributable to rebuilding and alteration rights.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	We agree wholeheartedly!
16. Scottish Compulsory Purchase Association	This proposal is supported. Again, reference should be made to the Localism Act 2011.
19. Odell Milne	Agreed.
20. SSE plc	We agree that paragraph 1 of Schedule 11 to the 1997 Act should be repealed to reduce any unnecessary complication.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.

25. East Ayrshire Council	Agreed.
28. Royal Town Planning Institute Scotland	RTPI Scotland agrees that this statutory assumption of planning permission of development in terms of the above legislation should be repealed.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	We agree with this proposition in order to avoid windfall cases such as Greenweb.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree that this provision is outdated. Therefore we agree with the proposal not to reinstate it into the new Statute.

Analysis

Explanation of proposal	Section 23(3) of the 1963 Act provides, with certain exceptions, that it shall be assumed that, in respect of relevant land, planning permission would be granted (subject to certain conditions) for any "development not constituting new development", as specified in paragraph 1 of Schedule 11 to the 1997 Act. Paragraph 1 relates to matters such as rebuilding buildings which were in existence on 1 July 1948, but were war damaged after 7 January 1937. It was proposed that the statutory assumption of planning permission for development, contained in paragraph 1 of Schedule 11 to the 1997 Act, should be repealed. The assumption is an anachronism which derived originally from a provision in the 1947 Planning Act, which provided that a "development charge" should not apply to development which was closely related to the existing use of the land being "development not constituting new development". This assumption was removed for England and Wales by section 232 of the 2011 Act.

Summary of responses	18 consultees responded to this proposal. 17 agreed that the statutory assumption should be repealed, with some referring to the fact that it could lead to an unintended windfall. One (RC) disagreed but gave no reason.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
7. West Lothian Council	Agreed. Otherwise windfall compensation is payable where one dwellinghouse is being developed for use as two or more dwellinghouses.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	Agreed, especially in view of the equivalent English provision being removed in their 2011 Act.
16. Scottish Compulsory Purchase Association	It is considered that this statutory assumption should be repealed.
19. Odell Milne	Agreed.
20. SSE plc	We believe that paragraph 2 of Schedule 11 to the 1997 Act should be repealed to accord with that of the 2011 Act for England and Wales.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. The equivalent English provision was removed in 2011.
25. East Ayrshire Council	Agreed.
28. Royal Town Planning Institute Scotland	RTPI Scotland also agrees that this assumption should be repealed.
31. Association of Chief Estates Surveyors Scottish	Agreed.

Branch	
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	No. Where a property being acquired would be capable of such subdivision, why should the assumption not apply? In what way is this greatly different from valuation based on selling property in parts rather than as a whole?
40. Law Society of Scotland	Yes, we agree this should be repealed.
42. Scottish Water	Yes.
43. Faculty of Advocates	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
44. Scottish Property Federation	We see no need for a statutory assumption to be implanted into the new Statute along these lines.

Analysis	
Explanation of question	Section 23(3) of the 1963 Act provides that, subject to section 23(4), it shall be assumed that, in respect of the relevant land, planning permission would be granted for any development of a class specified in paragraph 2 of Schedule 11 to the 1997 Act. Paragraph 2 of Schedule 11 provides that "development not constituting new development" includes the use as two or more separate dwellinghouses of any building which at a material date was used as a single dwellinghouse. This assumption was removed in England and Wales by the 2011 Act. This question asked whether the statutory assumption should be repealed.
Summary of responses and analysis	18 consultees responded to this question. 16 agreed that the assumption should be repealed. RC disagreed that the assumption should be repealed but gave no reason. MacR also disagreed and pointed out that there is no difference between this assumption and the valuation of property in parts rather than as a whole.

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

(Paragraph 13.40)

Respondent	
1. Professor Jeremy Rowan Robinson	It is neater and simpler if the date for applying planning policies and considering physical factors is the same and that would suggest the date on which the interests in land are taken to be fixed (i.e. the date of the notice to treat or deemed notice to treat). But I can see that might be harsh if there is a long delay between that date and the valuation date and planning policies change or land values rise or fall significantly in the meantime so there is something to be said for the date of valuation. If the latter date is close to the date on which interests are fixed, there is no problem. If there is delay, the date of valuation more closely reflects the position at the time when compensation is assessed. Of course, that may not always benefit a claimant. And see the answer to Q.100 below.
7. West Lothian Council	The relevant valuation date.
13. Strutt & Parker LLP	The relevant date should be on the GVD or the date of any positive CAAD.
16. Scottish Compulsory Purchase Association	In light of some of our responses above, it is considered that the relevant date is the vesting date on the basis that a single compulsory purchase system is introduced incorporating a General Vesting Declaration or the making of a CAAD, as highlighted in question 99.
19. Odell Milne	I think the date must be the vesting date or the date on which a CAAD is obtained, if earlier.
20. SSE plc	We believe that the relevant date for referring to the applicable development plan should be the date of serving of the CPO notice.
21. District Valuer Services	It should be the date of valuation but note changes made by Section 232 of the Localism Act 2011 to the Land Compensation Act 1961
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The relevant date should be on the GVD or the date of any positive CAAD.
25. East Ayrshire Council	The date of the GVD.
26. National Grid plc	The date of vesting.
31. Association of Chief Estates Surveyors Scottish Branch	This should be the vesting date.
35. Shepherd and Wedderburn	The relevant date should be the same as the relevant valuation date

	in the 1961 Act. It seems logical that all planning assumptions that can or should be made are made on a consistent date.
38. MacRoberts LLP	Date of vesting/possession.
40. Law Society of Scotland	We consider that the "relevant date" should be the date of the notice to treat or the date on which a GVD is made.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Again the introduction of a unitary approach to CPO implementation will need to take this consideration. The dates of making a Notice to treat or GVD would appear to be correct though in advance of any proposal for a unitary approach to CPO implementation.

Analysis	
Explanation of question	None required.
Summary of responses and analysis	16 consultees responded to this question. SCPA, OM, NG, ACES and MacR stated that the relevant date should be the vesting date. FoA suggested it should be the date when the AA enters on, and takes possession of, the land. JRR, S&P, CAAV, EAC, LSS and SPF stated it should be the date of the Notice to Treat or GVD. WLC, S&W and DVS suggested the relevant valuation date. DVS made reference to the definition of the relevant valuation date in the 2011 Act, which only applies to England and Wales. SSE thought it should be the date of serving of the CPO notice.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	I agree.

7. West Lothian Council	Agreed. Waiting until the relevant valuation date appears to be too late.
10. Renfrewshire Council	Yes. You must value in a no scheme world, so it is appropriate that the underlying scheme does not exist.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported.
19. Odell Milne	Agreed.
20. SSE plc	We believe that any increase in value due to the overall development scheme must be left out of account and the valuation should be carried out assuming the availability of planning permission but disregarding the effect of the scheme.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	This seems sensible. Although it will inevitably require a re-writing of history, it does give the affected party an opportunity to promote a case based on what would truly have happened on the valuation date if the compulsory purchase had never affected his property.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	This is reasonable. However, we consider that it would be important to clarify what is meant by when the CPO "first published". If this is meant to be when the CPO is first notified (i.e. prior to confirmation) then we consider that is the appropriate date.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree.
Analysis	
Explanation of proposal	In England and Wales the underlying scheme is deemed to be cancelled on the "launch date". Where the acquisition is authorised by a CPO, the launch date is the date of first publication of notice of the CPO. This proposal would treat the underlying scheme in the same way for Scotland.
Summary of responses and analysis	18 consultees responded to this proposal and all agreed with it. LSS stated that it would be important to clarify what is meant by "first published" and considered that the appropriate date would be when the CPO is first notified (prior to confirmation).

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)

Respondent	
1. Professor Jeremy Rowan Robinson	I agree.
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Yes. As per previous comments on question 93, valuation must be undertaken in a no scheme world.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported.

19. Odell Milne	Agreed, I think that is particularly important so as to treat landowners fairly where a scheme is progressing by way of several separate CPOs e.g. A9 dualling project.
20. SSE plc	We agree that the scheme of development underlying the acquisition should be assumed to be cancelled on the launch date. In accordance with legislation for England and Wales, we agree that the assumption is that the whole scheme will be cancelled and not simply the intention to acquire the relevant land. In the Margate case [Margate Corporation -v- Devotwill Investments [1970] 2 All ER864], the acquiring authority's underlying proposal should be disregarded.
21. District Valuer Services	Yes. However, again reference is made to the changes brought by the Localism Act 2011 which deals very sensibly with planning assumptions.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes the entire scheme should be deemed to be cancelled not just the intention to acquire the relevant land.
28. Royal Town Planning Institute Scotland	RTPI Scotland agrees with the principle set out above.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree with this proposition, as to do otherwise would lead to additional confusion. If the proposal as set out in 93 (above) is taken forward, then this should follow.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.

44. Scottish Property Federation	We agree.
Analysis	
Explanation of proposal	In England and Wales the 2011 Act makes it clear that the whole scheme is assumed to be cancelled. This proposal would treat the scheme in the same way for Scotland.
Summary of responses and analysis	21 consultees responded to this proposal and all agreed with it.

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

Respondent	
1. Professor Jeremy Rowan Robinson	I agree.
7. West Lothian Council	Agreed. This would simplify matters.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported.
19. Odell Milne	Agreed, simplification of the rules relating to the CAAD would be welcome. However, the availability of CAADs in some situations where CP is used and not in others does not work fairly in practice. Whilst it is understood that the remit of the SLC does not include legislation without its agreed scope and in particular in relation to authorising statutes which are UK wide, any opportunity to make the process available on a more uniform way would be welcome.
20. SSE plc	We agree that the subject land should be valued with the benefit of any permission which would have been expected in the absence of compulsory purchase and therefore the rule regarding "appropriate alternative development" should be included within the new statute.
21. District Valuer Services	Yes – see Section 232 of the Localism Act 2011.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.

25. East Ayrshire Council	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree as well with the logic of the Law Commission report. We agree with this proposal therefore.

Analysis

Explanation of proposal	Section 14 of the 1961 Act, as amended, relates to taking account of actual or prospective planning permission when valuing land under rule 2. Under section 14 it may be assumed that planning permission is in force for development that is "appropriate alternative development" at the relevant date. Planning assumptions were originally introduced at a time when development plans were more site-specific than those currently issued. Section 24 of the 1963 Act refers to old types of development plans, which can be unhelpful when trying to satisfy the statutory test. In England and Wales the 2011 Act amended the position on "appropriate alternative development". This proposal would amend the position on "appropriate alternative development" in the same way for Scotland.
Summary of responses and analysis	16 consultees responded to this proposal, and all agreed with it. OM pointed out that only being able to use CAADs in some situations where CP is used, and not in others, does not always work fairly in practice.

	CAADs are dealt with in Chapter 14.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
6. Craig Connal QC	Yes – this is little used and it might be sensible to try to draw a line.
7. West Lothian Council	Agreed. It is unfair to allow a valuation to stretch on beyond the relevant valuation date up to 10 years. It would be very difficult to budget for projects if compensation could still be payable up to 10 years after the valuation date.
9. David Strang Steel	There should instead be some clawback provision, as might well be the case with a commercial transaction, and noted in Crichel Down cases in favour of the authority.
13. Strutt & Parker LLP	There should instead be some clawback provision, as might well be the case with a commercial transaction, and noted in Crichel Down cases in favour of the authority.
16. Scottish Compulsory Purchase Association	It is considered that, on balance, the provisions should be retained although it should be pointed out that it is very rare for this scenario to occur.
19. Odell Milne	I think this provision needs to be retained since, whilst I have never seen it used, it is fair that it be available in these circumstances.
20. SSE plc	We believe that the provisions should be repealed. Acquiring authorities will be under a duty to obtain best value from land, and that may include further development of small areas of land which were not fully developed under the initial scheme. Furthermore, the principle of equivalence means that the former landowner should not benefit from any further increase in value of the land, and there are risks to the acquiring authority of further costs for remote claims some time after the initial acquisition – this strikes at the certainty required by statutory authorities. Finally, the difficulty in enforcing such provisions should be taken into account. However, if equivalent provisions are to be retained or included in new legislation, we would strongly recommend that these are time limited.
21. District Valuer Services	Yes although we are not aware of any cases where this has happened. Assuming all necessary information was available at the valuation date then clawback should only apply where full Market

	Value is not being paid. Clawback is only applied in the property market when there are recognised unascertainable sums potentially payable sometime in the future. Further compensation under s31 would represent a windfall gain. Crichel Down situations are very different in nature as they often involve redevelopment where planning is uncertain and the saleback follows market practice in including clawback provisions. Otherwise it would be very difficult for parties to reach agreement as the selling authority would wish to include hope or deferred development value which would be resisted by the purchaser.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The commercial model could suggest some clawback provision, as might apply under Crichel Down.
25. East Ayrshire Council	Agreed.
31. Association of Chief Estates Surveyors Scottish Branch	Probably repealed as the principle is Market Value. The prospect of any future value would be included as Hope Value.
33. DJ Hutchison	There should instead be some clawback provision, as might well be the case with a commercial transaction, and noted in *Crichel Down* cases in favour of the authority.
35. Shepherd and Wedderburn	Yes. A Landowner should be compensated based on the value of his land at the relevant date. The prospect of Planning Permission gain granted subsequent to that date should be taken account of in the compensation exercise. If there was only limited prospect of subsequent Planning Permissions being granted at the relevant date, then it does seem anomalous for further compensation to be paid in the future.
38. MacRoberts LLP	No, by reference to the last sentence of paragraph 13.75.
40. Law Society of Scotland	In the interests of fairness to potential claimants, we consider that it should not be repealed and should be re-enacted.
42. Scottish Water	Yes.
43. Faculty of Advocates	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 [Scottish Public Services Ombudsman] 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.
44. Scottish Property Federation	We believe these provisions should be reviewed before any decision on repeal is made. There could be a case for compensation where land has been alternatively used by an acquiring authority and for whatever reason, not used for the purpose intended at the time of the CPO, with planning permission granted subsequently to the landowner for planning permission that would have added value to their investment. We suspect the situations will be very rare and unusual however so we would not rule out repeal further to a review of the provision.
Analysis	
Explanation of question	Part V of the 1963 Act provides for payment of additional compensation in a situation where additional planning permission is granted after the CP. Such additional planning permission may increase the value of the acquired land above the amount initially paid in compensation. The DP highlighted arguments for both retaining the provisions and repealing them.
Summary of responses and analysis	19 consultees responded to this question. Nine stated that these provisions should be repealed and not re-enacted. Five (SCPA, OM, MacR, LSS and FoA) stated that they should be retained. Four (DSS, S&P, CAAV and DJH) suggested an alternative. SPF wanted a further review before any decision on repeal was made. Of those who responded that the provisions should be retained, FoA pointed out that CP powers are draconian powers which interfere

	with rights of property. If land was compulsorily acquired and was then not required for the scheme, it seemed unfair that the AA might obtain a windfall benefit. In addition, an AA has the ability to enhance the value of land which it has compulsorily acquired through the grant of an appropriate planning consent. FoA did not consider that any potential difficulties in budget planning would justify repeal of this provision. LSS, OM and MacR also opposed repeal in the interests of fairness. DSS, S&P, CAAV and DJH suggested that there should, instead, be some commercial form of clawback, as would be the case for AAs under the Crichel Down Rules. WLC suggested that the provisions should be repealed as it would be unfair, and very difficult to budget for projects, if compensation could still be payable up to 10 years after the valuation date. ACES and S&W pointed out that a landowner should be compensated for his land at the relevant date and the prospect of planning permission should be taken into account in the compensation exercise. CC, SCPA, DVS and SPF all felt that the situations covered by the provisions would be very rare.

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

(Paragraph 13.76)

Respondent	
7. West Lothian Council	No reduce to 3 years.
9. David Strang Steel	The period should reflect what would happen in commercial transactions.
10. Renfrewshire Council	Yes. This is a sensible period from which changes in planning permission could reasonably have resulted in an increased level of compensation and should remain.
13. Strutt & Parker LLP	The period should reflect what would happen in commercial transactions. We consider 10 years, two local plan periods, to be reasonable.
16. Scottish Compulsory Purchase Association	The 10-year period should be retained.

19. Odell Milne	I think ten years is reasonable.
21. District Valuer Services	Yes, if retained 10 years seems reasonable. It should be noted that in the "real" world clawback, if it is applied, is often on a sliding scale reducing over 10 years.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	10 years (in effect, two local plan periods) is reasonable.
31. Association of Chief Estates Surveyors Scottish Branch	If retained the existing 10 years should remain.
33. DJ Hutchison	The period should reflect what would happen in commercial transactions.
38. MacRoberts LLP	No, 5 years seems a reasonable balance.
40. Law Society of Scotland	We consider that 10 years strikes a reasonable balance in time to enable the claimant to receive additional compensation should a planning event occur which increases the value of land which would not have been in contemplation when his claim was settled.
42. Scottish Water	This contradicts the attempt to confirm a 6-year time limit
43. Faculty of Advocates	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.
44. Scottish Property Federation	This question should form part of the review previously suggested. With the time for extant planning permission reduced to three years in Scotland we feel that allowing ten years for successful planning permission subsequent to a CPO is probably overly generous and a five year period is probably more sensible, should the provision remain.
Analysis	
Explanation of question	For those who answered question 96 in the negative, and wanted to retain the possibility of extra compensation, this question asked whether the period of time within which subsequent planning permission could be considered, should remain as 10 years.
Summary of responses and analysis	15 consultees responded to this question. Eight favoured retaining 10 years as a reasonable period. Three favoured five years, one suggested six years and one suggested three years. Three suggested that the period should reflect commercial practice, although, of these, only S&P suggested a specific period (10 years).

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, but there might be difficulty in expecting a claimant to apply for a CAAD prior to confirmation of the CPO. It might give the impression that any objection to the CPO is unlikely to succeed. And if an objection is successful, a claimant would have incurred the costs of applying for a CAAD unnecessarily.
6. Craig Connal QC	Logically the answer is yes (but see the discussion above about bringing issues of CPO confirmation and compensation closer together or in a different order). The period might be within six months of confirmation if the present system is adopted.
7. West Lothian Council	Agreed. The time limit should be 3 - 6 months following the making of the CPO.
9. David Strang Steel	We understand that it is 6 years from the GVD, which seems reasonable.
10. Renfrewshire Council	Bearing in mind the 10 year rule this would be the time limit.
13. Strutt & Parker LLP	There should be no time limit for the making of a CAAD and the effective date should be the date of any positive CAAD or the GVD

	whichever is the earlier.
16. Scottish Compulsory Purchase Association	It is considered that an application for a CAAD should be able to be made any time after the draft CPO has been formally promoted and all statutory and non-statutory objectors have been informed of this decision - this, in essence, is the acquiring authority giving the "green light" to its scheme and its intention to (compulsorily) acquire all relevant property interests in order to have complete control over the relevant landholding in order to undertake the public work. It is recognised that even after a draft Compulsory Purchase Order has been promoted there may be a considerable time lapse until it is confirmed and a vesting date occurs. Equally, the process for a CAAD to be determined can also be time consuming as in the first instance careful consideration requires to be given to any such application by the Local Planning Authority and that there is a right of appeal to that decision that lies both with the acquiring authority and the landowner. Nevertheless, it is considered that there should be no time limit on making an application for a CAAD. The best justification for no time limit would be the case where, for whatever reason, the claimant only claimed compensation at the last minute i.e. just before the expiry of the 6-year time bar to the Lands Tribunal and it was only recognised at that time that the land acquired did have potential development value in the absence of the scheme and that a CAAD was necessary. [From answer to question 98 It is considered that the heritable compensation should be assessed as at the date of vesting and thus all relevant matters relating thereto should also coincide with that date. At present, the effective date of a CAAD is the date of the promotion of the draft Compulsory Purchase Order which, as stated above, may be some time before the vesting date which can lead to considerable problems of being able to relate planning, market demand and value to two different dates. Thus, it is proposed that the effective date of a CAAD is the date of the final determination of a CAAD if applied for and issued prior to vesting or, if vesting has occurred then, then it is effective as at the vesting date.]
17. Lands Tribunal for Scotland	We think it would be difficult to impose time limits. There are cases where the land is only in fact taken long after the making of the CPO. So long as a claim is not time barred why should it not be possible to apply for a CAAD?
20. SSE plc	We believe that a reasonable period should be allowed for applying for a CAAD would recommend that this should be a period of three months.
21. District Valuer Services	No – imposing a time limit would be unhelpful. Please note that this question should refer to draft road orders or made CPO orders as

	these are the relevant dates for CAADS currently, depending on the authority making the orders.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	There should be no time limit for the making of a CAAD and the effective date should be the date of any positive CAAD or the GVD whichever is the earlier.
25. East Ayrshire Council	Yes. 1 year.
26. National Grid plc	A time limit for applying for a CAAD should be linked to confirmation of the CPO. We would suggest that there should be a time limit of 6 months after the date of confirmation.
30. Isobel Gordon	It is considered that an application for a CAAD should be able to be made any time after the draft CPO has been formally promoted and all statutory and non-statutory objectors have been informed of this decision. This is when the acquiring authority giving the "green light" to its scheme. After a draft Compulsory Purchase Order has been promoted there may be a considerable time lapse until it is confirmed and a vesting date occurs (note the AWPR draft orders in 2007 vesting date 2013). The process for a CAAD to be determined can also be time consuming as in the first instance careful consideration requires to be given to any such application by the Local Planning Authority and that there is currently a right of appeal to that decision that lies both with the acquiring authority and the landowner. We believe that there should be no time limit on making an application for a CAAD. We do not find it in order that the acquiring authority can input to the deciding authority that they wished the determination to be carried out after the planning appeal decision was known.
31. Association of Chief Estates Surveyors Scottish Branch	Any time limit should align with the Lands Tribunal limits.
33. DJ Hutchison	We understand that it is 6 years from the GVD, which seems appropriate.
35. Shepherd and Wedderburn	As expressed later in this chapter, we believe that the CAAD process should be revised to require appeals against CAAD decisions to be made to the Lands Tribunal. [This answer is considered in the analysis of question 107.]

36. Scottish Power Ltd	We believe that there should be a three month time limit for applying for a CAAD, following the making of a CPO.
40. Law Society of Scotland	We consider that the current statutory arrangements that apply under Section 25 (1) and (2) are adequate.
42. Scottish Water	Yes, two years. With larger more complex acquisitions such as city centre development areas, it can take some time for a clearer picture to emerge.
43. Faculty of Advocates	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.
44. Scottish Property Federation	The answer is probably yes, and it should be done fairly expeditiously to avoid undue uncertainty for the acquiring authority and the landowner over the level of compensation due.
45. Scottish Power Energy Networks Holdings Ltd	We believe that there should be a three month time limit for applying for a CAAD, following the making of a CPO.
Further responses, either made informally or at engagement events	It was stated that it was sometimes unclear what approach should be taken by local authorities on the relevant date for assessing CAADs compared to assessing compensation. It was suggested that Guidance or Directions from the SG was required. Reference was made to an issue which arose in *Gordon v National Grid*, where compensation was not awarded for the loss of the opportunity to erect and operate a wind turbine, as the LTS considered that planning permission would be granted to do that. There was concern that permission might not, in fact, be granted. It was suggested that provision should be made to allow a right to

	return to the LTS to seek compensation in that event.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	22 consultees responded to this question. 12 consultees replied that there should be a time limit, with a wide variety of suggestions for the limit. Of those who suggested that the time limit should run from the making of the CPO, WLC suggested three to six months, SSE and SPEN suggested three months, EAC one year and SW two years. Of those who suggested that the time limit should run from the date of confirmation of the CPO, JRR did not suggest a specific time and CC and NG suggested six months. RC suggested a time limit of 10 years. FoA supported, in principle, introducing a time limit but did not suggest a specific period. SPF also supported a time limit, which should be fairly short to avoid uncertainty to both parties about the level of compensation. 10 consultees replied specifically, or by implication, that no time limit should be introduced. Two (DSS and DJH) wished to retain the limit of six years from the GVD within which a claimant must currently make any claim to the LTS. LTS thought that it would be difficult to impose time limits as there are cases where the land is taken long after the making of the CPO, so a CAAD should be possible at any time while the claim itself is not time-barred. ACES agreed that any time limit should align to the current LTS limits. S&P stated that there should be no time limit for applying for a CAAD and the effective date should be whichever is the earlier of a positive CAAD or GVD. SCPA and IG considered that a CAAD application should be possible at any time after the draft CPO had been formally promoted, and all objectors (statutory and non-statutory) had been informed. SCPA also stated that, although there could be a considerable time lapse, it was possible that a claimant may only claim compensation from the LTS at the very end of the six-year period. DVS stated that imposing a time limit would be unhelpful, and

	suggested that the question should apply to both draft road orders and CPO orders, depending on the AA making the order, as these both currently provide relevant dates for CAADs. In an informal response, it was suggested that provision should be made to allow a claimant the right to return to the LTS to seek further compensation, in that event that planning permission is not granted, in a situation where the LTS had proceeded on the basis that it would be.

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

(Paragraph 14.12)

Respondent	
1. Professor Jeremy Rowan Robinson	The more precise the information in a CAAD, the easier the valuation - so yes, I would support a requirement to be as precise as possible but that would require the application for the CAAD to be precise. The equivalent of an application for outline planning permission should not be sufficient; or if it is, there should be some discount because of the uncertainty. Ideally, use, density, size and any infrastructure requirements should be specified.
6. Craig Connal QC	This is questionable but more would be better. That then might turn out to be difficult in a number of cases. For instance, an outline application for housing will normally be expected to give some indication of numbers and types of houses. On the other hand that might be difficult to determine.
7. West Lothian Council	As comprehensive as possible and include details on what level of development would have been permitted.
9. David Strang Steel	We believe considerable changes should be made to the current CAAD provisions. CAAD applications should not be considered to be a full planning application. At present CAAD applications are restricted to land acquired and does not extend to retained land. This enables an acquiring authority to argue that development outside the acquired land is mainly to be valued on a “hope” basis. Based on the LTS decision in our case, this would be 20% of development value.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	It is our experience that planning authorities have limited experience of CAADs and it is this that gives rise to difficulties. Aberdeenshire Council for example had not had reason to deal with a CAAD for over 50 years prior to an application for a CAAD in respect of land

	affected by a pipeline in 2008. As a consequence of the AWPR they have had a further four CAADs; most on the AWPR. This may be due to issues in route selection. Better guidance is called for but we consider that the current provisions are workable. CAAD applications should not be considered to be a full planning application.
16. Scottish Compulsory Purchase Association	It is considered that the heritable compensation should be assessed as at the date of vesting and thus all relevant matters relating thereto should also coincide with that date. At present, the effective date of a CAAD is the date of the promotion of the draft Compulsory Purchase Order which, as stated above, may be some time before the vesting date which can lead to considerable problems of being able to relate planning, market demand and value to two different dates. Thus, it is proposed that the effective date of a CAAD is the date of the final determination of a CAAD if applied for and issued prior to vesting or, if vesting has occurred then, then it is effective as at the vesting date. CAADs have over the last few years attained much greater importance but it requires to be borne in mind their principal usage is to assist in the assessment of compensation/valuation process. Thus, it is considered that a CAAD should contain as much relevant information as possible to provide clarity to both the acquiring authority and the landowner in assessing compensation. It can be appreciated that in the vast majority of cases where planning permission is granted then such consent will be subject to a series of conditions and, in many cases, a Section 75 Agreement may form part of the consent. Accordingly, a CAAD should be regarded as akin to an application for planning permission in principle and thus should contain all relevant and detailed information to guide the parties to the correct level of compensation due. However, it should be made clear that the information required under the Town and Country Planning (Scotland) Act 1997 for submission for such an application and the cost of all relevant information/assumptions which the Local Planning Authority may require may be recovered as part of any claim for compensation. Further, at present the legislation restricts a CAAD to the land acquired and does not extend to retained land in the circumstance where there is a part-only land take. The situation is relatively straightforward where the whole property has been compulsorily acquired but difficulties do arise with regard to part-only acquisitions whereby part or all of the land acquired may be subject to a CAAD but no planning development guidance can be given with regard to the retained land, especially that land lying immediately adjacent to the acquired land; accordingly, the line of acquisition acts as a

	potential artificial planning boundary Thus, it is suggested that a CAAD can be utilised in connection with not just the land acquired (or to be acquired) but also in respect of all retained land or a designated part thereof. It has also to be borne in mind that acquiring authorities will only be granted utilisation of their compulsory purchase powers for the land required for the specific public work – no more and no less. Thus, arbitrary demarcation lines are determined relative to the public work and not with regard to planning considerations. Further, in order to reduce the compensation burden on the taxpayer, acquiring authorities nowadays are much more adept in ensuring that the land take is kept to a minimum and, in many cases, where possible, will purposefully design schemes to reduce the amount of part land-take acquisitions. Nevertheless, the fact remains that the majority of compulsory acquisitions in Scotland comprise part only acquisitions and the CAAD system requires to more accurately reflect this situation; in addition, the amount of compensation will be strongly influenced by planning/development considerations and thus the CAAD system requires to be as precise as possible. Please also refer to our response to question 107.
17. Lands Tribunal for Scotland	We think it would be helpful if CAADs included, if possible, all the conditions which would be applicable to a planning consent, e.g. residential density, parking provision, roads matters, s 75, affordable housing content etc.
20. SSE plc	We believe that whilst Section 25(4) of the 1963 Act provides that a CAAD certificate will identify any classes of development for which permission would have been granted the certificate does not have to provide great detail regarding the nature of the development. Whilst section 25(5) should specify those conditions which might reasonably be expected to be applicable, the certificate does not provide sufficient detail to determine an accurate valuation of the property in question. It is our opinion that any willing seller should have a reasonable understanding re the type of development that they hoped to secure planning permission prior to CPO and therefore it is reasonable to request that any CAAD certificate should be able to provide details which would normally be issued in respect of an outline planning permission.
21. District Valuer Services	It is considered that the heritable compensation should be assessed as at the date of vesting and thus all relevant matters relating thereto should also coincide with that date. At present, the effective date of a CAAD is the date of the making of the Compulsory Purchase Order or Draft Road Orders which, as stated above, may be some time before the vesting date which can lead to considerable problems of being able to relate planning, market demand and value to two different dates. Thus, it is proposed that

	the effective date of a CAAD is the date of the final determination of a CAAD if applied for and issued prior to vesting or, if vesting has occurred then, then it is effective as at the vesting date. CAADs have over the last few years attained much greater importance but it requires to be borne in mind their principal usage is to assist in the assessment of compensation/valuation process. Thus, it is considered that a CAAD should contain as much relevant information as possible to provide clarity to both the acquiring authority and the landowner in assessing compensation. It can be appreciated that in the vast majority of cases where planning permission is granted then such consent will be subject to a series of conditions and, in many cases, a Section 75 Agreement may form part of the consent. Accordingly, a CAAD should not be regarded as akin to an application for planning permission as it is an aid to valuation. The planning officer should be free to request such information as is necessary for a CAAD to be issued. However, it should be made clear that the information required and the cost of all relevant information/assumptions which the Local Planning Authority may require may be recovered as part of any claim for compensation. Further, at present the legislation restricts a CAAD to the land acquired and does not extend to retained land in the circumstance where there is a part-only land take. The situation is relatively straightforward where the whole property has been compulsorily acquired but difficulties do arise with regard to part-only acquisitions whereby part or all of the land acquired may be subject to a CAAD but no planning development guidance can be given with regard to the retained land, especially that land lying immediately adjacent to the acquired land; accordingly, the line of acquisition acts as a potential artificial planning boundary Thus, it is suggested that a CAAD can be utilised in connection with not just the land acquired (or to be acquired) but also in respect of all retained land or a designated part thereof. The majority of compulsory acquisitions in Scotland comprise part only acquisitions and the CAAD system requires to more accurately reflect this situation; in addition, the amount of compensation will be strongly influenced by planning/development considerations and thus the CAAD system requires to be as precise as possible. Please also refer to our response to question 107.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Planning authorities have limited experience of CAADs which can create difficulties. We understand that Aberdeenshire Council had not dealt with a CAAD for over 50 years prior to an application for a CAAD in respect of land affected by a pipeline in 2008. As a consequence of the AWPR they have had a further four CAADs;

	most on the AWPR. The current provisions appear workable but better guidance is needed to assist local planning authorities since is the CAAD that they issue that is relevant for compensation purposes. CAAD applications should not be considered to be a full planning application.
25. East Ayrshire Council	East Ayrshire Council has insufficient experience in CPO transactions to comment on this matter.
26. National Grid plc	Currently CAADs do not provide sufficient information. A CAAD should contain conditions like a planning permission so that any planning constraints which may affect the value of the land are known. The CAAD should also contain heads of terms or the commercial provisions of any legal agreement, again so that how this affects the valuation of the land and ultimately the compensation can be considered and is transparent.
30. Isobel Gordon	Aberdeenshire Council has not had reason to deal with a CAAD for over 25 years prior to our application in 2006 for a CAAD in respect of the land affected by the pipeline. Better guidance may be necessary but we consider that the current provisions are workable. CAAD applications should not be considered to be a full planning application. The main issue is however that as legislation currently stands a CAAD can only be obtained for the area affected by the scheme (in our case the servitude width although a greater area is impacted). For the reasons set out at proposal 3 the CAAD we obtained is of limited assistance. The acquiring authority are able to argue that whilst a positive CAAD has been granted for the strip there is only hope value for turbines off the servitude. This is clearly inequitable.
31. Association of Chief Estates Surveyors Scottish Branch	CAADs need to be redefined with clear guidelines and expected outcomes that will assist the parties to reach agreement.
34. DJ Hutchison	We believe considerable changes should be made to the current CAAD provisions. CAAD applications should not be considered to be a full planning application. At present CAAD applications are restricted to land acquired only and do not extend to retained land. The Acquiring Authority argue that development outside the acquired land is to be valued on a “hope” basis, which based on recent LTS decisions was only 20% of

	Development Value.
35. Shepherd and Wedderburn	We do not believe that sufficient information is currently required with applications for CAADs. The judgement on where to draw the line is a difficult one but, on balance, it seems to us that if a Landowner wishes to obtain full development value for a site as a result of a positive CAAD, he should require to submit the same level of detail as would be required in order to obtain Planning Permission in Principle. The only exceptions to this are we do not believe it is practical to require the usual pre-application consultation requirements to be fulfilled for developments of a major scale. Nor do we believe that full EIA procedures can be followed as it is inevitable that statutory consultees and members of the public are unwilling to engage in considering the environmental effects of a hypothetical development that will, in practice, never occur.
40. Law Society of Scotland	Experience is variable across Scottish Planning Authority Areas and there would be merit in some form of standardisation in order to assist practice, perhaps by way of standard application forms and an updated Scottish Statutory Instrument. Particular issues are the relevant date and the future date, use of conditions and section 75 agreements.
42. Scottish Water	Yes.
44. Scottish Property Federation	No – this needs to be reviewed.
Further responses, either made informally or at engagement events	General comments were made about problems with CAADs in Scotland, and that there was no SG Guidance and a lack of training. RICSS had asked the SG to issue Guidance but were told that there was no time/staff resource. The view was expressed that some AAs did not seem to know how to approach CAADs. Most treated them like planning permission. Reference was made to the case of *Christies of Scotland Ltd v Scottish Ministers* in support of CAADs being available for retained land as well as acquired land. CAADs do not contain pages of conditions or even details of the size of the development, so are like outline consent. This causes problems for valuers who need information to make the valuation. In Wales CAADs are treated like a normal planning consent. AAs should respond within 21 days but rarely do.
Analysis	
Explanation of question	None required.
Summary of responses and	19 consultees responded to this question.

analysis	Five answered "yes", with three (S&P, CAAV and IG) stating that the current provisions were workable. They also stated that CAAD applications should not be considered to be full planning applications. The remaining 14 stated that sufficient information was not currently provided in CAADs. JRR stated that a precise application for the CAAD would be required, and that the equivalent of outline planning permission should not be sufficient, or should result in some discount due to uncertainty. Ideally the CAAD should specify use, density, size and any infrastructure requirements. CC believed that more information would be better, but might be difficult in the case such as an application for housing in relation to numbers and types of houses. DSS and DJH believed that considerable changes should be made to the current CAAD provisions and that an application should not be considered to be a full planning application. They also referred to issues with the current restriction of CAADs to acquired land only, and believed that they should be extended to cover retained land. IG agreed that a CAAD application should not be considered to be a full planning application and also that it should not be restricted to the area of land directly affected by the scheme (in their case the servitude width) when a greater area is impacted. SCPA and DVS considered that a CAAD should contain as much relevant information as possible to provide clarity to both the AA and landowner in assessing compensation. A CAAD should be regarded as akin to an application for planning permission in principle, and contain all relevant and detailed information to guide the parties as to the correct compensation. Further, they wanted CAADs to be available for retained land, or a designated part of it, as well as acquired land. Reference was made to the case of *Christies of Scotland Ltd v Scottish Ministers* in support of CAADs being available for retained land as well as acquired land. S&W suggested that if landowners wished to obtain full development value, they should require to submit the same level of detail as for planning permission in principle, with exceptions for pre-application consultation requirements and EIA procedures. LTS indicated that it would be helpful if CAADs included, where possible, all the conditions applicable to a planning consent, e.g. residential density, parking provision, roads matters, s 75, affordable housing content, etc. SSE also suggested that the certificate should be able to provide details which would normally be issued in respect of outline planning permission. NG suggested that CAADs should contain conditions like a planning permission, and also the heads of

	terms or the commercial provisions of any legal agreement, so that any of these affecting the land value are known. LSS referred to the variable practice in planning authorities and suggested that there should be some standardisation to assist practice, perhaps using standard application forms and updated secondary legislation. Particular issues are the relevant date and the future use, use of conditions and section 75 agreements.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Ideally, the date should be the same as that in answer to Q.87/92 above. There doesn't seem to be any good reason for providing for different dates. [Question 87 asked about the relevant date for determining existing planning permission over the land to be acquired. Question 92 asked about the relevant date for referring to the development plan, in terms of special assumptions in respect of certain land in the plan. Answer to questions 87 and 92:- It is neater and simpler if the date for applying planning policies and considering physical factors is the same and that would suggest the date on which the interests in land are taken to be fixed (i.e. the date of the notice to treat or deemed notice to treat). But I can see that might be harsh if there is a long delay between that date and the valuation date and planning policies change or land values rise or fall significantly in the meantime so there is something to be said for the date of valuation. If the latter date is close to the date on which interests are fixed, there is no problem. If there is delay, the date of valuation more closely reflects the position at the time when compensation is assessed. Of course, that may not always benefit a claimant. See also the answer to question 104.]
6. Craig Connal QC	This is debateable. Possibly the start date with ideally a discretion to vary that if it turns out to be unfair, although I do recognise that that would be difficult for a local authority, rather than an appeal body to consider.
7. West Lothian Council	Agreed. This would fix the date for determination of CAADs as early

	as possible in the process.
9. David Strang Steel	We do not agree with this proposal. [From general comments Chapter 14 - Valuation of land to be acquired - CAADs In January 2009 we applied for a CAAD in terms of the provisions of sec 25 of the 1973 Act, as amended. This was in respect of a supermarket and petrol station. On 14 July 2009, Aberdeenshire Council granted a positive CAAD and added an observation on the possibility of use of the land for residential development. The Scottish Ministers appealed against that decision and on the 24 January 2011, the Scottish Ministers cancelled the initial CAAD in terms of sec 26 of the 1973 Act. In the LTS case it was not disputed that the critical issue was the question of whether or not there would have been planning permission for development of our land as a supermarket if there had been no scheme requiring the field. It was established that a supermarket of suitable size could have been built on the site and that there was "a *sustained need for* a *large scale supermarket in Stonehaven".* The need for a large supermarket to satisfy an acknowledged retail deficiency had been identified in the 1999 Aberdeenshire Towns Shopping Study and was confirmed by the 2004 Aberdeen and Aberdeenshire Shopping Study and the 2006 Imagine Stonehaven Capacity Study. Field 52 had been identified as a possible location for development as early as 1995. An application for planning permission was submitted to Aberdeenshire Council as planning authority on 18th October 2007. That application was never determined solely because of the AWPR proposal. In the no-scheme world, the Council would have had the opportunity to determine the application for planning permission for retail development in or before the end of 2009 and the LTS considered that it would probably have determined the matter by that time. The only technical objection to the planning application was by the Scottish Ministers because of the AWPR. In the no-scheme world the LTS concluded that it would have been very unlikely that the Scottish Ministers would have been objectors. Missives had been agreed with Sainsbury in 2009 for the sale of the land conditional on planning permission being granted for retail development at an agreed sum of £10.25 million. Essentially the question for the LTS was whether the relevant planning authority might have been expected to allow that consideration to dominate in the apparent absence of any better site. CAAD procedures can be referred to as evidence of what would

	have happened in an assumed no scheme world. The relevant planning authority received a report from the local officials supporting the grant of a CAAD. In that report all aspects of the proposed development were considered in the same way as would have been done in a report on an actual application for planning permission. The officials' advice was that there was no available site closer to the town centre which did not have a physical impediment to its development; that despite the difficulties with location it was likely that public transport would be able to access the Field 52 site: and that although some junction improvements might be needed, there was no suggestion that practical or engineering solutions could not be found to the identified traffic concerns. The planners view was that existing outlets would not be so affected that overall vitality and viability of the town centre would be at risk. The report also dealt with alternative developments and expressed the view that there was no reason to consider that the subjects were wholly unsuitable for residential development. Aberdeenshire Council granted the CAAD for retail development. The LTS saw no reason to doubt that the Council would have reached the same conclusion on the actual application for planning permission in a no scheme world. The acquiring authority challenged the grant of the CAAD and it was cancelled. The LTS had to consider the element of 'hope value' as a consequence. The changes introduced by section 232 of the 2011 Act in England do not apply here. The assessment of compensation differs markedly north and south of the Border.]
13. Strutt & Parker LLP	We would strongly disagree. We consider that there needs to be some consistency of approach, and acknowledge that, as noted in [paragraph] 14.18 [of the DP], 'depending on what changes have taken place, this may work to the advantage of one of the parties'. At least it would settle matters. The important issue is that a landowner should be free to deal with his property interest as he sees fit up to the valuation date. If the scheme impacts on that use he should be free to require any promoting authority to acquire his interests at that point. (This is why we consider that the blight notice provisions should also be considered in any new legislation).
16. Scottish Compulsory Purchase Association	This proposal is not supported for the reasons outlined above. [From answer to question 99 It is considered that the heritable compensation should be assessed

	as at the date of vesting and thus all relevant matters relating thereto should also coincide with that date. At present, the effective date of a CAAD is the date of the promotion of the draft Compulsory Purchase Order which, as stated above, may be some time before the vesting date which can lead to considerable problems of being able to relate planning, market demand and value to two different dates. Thus, it is proposed that the effective date of a CAAD is the date of the final determination of a CAAD if applied for and issued prior to vesting or, if vesting has occurred then, then it is effective as at the vesting date.]
17. Lands Tribunal for Scotland	We think the SLC is correct when it says that in England the planning and other assumptions for a CAAD are assessed when the land is proposed to be acquired, in the sense used by Lord Denning in *Jelson v Minister for Housing*. However it is not clear whether his dictum is applied in practice and it is highly unsatisfactory that there should be doubt about this matter. As he put it the dates under section 22 (2) of the 1961 Act are (a) (put shortly) where there is an *actual* notice to treat; (b) (put shortly) where there is a *deemed* notice to treat; (c) (put shortly) where there is an offer to negotiate to purchase. If as stated in paragraph 14.17 the practice in Scotland by virtue of section 30(2) of the 1963 Act is that this is the date of the notice of publication of the making of the CPO, then this interpretation leads to an earlier date and is inconsistent with the interpretation of the equivalently worded English Act. But it may be a preferable approach for the reason given by Lord Neuberger in *Spirerose*. There would need to be clarity as to whether "making the order" includes, in an appropriate case, the making of a draft order. [See also the answer to questions 87, 100-104, 109,110, 111 - planning assumptions and dates]
20. SSE plc	We agree that the relevant date for determination of a CAAD should be the date of publication of the notice of making of the CPO as it establishes a degree of certainty. It is also acknowledged that a significant period of time can lapse between the date of publication of the notice of the making of the CPO and the date of entry and hence before compensation is ultimately settled. However when assessing the CAAD, the local authority should assess the potential for development at the time the notice is served as changes to the development plan could be negotiated which may alter the overall outcome of the CAAD certificate.
21. District Valuer Services	No! We believe that it is very important that such a provision is not included. Many problems have been caused in CAADs in the Aberdeen Western Peripheral Route (AWPR) because the date of CAAD assessment is five and a half years prior to the date of valuation. This meant that, although there was a negative CAAD in one particular case, the claimants were able to argue, successfully, for hope value before the LTS. If the date of CAAD assessment was

	the same as the date of valuation, there would have been a much greater degree of clarity over the assumptions to be made and a great deal of time and money would have been saved. We are now in the position that CAADs in this scheme provide little clarity at all and are of little use to either party, negating the whole purpose of the process. It is very important that the changes in the Localism Act with respect to CAADs are brought into the Scottish Act. [From answer to question 99 It is considered that the heritable compensation should be assessed as at the date of vesting and thus all relevant matters relating thereto should also coincide with that date. At present, the effective date of a CAAD is the date of the promotion of the draft Compulsory Purchase Order which, as stated above, may be some time before the vesting date which can lead to considerable problems of being able to relate planning, market demand and value to two different dates. Thus, it is proposed that the effective date of a CAAD is the date of the final determination of a CAAD if applied for and issued prior to vesting or, if vesting has occurred then, then it is effective as at the vesting date.]
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No. A landowner should be free to deal with his property interest as he sees fit up to the valuation date. If the scheme limits that use he should be free to require any promoting authority to acquire his interests at that point. This is one illustration of why blight notice provisions should be considered in any new legislation as an integral part of the compulsory purchase regime.
25. East Ayrshire Council	Agreed.
30. Isobel Gordon	We consider that there needs to be some consistency of approach, and acknowledge that, as noted in [paragraph] 14.18 [of the DP], 'depending on what changes have taken place, this may work to the advantage of one of the parties'. At least it would settle matters. The important issue is that a landowner should be free to deal with his property interest as he sees fit up to the valuation date. If the scheme impacts on that use he should be free to require any promoting authority to acquire his interests at that point.
31. Association of Chief Estates Surveyors Scottish Branch	The CAAD should assist reaching compensation settlement and should therefore be the same as the valuation date.
33. DJ Hutchison	We do not agree with this proposal.

35. Shepherd and Wedderburn	We disagree. We believe that the valuation date should be the correct date for considering the physical features of the site and the planning assumptions which apply to it. If the relevant date for a CAAD assessment is linked to the date of publication of the CPO, a Landowner may be deprived of the true value of his site at the valuation date since the CAAD is potentially linked to a much earlier date at which the prospects of obtaining Planning Permission may have been poorer (e.g. Spirerose). We consider that a fairer approach is to assess the CAAD against planning policy (always excluding the scheme) on the relevant valuation date, working on an assumption that the CPO was cancelled as at the date of its publication. That approach provides the Landowner with the opportunity to develop a case for a CAAD in the no scheme world from the moment of publication of the CPO as opposed to working on the hypothetical assumption that an application was made and the decision taken on effectively the same date. We recognise that this could give rise to some greater uncertainty for acquiring authorities who will not be able to control the valuation date with as much certainty as the date on which the Compulsory Purchase Order is published but, in striking a balance, it seems that this is the fairest approach.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	We consider that it would be important to include an amendment, the effect of which would mean that CAADs are to determine planning prospects as at the relevant valuation date as is currently the case with the 1961 Act as amended.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	It was suggested that the DP proposed that, when selecting the date for assessing CAADs, the current position should remain unchanged, with the CAAD assessment date being the date of publication of the notice of the making of the CPO, or the draft road order. This was widely viewed as unworkable by practitioners. The date of the CAAD

	assessment can be years before the valuation date (e.g. for AWPR it was five to six years). It was suggested that the changes in England and Wales (introduced by the 2011 Act, in light of the problems which arose in *Spirerose*) were preferable. However, a representative from England and Wales stated that he would prefer to revert to their old system, using the date of publication. There was a suggestion that CAADs should also be available for retained land and not just for acquired land as at present. In relation to planning assumptions, sections 13, 14 and 22 to 24 of the 1963 Act all contain wording consistent with the old 1960s planning system, so they no longer work well. It was stated that there were varied approaches from different AAs about the relevant date for determining the CAAD when assessing compensation.
Analysis	
Explanation of question	This proposal related to setting the effective date of a CAAD. It suggested that the new statute should include provisions along the lines of the current provision, section 30(2) of the 1963 Act, to identify the relevant date for determination of a CAAD. It also suggested that the same date should apply to statutory planning assumptions. Section 30(2) of the 1963 Act provides that the effective date of the CAAD shall be, for an interest in land proposed to be acquired, the date the necessary notice has been published or served, as required by the underlying Act etc. This means that the effective date of the CAAD is the date of the publication of the notice of making the draft CPO. This is in contrast to the current position in England and Wales under section 5A of the 1961 Act, which provides that the "relevant valuation date" is: • for NTT, the earlier of the date of entry and possession, and the date when the assessment is made, and • for GVD, the earlier of the vesting date and the date when the assessment is made. The current statutory planning assumptions are contained in sections 22-24 of the 1963 Act, as amended. Chapter 13 of the DP considered changes in relation to these, and, in particular, question 85 asked whether the statutory planning assumptions should also apply to land other than the land which is being valued for compensation purposes, as is the position in England and Wales following changes made by the 2011 Act.

Summary of responses and analysis	Of the 20 consultees who responded to this proposal, seven consultees agreed with it. 12 consultees disagreed with the proposal, some in very strong terms. One consultee did not expressly agree or disagree. LTS suggested that if it is the practice in Scotland, under section 30(2) of the 1963 Act, to fix the date as the notice of publication of the making of the CPO, this might be preferable to the dates under the amended English legislation, which allows for changes in circumstances between the initial making of the CPO and the NTT and the eventual determination of compensation. There would need to be clarity about whether "making the order" included making a draft order, in appropriate cases. Of those who agreed with the proposal and gave reasons, WLC stated that this would fix the date for determination of CAADs as early as possible in the process. SSE agreed that the relevant date should be the publication of the notice of making the CPO as it would establish a degree of certainty. They acknowledged that a significant period could then elapse before the date of entry and compensation being ultimately settled, but stated that the AA should assess the potential for development at the time the notice is served. Of those who disagreed, CC thought that the proposal was debatable, and that while it might provide an initial date, there would need to be a discretion if that date turned out to be unfair. S&P, CAAV and IG strongly disagreed with the proposal and stated that the important issue was that a landowner should be free to deal with his property interest as he sees fit up to the valuation date. If the scheme impacts on that use, he should be free to require the AA to acquire his interests at that point. DVS believed that it was very important that such a provision should not be included, and referred to the problems with AWPR where the date of the CAAD assessment was five and a half years before the date of valuation. They pressed for the same changes to be made in Scotland as were made for CAADs under the 1961 Act. LSS also suggested the same changes for Scotland. ACES also disagreed with the proposal, stating that the CAAD should assist reaching compensation settlement and therefore the effective date should be the same as the valuation date. S&W believed that the valuation date should be the correct date for considering the physical features of the site and the planning assumptions which apply to it. If the date was linked to publication of the CPO, the landowner might be deprived of the true value of the site at the date of valuation, as prospects of planning permission may have been poorer at the earlier date. They considered a fairer approach would be to assess the CAAD against planning policy (always excluding the scheme) on the relevant valuation date,

	working on an assumption that the CPO was cancelled as at the date of its publication. That approach would provide the landowner with the opportunity to develop a case for a CAAD in the no-scheme world from the moment of publication of the CPO, as opposed to working on the hypothetical assumption that an application was made, and the decision was taken, on the same date. JRR stated that, ideally, the date should be the same as relevant date for determining existing planning permission over the land to be acquired, and also the relevant date for referring to the development plan, in terms of special assumptions in respect of certain land in the plan.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	It is desirable that the answer to Q.93 and Q.101/103 should be the same. [Proposal 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. Answer: I agree.]
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. This would provide consistency.
9. David Strang Steel	We support this proposal.
10. Renfrewshire Council	As per earlier advice value in a no scheme world should continue.
13. Strutt & Parker LLP	We agree with the Commission's comments regarding the present state of Scots Law in relation to the 2011 Act in England. We are concerned with regard to the issues that arose in respect of *Strang Steel –v- The Scottish Ministers*.
16. Scottish Compulsory	This proposal is supported.

Purchase Association	
17. Lands Tribunal for Scotland	[See also the joint answer to questions 87, 100-104, 109,110, 111 - planning assumptions and dates. Joint answer We think it is fair to say that the less flexible is the relevant date for the fixing of planning and factual assumptions, the greater the certainty of rights but the greater risk of injustice. As we suggest at Q56 above there may be merit in a stated policy aim whether the fixing of relevant dates should prevail over the right to "full" compensation and equivalence, and whether a range of dates should be specified within which a discretion to fix compensation should exist. We illustrate the point with reference to hope value, but illustrations could no doubt be made in other types of claim: A difficult question is the date for fixing hope value. Hope value may exist in land even where there is no reference to it in a statutory or evolving development plan. But the value is date sensitive. Assume there is no CAAD issue, and also assume the site is not an allocated development site in the adopted development plan. The tortuous provisions of ss 22 – 30 of the 1963 Act do not directly apply. In this scenario it is by no means certain what is the correct date to fix the *planning assumptions* for assessing hope value. Arguably it is the same date as the *valuation* date. Without going into a lengthy discourse on what was said *obiter* in cases such as *Spirerose* (p 226 of discussion Paper n. 74) and others we do not think there is clear judicial guidance on how far back section 16 (no depreciation in value on account of knowledge of the scheme) allows the Tribunal to consider what would have happened in the no scheme world as regards the evolution of planning issues. The legislation is unsatisfactory. As we said at Q.56 many difficult cases involve an assessment of the value of a lost opportunity in the shadow period. The opportunity may have been transient. Planning is a dynamic process. For example, development sites come in and out of the development plan during what can be a lengthy process of the plan's formation. If the site is in the draft plan on a supposed "relevant date", that may be fortuitous for the claimant in the assessment of hope value. It would be equally unfortunate if the relevant date was say a year later by which time the site had been removed. There is then the complication if the site is seen less favourably by the planners (and the market*) because* of the risk or need for a CPO. If the development site was removed from the draft local plan at a particular date because of a possible CPO, e.g. because a "better" non-blighted site emerged, there would be injustice if the planning

	assumptions in the no scheme world have to be fixed at a later date. This then gives rise to the issue how far the back the Tribunal should look to attempt to ascertain the no scheme world at the valuation date. The principle of equivalence and full compensation might require that to be a very long time in some types of case. In reality, a piece of land can be "blighted" (in the non-technical sense) well before even a draft order stage. The site of some future infrastructure is often "safeguarded" from the date of its being entered in a draft local plan. From that point on the planners and market know there is a risk of a CPO, so the site is likely to be treated differently. From then on it has poor prospects of securing a valuable allocation in the plan or a consent, but still well before the making of the CPO. (There are of course procedures to require the planning authority to buy land if not capable of reasonably beneficial use, but that is a different issue, and for present purposes it is assumed there is an adequate existing use. It is also assumed that the strict requirements for a blight notice have not been met.) A loss is incurred well before the making of the CPO, prior to the deemed cancellation of the scheme, and that loss can only be ascertained by looking at the planning picture in existence well before the CPO was made. It may be the example we have given would be considered to be too remote to give rise to a recoverable loss. There was no scheme in existence to be hypothetically cancelled. Nevertheless, it illustrates just how fortuitous circumstances can be in regard to timings and the incidence of a loss. We therefore suggest consideration of an approach which allows flexibility in selecting dates to consider planning issues in the no scheme world. In other words there could be an approach where the selection of one particular date may have to yield to the interests of justice. Consistent with this approach we note that *in South Lanarkshire Council v Lord Advocate 2002 SC 88* the Lord President at [11] said it was permissible for a CAAD to specify what would have been granted planning permission at a date after the relevant date because of a change in circumstances. He went on to say that a flexible approach would advance the aim of the system to assist in determining the appropriate level of compensation. Whatever date is to be relevant for establishing planning assumptions and deemed cancelation of the scheme, consideration should be given for providing the same date for assumptions to be applied for the fixing of hope value. Or is hope value to be fixed at the valuation date, assuming there has never been a scheme? Clarity would be of assistance. We note that under existing law a negative CAAD does not prevent the assumption of hope value. Although we do not endorse the existing legislation we would point out that it achieves a proper aim

	namely to reflect market behaviour where there may be hope value in some cases even where a planning application would have been refused at a particular time. Separately, we note there is the anomaly, central to *Spirerose*, that absent a CAAD where the LTS consider that a development *would*, on balance of probability have been given planning permission, it cannot award full development value but only a value discounted for uncertainty.]
20. SSE plc	We agree with Lord Bridge's opinion that the essential purpose of the procedure for obtaining certificates of appropriate alternative development is to secure the payment of fair compensation to landowners who are compulsory expropriated. We agree that any application for CAAD must require the local planning authority to issue their opinion regarding the grant of planning permission in respect of the land in question if it were not proposed to be acquired by an authority possessing compulsory purchase powers therefore it must be determined by the application of ordinary planning principles which existed at that date.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
30. Isobel Gordon	We agree with the Commission's comments regarding the present state of Scots Law in relation to the 2011 Act in England. We are concerned however with regard to the issues that arose in respect of *Strang Steel –v- The Scottish Ministers*.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
34. DJ Hutchison	We support this proposal.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree.

42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	To ensure consistency of approach we agree.
Further responses, either made informally or at engagement events	It was stated that it was necessary to assume that the scheme was cancelled for the purposes of CAADs. There would have to be a good reason why two separate dates would be chosen.
Analysis	
Explanation of question	This proposal is linked to proposals 102 and 103, as well as question 104.
Summary of responses and analysis	22 consultees responded to this proposal. 21 supported it and one (LTS) expressed concerns. Of those supporting it, S&P and IG agreed that Scots law would benefit from the changes already made for England and Wales. SSE agreed with Lord Bridge in *Grampian Regional Council* that the essential purpose of the CAAD procedure is to secure fair compensation. Any application must require the local planning authority to issue their opinion regarding the granting of planning permission if the land were not being acquired under CP powers. FoA supported the proposal and agreed that providing clarity about planning assumptions in the statute would be beneficial. RC stated that calculating value in a no-scheme world should continue. LTS raised the issue that the less flexible the relevant date is for the fixing of planning and factual assumptions, the greater will be the certainty of rights but also the greater the risk of injustice. They suggested that there may be merit in stating a policy aim confirming whether the fixing of relevant dates should prevail over the right to "full" compensation and equivalence, and whether a range of dates should be specified within which a discretion to fix compensation should exist. They expressed concern about the lack of judicial guidance on how far back the LTS may look when considering what would have happened in the no-scheme world.

102. **The cancellation assumptions in relation to CAADs should be set out expressly in the proposed new statute.**

(Paragraph 14.30)

Respondent	
1. Professor Jeremy Rowan Robinson	It is desirable that the answer to Q.93 and Q.101/103 should be the same. [Proposal 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. Answer: I agree.]
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. This would be a consistent approach.
9. David Strang Steel	We support this proposal.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	We agree clarity is necessary.
16. Scottish Compulsory Purchase Association	This proposal is supported.
17. Lands Tribunal for Scotland	[See the answer to questions 87, 100-104, 109,110, 111 - planning assumptions and dates.]
20. SSE plc	We agree that a consistent approach would be beneficial and should be set out in statute.
21. District Valuer Services	Yes
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. A clear statement is necessary.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
30. Isobel Gordon	We agree clarity is necessary.

31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
33. DJ Hutchison	We support this proposal.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Yes, we agree with this proposal and support clarity.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates supports this proposal.
44. Scottish Property Federation	Yes.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	None required.
Summary of responses and analysis	23 consultees responded to this proposal. 21 supported it, with some stating that it would be a consistent approach which would provide necessary clarity. RC disagreed, but provided no reason. LTS expressed similar concerns as set out by them in previous answers.

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

(Paragraph 14.30)

Respondent	
1. Professor Jeremy Rowan Robinson	It is desirable that the answer to Q.93 and Q.101/103 should be the same. [Proposal 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.

	Answer: I agree.]
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. This would be a consistent approach.
9. David Strang Steel	We support this proposal.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	We agree.
16. Scottish Compulsory Purchase Association	This proposal is supported.
17. Lands Tribunal for Scotland	[See the answer to questions 87, 100-104, 109,110, 111 - planning assumptions and dates.]
20. SSE plc	We agree that a consistent approach would be beneficial and should be set out in statute.
21. District Valuer Services	Yes
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
30. Isobel Gordon	We agree.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
34. DJ Hutchison	We support this proposal.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree.

42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	To support consistency – yes.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	23 consultees responded to this proposal. 22 supported it, with some referring to consistency being beneficial. LTS expressed similar concerns, as set out in previous answers.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Am I missing something or have we already considered this question at Q.100 above? It would be desirable to tie in the dates in answer to Q.87/92 and 100 above to the date here. If the relevant date was to be taken as the date on which notice of the CPO was first published, there could be a considerable gap between that date and the date of valuation which might render the valuation somewhat historic.
7. West Lothian Council	Agreed. This would provide certainty and consistency.
9. David Strang Steel	We do not agree with this proposal.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	We disagree.
16. Scottish Compulsory Purchase Association	We do not think it should be so linked for the reasons given above. [See the answer to question 99.]
17. Lands Tribunal for Scotland	[See also the answer to questions 87, 100-104, 109,110, 111 - planning assumptions and dates.]
20. SSE plc	As discussed above, we agree that the relevant date for

	determination of a CAAD should be the date of publication of the notice of making of the CPO as it establishes a degree of certainty. It is also acknowledged that a significant period of time can lapse between the date of publication of the notice of the making of the CPO and the date of entry and hence before compensation is ultimately settled. However when assessing the CAAD, the local authority should assess the potential for development at the time the notice is served as changes to the development plan could be negotiated which may alter the overall outcome of the CAAD certificate.
21. District Valuer Services	See response to Q100 – should be the date of valuation. [Response to proposal 100 No! We believe that it is very important that such a provision is not included. Many problems have been caused in CAADs in the Aberdeen Western Peripheral Route (AWPR) because the date of CAAD assessment is five and a half years prior to the date of valuation. This meant that, although there was a negative CAAD in one particular case, the claimants were able to argue, successfully, for hope value before the LTS. If the date of CAAD assessment was the same as the date of valuation, there would have been a much greater degree of clarity over the assumptions to be made and a great deal of time and money would have been saved. We are now in the position that CAADs in this scheme provide little clarity at all and are of little use to either party, negating the whole purpose of the process. It is very important that the changes in the Localism Act with respect to CAADs are brought into the Scottish Act.]
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No. These are separate processes.
25. East Ayrshire Council	Yes.
26. National Grid plc	That would provide clarity and consistency and, as a CAAD is used for valuation purposes; this would seem to be sensible.
30. Isobel Gordon	We disagree. The date of valuation for a positive CAAD should be the date this was granted if earlier than the vesting date/or in the case of Notice to Treat the date of entry.
34. DJ Hutchison	We do not agree with this proposal.

35. Shepherd and Wedderburn	See our answer to 100 above. [Answer to proposal 100 We disagree. We believe that the valuation date should be the correct date for considering the physical features of the site and the planning assumptions which apply to it. If the relevant date for a CAAD assessment is linked to the date of publication of the CPO, a Landowner may be deprived of the true value of his site at the valuation date since the CAAD is potentially linked to a much earlier date at which the prospects of obtaining Planning Permission may have been poorer (e.g. *Spirerose*). We consider that a fairer approach is to assess the CAAD against planning policy (always excluding the scheme) on the relevant valuation date, working on an assumption that the CPO was cancelled as at the date of its publication. That approach provides the Landowner with the opportunity to develop a case for a CAAD in the no scheme world from the moment of publication of the CPO as opposed to working on the hypothetical assumption that an application was made and the decision taken on effectively the same date. We recognise that this could give rise to some greater uncertainty for acquiring authorities who will not be able to control the valuation date with as much certainty as the date on which the Compulsory Purchase Order is published but, in striking a balance, it seems that this is the fairest approach.]
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	No. We consider these to be distinct processes.
40. Law Society of Scotland	We believe that this would bring greater clarity to the position.
42. Scottish Water	Yes.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	There is a link between this question, questions 85 to 92 which relate to planning assumptions and proposal 100 which relates to the effective date of a CAAD. This question asked if the relevant date for determining a CAAD should be linked to the date for cancellation of the scheme for the valuation of planning assumptions.
Summary of responses and analysis	19 consultees responded to this question. Eight agreed that the relevant date for determining a CAAD should be linked to the date for cancellation of the scheme for the valuation of planning assumptions.

	Of those who gave reasons, WLC and NG stated that this would give certainty, clarity and consistency, which would be sensible as CAADs are used for valuation purposes. JRR advised that it would be desirable to tie in this date with the dates in the answer to questions/proposals 87, 92 and 100. 11 consultees disagreed. SCPA and DVS referred to previous answers which indicated that the date of the CAAD assessment should be the same as the date of valuation. SSE took the view that the relevant date for determining a CAAD should be the date of publication of the notice of the making of the CPO. CAAV stated that determining a CAAD, and cancelling of the scheme for the valuation of planning assumptions, are separate processes.

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

(Paragraph 14.33)

Respondent	
1. Professor Jeremy Rowan Robinson	No, they should be treated as for a planning appeal - that is what the CAAD tries to replicate.
6. Craig Connal QC	As elsewhere, oral procedure by way of some form of hearing should always be available with a written procedure if the parties wish.
7. West Lothian Council	There should be scope for matters to be dealt with by hearing session as opposed to formal inquiry session as this can be the most efficient way to proceed and would accord with other planning appeal processes.
9. David Strang Steel	We consider that any right of appeal should be limited to the landowner as they are the ones where property rights are being extinguished.
10. Renfrewshire Council	No, but they should have a right of appeal and this should be to Scottish Ministers.
13. Strutt & Parker LLP	We have considerable concerns about the operation of section 26 of the 1963 Act given the situation pertaining to *Strang Steel –v- The Scottish Ministers* where a positive CAAD issued by the local authority was cancelled by a Report following an appeal by Transport Scotland. It is worth noting the views of the LTS in that case as to the prospect of planning consent for the land in question and that the alternative site found by the Reporter in the Appeal still has not been developed. We consider that only the landowner of the land subject to the CAAD

	should be entitled to appeal.
14. John Watchman	Certificates of Appropriate Alternative Development 8.1 I consider that, as a matter of consistency, the appellant (as opposed to the Scottish Ministers through their Reporters) ought to be able to choose the form of appeal process and, accordingly, they should be able to insist upon a public inquiry for a CAAD appeal. This opinion is academic if the jurisdiction for CAAD appeals is transferred to the Lands Tribunal for Scotland (see below).
16. Scottish Compulsory Purchase Association	It is considered that such a right should be retained although the default position should be that the matter would be dealt with by written submissions: agreement between the parties as to the way by which an appeal should be handled is required.
17. Lands Tribunal for Scotland	Q 105,107,108 – CAAD Procedures One problem is that where a government department appeals a positive CAAD issued by a local planning authority, seeking a negative CAAD in its place, there is a perception that such appellants may tactically "throw the kitchen sink" at the claimant developer's case. In the no scheme world this may not have happened. The government would not have been involved in the decision. There is no third party right of appeal and, in today's planning world, little possibility of a call in. Even in a call in, the Ministers would in reality only have objected for reasons within their remit (e.g. trunk roads) and not a host of other reasons. The developers having taken advice as to the position of the local planning authority might have invested in a project, not expecting another perhaps equally persuasive but opposing view of the planning merits to be presented against them by an acquiring authority subsequently coming on the scene in the "scheme world." This is a difficult and perhaps an extreme example, but nevertheless leads to a concern that the acquiring authority, if a government department, should not have its appeal heard by the DPEA. The Scottish Ministers have judicially admitted that, in the context of a planning case where a government agency was a party to the proceedings, that the reporter and Ministers were not an independent and impartial tribunal: *County Properties v Scottish Ministers 2000 SLT 965 at [12]* (decision but not concession overturned on the view that right to judicial review and procedural safeguards then in existence cure the lack of impartiality – see *Alconbury* at Q 15 above). We cannot comment whether a perception of unfairness would be removed by the reporters reporting to the LTS instead of Ministers. However we would point out that "hearings" almost invariably held by the DPEA do not provide opportunity to test the other party's case by cross examination, discussed under Q15 above. This situation, when

	carried into the CAAD procedure, may risk not holding the public's confidence in the type of contentious issues to be expected in compulsory purchase compensation. The default procedure in the LTS would be for evidence to be given under oath and subject to cross examination, although parties may agree to have their cases determined in writing without any form of hearing. The LTS has experience of assessing hope value which in turn involves an assessment of evidence about the likelihood of planning permission being granted.
20. SSE plc	We believe that the reporter should have some discretion in terms of dealing with an appeal by adopting alternative forms of procedure such as written representations.
21. District Valuer Services	It is considered that such a right should be retained although the default position should be that the matter would be dealt with by written submissions.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. The CAAD process is the simulacrum of a planning application and should have all the provisions, including appeals, that would be possible for a planning application.
25. East Ayrshire Council	Landowners using the process will likely wish to retain the right to insist on a public inquiry but as noted in the discussion paper, this can take time. Is there scope to have an alternative procedure that would be streamlined and therefore quicker to use?
26. National Grid plc	The parties should not be entitled to insist on a public inquiry. The matter should be dealt with like a planning appeal where the need for any further procedure and the type of procedure is a matter for the Reporter to determine.
30. Isobel Gordon	We have considerable concerns about the operation of section 26 of the 1963 Act. NG initially sought to challenge the CAAD granted to us. As illustrated by *Strang Steel –v- Scottish Ministers* a CAAD in respect of what was known as Field 52 was challenged by Transport Scotland on behalf of the Scottish Ministers and overturned. Had this been a planning application no such appeal rights would have existed and as the LTS observed "there was no reason to doubt that the Council would have granted planning consent". It is difficult to escape the fact that a potential injustice arose as a consequence. There appears to be no good reason for an acquiring authority to have such a right of appeal when it would not in respect of a

	planning application (save in respect of judicial review). We consider that only the landowner of the land subject to the CAAD should be entitled to appeal. We note that this would reflect existing planning legislation.
34. DJ Hutchison	We consider that any right of appeal should be limited to the landowner as currently within the Planning process.
35. Shepherd and Wedderburn	Yes. CAADs are, by their nature, complicated proposals and it is important that if any of the Applicant, the acquiring authority or the planning authority feel the need to test each other's evidence by question, that opportunity should be given.
38. MacRoberts LLP	No, written submissions should be sufficient.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	CAAD appeals raise invariably complex issues and we believe that these would best be served by preserving the parties' entitlement to insist upon a public inquiry when appealing a CAAD decision.
42. Scottish Water	No.
43. Faculty of Advocates	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. See also answer to question 7. [Answer to question 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.]
44. Scottish Property Federation	We feel that the right to insist upon an inquiry is an important right for the claimant – it is in examination that key factors will often be brought to light that are not otherwise explored and therefore where CPO is concerned we feel it is important to safeguard this right to be heard.
Further responses, either made informally or at engagement events	It was suggested that in most cases written submissions might suffice. There was support for the default position to be written only, but with the right to ask for an Inquiry.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	23 consultees responded to this question. 12 responded "no" and 11 responded "yes". Of those who responded "no" and gave an explanation, JRR stated that parties should be treated as they would in a planning appeal, as that is what the CAAD tries to replicate. NG agreed that the matter should be dealt with like a planning appeal where future procedure is for the Reporter to determine. SSE believed that the Reporter should have some discretion when dealing with an appeal, by adopting alternatives forms of procedure such as written representations. MacR stated that written submissions should be sufficient. RC answered "no" but suggested that there should be a right of appeal, to the SMs. Four consultees (DSS, S&P, IG and DJH) considered that only the landowner should be entitled to insist on having a public inquiry, as they are having property rights extinguished. IG stated that this would reflect existing planning legislation. JW considered that only the appellant (and not SMs through their

	Reporters) should be able to insist on a public inquiry for a CAAD appeal, but believed that such appeals should be transferred to the LTS in any event. LTS also expressed concern about an AA, where it is a Government department, having its appeal heard by the DPEA. It also pointed out that the "hearings" held by the DPEA usually do not provide the opportunity to test the opposing party's case by cross examination. Of those who responded "yes", CC stated that oral procedure by way of some form of hearing should always be available, but a written procedure could be used if the parties wished. SCPA and DVS considered the right to insist should be retained, but that the default position should be for written submissions. CAAV stated that the CAAD process is the simulacrum of a planning application and should have all the same provisions available, including appeals. WLC considered that there should be scope for matters to be dealt with by a hearing rather than formal inquiry, as this could be the most efficient way to proceed and would accord with planning appeal processes. EAC suggested that landowners would wish to retain the right to insist on a public inquiry but wondered whether there was scope for an alternative, quicker, streamlined procedure. S&W and LSS noted that CAADs are complicated and stated that it was important that any affected party (applicant, AA or planning authority) should have the opportunity to test each other's evidence, if they felt the need. FoA noted that the CP/CAAD provisions might be regarded as anomalous with the current planning regime, but also that there is a significant difference between the obtaining of planning consent, which requires the agreement of the landowner to implement, and the divesting of land, which is of irrevocable nature in the first instance. Therefore they considered that the parties should continue to be able to insist upon a public inquiry when appealing against a CAAD decision. SPF felt that the claimant should retain the right to insist upon an inquiry (with no mention of the position of the AA) where CPO is involved.

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

(Paragraph 14.36)

Respondent	
6. Craig Connal QC	Sensibly this should be made the same as other cases i.e. 3 months. It is not necessarily to be assumed that the urgency to determine a matter of this kind is greater than the urgency which would arise to determine an issue over a real planning permission.
7. West Lothian Council	It should be changed to 3 months.
9. David Strang Steel	If there is a right to appeal the time limit should be extended to 3 months, to give proper time for meetings to be convened etc. This is the time allowed for an appeal against a refusal of planning permission.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	We consider this time frame to be tight. It should be three months as in respect of an appeal following refusal of a planning application.
16. Scottish Compulsory Purchase Association	It is considered that the time limit should be extended to three months - similar to a planning permission refusal.
20. SSE plc	We believe that a consistent approach is desirable and have no major concern with increasing the time limit to three months to accord with ordinary planning appeals.
21. District Valuer Services	It is considered that the time limit should be extended to three months - similar to a planning permission refusal.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The period for appeals should be three months as for an appeal following refusal of a planning application. One month is too tight.
25. East Ayrshire Council	One month would seem to be reasonable.
26. National Grid plc	No.
30. Isobel Gordon	We consider the time frame to be tight. It would be logical to tie the appeal date to that in the planning process (i.e. three months).
31. Association of Chief Estates Surveyors Scottish Branch	Period should be aligned to other appeal periods.
34. DJ Hutchison	If there is a right of appeal the time limit should be extended to 3 months, to allow sufficient time to consider the options. This is the time allowed for an appeal against a refusal of planning permission.

35. Shepherd and Wedderburn	Yes. We see no reason that the 3 month time limit for appealing planning decisions should not apply to CAADs.
38. MacRoberts LLP	Bring it in line with planning appeals.
39. Scottish Land and Estates	One month is quite a strict timescale and could be lengthened.
40. Law Society of Scotland	We believe that the time limit should be extended to 3 months, which would make this consistent with other planning legislation.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We believe that one month should be sufficient – we would wish to avoid extending the process much further. On a point of consistency we observe that the discussion paper refers to different periods of time in several places and it would be helpful if the new statute could introduce some consistency of approach – i.e. to use days or weeks instead of months and years. This would aid consistency as well as accuracy for the subsequent users of the legislation.
Further responses, either made informally or at engagement events	There was a view that one month is too short as someone may be away for part/most of that time.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	21 consultees responded to this question. Five responded that there should be no change from the one-month time limit to appeal against a CAAD. SPF wished to avoid extending the process further. They made a separate comment about the need for the new statute to adopt consistency when setting out time limits, to avoid the current mixture of days, weeks, months and years. The remaining 16 consultees responded that the time limit should be extended, with 14 suggesting three months, in line with the time limit for appealing against a refusal of a planning application, and to allow

	sufficient time to properly consider the options.

107. **Should an appeal against a CAAD be made to the LTS rather than to the Scottish Ministers?**

(Paragraph 14.53)

Respondent	
1. Professor Jeremy Rowan Robinson	See answer to Q. 108. [Answer to question 108 My preference would be for keeping appeals with the Scottish Ministers. While the CAAD process is about the assessment of compensation, it turns on planning issues in much the same way as a planning appeal.]
6. Craig Connal QC	The answer is no on logical grounds because as discussed it should be the same as for ordinary planning permission. However, were a specialist planning tribunal to be available to determine such matters, that would be preferable because it would eliminate all possible issues of political influence on decision-making. [14.42. In my view the commentary is wrong. All kinds of systems of this type are open to abuse if some form of non-decision is not appealable. Judicial review is not a suitable alternative remedy. Arguably the substantive decision in the case is wrong because it leads to a preference for form over substance, in the absence of any indication that the failure to produce the document had any material significance whatsoever to the substantive determination which would have followed.]
7. West Lothian Council	Agreed. The LTS would be impartial.
9. David Strang Steel	Where the promoter of a scheme is a Government department, the Reported is employed and paid by another government department and the appeal is to the Scottish Ministers, there is a perception of a conflict of interest. In the light of the LTS decision is *Strang Steel –v- Scottish Ministers* the Law Commission should not be surprised at our very strong view in favour of such a proposal since the Scottish Ministers cannot be seen to be a disinterested party in a scheme promoted by themselves. It is difficult to escape the fact that we suffered an injustice as a consequence of this anomaly between CAAD procedures and planning decision. There appears to be no good reason for an acquiring authority to have such a right of appeal when it would [have no such right] in

	respect of a planning application (save in respect of judicial review). Any appeal should be to the LTS since a CAAD is a valuation tool.
10. Renfrewshire Council	No. Planning appeals normally dealt with by Scottish Ministers.
13. Strutt & Parker LLP	Since the Scottish Ministers cannot be seen to be disinterested in a scheme promoted by themselves this would seem reasonable. In Strang Steel –v- Scottish Ministers a CAAD in respect of what was known as Field 52 (on the route of the AWPR) was challenged by Transport Scotland on behalf of the Scottish Ministers and overturned. Had this been a planning application no such appeal rights would have existed, and as the LTS observed in the compensation dispute, "*there was no reason to doubt that the Council would have granted planning consent*". There appears to be no good reason for an acquiring authority to have such a right of appeal in respect of a CAAD when it would not in respect of a planning application (save in respect of judicial review). Since the issue is one of compensation any appeal should be to the LTS.
14. John Watchman	8.2 A CAAD appeal should be dealt with by the Lands Tribunal for Scotland. In my opinion it is, at least as a matter of policy, unsustainable in a modern justice system to endorse the possibility of the Scottish Ministers as acquiring authority having a right of appeal against the grant of a positive CAAD to the Scottish Ministers. I would also draw attention to the 13 October 2014 decision of the Lands Tribunal for Scotland (LTS/COMP/2013/12) in [*Strang*] *Steel v The Scottish Ministers*. That decision, which is not referred to in the SLC Discussion Paper, refers to an appeal to a tribunal (as opposed to government) avoiding the obvious potential difficulty of the apparent [financial] conflict of interest of the Scottish Ministers as the acquiring authority challenging the grant of a positive CAAD and as the authority that is the decision-maker tasked with determining that challenge.
15. DLA Piper Scotland LLP	There is an issue in principle about whether it is appropriate for a body such as Transport Scotland as promoter to be able to appeal to Scottish Ministers (i.e. themselves) about the decision in a CAAD.
16. Scottish Compulsory Purchase Association	It has to be recognised that in some compulsory purchase cases, the acquiring authority is in effect The Scottish Ministers. The refusal or acceptance of a positive CAAD will have in many cases a significant effect on the amount of compensation due and it is considered that in order to remove any perception of bias it may be preferable for the appeal to be heard by the Lands Tribunal for Scotland rather than

	DPEA. Further, it should also be recognised that in the initial application for a CAAD, which is to the relevant Local Planning Authority, who may also be the acquiring authority and thus again to ensure no perception of bias it may be preferable for the initial CAAD application to be submitted to DPEA for the issue of a CAAD and, as stated above, an appeal to the Lands Tribunal for Scotland with that decision being final. In other circumstances, the appeal should remain with DPEA with a report and recommendations being submitted to The Scottish Ministers for their approval/modification/rejection. With regard to the present system, it is considered that the acquiring authority's right to object to a positive CAAD runs contrary to the planning system- as there are no third party rights of appeal against the grant of planning permission. Thus, it is considered that only the claimant should have the right to lodge a CAAD (it has been very rare and unusual for an acquiring authority to do so) but with the acquiring authority having the right to make representations thereto: further, the claimant retains the right to appeal against either a negative or positive CAAD. There is however, the alternate view that the status quo should prevail i.e. either the claimant or the acquiring authority can seek a CAAD and the appeal process can be used by either party thereafter.
17. Lands Tribunal for Scotland	Answer to questions 105, 107, 108, CAAD Procedures One problem is that where a government department appeals a positive CAAD issued by a local planning authority, seeking a negative CAAD in its place, there is a perception that such appellants may tactically "throw the kitchen sink" at the claimant developer's case. In the no scheme world this may not have happened. The government would not have been involved in the decision. There is no third party right of appeal and, in today's planning world, little possibility of a call in. Even in a call in, the Ministers would in reality only have objected for reasons within their remit (e.g. trunk roads) and not a host of other reasons. The developers having taken advice as to the position of the local planning authority might have invested in a project, not expecting another perhaps equally persuasive but opposing view of the planning merits to be presented against them by an acquiring authority subsequently coming on the scene in the "scheme world." This is a difficult and perhaps an extreme example, but nevertheless leads to a concern that the acquiring authority, if a government department, should not have its appeal heard by the DPEA. The Scottish Ministers have judicially admitted that, in the context of a planning case where a government agency was a party to the proceedings, that the reporter and Ministers were not an independent and impartial tribunal: *County Properties v Scottish Ministers 2000 SLT 965 at [12]* (decision but not concession overturned on the view that right to judicial review and procedural

	safeguards then in existence cure the lack of impartiality – see *Alconbury* at Q 15 above). We cannot comment whether a perception of unfairness would be removed by the reporters reporting to the LTS instead of Ministers. However we would point out that "hearings" almost invariably held by the DPEA do not provide opportunity to test the other party's case by cross examination, discussed under Q15 above. This situation, when carried into the CAAD procedure, may risk not holding the public's confidence in the type of contentious issues to be expected in compulsory purchase compensation. The default procedure in the LTS would be for evidence to be given under oath and subject to cross examination, although parties may agree to have their cases determined in writing without any form of hearing. The LTS has experience of assessing hope value which in turn involves an assessment of evidence about the likelihood of planning permission being granted.
20. SSE plc	We believe this is a spatial planning matter and as such should be made to the Scottish Ministers.
21. District Valuer Services	The initial application for a CAAD is to the relevant Local Planning Authority, who may also be the acquiring authority and thus again to ensure no perception of bias it would be preferable for the initial CAAD application to be submitted to DPEA in all cases for the issue of a CAAD followed, where necessary by an appeal to the Lands Tribunal for Scotland with that decision being final. This would also ensure that CAADs are dealt with by officials who are experienced in dealing with them. Many problems have been caused – Spirerose is a critical example – because they are often dealt with by planning officers who have no experience and no formal guidance provided in dealing with them. Given the importance of the planning position in certain cases, it should remain the case that either the claimant or the acquiring authority can seek a CAAD and the appeal process can be used by either party thereafter. A CAAD is an aid to valuation, and it is important that valuers for both parties have access to the same procedure.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Where the scheme is promoted by Scottish Ministers that should certainly be the case as they cannot be seen to be disinterested in a scheme promoted by themselves or their agencies. As a CAAD is to be in line with the planning process, there is no reason for an acquiring authority (whose only direct interest as such is financial) to have such a right of appeal in respect of a CAAD when it would not in respect of a planning application.

25. East Ayrshire Council	There may be some merit in having the LTS hear the appeal rather than the Scottish Ministers as this would show that an impartial and independent body were considering matters.
26. National Grid plc	Given that a CAAD is for valuation purposes in principle the LTS could consider an appeal however it is not clear whether they would have the right skill set and expertise to do so.
30. Isobel Gordon	Since the Scottish Ministers cannot be seen to be disinterested in any scheme promoted by themselves so this would seem reasonable.
31. Association of Chief Estates Surveyors Scottish Branch	On balance appeal to LTS.
34. DJ Hutchison	There appears to be no good reason for an acquiring authority to have such a right of appeal when it would not in respect of a planning application (save in respect of judicial review). Any appeal should be to the LTS since a CAAD is a valuation tool.
35. Shepherd and Wedderburn	Yes. This would help to avoid the situation which pervades at the moment whereby Scottish Ministers have, on occasion, appealed to themselves against positive CAAD decisions issued by planning authorities. We are not aware of any appeal by Scottish Ministers to Scottish Ministers being rejected. [Answer to question 98 As expressed later in this chapter, we believe that the CAAD process should be revised to require appeals against CAAD decisions to be made to the Lands Tribunal.]
36. Scottish Power Ltd	We consider that there is a case for appeal against a CAAD to be made to the LTS instead of the Scottish Ministers. We consider that this could shorten timescales and put the matter into expert and neutral hands.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	We do not consider that the appeal should be made to the LTS. CAAD appeals invariably involve planning issues and it is considered that these are best dealt with through the DPEA by way of an appointment of a Reporter to consider the issues and report to Ministers. We do appreciate that CPOs are sometimes made by Scottish Ministers and they are the confirming authority under the 1947 Act. There may be some merit in having the appellate function in relation to CAADs placed with the LTS. On balance we consider that the current arrangements work well and should be retained.

42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	The new statute should at least be clear that the reference to the Scottish Ministers will in practice mean the DPEA.
45. Scottish Power Energy Networks Holdings Ltd	We consider that there is a case for appeal against a CAAD to be made to the LTS instead of the Scottish Ministers. We consider that this could shorten timescales and put the matter into expert and neutral hands.
Further responses, either made informally or at engagement events	It was suggested that it might be preferable, and look fairer, to appeal to the LTS rather than the Reporter, especially if Transport Scotland is the AA. However, one representative stated that recent experience in England and Wales had been that there were delays in appeals to the Upper Chamber of the Lands Tribunal, meaning that parties had not received a hearing within a reasonable timescale, increasing both risk and costs. They would prefer to go back to the old system of appealing to a Planning Inspector, which worked fine in practice. There may be an issue about the speed that the LTS deals with cases, so there might need to be a presumption of written proceedings or another streamlined procedure.
Analysis	
Explanation of question	This question is linked to question 108. Currently appeals against CAAD decisions are made to the SMs under section 26 of the 1963 Act.
Summary of responses and analysis	26 consultees responded to this question. 18 responded “yes”, that such appeals should be made to the LTS rather than to the SMs.

	Seven responded "no". One (SCPA) gave arguments both ways. On the one hand, it may be preferable to appeal to the LTS, to remove any perception of bias. On the other hand, there was an alternate view that the status quo should remain, with either party being able to seek a CAAD, and appeal against it. SCPA also noted (along with DVS) that the initial CAAD application is currently made to the local planning authority, which may also be the AA, and suggested that it may be preferable for the initial application to be made to the DPEA, with any appeal to the LTS. Of those wishing to make appeals against CAADs to the LTS, several referred to the situation in *Strang Steel -v- Scottish Ministers* where the AA was a Government body (TS), which made a successful appeal against a positive CAAD to the SMs. The situation was criticised as a possible conflict of interest. LTS questioned the appropriateness of an AA appealing a positive CAAD, when they would not have been involved at all in the no-scheme world. They also noted that "hearings" held by the DPEA almost invariably did not provide opportunity to test the other party's case by cross examination, so there were issues about whether this was an impartial tribunal (under Article 6 of the Convention). They referred to the case of *County Properties v Scottish Ministers* where the SMs judicially admitted that, in the context of a planning case where a government agency was a party to the proceedings, the Reporter and SMs were not an independent and impartial tribunal. Several other consultees stated that the AA should not have a right to appeal against a CAAD, as it would have no such right in a planning situation. However DVS believed that both parties should retain the right to make and appeal against a CAAD, as it is an aid to valuation. Of those who wished to retain the appeal to the SMs, many did so on the grounds that, although the CAAD process is for the assessment of compensation, it is based on planning matters, appeals about which are normally made to the SMs. LSS considered that planning issues are best dealt with by the DPEA with the appointment of a Reporter. FoA did not consider that it would be efficient for the LTS to duplicate, for CAADs, what the SMs already do in relation to planning. CC suggested that it would be preferable to set up a specialist planning tribunal to eliminate any issues of undue political influence.

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)

Respondent	
1, Professor Jeremy Rowan Robinson	My preference would be for keeping appeals with the Scottish Ministers. While the CAAD process is about the assessment of compensation, it turns on planning issues in much the same way as a planning appeal.
6. Craig Connal QC	No.
7. West Lothian Council	Agreed. The first level inquiry by a DPEA reporter should be retained.
9. David Strang Steel	We would agree with this proposal if it were felt necessary to allow the acquiring authority a right of appeal but a DPEA Reporter is not entirely independent in that they are instructed and paid ultimately by their Ministers. This gives rise to a perceived conflict of interest. A *perceived* conflict of interest is a situation which a reasonable person would consider likely to compromise objectively. A *potential* conflict of interest is a situation which could develop into an actual or perceived conflict of interest. The integrity of the individual Reporter is not in question here. It is necessary for the standing of the individual and the CPO process that members of the public have confidence in the independence and impartiality of any appeal procedure. Where the Scottish Ministers are the confirming body and the acquiring authority and a CAAD results in increased costs for the acquiring authority there is clearly a potential conflict.
10. Renfrewshire Council	Do not believe an inquiry should be available for CAAD.
13. Strutt & Parker LLP	We agree with this proposal. Since a CAAD is a valuation tool this would seem sensible.
14. John Watchman	8.3 I do not support the Scottish Ministers (acting through their reporters) reporting to the Lands Tribunal for Scotland. Given the apparent conflict of interest the Scottish Ministers should not be involved in any capacity other than as acquiring authority. The members of the Lands Tribunal for Scotland are suitably qualified and experienced to deal with planning and compensation matters.
16. Scottish	As stated above, the compulsory purchase system and the

Compulsory Purchase Association	assessment of compensation should be undertaken in a transparent manner without any perception of negative and positive bias. Our views with regard to the CAAD appeal process is as stated under question 107 above demonstrate this ethos. Equally, it is considered that the option to deal with a CAAD appeal should be either by way of written representations or an inquiry.
17. Lands Tribunal for Scotland	[Answer to questions 105, 107, 108, CAAD Procedures One problem is that where a government department appeals a positive CAAD issued by a local planning authority, seeking a negative CAAD in its place, there is a perception that such appellants may tactically "throw the kitchen sink" at the claimant developer's case. In the no scheme world this may not have happened. The government would not have been involved in the decision. There is no third party right of appeal and, in today's planning world, little possibility of a call in. Even in a call in, the Ministers would in reality only have objected for reasons within their remit (e.g. trunk roads) and not a host of other reasons. The developers having taken advice as to the position of the local planning authority might have invested in a project, not expecting another perhaps equally persuasive but opposing view of the planning merits to be presented against them by an acquiring authority subsequently coming on the scene in the "scheme world." This is a difficult and perhaps an extreme example, but nevertheless leads to a concern that the acquiring authority, if a government department, should not have its appeal heard by the DPEA. The Scottish Ministers have judicially admitted that, in the context of a planning case where a government agency was a party to the proceedings, that the reporter and Ministers were not an independent and impartial tribunal: *County Properties v Scottish Ministers 2000 SLT 965 at [12]* (decision but not concession overturned on the view that right to judicial review and procedural safeguards then in existence cure the lack of impartiality – see *Alconbury* at Q 15 above). We cannot comment whether a perception of unfairness would be removed by the reporters reporting to the LTS instead of Ministers. However we would point out that "hearings" almost invariably held by the DPEA do not provide opportunity to test the other party's case by cross examination, discussed under Q15 above. This situation, when carried into the CAAD procedure, may risk not holding the public's confidence in the type of contentious issues to be expected in compulsory purchase compensation. The default procedure in the LTS would be for evidence to be given under oath and subject to cross examination, although parties may agree to have their cases determined in writing without any form of hearing. The LTS has experience of assessing hope value which in turn involves an assessment of evidence about the likelihood of planning

	permission being granted.]
20. SSE plc	We would refer to our reply at proposal 107. [Answer to question 107 We believe this is a spatial planning matter and as such should be made to the Scottish Ministers.]
21. District Valuer Services	See response to Q107. [Answer to question 107 The initial application for a CAAD is to the relevant Local Planning Authority, who may also be the acquiring authority and thus again to ensure no perception of bias it would be preferable for the initial CAAD application to be submitted to DPEA in all cases for the issue of a CAAD followed, where necessary by an appeal to the Lands Tribunal for Scotland with that decision being final. This would also ensure that CAADs are dealt with by officials who are experienced in dealing with them. Many problems have been caused – Spirerose is a critical example – because they are often dealt with by planning officers who have no experience and no formal guidance provided in dealing with them. Given the importance of the planning position in certain cases, it should remain the case that either the claimant or the acquiring authority can seek a CAAD and the appeal process can be used by either party thereafter. A CAAD is an aid to valuation, and it is important that valuers for both parties have access to the same procedure.]
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. That maintains the integrity of the planning process, subject to the point just considered.
26. National Grid plc	This may be a sensible compromise to allow the final decision to be taken by the LTS but for the planning considerations to be dealt with by a Reporter.
30. Isobel Gordon	We agree with this proposal. Since a CAAD is a valuation tool this would seem sensible.
34. DJ Hutchison	We would agree with this proposal if it were felt necessary to allow the acquiring authority a right of appeal. Given the inter-relationship between Government ministers, the perception of a conflict of interest would remain if the Reporter reports to the Scottish

	Ministers.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	In these circumstances, we consider that a DPEA Reporter will likely possess sufficient knowledge of the planning issues in order to interrogate the issues and report thereon. We consider that the decision should be made by the Scottish Ministers.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	If the LTS is identified in the new Statute then yes – but our feeling is that appeals should still be to Scottish Ministers because the wielding of CPOs is frequently a political decision, or inspired by a political imperative. As with our previous answer however it should be clear that reference to Scottish Ministers will mean in practice the DPEA.
Further responses, either made informally or at engagement events	If there is a change of the CAAD appeal from Scottish Ministers to the LTS, attendees were not sure how an inquiry before a Reporter could work in practice?
Analysis	
Explanation of question	This question applies only if the suggested change (to move CAAD appeals from the SMs to the LTS) in question 107 is accepted. It asked whether the inquiry procedure before a DPEA reporter should be retained, but with the report being made to the LTS.
Summary of responses and analysis	21 consultees responded to this question. Five (JRR, SSE, LSS, FoA and SPF) made it clear that they did not want CAAD appeals to be made to the LTS. 12 consultees responded “yes” to the question. However two (FoA and SPF) were clear that they wished CAAD appeals to remain with SMs. If this were changed, so that appeals were instead made to the LTS, they would wish the inquiry procedure before a DPEA reporter to be retained, prior to the appeal. Others who responded “yes” felt that it would be helpful to retain the

	DPEA procedure. NG stated that it might be a sensible compromise to allow the final decision to be taken by the LTS but for the planning considerations to be dealt with by a Reporter. Six consultees responded "no". JW did not believe that the SMs should be involved in any capacity, including making a report to the LTS, given the apparent conflict of interest. RC did not believe that an inquiry should be available for CAADs. DSS and DJH did not want AAs to continue to have a right of appeal, but responded "no" to this question if they did retain that right.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	It would be simpler if the test was the same as for the planning assumptions. I see no good reason why it should differ.
6. Craig Connal QC	See question 110. [Answer to question 110 Assuming certainty on one view departs from reality whereas some form of value reflects the reality of the market. The hypothetical purchaser would treat anything less than actual consent as only giving rise to hope, but would reflect the likelihood in the degree to which discount would be necessary.]
7. West Lothian Council	Agreed. The wording "reasonably have been expected to be granted" is preferable to wording simply stating "would have been granted".
9. David Strang Steel	We support this proposal. [In January 2009 we applied for a CAAD in terms of the provisions of sec 25 of the 1973 Act, as amended. This was in respect of a supermarket and petrol station. On 14 July 2009, Aberdeenshire Council granted a positive CAAD and added an observation on the possibility of use of the land for residential development. The Scottish Ministers appealed against that decision and on the 24 January 2011, the Scottish Ministers cancelled the initial CAAD in terms of sec 26 of the 1973 Act. In the LTS case it was not disputed that the critical issue was the question of whether or not there would have been planning permission for development of our land as a supermarket if there had been no scheme requiring the field. It was established that a supermarket of suitable size could have been built on the site and

	that there was "a sustained need for a large scale supermarket in Stonehaven". The need for a large supermarket to satisfy an acknowledged retail deficiency had been identified in the 1999 Aberdeenshire Towns Shopping Study and was confirmed by the 2004 Aberdeen and Aberdeenshire Shopping Study and the 2006 Imagine Stonehaven Capacity Study. Field 52 had been identified as a possible location for development as early as 1995. An application for planning permission was submitted to Aberdeenshire Council as planning authority on 18th October 2007. That application was never determined solely because of the AWPR proposal. In the no-scheme world, the Council would have had the opportunity to determine the application for planning permission for retail development in or before the end of 2009 and the LTS considered that it would probably have determined the matter by that time. The only technical objection to the planning application was by the Scottish Ministers because of the AWPR. In the no-scheme world the LTS concluded that it would have been very unlikely that the Scottish Ministers would have been objectors. Missives had been agreed with Sainsbury in 2009 for the sale of the land conditional on planning permission being granted for retail development at an agreed sum of £10.25 million. Essentially the question for the LTS was whether the relevant planning authority might have been expected to allow that consideration to dominate in the apparent absence of any better site. CAAD procedures can be referred to as evidence of what would have happened in an assumed no scheme world. The relevant planning authority received a report from the local officials supporting the grant of a CAAD. In that report all aspects of the proposed development were considered in the same way as would have been done in a report on an actual application for planning permission. The officials' advice was that there was no available site closer to the town centre which did not have a physical impediment to its development; that despite the difficulties with location it was likely that public transport would be able to access the Field 52 site: and that although some junction improvements might be needed, there was no suggestion that practical or engineering solutions could not be found to the identified traffic concerns. The planners view was that existing outlets would not be so affected that overall vitality and viability of the town centre would be at risk. The report also dealt with alternative developments and expressed the view that there was no reason to consider that the subjects were wholly unsuitable for residential development. Aberdeenshire Council granted the CAAD for retail development. The LTS saw no reason to doubt that the Council would have reached the same conclusion on the actual application for planning

	permission in a no scheme world. The acquiring authority challenged the grant of the CAAD and it was cancelled. The LTS had to consider the element of 'hope value' as a consequence. The changes introduced by section 232 of the 2011 Act in England do not apply here. The assessment of compensation differs markedly north and south of the Border.]
10. Renfrewshire Council	Yes. So long as the Planning Authority confirm that it would be reasonable.
13. Strutt & Parker LLP	We support this proposal. This is the wording introduced in the amendment in 2011 to the English CPO legislation.
16. SCOTTISH COMPULSORY PURCHASE ASSOCIATION	It is considered that such planning permission which could reasonably have been expected to have been granted at the relevant valuation date should be assumed to have been granted. Reference is again made to the Localism Act 2011.
17. Lands Tribunal for Scotland	Answer to questions 87, 100-104, 109, 110, 111 - planning assumptions and dates We think it is fair to say that the less flexible is the relevant date for the fixing of planning and factual assumptions, the greater the certainty of rights but the greater risk of injustice. As we suggest at Q56 above there may be merit in a stated policy aim whether the fixing of relevant dates should prevail over the right to "full" compensation and equivalence, and whether a range of dates should be specified within which discretion to fix compensation should exist. We illustrate the point with reference to hope value, but illustrations could no doubt be made in other types of claim: A difficult question is the date for fixing hope value. Hope value may exist in land even where there is no reference to it in a statutory or evolving development plan. But the value is date sensitive. Assume there is no CAAD issue, and also assume the site is not an allocated development site in the adopted development plan. The tortuous provisions of ss 22 – 30 of the 1963 Act do not directly apply. In this scenario it is by no means certain what is the correct date to fix the *planning assumptions* for assessing hope value. Arguably it is the same date as the *valuation* date. Without going into a lengthy discourse on what was said *obiter* in cases such as *Spirerose* (p 226 of discussion Paper n. 74) and others we do not think there is clear judicial guidance on how far back section 16 (no depreciation in value on account of knowledge of the scheme) allows the Tribunal to consider what would have happened in the no scheme world as regards the evolution of planning issues. The legislation is

	unsatisfactory. As we said at Q.56 many difficult cases involve an assessment of the value of a lost opportunity in the shadow period. The opportunity may have been transient. Planning is a dynamic process. For example, development sites come in and out of the development plan during what can be a lengthy process of the plan's formation. If the site is in the draft plan on a supposed "relevant date", that may be fortuitous for the claimant in the assessment of hope value. It would be equally unfortunate if the relevant date was say a year later by which time the site had been removed. There is then the complication if the site is seen less favourably by the planners (and the market*) because* of the risk or need for a CPO. If the development site was removed from the draft local plan at a particular date because of a possible CPO, e.g. because a "better" non-blighted site emerged, there would be injustice if the planning assumptions in the no scheme world have to be fixed at a later date. This then gives rise to the issue how far the back the Tribunal should look to attempt to ascertain the no scheme world at the valuation date. The principle of equivalence and full compensation might require that to be a very long time in some types of case. In reality, a piece of land can be "blighted" (in the non-technical sense) well before even a draft order stage. The site of some future infrastructure is often "safeguarded" from the date of its being entered in a draft local plan. From that point on the planners and market know there is a risk of a CPO, so the site is likely to be treated differently. From then on it has poor prospects of securing a valuable allocation in the plan or a consent, but still well before the making of the CPO. (There are of course procedures to require the planning authority to buy land if not capable of reasonably beneficial use, but that is a different issue, and for present purposes it is assumed there is an adequate existing use. It is also assumed that the strict requirements for a blight notice have not been met.) A loss is incurred well before the making of the CPO, prior to the deemed cancellation of the scheme, and that loss can only be ascertained by looking at the planning picture in existence well before the CPO was made. It may be the example we have given would be considered to be too remote to give rise to a recoverable loss. There was no scheme in existence to be hypothetically cancelled. Nevertheless, it illustrates just how fortuitous circumstances can be in regard to timings and the incidence of a loss. We therefore suggest consideration of an approach which allows flexibility in selecting dates to consider planning issues in the no scheme world. In other words there could be an approach where the selection of one particular date may have to yield to the interests of justice. Consistent with this approach we note that *in South Lanarkshire*

	Council v Lord Advocate 2002 SC 88 the Lord President at [11] said it was permissible for a CAAD to specify what would have been granted planning permission at a date after the relevant date because of a change in circumstances. He went on to say that a flexible approach would advance the aim of the system to assist in determining the appropriate level of compensation. Whatever date is to be relevant for establishing planning assumptions and deemed cancelation of the scheme, consideration should be given for providing the same date for assumptions to be applied for the fixing of hope value. Or is hope value to be fixed at the valuation date, assuming there has never been a scheme? Clarity would be of assistance. We note that under existing law a negative CAAD does not prevent the assumption of hope value. Although we do not endorse the existing legislation we would point out that it achieves a proper aim namely to reflect market behaviour where there may be hope value in some cases even where a planning application would have been refused at a particular time. Separately, we note there is the anomaly, central to *Spirerose*, that absent a CAAD where the LTS consider that a development *would*, on balance of probability have been given planning permission, it cannot award full development value but only a value discounted for uncertainty.
20. SSE plc	We believe that there should be consistency within the UK and recommend that the provisions within England and Wales should be reflected in Scotland. Subject to our answer below, it is appropriate that any assessment of the compensation should take account of situations whereby planning permission could reasonably have been expected to be granted.
21. District Valuer Services	We consider the higher test of "would have been granted" is appropriate although can be hard to define. The claimants position is protected however as compensation will still reflect "hope value" where appropriate. Note changes in s 232 of Localism Act however which has brought in a similar change.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. This would also follow the 2011 amendment to the English CPO legislation. [General Comments Chapter 14 Valuation of land to be acquired - CAADs Compensation for the value of land taken is generally based on the planning position that would have been relevant without the scheme. CAADs are an important tool in assessing value.

	There are practical difficulties where planning consent is speculative. The CPO process does not readily accommodate the voluntary and customary commercial routes open to a landowner in such a case: • selling at or not far above existing use value with a clawback in the event of a more valuable planning consent being obtained (often within a specified time span). • entering into an option agreement with a developer.]
25. East Ayrshire Council	No.
26. National Grid plc	No it must be demonstrated that it would have reasonably have been expected to be granted.
30. Isobel Gordon	We consider that such planning permission which could reasonably have been expected to have been granted at the relevant valuation date should be assumed to have been so granted.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
34. DJ Hutchison	We support this proposal.
35. Shepherd and Wedderburn	No. If the relevant dates for assessing CAAD applications are amended, the affected owner will have the option of seeking a certain planning position or relying on hope value without an assumed Permission.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	We agree with this statement on the basis that there should be consistency between Section 25 and Section 24 of the 1963 Act.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	It was stated that this is a policy issue, and noted that the "reasonably expected" test favours claimants.

Analysis	
Explanation of question	Questions 109, 110 and 111 are linked. Under section 25 of the 1963 Act, the planning authority must be of the opinion that planning permission would have been granted. This question asked whether the test should be amended and lowered, so that the planning authority should be of the opinion that planning permission might reasonably have been expected to be granted (which is the test in section 24 of the 1963 Act).
Summary of responses and analysis	21 consultees responded to this question. 14 responded "yes", and some indicated that this would be consistent with amendments made in 2011 for England and Wales. LSS and FoA suggested that there should be consistency between sections 24 and 25 of the 1963 Act. Four consultees responded "no" (although NG stated that it must be demonstrated that it would have reasonably been expected to be granted, which seems to agree with lowering the test). DVS stated that the current higher test of "would have been granted" was appropriate, although it could be hard to define. The claimant's position would still be protected by "hope value" where appropriate. S&W stated that if the relevant dates for assessing CAAD applications were amended, the affected owner would still have the option of seeking a certain planning permission or relying on hope value, without an assumed planning permission. JRR stated that it would be simpler if the test were the same as for planning assumptions and could see no reason for any difference. CC referred to the hypothetical purchaser who would treat anything less than actual consent as only giving rise to hope value, but would reflect the likelihood in the degree to which discount would be necessary. LTS provided a detailed combined answer to various inter-related questions, including this question. See the summary in their response to question 87.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	A difficult question! To restrict compensation to a value based on hope value alone where the evidence shows that permission would have been granted is unfair but could treating a probability as a

	certainty sometimes give a claimant an advantage they would not have enjoyed in the market?
6. Craig Connal QC	Assuming certainty on one view departs from reality whereas some form of value reflects the reality of the market. The hypothetical purchaser would treat anything less than actual consent as only giving rise to hope, but would reflect the likelihood in the degree to which discount would be necessary.
7. West Lothian Council	Agreed. Claimants could submit a CAAD if concerned about unfair assessment of compensation.
9. David Strang Steel	We consider there is still need for a CAAD process to allow an accurate compensation assessment.
10. Renfrewshire Council	Hope value can only apply where it exists and is likely to occur in years to come.
13. Strutt & Parker LLP	We agree that there is no justification for the higher test imposed by section 25.
16. Scottish Compulsory Purchase Association	It is considered that in such circumstances there is still a need for a CAAD process to determine what, if any, planning permission could have reasonably expected to have been granted at the relevant valuation date rather than just relying on "hope value" which in turn is subject to subjectivity by professional property valuers. In this type of situation, in order to ensure that an accurate compensation assessment is made as much certainty with regard to the development potential/planning permission requires to be incorporated in such an assessment.
17. Lands Tribunal for Scotland	[See the joint answer to questions 87, 100-104, 109,110, 111 - planning assumptions and dates - set out at question 109 above.]
20. SSE plc	We believe that such planning permission be reflected in hope value only.
21. District Valuer Services	Yes, but only to the extent that the market would do so.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	There is no justification for the higher test imposed by section 25.
25. East Ayrshire Council	No.
26. National Grid plc	Yes.
30. Isobel Gordon	We agree that there is no justification for the higher test imposed by

	section 25.
31. Association of Chief Estates Surveyors Scottish Branch	The markets' reaction to the prospect of future value should be part of the valuation.
34. DJ Hutchison	We consider there is still need for a CAAD process to allow an accurate compensation assessment.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	No.
40. Law Society of Scotland	That appears to be the current practice and we see no reason to alter this.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 109, 110 and 111 are linked.
Summary of responses and analysis	21 consultees responded to this question. 10 answered "yes", some with further explanation. WLC stated that a claimant could submit a CAAD if concerned about unfair assessment of compensation. RC stated that hope value could apply where it exists, and DVS agreed that planning permission could only be reflected by hope value to the extent the market would do so. LSS could see no reason to alter the current practice and FoA answered "yes", assuming that the change suggested in question 109 is made. Three consultees (DSS, SCPA and DJH) stated that, in such circumstances, there will still be a need for a CAAD process to allow an accurate compensation assessment. Three consultees (S&P, CAAV and IG) stated that there was no justification for the higher test imposed by section 25 of the 1963 Act. Two consultees (EAC and MacR) answered "no" without explanation. JRR stated that this was a difficult question, as it would be unfair to

	restrict compensation to a value based on hope value alone if the evidence showed that permission would have been granted, but treating a possibility as a certainty might give a claimant an advantage that they would not have had in the market. CC stated that assuming certainty on one view departs from reality, whereas some form of value reflects the reality of the market. A hypothetical purchaser would treat anything less than actual consent as only giving rise to hope, but would reflect the likelihood in the degree to which any discount would be necessary. LTS provided a detailed combined answer to various inter-related questions, including this question.

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

(Paragraph 14.64)

Respondent	
6. Craig Connal QC	See question 110. [Answer to question 110 Assuming certainty on one view departs from reality whereas some form of value reflects the reality of the market. The hypothetical purchaser would treat anything less than actual consent as only giving rise to hope, but would reflect the likelihood in the degree to which discount would be necessary.]
7. West Lothian Council	Agreed, where possible. This would provide a consistent approach.
9. David Strang Steel	We support this proposal.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	It is considered that the same criteria should indeed be applied in relation to all relevant planning assumptions.
17. Lands Tribunal for Scotland	[See also the joint answer to questions 87, 100-104, 109,110, 111 - planning assumptions and dates - set out at question 109 above.]
20. SSE plc	We believe that the same criteria be applied in relation to all relevant planning assumptions.
21. District Valuer Services	Yes.

23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	No.
30. Isobel Gordon	The same criterion should apply.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
34. DJ Hutchison	We support this proposal.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	This in our view would seem logical.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates considers that it is appropriate that the same criteria should apply to all relevant planning assumptions.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Questions 109, 110 and 111 are linked.
Summary of responses and analysis	19 consultees responded to this question. 15 answered "yes". Two (RC and EAC) answered "no". CC responded that assuming certainty on one view departs from reality, whereas some form of value reflects the reality of the market. LTS provided a detailed combined answer to various inter-related questions, including this question.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	I agree.
7. West Lothian Council	Agreed. It is a matter of what is equitable.
9. David Strang Steel	We support this proposal.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	We agree.
16. Scottish Compulsory Purchase Association	This proposal is supported.
20. SSE plc	We are in agreement with this.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
30. Isobel Gordon	We agree.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
33. DJ Hutchison	We support this proposal.
35. Shepherd and	We agree.

Wedderburn	
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	For the reasons referred to in paragraph 15.17 of the Discussion Paper, the Faculty of Advocates agrees with this proposal.
44. Scottish Property Federation	It is important to acknowledge the whole effect of a CPO upon a landowner – so yes, we agree with this proposal.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	Section 48 of the 1845 Act provides that a claim relating to severance or injurious affection will arise where injury to the retained land is sustained by the owner. It has been suggested that retained land must be contiguous with the compulsorily acquired land. However, the majority of authorities suggested that the statutory definition of retained land should not be interpreted as merely one of physical proximity but should take account of the effect of the acquisition on that land. This proposal set out to clarify the position.
Summary of responses and analysis	22 consultees responded to this proposal and all agreed with it.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	I agree.
7. West Lothian Council	Agreed that this is the appropriate basis.
9. David Strang Steel	There are two main methods of assessing disturbance:- • "before" and "after" • value land acquired on open market basis and the diminished value of the retained land. The latter is used where the parts are used for different purposes and/or land development potential for different uses. Both should be retained.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	We are concerned about the drafting of such a provision. There are however situations where, in practice, difficulties arise. In a case currently before the LTS a CPO scheme prevented the building of two turbines on retained land. The turbines would have produced a very significant income stream for the affected landowner in addition to other turbines which were built. It is important that any proposal does not rule out compensation for loss of profit. Such a situation is less risk to the actual claimant than would be reflected in an arm's length sale transaction. Severance and injurious affection should not be confined to capital value as may be implied by a "before" and "after" valuation. There needs to be flexibility. See comment on proposal 75 above. Often injurious affection losses are best considered by a DCF [Discounted Clash Flow] type approach for profits lost on retained land as a consequence of a CPO scheme. Whereas the market value of acquired land should be on open market basis (i.e. ignoring the circumstances of the claimant) the principle of equivalence suggests that the circumstances of the actual claimant must form part of the assessment of a claim for severance/injurious affection disturbance. [Answer to question 75 We agree with this proposal but have concerns re the wording of this proposal because of the interlinking of injurious affection,

	severance and disturbance. The two main methods under Rule 2 are:- • "Before and after" (the "before" being under the no scheme world and the after the "blighted" value). • Value on an OMV [open market value] basis the land acquired and, separately, the diminished value of the retained land. Both should be retained and a flexible approach adopted.]
16. Scottish Compulsory Purchase Association	As stated in response to question 75, it is considered that there are (at least) two recognised approaches to the assessment of Severance and Injurious Affection and flexibility of approach should not be restricted by any new legislation. [Answer to question 75. The answer to this question is yes and, in practice, there are two main methods by which the Rule 2 element of compensation in a part-only compulsory acquisition is assessed. Firstly, on a "before" and "after" basis whereby the "before" value is the unblighted open market value of the whole subjects as at the date of vesting: the "after" value is the open market value of the subjects reflecting both the part acquired as well as the diminished value of the retained land. The alternative approach is to specifically value on an open market value basis the land acquired and then add on the diminished value of the retained land which is the favoured approach adopted by the Lands Tribunal. It is considered that as a variety of approaches may be legitimate dependent upon the circumstances of the acquisition, any new legislation should not be proscriptive in nature thus allowing flexibility in assessing the compensation due. An example of the former approach would be in respect of a dwelling-house where part of the garden ground was compulsorily acquired and in this situation the principle of assessing the compensation is relatively straightforward i.e. "before" and "after" valuations are undertaken (what these values are of course will be subject to negotiation). An example of the latter approach would be the part-acquisition of a large area of land where the land acquired was used for different purposes and/or had potential for development for different uses.]
14. Lands Tribunal for Scotland	Concurrent or "before and after" approach We would prefer the statute not to be prescriptive. We agree there is merit in the before and after approach in appropriate cases such as where, in reality, the same assumptions fall to be applied to the taken land as well as the retained land. Equally we believe there

	may be cases where the before and after approach could achieve an unrealistic result.
20. SSE plc	We believe that since the RICS requires any valuation to be undertaken by a Registered Valuer governing valuation guidance will be taken into account, however the "before and after" basis is deemed to be a sensible approach.
21. District Valuer Services	This is considered to be appropriate following case law (*McLarens Discretionary Trustees v Secretary of State for Scotland*) which followed decisions in England. This is in accord with the principle of equivalence, is easy to understand and implement. Consideration could also be given as to whether any new term should encompass both 'severance' and 'injurious affection' as they are usually taken together for the purpose of assessing compensation; the terms are often confusing to the layman - and indeed to many valuers.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We are concerned about the drafting of such a provision. While the payment for acquired land should be on open market basis (i.e. ignoring the circumstances of the claimant), the principle of equivalence suggests that the circumstances of the actual claimant must form part of the assessment of a claim for severance and injurious affection as well as disturbance. The drafting of the provisions here should allow the valuers the opportunity to take the appropriate approach to each case, whether that is an assessment of capital values or of lost profits or on some other basis. Injurious affection losses can sometimes be best considered by a Discounted Cash Flow (DCF) type approach to profits expected to be lost on retained land as a consequence of a CPO scheme. [See also the answer to question 75. We are concerned about the way in which this proposal is expressed as it appears to risk confusion with the issues of injurious affection, severance and disturbance and so the assessment of the acquired land with effect of the compulsory purchase on retained land. The framework of the law should support careful analysis of the issues in case, avoiding both double counting and omission of items of claim while, with the variety of properties and circumstances that are met, leaving the valuers involved with the discretion to adopt the approach most suitable to each case in hand. It would be conventional to value the land taken on a market value basis and then separately assess any diminution in the value of the

	retained land (injurious affection) and the effects of retained land being severed (severance) and the costs imposed (disturbance). An alternative approach within Rule 2 (market value) is to undertake a "before and after" valuation of the whole property, taking acquired and retained land together, with the "before" valuation being on the no scheme world assumption and the "after" valuation being on the basis of the "blighted" value. The new law should leave the professional valuer with the necessary discretion to address each case in its own circumstances, able to adopt either approach.]
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
30. Isobel Gordon	We are concerned about the drafting of such a provision. Severance and injurious affection should not be confined to capital value as may be implied by the "before" and "after" valuation proposed. Often injurious affection losses are best considered by a DCF type approach such as in loss of wind turbines on retained land as a consequence of a CPO scheme.
31. Association of Chief Estates Surveyors Scottish Branch	Before and After should be used as it is easily understood and achieves fair results but other approaches should be allowed provided they can be justified.
33. DJ Hutchison	There are two main methods of assessing disturbance:- • "before" and "after" • value land acquired on open market basis and the diminished value of the retained land. The latter is used where the parts are used for different purposes and/or land development potential for different uses. Both should be retained.
35. Shepherd and Wedderburn	We agree.
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Agreed.

40. Law Society of Scotland	We agree. This seems reasonable.
42. Scottish Water	Yes.
43. Faculty of Advocates	For the reasons referred to in the Discussion Paper, the Faculty of Advocates agrees with this proposal.
44. Scottish Property Federation	This would [give] a clear and transparent purpose to the new Statute for the assessment of compensation as well as better representing the loss to a landowner. On this basis, we support this proposal.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	None.

Analysis

Explanation of proposal	The DP considered two bases for assessment of compensation for severance or injurious affection; (1) the concurrent value and (2) the "before and after" value. It proposed the "before and after" value as the appropriate basis.
Summary of responses and analysis	23 consultees responded to this proposal. 13 consultees agreed with the proposal. However, seven disagreed, and two (CAAV and ACES) pronounced qualified agreement. Of those who disagreed, DSS, S&P, SCPA, LTS, IG and DJH took the view that the legislation needed to be flexible and allow both concurrent and "before and after" methods. LTS would prefer the statute not to be prescriptive. They agreed that there was merit in the "before and after" approach in appropriate cases such as where, in reality, the same assumptions fail to be applied to the taken land as well as the retained land. They also believed there may be cases where that approach could achieve an unrealistic result. CAAV were concerned about the drafting of this proposal. While the payment for acquired land should be on an open market basis (ignoring the circumstances of the claimant) the principle of equivalence suggested that the circumstances of the actual claimant must form part of the assessment of a claim for severance and injurious affection as well as disturbance. Provisions should be drafted to allow valuers to take the appropriate approach in each case, whether that is on an assessment of capital values or of lost profits or on some other basis. Injurious affection losses could sometimes be

	best considered by a Discounted Cash Flow (DCF) approach to profits expected to be lost on retained land as a consequence of a CPO scheme. ACES stated that "before and after" was easily understood but that other approaches should be allowed provided they could be justified. Of those who agreed with the proposal, SSE believed that since RICS requires any valuation to be undertaken by a registered valuer, governing valuation guidance will be taken into account. They stated that the "before and after" approach was sensible. DVS considered the proposal acceptable, in light of case law (*McLarens Discretionary Trustee -v- Secretary of State for Scotland*) which followed decisions in England. They noted that it accorded with the principle of equivalence and was easy to understand and implement.

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

(Paragraph 15.37)

Respondent	
1. Professor Jeremy Rowan Robinson	I agree.
7. West Lothian Council	Agreed. Valuation should be carried out as at the date of severance.
9. David Strang Steel	The claims should certainly be at the date of severance, but should be able to take account of factors only known after the date – say planning permission refused or granted. We would perhaps disagree that it would be to the disadvantage of the landowner to defer the date, as it would be more likely to get the correct result. If less damage to the owner, then less paid out, and it would be more certain.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	We agree that the claims should certainly be at the date of severance and should take into account factors known or foreseeable at that date.
16. Scottish Compulsory Purchase Association	This proposal is supported on the basis that the date of severance is the vesting date.

17. Lands Tribunal for Scotland	**Assessment of Injurious Affection** In principle we would have thought it right that the assessment for injurious affection should be made at the same time as the assessment of the value of the taken land. We are aware however of cases where compensation for say disturbance is deferred until a point where e.g. removal costs have been incurred and are known. We are not sure if that scenario is so very different to the one postulated for known or likely impacts to the value of retained land, but difficult to quantify at a particular time.
20. SSE plc	We believe that the assessment of injurious affection must continue to be assessed as at the date of severance.
21. District Valuer Services	This proposal is supported on the basis that the date of severance is the vesting date.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes, taking into account the factors known or foreseeable at that date.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes at the date of vesting.
30. Isobel Gordon	We agree that the claims should certainly be at the date of severance and should take into account factors known or foreseeable at that date.
13. Association of Chief Estates Surveyors Scottish Branch	Yes - The use of one common date for all these assessments would make the provisions easier to apply.
33. DJ Hutchison	The claims should certainly be at the date of vesting but be able to take account of factors only known about after the date. Where factors change during the construction it should follow that these can be reflected in the overall compensation payable.
35. Shepherd and Wedderburn	While we understand the logic behind assessing injurious affection as at the date of severance, it seems to us that there is a danger that fact will be replaced with fiction. For example, if severance occurs on 1 June 2015 but the parties are unable to agree quickly what the value of the severance claim should be, it is conceivable that the matter would have to be referred to the Lands Tribunal for

	determination. It may take 2 years for the Tribunal to reach a view because of initial informal negotiations post severance and subsequent formal procedures in the Tribunal itself. In a scenario where the Lands Tribunal is being asked to rule on injurious affection caused by the scheme, it seems difficult to accept that the Tribunal and the parties to the case would have to ignore what had actually happened on the ground in the 2 year period since severance actually occurred and, instead, attempt to imagine what might have happened based on the parties' state of knowledge as at 1 June 2015. For those reasons, we suggest that injurious affection should be assessed, with the agreement of the parties, at the date of severance, failing which on the earlier of (a) the date of the Lands Tribunal's decision; and (b) the date of completion of the works authorised by the project.
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	For the reasons referred to in the Discussion Paper, the Faculty of Advocates agrees with this proposal.
44. Scottish Property Federation	This would seem to be necessary in light of our support for proposal 113 – we support proposal 114 therefore.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	It has been argued that there would be a fairer assessment of loss if events could be taken into account when assessing the value of retained land, even if they occurred after the date of severance. Events may occur which turn speculation into fact. The DP took the view that, notwithstanding these concerns, injurious affection should

	be assessed as at the date of severance.
Summary of responses and analysis	24 consultees responded to this proposal. 17 agreed without reservation. Seven agreed subject to specific qualifications. S&P, CAAV and IG stated that claims should be assessed at the date of severance and that they should take account of factors known or foreseeable at that date. DSS and DJH stated that the claims should be able to take account of factors which only became known after the date of severance. DSS gave the example of planning permission refused or granted. LTS thought that, in principle, the assessment for injurious affection should be made at the same time as assessment of the value of the land taken. However, they were aware of cases where compensation for any disturbance was deferred until a point where, for example, removal costs had been incurred and were known. They were not sure if that scenario was very different to the one postulated for known or likely impacts to the value of retained land, but difficult to quantify at a particular time. DVS, SCPA and NG wanted the date of severance to be the vesting date for the land taken. S&W understood the logic behind assessing injurious affection as at the date of severance but were concerned that such a rule might replace fact with fiction. They gave an example where severance occurred on 1 June 2015, the parties were unable to quickly agree the value of the severance claim, so the matter was referred to LTS, taking two years. It was difficult to accept that LTS and the parties should have to ignore what had actually happened on the ground in the two year period, and instead would require to attempt to imagine what might have happened based on the parties' state of knowledge at 1 June 2015. S&W suggested that injurious affection should be assessed, with the agreement of the parties, at the date of severance, failing which on the earlier of (a) the date of the LTS decision, and (b) the date of completion of the works authorised by the project.

115. **Compensation for injurious affection, properly so called, should be limited to damage caused to the market value of the retained land.**

(Paragraph 15.44)

Respondent	
1. Professor Jeremy Rowan Robinson	I agree.

7. West Lothian Council	Agreed. This keeps the process simple and costs for loss of business can be claimed under a different head of claim i.e. disturbance. This will prevent double counting.
9. David Strang Steel	We agree with the Law Commission's comment at paragraph 15.40 that: - *'compensation for injurious affections will not cover loss of profitability of the retained land or the costs incurred by the claimant in terms of remedying the detriment caused to the land by compulsory acquisition'.* We agree with this proposal provided loss of profits etc. as noted are clearly and expressly dealt with elsewhere.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	Claims for severance, injurious affection are relatively common in agricultural situations. We consider that careful drafting will be required here if reference is to be to market value. A capital valuation on a before and after basis is likely to result in a lower value than an assessment of lost profits because comparable sales reflect risk to a potential purchaser – i.e. giving rise to the issues referred to at [paragraph] 15.41 [of the DP]. Issues such as this frequently arise in wind, hydro or solar schemes affected by CPOs. The affected party should be compensated on the basis of equivalence. On balance we consider that the wording of any injurious affection/severance claim should not be restricted to market value but sufficiently wide as to avoid the situation that arose in *Cooke –v- Secretary of State for the Environment* rather than be restricted to a market value assessment.
16. Scottish Compulsory Purchase Association	This proposal is supported albeit it may be in some circumstances the decrease in the market value of the retained land may be wholly or partly assessed relative to a potential loss of profits and thus retention of flexibility of approach is required. Reference is made to the response to question 113 and it will also be necessary to ensure that double-counting does not occur. [Response to question 113 As stated in response to question 75, it is considered that there are (at least) two recognised approaches to the assessment of Severance and Injurious Affection and flexibility of approach should not be restricted by any new legislation.]

17. Lands Tribunal for Scotland	**Compensation for Injurious Affection** We agree with paragraph 15.38 [of the DP] that the CAAD procedure, in practice, provides useful guidance as to the value of retained land. If part of a development site is taken, there would seem to be no good reason why the remainder should be valued without reference to the same planning assumptions in the no scheme world. We are cautious as to limiting a claim for injurious affection in the way suggested. The legislation would need to be clear that it does not intend to prevent an alternative disturbance claim which might also be related to the retained land. If the concern is to prevent a double recovery, it is considered that such would not in any event be permitted under normal valuation principles.
20. SSE plc	We agree that compensation for injurious affection must be limited to the damage caused to the market value of the retained land in order to prevent any duplication of claims in respect of those which are more akin to disturbance.
21. District Valuer Services	Yes – any loss of profitability to a business should continue to be assessed separately as a disturbance item
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Claims for injurious affection are, like severance, relatively common in agricultural situations and it is not necessarily always best addressed by a market value assessment. We consider that careful drafting will be required here so that the basis is wide enough to do justice to the range of cases, including those involving high value income streams from renewable energy projects, that may be found.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
30. Isobel Gordon	We consider this proposal to be unnecessary restrictive and one which could lead to potential injustice. There is often interlinking between injurious affection, severance and disturbance claims and flexibility is necessary. In our case the pipeline resulted in the loss of the ability to install two wind turbines out of a six turbine scheme. A capital valuation on a before and after basis would result in a lower value than an assessment of lost profits because comparable sales reflect risk to a potential purchaser who would have to outlay considerable capital which is not the case for ourselves in our situation – i.e. giving rise to the issues referred to at [paragraph]

	15.41 of the DP]. We consider that the wording of any injurious affection/severance claim should not be restricted to market value but sufficiently wide as to avoid the situation that arose in *Cooke -v- Secretary of State for the Environment*.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
33. DJ Hutchison	We agree with the Law Commission's comment at paragraph 15.40 [of the DP] that:- *'compensation for injurious affections will not cover loss of profitability of the retained land or the costs incurred by the claimant in terms of remedying the detriment caused to the land by the compulsory acquisition'.* We agree with this proposal <u>provided</u> loss of profits etc. as noted are clearly and expressly dealt with elsewhere.
35. Shepherd and Wedderburn	We agree.
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	This seems reasonable, provided other losses are recoverable as a disturbance claim or other consequential loss.
42. Scottish Water	Yes.
43. Faculty of Advocates	For the reasons referred to in paragraph 15.44 of the Discussion Paper, the Faculty of Advocates agrees with this proposal.
44. Scottish Property Federation	We respect the fact that an acquiring authority will wish to avoid duplication of compensation, however, we have previously argued that compensation should be assessed based on the whole effect of a CPO and its consequences for retained land in particular. We have reservations about limiting the basis for compensation for injurious affection therefore. Should this proposal be taken forward however it will be important to ensure that the opportunity for full disturbance loss to be represented in compensation is supported.
45. Scottish Power Energy Networks	We agree with this proposal.

Holdings Ltd	
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	Following severance, injurious affection in the wider sense will include not only the depreciation in the value of the land but also loss of profits, costs, inconvenience and other forms of loss. This proposal suggested that injurious affection should be limited purely to diminution in the capital or market value of the retained land. This would leave the other aspects of loss to be dealt with under other headings, which, it is argued, would avoid any possible problems with duplication of claim.
Summary of responses and analysis	23 consultees responded to this proposal. 19 supported the proposal, and four opposed it. Of those supporting it, many did so on the basis that it must be made clear that loss of profit would be dealt with under a separate heading. WLC felt the proposal would allow the process to be simple, and the costs for loss of business could be claimed under a different heading, which would prevent double counting. DSS and DJH wanted loss of profits clearly and expressly dealt with elsewhere. SSE agreed that injurious affection must be limited to damage to the market value of the retained land in order to prevent any duplication of claims in respect of those which are more akin to disturbance. DVS agreed that loss of profitability to a business should be assessed separately as a disturbance item. LSS agreed with the proposal, provided other losses were recoverable as a disturbance claim or other consequential loss. SCPA, while supporting the proposal, pointed out that there may be circumstances where the market value of the retained land should be assessed relative to a potential loss of profits and this flexibility should be retained. Of those opposing the proposal, S&P pointed out that injurious affection claims are relatively common in agricultural situations and careful drafting would be required if there was a reference to market value. A capital valuation on a “before and after” basis is likely to result in a lower value than an assessment of lost profits because comparable sales reflect risk to a potential purchaser and give rise to the issues set out at paragraph 15.41 of the DP (depreciation in market value may be less than the full cost to the claimant of the injurious affection). S&P argued that the affected party should be

	compensated on the basis of equivalence and stated that, on balance, they considered that any injurious affection/severance claim should not be restricted to market value but sufficiently wide as to avoid the situation in *Cooke-v-Secretary of State for the Environment* (DP paragraph 15.41). LTS agreed, firstly, that the CAAD procedure provided useful guidance as to the value of retained land and stated that if part of a development site were taken, there would seem to be no good reason why the remainder should be valued without reference to the same planning assumptions in the no-scheme world. Secondly, they were cautious about limiting a claim for injurious affection in the way suggested by the proposal. The legislation would need to set out clearly that it was not intended to prevent an alternative disturbance claim which might also be related to the retained land. However they were clear that double counting would not be permitted under normal valuation principles. CAAV agreed with the view of S&P that, in agricultural situations, injurious affection is not necessarily best addressed by a market value assessment. Careful drafting would be required so that the basis for valuation is wide enough to do justice to the range of cases that may be found, including those involving high value income streams from renewable energy projects. IG considered the proposal to be unnecessarily restrictive and one which could lead to potential injustice. She stated that there was often interlinking between injurious affection, severance and disturbance claims so flexibility was necessary, and pointed to her situation where she lost the opportunity to install two wind turbines out of a six turbine scheme. She explained that a capital valuation on a "before and after" basis would result in a lower value than on assessment of lost profits, because comparable sales reflected risk to a potential purchaser who would have to outlay considerable capital, thus giving rise to the issues set out in the DP, paragraph 15.41. The wording of any injurious affection/severance claim should not be restricted to market value but be sufficiently wide as to avoid the situation in *Cooke-v-Secretary of State for the Environment* (DP paragraph 15.41). SPF respected the desire to avoid duplication of claim but pointed out that they had previously argued that compensation should be assessed based on the whole effect of a CPO and its consequences for retained land in particular. They expressed reservations about limiting the basis for compensation for injurious affection.

116. **The proposed new statute should confer a discretion on an acquiring authority to carry out accommodation works.**

(Paragraph 15.49)

Respondent	
1. Professor Jeremy Rowan Robinson	I agree.
7. West Lothian Council	Agreed. This could reduce the compensation payable by an acquiring authority. There may be issues in agreeing the extent of the accommodation works but it has been suggested as a discretionary right rather than an obligation.
9. David Strang Steel	We do not agree with this proposal – it leaves the acquiring authority too much scope to underspecify works such as fences.
10. Renfrewshire Council	Agreed – This happens as a matter of course.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	Again requirements for accommodation works (new accesses, water troughs, fences etc.) are common in agricultural claims. In practice because most large projects are design and build and accommodation works are on retained land over which the contractor has no access, claimants are paid for accommodation works. We have encountered difficulty on the AWPR where the development consortium has not followed specification or agreements relating to accommodation works agreed with the acquiring authority (including the provision of adequate watering facilities for the livestock). On raising the issue with the acquiring authority, clients have been referred to the developer (with whom the claimant has no contractual relationship).
16. Scottish Compulsory Purchase Association	It is considered that any proposed new statute should incorporate an appropriate definition of Accommodation Works i.e. physical works undertaken on either retained land where there is a part-only compulsory acquisition or on privately-owned land where no land has been acquired that ameliorate the effects of the public work and to also give a legislative responsibility to an acquiring authority to undertake such works, if it so wishes, but in discussion and negotiation with the affected land owners. Equally, there should be a duty of care on acquiring authorities to ensure that any such works that are undertaken are completed properly and in accordance with previously-agreed specifications. Occasions have arisen where inferior works (or no works at all) have been provided and the acquiring authority takes no remedial action but suggests that the claimant take the matter up with the contractor- even though there is no contractual relationship between the claimant and the contractor.

20. SSE plc	We agree with the present discretionary principle whereby an acquiring authority may be able to mitigate the amount of compensation payable to the claimant whilst the claimant is under a duty to mitigate loss. We agree that the acquiring authority should have a discretion to carry out works, but that the value of such work to the claimant should be taken into account on the overall compensation paid.
21. District Valuer Services	Yes. This is a very useful flexibility which can work to the advantage of both parties. However it should be a discretion, not a duty or acquiring authorities could be forced into very expensive and uneconomic works. The legislation should define accommodation works as being "works constructed on the claimants retained land in lieu of compensation" i.e. the works are not in addition to the compensation otherwise payable and should only be carried out if this test is met.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. Agricultural cases commonly see the need for accommodation works such as new accesses, water troughs, fences and revised drainage arrangements. In practice, with the use of design and build for most large projects and as accommodation works are on retained land over which the contractor has no access, claimants are paid for accommodation works. This can lead to major problems with contractors over delivering agreed accommodation works - including the provision of adequate watering facilities for the livestock. No one then accepts responsibility as when the issue is raised with the acquiring authority, the claimant is referred to the developer (with whom he has no contractual relationship) who is simply trying to do the job as cheaply as possible and may have sub-contractors in the way.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes as this can help the acquiring authority mitigate compensation and accommodation works and may be preferred by the affected party. The new statute would have to make it clear that the acquiring authority have the right to carry out such works and would have to provide it with the necessary rights to do so e.g. access rights etc. However it must be for the acquiring authority to decide whether it carries out accommodation works or pays compensation. So any provision in the new statute must not make it mandatory for the acquiring authority to carry out accommodation works.
30. Isobel Gordon	In our case NG gave undertakings to the Reporter with regard to accommodation works (ducts for pipes and pipe protection over

	crossing points) but failed to carry out such works. Requirements for accommodation works (new accesses, water troughs, fences etc.) are common in agricultural claims. In practice, because most large projects are design and build and accommodation works are on retained land over which the contractor has no access, claimants are paid for accommodation works. The issue is that acquiring authorities insist on landowners obtaining multiple quotes etc. giving rise to considerable additional time and effort which they then are reluctant to reimburse and cause undue expense with delay tactics.
31. Association of Chief Estates Surveyors Scottish Branch	Present position is satisfactory – acquiring authority should have discretion.
33. DJ Hutchison	We do not agree with this proposal - it leaves the acquiring authority too much scope to underspecify works such as fences.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Accommodation works can be substantial and involve amendments to drainage, new accesses and fencing among other changes. There is a need for clear lines of responsibility to avoid "buck passing" between an acquiring authority, their contractor and sub-contractors.
40. Law Society of Scotland	This seems reasonable, subject to such works being accepted by the affected party or parties.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We accept this proposal – there needs to be flexibility to allow such arrangements and it ought to be in the interests of both parties to find a suitable agreement for accommodation works where they are required.
Further responses, either made informally or at engagement events	At various events landowners, agents and solicitors complained in great detail about their treatment by contractors to which completion of public works have been delegated by AAs. Complaints included contractors not undertaking works at all, not complying with specifications and not engaging with landowners. In an informal response relating to accommodation works under AWPR, reference was made to TS using orders under section 140 of the Roads (Scotland) Act 1984, to obtain access over, and use of, land which should have been acquired under the scheme. This was due to a failure to include accommodation works in the original tender for the scheme, so they could not be provided by the contractor.
Analysis	
Explanation of question	It appears to be relatively common for AAs to carry out small or minor works to mitigate the damage caused to retained land, including installing fencing, double glazing and new accesses. Such mitigation works can reduce the level of compensation. The DP proposed that a discretionary power to carry on with this practice should be set out in the new statute.
Summary of responses and analysis	22 consultees responded to this proposal. 18 thought that the proposal was acceptable although some qualified their responses. Four disagreed with the proposal. DSS and DJH felt that it would give the AA too much scope to underspecify works such as fences. S&P explained that accommodation works are common in agricultural claims. They stated that most large CPO projects are “design and build”, and accommodation works are on retained land over which the contractor has no access. As a result, claimants tend to be paid for accommodation works. S&P had encountered difficulties on the AWPR where the development consortium had not followed the specification or agreement relating to accommodation works agreed with the AA, including the provision of adequate watering facilities for

	livestock. On raising this issue with the AA, clients had been referred to the development consortium with which the claimant had no contractual relationship. CAAV and IG also referred to the problems caused by the lack of a contractual relationship between the claimant and any contractor. SCPA considered that any proposed new statute should incorporate an appropriate definition of accommodation works i.e. physical works that ameliorate the effects of the public work, undertaken either on retained land where there is a part-only compulsory acquisition or on privately owned land where no land has been acquired. The AA should also be given legislative responsibility to undertake such works, if it so wishes, but in discussion and negotiation with the affected land owners. Equally there should be a duty of care on AAs to ensure that any such works are completed properly and in accordance with previously agreed specifications. They referred to occasions where inferior works, or no works at all, had been provided but the AA had taken no action other than to refer the claimant to the contractor, notwithstanding that the claimant had no contractual relationship with the contractor. IG referred to undertakings given in her case by NG to the Reporter in relation to accommodation works which they then failed to carry out. IG stated that AAs insisted on landowners obtaining multiple quotes for accommodation works, taking considerable additional time and effort, which AAs were then reluctant to reimburse. SLE pointed out that accommodation works can be substantial and include amendments to drainage, new accesses and fencing. There was a need for clear lines of responsibility to avoid “buck passing” between an AA, their contractor and sub-contractors. FoA supported the proposal but stated that any legislation conferring a discretion on an AA, should make it clear that this is a discretion to agree with the landowner a scheme of works, and that this is on the existing common law basis, i.e. the landowner cannot be compelled to accept a proposed scheme, failure to agree will not affect the amount of compensation to be paid, and the AA has the power to give an undertaking not to use the acquired land for certain specified purposes. SSE stated that the value of any accommodation works to the claimant should be taken into account when assessing the overall compensation to be paid. In an informal response relating to accommodation works under AWPR, reference was made to TS using orders under section 140 of the Roads (Scotland) Act 1984, to obtain access over, and use of, land which should have been acquired under the scheme. This was

	due to a failure to include accommodation works in the original tender for the scheme, so they could not be provided by the contractor.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	I have no strong views about 117 but think that there is something to be said for treating the matter in the same way as for severance - as they are the converse of each other.
7. West Lothian Council	No. Betterment should apply regardless of whether the land is contiguous or adjacent as land which is not contiguous or adjacent may also benefit from the public works.
9. David Strang Steel	The rules pertaining to betterment are confused and inconsistent. From other cases we have heard about on the AWPR they are being used by the DV to counter any claim by affected parties for the market value of their property.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	We consider it is not.
16. Scottish Compulsory Purchase Association	It is considered that the current situation with regard to set-off for betterment is confused, open to misinterpretation, extremely difficult to apply on a consistent basis and, in many cases, iniquitous and thus, on balance, should not be incorporated in any new proposed statute. As stated within this Response Paper, the compulsory purchase of private property rights can impose a severe imposition or restriction on landowners: whilst the statutory right to exercise compulsory powers to acquire such land interests is needed (provided proper justification is shown) there requires nevertheless to be a counter-balance with regard to the assessment of compensation. It is considered that any rule that allows for the set-off for betterment for compensation does not reflect that proper balance and, as pointed out in the Discussion Paper, creates an opportunity for confusion, time delay and inconsistent amounts of compensation. Nevertheless, it is recognised that retention of the status quo of the ability to set-off betterment in the compensation assessment will be favoured by acquiring authorities.
20. SSE plc	It is for the acquiring authority to establish that betterment has occurred and that the value of the land retained would not have

	increased but for the scheme. Compensation claims assessments should seek to balance the private interests of the landowner against general public interest and should betterment be disregarded, this could provide a landowner with compensation which goes beyond the spirit of equivalence.
21. District Valuer Services	Yes. Unless set off is restricted to the increase in the value of the contiguous or adjacent land the valuation process becomes unworkable, particularly as the distance between the land taken and the land retained increases.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No- for reasons set out above.
26. National Grid plc	Yes.
30. Isobel Gordon	We agree with this proposal.
31. Association of Chief Estates Surveyors Scottish Branch	No – the provisions relating to betterment require revision.
34. DJ Hutchison	The rules pertaining to betterment are confused and inconsistent. From other cases we have heard about on the AWPR they are being used by one DV to counter any claim by affected parties for the market value of their property.
35. Shepherd and Wedderburn	No. See our answer to 118 below. [Answer to proposal 118 We agree with this proposal. The valuation of land acquired is undertaken on the basis that the scheme has been cancelled. It is a hypothetical valuation undertaken to put the Landowner into the position he would have been were it not for the scheme itself. If it is accepted that that principle should continue to underpin the system of compulsory purchase compensation, it seems to us wrong that the acquiring authority should be entitled to set-off an increase in value of retained land which the Landowner may have no intention of selling.]
36. Scottish Power Ltd	We believe that this would be satisfactory.

38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	No.
40. Law Society of Scotland	The reference to "adjacent land" will cause difficulties as to where the limits of this adjacency lie.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
45. Scottish Power Energy Networks Holdings Ltd	We believe that this would be satisfactory.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Current legislation provides that where compulsory acquisition of part of a claimant's land results in betterment of the value of the retained land, the increase in value must be set off or deducted from compensation for the land taken. The rule relates to land that is "contiguous or adjacent" to the land taken. "Contiguous" has been interpreted as meaning "touching" but "adjacent" is not regarded as having precise or uniform meaning. The DP considered that it was important that the rule on betterment should only apply to land which was capable of being clearly demarcated. The DP asked whether the current rule was satisfactory in this respect, and this question was designed to ask consultees only about the degree of proximity. The discussion in the DP relating to proposal 118 reflected on more general issues.
Summary of responses and analysis	21 consultees responded to this question. Eight consultees thought that the rule was satisfactory, although most gave no reason. 12 did not believe the rule was satisfactory and JRR gave no strong views. WLC stated that betterment should apply regardless of whether the land is contiguous or adjacent as other land may also benefit from

	public works. DSS and DJH considered that the rules on betterment were confused and inconsistent. They understood that on the AWPR scheme the DV were using betterment to counter any claim for market value. SCPA considered that betterment was confused, open to misinterpretation, extremely difficult to apply on a consistent basis and, in many cases, iniquitous, and therefore, on balance, should not be incorporated in any proposed new statute. LSS stated that the reference to "adjacent land" would cause difficulties as to where the limits of the "adjacency" would lie.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	The whole question of how to treat betterment and injurious affection or blight has caused difficulties for the system for years. I note that you suggest (recommendation 118, p.245) that the provision for set off of benefit to retained land might be dropped from the compensation code and I agree with this. My view is that it is a matter better dealt with through general or local taxation. However, the converse of set off of betterment is compensation for other injurious affection. I make a distinction here between loss arising because the acquired land is important to the overall value of the land (severance) and loss arising because the scheme of the acquiring authority has a negative impact on the retained land (other injurious affection). If set off of betterment is taken out of the compensation code, logic suggests that other injurious affection should be as well and perhaps dealt with through Part 1 of the 1973 Act which provides for compensation for the negative impacts of public works. These are not increases or decreases in value directly attributable to the compulsory acquisition - contrast severance - but are increases or decreases which might be experienced in common with neighbours who have had no land acquired. The only argument for dealing with other injurious affection as part of the compulsory purchase compensation is that the claimant only has to make one claim - and I accept that that is a powerful argument.
7. West Lothian Council	No. The acquiring authority should be able to set off compensation against betterment.
9. David Strang	Agreed, this makes sense given that neighbouring landowners who do not have land acquired may benefit from the scheme with no set-

Steel	off.
10. Renfrewshire Council	No, where the retained land benefits from the scheme, this should be taken into account, just as the retained land is compensated when a loss occurs.
13. Strutt & Parker LLP	We strongly agree with this proposal. This would accord with the recommendations carried at from the Scottish Executive in 2001 [Murning Review]. In our experience in respect of the AWPR and other schemes, the Law Commission's statement at 54 that "it is for the acquiring authority to establish that betterment has occurred and that the value of the land would not have increased, but for the scheme" tends to be ignored. It is our experience that DVs argue betterment without adequate justification. Given that neighbouring landowners who do not have land acquired benefit from the scheme with no set-off, it means that those with land acquired bear a greater burden of funding new schemes. [Answer to proposal 82 This is the concept of betterment. In our experience betterment is used by acquiring authorities to try to reduce compensation payable; often on the flimsiest of evidence. In the AWPR it is our experience that some DVs have argued betterment to provide a £nil in response to a claim for advance payment despite having been unable to speak to planning authorities. It seems to be unreasonable for a landowner with no land taken to enjoy the full fruits of a scheme but an immediate neighbour whose land is being taken should have betterment deducted from his compensation. It suggests that a landowner who is affected by a scheme bears a disproportionate cost of its implementation.]
16. Scottish Compulsory Purchase Association	See the response to question 117 above. [Answer to question 117 It is considered that the current situation with regard to set-off for betterment is confused, open to misinterpretation, extremely difficult to apply on a consistent basis and, in many cases, iniquitous and thus, on balance, should not be incorporated in any new proposed statute. As stated within this Response Paper, the compulsory purchase of private property rights can impose a severe imposition or restriction on landowners: whilst the statutory right to exercise compulsory powers to acquire such land interests is needed (provided proper justification is shown) there requires nevertheless to

	be a counter-balance with regard to the assessment of compensation. It is considered that any rule that allows for the set-off for betterment for compensation does not reflect that proper balance and, as pointed out in the Discussion Paper, creates an opportunity for confusion, time delay and inconsistent amounts of compensation. Nevertheless, it is recognised that retention of the status quo of the ability to set-off betterment in the compensation assessment will be favoured by acquiring authorities.]
20. SSE plc	The underlying ethos of CPO seeks to balance private interests of a landowner against the interest of the general public. Whilst a landowner may lose part of their property the financial loss should assessed alongside any betterment which they may also enjoy in respect of their remaining land. The fact that other non-connected owners may perhaps also benefit from the proposed scheme, as a consequence of good fortune, this windfall is not as a consequence of the direct actions of the acquiring authority to purposely ensure that the scheme seeks to benefit a certain individual against all others. Thus, to commend to repeal the provisions of offsetting betterment on the presumption that it is perhaps unfair is contrary to the spirit of equivalence. We disagree with this proposal for the reasons stated in our response to proposal 117.
21. District Valuer Services	No. It is reasonable to take into consideration the benefits to a claimant's retained land brought about by the scheme (and public investment) as otherwise this would not adhere to the principle of equivalence. The deduction for betterment will only apply where there is already a claim for reduction in value of other land. It is reasonable that, where someone makes such a claim, the effects on his or her retained land (both adverse and beneficial) should be looked at overall. Claimants can claim very substantially - in some cases gaining millions of pounds worth of development value entirely due to public investment in the scheme. The case for a tax to be paid by landowners who benefit from public investment was made as long ago as 1909 by Winston Churchill, who spoke against the landowner "who contributes nothing to the process from which his own enrichment is derived", and betterment is one form of levy which ensures that those who directly benefit from such schemes have that benefit taken into account.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. Members' reports that some acquiring authorities do not accept the onus of proof here but simply assert betterment without adequate justification. Currently, where neighbouring landowners who do not have land taken benefit from the scheme with no set-off, those who have land

	acquired bear a greater burden of funding that scheme. [See also answer to question 82. Betterment is a more problematic concept in practice than it sounds. Disregarding betterment arising from the scheme seems the correlative of disregarding blight arising from the scheme. A further issue is the equitable treatment of affected persons who have land taken when bettered may be offset against other compensation but it is not withdrawn from those who gain from the scheme but do not lose land. They might be competing with neighbours, yet the affected landowner bears a disproportionate cost of the scheme's implementation. It is a cause of concern that acquirers, naturally arguing their corner, can put undue stress on betterment in seeking to reduce liabilities when there may be no real case for that.]
24. Shona Blance	Essential but not enough given the potential to limit compensation to the landowner via development plans.
26. National Grid plc	No they should be retained.
30. Isobel Gordon	We strongly agree with this proposal. Betterment gives rise to considerable aggravation. In our experience the Law Commission's statement at 54 that "it is for the acquiring authority to establish that betterment has occurred and that the value of the land would not have increased, but for the scheme" tends to be ignored and betterment is argued on behalf of acquiring authorities without adequate justification. We are aware from affected farmers on the AWPR that the DV is using examples of betterment set off on the A74 as 'evidence' for the same occurring on the AWPR without reference to the actual planning situation. Given that neighbouring landowners who do not have land acquired benefit from the scheme with no set-off, it means that those with land acquired bear a greater burden of funding new schemes. We had direct experience when the A94 was upgraded to build the A90 dual carriageway. The argument put forth by the roads authority was that the dual carriage way had created betterment as the farm cottages located at the road side would experience only half the amount of traffic noise as the south bound carriage way was further away. In reality what happened that more traffic use the road and the cottages easily experience double the traffic going past if not more.

	Betterment is an unproductive argument in CPO compensation.
31. Association of Chief Estates Surveyors Scottish Branch	Betterment is a valid concept but requires revised provisions. [See answer to question 82 There should be clear rules for dealing with cases where the uplift in value arises from the scheme. This should include hope value considerations.]
34. DJ Hutchison	Agreed, this makes sense given that neighbouring landowners who do not have land acquired may benefit from the scheme with no set-off.
35. Shepherd and Wedderburn	We agree with this proposal. The valuation of land acquired is undertaken on the basis that the scheme has been cancelled. It is a hypothetical valuation undertaken to put the Landowner into the position he would have been were it not for the scheme itself. If it is accepted that that principle should continue to underpin the system of compulsory purchase compensation, it seems to us wrong that the acquiring authority should be entitled to set-off an increase in value of retained land which the Landowner may have no intention of selling.
36. Scottish Power Ltd	We do not agree with this proposal.
38. MacRoberts LLP	Agreed. This squares with equivalence. In a "normal" situation a landowner would be entitled to any windfall value. Acquiring authority wanting to have their cake and eat it.
39. Scottish Land and Estates	Caution needs to be exercised here. It would be invidious for the acquiring authority to place undue emphasis on betterment to minimise their liability if this cannot be fully demonstrated or evidenced. A landowner may also bear a disproportionate cost from implementation of a CPO, but other neighbours might also share the overall “betterment”.
40. Law Society of Scotland	Yes, this seems reasonable. The other sensible proposal is that made by the DETR Review (at para 15.62 of the DP) that betterment should only be set-off against compensation for injury caused to the retained land and should not affect the other heads of compensation payable to the landowner.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We do not believe that betterment should be required to be set off but it could form part of an overall agreement on compensation with the landowner. The narrow term of requiring betterment to be set off should therefore not be reinstated in the new Statute.
45. Scottish Power Energy Networks Holdings Ltd	We do not agree with this proposal.
Further responses, either made informally or at engagement events	The presentation on set-off in betterment cases provided arguments for both retaining this rule and abolishing it. The argument presented for set-off to be retained was that there is a public interest AAs should not be burdened with additional compensation, and the principle of equivalence meant that set-off of betterment would ensure that the landowner was not better off as a result of the CPO. The arguments presented against set-off were (1) the inequality between owners who have had land acquired and their neighbours who have not, (2) the burden that was unfairly placed on the owner to disprove betterment when the AA claimed it applied, (3) delay and related costs and (4) the rule is unfair as the value of betterment relates to development value even if the owner had no intention to develop. Participants noted that delay was often caused by the lack of clarity on the rules relating to betterment. Participants wondered how an AA could provide one figure for betterment while the planning authority gave another. Some participants noted that it would be unfair for landowners to have a windfall due to betterment. Others argued that landowners were worse off when they did develop their retained land. At that stage, in order to obtain planning permission, they were forced to agree to a section 75 agreement (which is an agreement with the planning authority under which a developer commonly agrees to make a substantial payment for infrastructure). This, in effect, would mean that landowners were paying twice if betterment was also set off. Some participants queried whether betterment was a good way to alleviate the burden on the state as a result of such schemes. It was argued that betterment was “hit and miss”, was only recovered from landowners subject to the CPO and the maximum amount was the value of the land acquired. Other participants argued this was the best way as previous attempts to reduce the burden on the state had not been successful. Some participants noted that having to go to the LTS may be

	preventing potential betterment issues being disputed. Some participants argued for a threshold to be set where set-off would only apply if the property was over a certain value. There was a discussion about the elements of compensation against which betterment should be set off. Some argued it should only be set off against injurious affection (instead of the value of the land). [For more comments on betterment and set-off see further responses to question 82]
Analysis	
Explanation of proposal	The DP set out the arguments both for and against setting off betterment, relevant comparative law and suggested a possible way forward. It recognised there was no easy solution to set-off for betterment, and the treatment of betterment was one of policy. On balance, the DP proposed that these provisions should be repealed.
Summary of responses and analysis	22 consultees responded to this proposal. 12 agreed with it and eight disagreed. FoA noted it was a matter of policy, while ACES noted that betterment was a valid concept but stated that it required revised provisions. JRR agreed that set-off of benefit to retained land should be removed, and took the view that it was a matter better dealt with through general or local taxation. DVS stated that it was reasonable to take into consideration the benefits to a claimant's retained land brought about by the scheme, and public investment, as otherwise this would not adhere to the principle of equivalence. They pointed out that the case for a tax to be paid by landowners who benefit from public investment was made in 1909 by Winston Churchill. Betterment is a form of levy which ensures that those who directly benefit from such schemes have that benefit taken into account. DSS and DJH pointed out that neighbouring landowners, who do not have land acquired, may benefit from the scheme, but experience no set-off. CAAV agreed with this point and added that some AAs do not accept the onus of proof falls on them, and simply assert betterment with no justification. S&P strongly agreed with this proposal. They pointed out that this would accord with the Murning Review. S&W agreed with the proposal. They pointed out that valuation of the land acquired is undertaken on the basis that the scheme has been cancelled. It is a hypothetical valuation undertaken to put the landowner in the position he would have been were it not for the scheme itself. If it was accepted that that principle should continue

	to underpin the system of CP compensation, it seemed wrong that the AA should be entitled to set off an increase in value of retained land which the landowner may have no intention of selling. MacR stated that the proposal equated with equivalence. LSS felt this was a reasonable proposal. They also agreed with the proposal made by the DETR Review (at paragraph 15.62 of the DP) that betterment should only be set off against compensation for injury caused to the retained land and should not affect the other heads of compensation payable to the landowner. WLC, RC, SSE, NG, SP, SW, SPEN and DVS all opposed this proposal. This group comprises the bodies with compulsory powers, together with the District Valuer.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Agreed.
6. Craig Connal QC	Yes.
7. West Lothian Council	No. It should be connected to the market value although not form part of the compensation for the purchase of the land. Some of the costs incurred as a result of disturbance should be connected to the value of the property i.e. legal costs.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We support this proposal subject to the general rule against double counting. Note our comment in respect of Chapter 15.
16. Scottish Compulsory Purchase Association	This proposal is supported inasmuch as the disturbance assessment is consistent between the Rule 2 and Rule 6 elements, creates equivalence and follows the long-established principle determined in Horn v Sunderland (1941).

17. Lands Tribunal for Scotland	**Q119 / Q120 – Compensation for Disturbance** We suggest that the *Horn* problem might be resolved by the modern approach to causation and remoteness, exemplified in *Shun Fung* (paragraph 16.35). If the landowner in the no scheme world would, in any event, have removed, say in order to extract development value, it would seem contrary to principle for it to claim removal costs as a "loss" since it already gets compensation for the loss of development value. If those costs would have been incurred in any event in extracting development value why should they be recoverable? We think experience shows that the "value to seller" approach to market value of land taken is apt to blur into disturbance claims in certain cases. We think any new statutory approach to disturbance should bear in mind the many ways disturbance may take effect, including in the valuation of the land itself. Accordingly we would favour an approach where there are stated guiding principles (such as no double recovery if that is not already clear) rather than too strict a compartmentalisation of claims.
20. SSE plc	We agree with the judgement of Goddard LJ [in *Horn v Sunderland Corporation*] that the assessment of compensation for disturbance should be carried out separately from the assessment of the market value of the property.
21. District Valuer Services	No – this would go against the principle of equivalence which has been widely accepted by claimants and acquiring authorities for 70 plus years and we are not aware of any examples requiring it to be changed. It is widely accepted and understood by the whole surveying profession, and there has never been any suggestion previously that this needs to be changed. It is widely regarded as being fair.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes – provided care is taken to avoid double counting.
24. Shona Blance	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
30. Isobel Gordon	Note our comment above in respect of Chapter 15.

	In many instances market value and disturbance issues are closely related such as in our dispute. The valuation concept of 'value to owner' is what requires to be clearly established.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	We agree, although we do consider that a claim for disturbance should be consistent with the claim concerning loss of market value.
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	This seems reasonable**.**
42. Scottish Water	Yes
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree – the analysis of loss for market value of land and of disturbance are two different disciplines and should not be merged.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	None.
ANALYSIS	
Explanation of proposal	Compensation for disturbance is currently assessed in terms of two separate rules; rule 2 (value of land) and rule 6 (other disturbance). In terms of current law and practice these are assessed together. The DP proposed, for various reasons, that they should be assessed separately.

Summary of responses and analysis	25 consultees responded to this proposal. 22 agreed with it. WLC and DVS opposed it. DVS argued that the current system has been widely accepted for 70 years. LTS acknowledged that there is a problem with the current system but suggested it might be resolved by the modern approach to causation and remoteness, exemplified in the English decision of *Shun Fung* (see DP paragraph 16.35). LTS said that experience showed that the "value to seller" approach to market value of land taken, was apt to blur into disturbance claims in some cases. They would favour an approach where there were stated guiding principles (such as no double recovery) rather than too strict a compartmentalisation of claims.

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

(Paragraph 16.34)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes please.
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. This would provide clarity.
10. Renfrewshire Council	Yes but the circumstances in which it would be applicable would need to be set out.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes but the circumstances in which it would be applicable would need to be set out.
13. Strutt & Parker LLP	We agree with this proposal for the reasons set out by the Law commission but are concerned that: - • A claim may fall between the wording of "market value" per proposal 115 and the nature of claim envisaged under this Head. • The potential for double counting. • In many instances market value and disturbance issues are closely related such as the turbine example. Any new legislation should take this into account.
16. Scottish Compulsory	This proposal is supported and, as set out in this response paper, disturbance compensation needs to be widened in nature-

Purchase Association	particularly with regard to the informal pre-scheme situation.
17. Lands Tribunal for Scotland	**Q119 / Q120 – Compensation for Disturbance** We suggest that the *Horn* problem might be resolved by the modern approach to causation and remoteness, exemplified in *Shun Fung* (paragraph 16.35). If the landowner in the no scheme world would, in any event, have removed, say in order to extract development value, it would seem contrary to principle for it to claim removal costs as a "loss" since it already gets compensation for the loss of development value. If those costs would have been incurred in any event in extracting development value why should they be recoverable? We think experience shows that the "value to seller" approach to market value of land taken is apt to blur into disturbance claims in certain cases. We think any new statutory approach to disturbance should bear in mind the many ways disturbance may take effect, including in the valuation of the land itself. Accordingly we would favour an approach where there are stated guiding principles (such as no double recovery if that is not already clear) rather than too strict a compartmentalisation of claims.
20. SSE plc	We agree with the proposal of an express statutory provision for disturbance.
21. District Valuer Services	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes – and this should be for both "disturbance and other matters" to avoid the development of specific arguments over the technical definitions here. The real issue is the causation of the loss. A review of exiting problems may prompt clarification to minimise future issues but this should not serve to exclude potential items where there causation of the loss can be shown. In specific terms, we raise two issues – pre-CPO surveys and professional fees incurred by claimants. Pre-CPO Surveys – As we have advised above these are now a significant feature of the CPO process, both in considering a range of possible routes for works and in the design of the final scheme. They can be disruptive and costly for owners and occupiers. There should be stronger provision for compensation and this seems most naturally considered as disturbance. Professional Fees Incurred by Claimants - Case law suggests that professional fees reasonably incurred in the matter by an affected party are among "other matters". Our view is that it is better to have

	an effective catch-all expression than anything resembling a list. We accept that it is subject to an obligation to mitigate losses. Members repeatedly report difficulties with the payment of fees, some of which are documented in an annual survey we undertake. While the claimant's professional representation is commonly seen as a direct charge on the acquirer, this is a mis-description. It is the claimant who instructs the professional support he properly needs and is liable for that cost. Where that cost flows reasonably from the acquisition, the claimant can recover that from the acquirer. This position has then been complicated by the history of the previous state-sponsored Ryde's Scale for fees on compulsory purchase. This was last reviewed in 1996 and has since not only been formally abandoned but is seen as contrary to EU competition law as expressed in the UK in the Competition Act and the Enterprise Act. However, acquirers seek to impose scale fees, whether Ryde's, Ryde's augmented by a percentage (now often between 20 and 50 per cent) or one they have devised. In all these cases, these can have not greater force in law than an acquirer's initial offer, not something to enforce – yet they often tend to approach it as something they can impose. We see the English case law, as set out in *Matthews v Environment Agency* and more recently in *Poole v South West Water*, as persuasive for the position in Scotland – that the claimant is entitled to the reimbursement of his reasonable costs in being represented in the matter. As *Poole* shows that can quite properly be on the time and expenses basis that is often apt for professional work on what can often be an open-ended instruction where the time spent can achieve benefits in accommodation works rather than compensation. *South West Water* had sought to impose Ryde's Scale plus 20 per cent but the Tribunal followed the analysis of case law and upheld repayment on the hourly basis agreed between the claimant and his valuer – in that case, £120/hour in 2007/8). As the Office of the Deputy Prime Minister said when announcing the abandonment of Ryde's Scale: "… Surveyors should be reimbursed in full in line with all other professional advisers. We do not therefore intend to commission any further reviews of the non-statutory Ryde's Scale, and expect that fees will normally be assessed henceforth on a reasonable basis agreed between the parties." The position should be exactly the same as for any other professional work on this or other matters, whether by a solicitor or an accountant or, indeed, other work by the valuer.

	It is for the professional to agree terms with the claimant, whether on time and expenses or some other basis. Where this is on an hourly rate acquiring authorities can dispute these in assessing compensation potentially leaving an affected party out of pocket, unless willing to appeal. That approach is unjust and revised legislation should set out the basis for reimbursement of any professional fees incurred by affected parties as a consequence of a CPO scheme, clarifying the application of Rule 6 of s. 5 of the 1961 Act in the way that has been followed by the courts since *Tobin v London County Council* and in Scotland by *South Lanark Council v McGee and Thomson*.
24. Shona Blance	Yes otherwise landowner is not fairly compensated for the impact of the scheme.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes for clarity and certainty.
30. Isobel Gordon	We agree with this but are concerned that:- • A claim may fall between the wording of "market value" per proposal 115 and the nature of claim envisaged under this Head. • The potential for double counting. • The drafting of these proposals needs to be carefully thought through.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	We agree.
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Agreed. Codify the common law position.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes, but there should be no definition of how it would be assessed.

43. Faculty of Advocates	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.
44. Scottish Property Federation	This must form a part of the new Statute if rights are to be properly preserved.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	To avoid the current issues of overlap between rules 2 and 6, the DP proposed that there should be an express statutory provision for disturbance compensation.
Summary of responses and analysis	25 consultees responded to this proposal. All agreed with it. Some pointed out that the drafting would need to be clear. S&P shared three possible concerns: (1) the potential for double counting, (2) a claim may fall between "market value" and the nature of claim under this head, and (3) in many instances market value and disturbance issues are closely related, such as with wind turbine developments. LTS reiterated the comments they had made on proposal 119. FoA thought that this proposal would overcome the problems of previous case law. CAAV helpfully summarised two instances where they found this issue to be a particular problem, namely pre-CPO surveys and professional fees incurred by claimants. CAAV lamented the continued use of Ryde's Scale despite the UK Government's abandonment of it.

121. **Should the principle of causation in relation to disturbance compensation be set out in the proposed new statute?**

(Paragraph 16.38)

Respondent	
1. Professor Jeremy Rowan Robinson	Ideally, all 3 principles should be articulated.

6. Craig Connal QC	Yes - this should be done by way of short statement in the relevant new wording.
7. West Lothian Council	Agreed. This would provide clarity.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	Yes, although it might be difficult to do more than outline the rules in the same way as Lord Nicholls did in *Director of Buildings & Land –v- Shun Fung Iron Works Ltd* [1995] 2 AC 111.
16. Scottish Compulsory Purchase Association	Whilst it is recognised that it may be challenging to draft an explicit set of words in any new legislation, it is nevertheless recommended that the principle of causation should be set out in any proposed new statute.
20. SSE plc	We recognise that it may be challenging to agree on a form of words within statute, we support the recommendation that parliamentary counsel should try and draft appropriate wording for further consultation.
21. District Valuer Services	Yes although this would be an ideal opportunity to clarify some of the current tests which are mainly derived from case law but could be incorporated in the new statute.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. Again, this should be on a general and indicative basis as in the decision in Shun Fung.
24. Shona Blance	Yes for clarity.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes.
30. Isobel Gordon	Yes, although it might be difficult to do more than to set out an outline in the same way as Lord Nicholls did in Shun Fung.

31. Association of Chief Estates Surveyors Scottish Branch	Yes.
35. Shepherd and Wedderburn	Yes.
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Yes, even if it represents only an incremental improvement which is available for judicial refinement.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	In a leading case on disturbance claims, three conditions were set out which must be satisfied for a claim to be successful. The first condition required that there must be a causal connection between the compulsory acquisition and the loss in question. The DP asked whether such a test should be set out in any new statute.
Summary of responses and	23 consultees responded to this question. All agreed that the principle

analysis	of causation should be set out in any new statute. S&P, IG and CAAV referred to the rules set out in the leading case of *Director of Buildings and Lands v Shun Fung Iron Works Ltd*. SCPA and SSE recognised that the test may be challenging to draft. MacR thought this a good idea even if it represented only an incremental improvement available for judicial refinement. FoA could see the attraction of setting this out in statute, but pointed out that the more detailed the statement, the greater would be the scope for further dispute. They suggested that a concise general statement would be easier to apply, but matters would still come down to the circumstances of particular cases as to whether there was 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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, that seems reasonable.
6. Craig Connal QC	Yes - although there is an argument for discretion for exceptional cases.
7. West Lothian Council	Agreed. This would provide clarity.
10. Renfrewshire Council	No. From date of vesting only.
13. Strutt & Parker LLP	There may be a disconnect between the date of publication of the notice and the actual acquisition (6 years in the case of the AWPR). The Law Commission should consider their findings at [paragraph] 16.43 [of the DP] and provide that disturbance should be valued as at the date of vesting with provision for payment of earlier losses where the claimant can establish the same following the extended meaning set out in Shun Fung. We appreciate that this may involve consideration of a duty to mitigate loss at an earlier date in such claims but the tendency for "pre-scheme blight" is such that there is a grave risk of affected landowners not being properly compensated unless such rights are

	incorporated.
16. Scottish Compulsory Purchase Association	It is considered that whilst this proposal is an extension of the current legislation, it does not go far enough. Recent practice of many acquiring authorities (and it is considered that this practice will be adopted by others and in the future widened in scope) has been to undertake very intensive and invasive investigations with regard to the options available in respect of a public work – the ongoing investigations with regard to the dualling of the A9 is a case in point. Whilst the state (under many guises) may have taken a decision in principle with regard to a public work, it is then the responsibility of the relevant officials to determine the precise nature and detail of the public work and the tendering/procurement route. In order to ensure that proper justification is made with regard to any associated Compulsory Purchase Order it is common nowadays for detailed and extensive investigations to be undertaken. These investigations in many cases involve direct contact with potentially-affected landowners and may incorporate ground investigation works, completion of questionnaires etc. As a consequence, even at an early pre-scheme stage, a landowner may well incur cost and expense in being involved in the project – whether in agreement or disagreement of the concept of the public work Thus, it is suggested that any new statute requires to recognise this situation as these costs and expenses are incurred as a direct consequence of compulsory purchase or the threat of compulsory purchase and thus should form a legitimate claim for disturbance whether or not any of the land is ultimately compulsorily acquired. It should be borne in mind that in many instances the acquiring authority will have engaged relevant professional consultants to undertake these initial investigation/option-forming commissions and will be already be incurring expense as a result. Thus, it is considered that there is a three-stage process within which (reasonable) disturbance costs may be incurred and should be able of being recouped i.e. firstly, at the pre-scheme stage as outlined above, secondly between the issue of the draft CPO and its vesting and thirdly after vesting. Nevertheless, it is accepted that costs incurred in objecting to a CPO, including PLI costs, do not fall to be recovered and are borne by the claimant.
20. SSE plc	We support the concept that a reasonable balance should be struck between the landowner who is threatened by compulsory purchase and the acquiring authority who should only be liable for reasonable expenses which are required to satisfy the principle of equivalence. Therefore if the “starting date” whereby a claimant may recover pre-acquisition losses is before the date of confirmation, this should minimise any delay caused by a claimant talking such steps to recover such losses. Furthermore, the fact that this date is brought forward would also place an onus on the claimant to mitigate loss and discourage unreasonable claims.

21. District Valuer Services	(This should read " from the making of the CPO or draft road orders") Yes but must depend on causation (see *Shun Fung*) and mitigation by the claimant. Compensation should not be payable where no land is to be acquired.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	We are not clear as to the exact proposals here but the liability to recompense for disturbance and other matters should arise wherever and whenever the loss can be shown to be caused by the Compulsory Purchase Order. We have argued above that the disturbance caused by surveys should be recognised in this – they are a compulsory imposition on the owners and occupiers of affected property.
24. Shona Blance	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	No. It is not clear why compensation for disturbance would arise from such an early date.
30. Isobel Gordon	There may be a disconnect between the date of publication of the notice and the actual acquisition (6 years in the case of the AWPR). The Law Commission should consider their findings at paragraph 16.43 [of the DP] and provide that disturbance should be valued as at the date of vesting with provision for payment of earlier losses where the claimant can establish the same.
31. Association of Chief Estates Surveyors Scottish Branch	Appropriate costs should be recoverable – the trigger point and the mechanism will require careful consideration.
35. Shepherd and Wedderburn	We agree.
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Agreed. The notice seems like a good opportunity also to alert the claimant to their obligations in relation to mitigation.
40. Law Society of Scotland	This seems reasonable and we agree. However, in stating this, it may well be that the scheme has impacted by way of disturbance prior to the making of the CPO and this needs to be carefully considered.
42. Scottish Water	Yes.

43. Faculty of Advocates	For the reasons set out in the Discussion Paper, the Faculty of Advocates agrees with this proposal.
44. Scottish Property Federation	We agree.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	At various engagement events stakeholders expressed concern about the amount of time and expense landowners incur as a result of pre-CPO access and enquiries.
Analysis	
Explanation of proposal	For some time there has been concern amongst stakeholders that pre-acquisition losses are not fairly dealt with by AAs. The DP pointed out that reasonable losses may be incurred even before there is a confirmed CPO. This proposal attempted to strike a reasonable balance between the landowner who is threatened by CP and the AA who should only be liable for reasonable expenses to satisfy the principle of equivalence.
Summary of responses and analysis	22 consultees responded to this proposal. An overwhelming majority were in favour of it although many did not think that the proposal went far enough, as compensation should available for earlier losses. Only two disagreed with the proposal. RC thought that compensation should be from the date of vesting only. NG did not think that it was clear why compensation for disturbance would arise from such an early date. SCPA considered that, while the proposal was an extension of the current legislation, it did not go far enough. They pointed to the practice of many AAs of undertaking extensive and invasive investigations into the options available for a public work. These often involved direct contact with potentially affected landowners and might include ground investigations, completion of questionnaires, etc. They noted that cost and expense was being incurred by a landowner at an early pre-scheme stage. They suggested that any new statute would require to recognise this situation. These costs and expenses are incurred as a direct consequence of CP or the threat of CP and should form a legitimate claim for disturbance whether or not any of the land is ultimately compulsorily acquired. SCPA referred to three stages where disturbance costs may

	reasonably be incurred: • pre-scheme, as referred to above • between the issue of the draft CPO and its vesting • after vesting. S&P and IG were of the view that although disturbance should be valued at the date of vesting, provision for payment of earlier losses should be available. CC thought that there was an argument for discretion in exceptional cases. DVS stated the proposal should be read to include compensation for disturbance being payable "from making of the draft road orders". While they agreed with the proposal, they stated that it must depend on causation (see *Shun Fung*) and mitigation by the claimant. Compensation should not be payable where no land is to be acquired. CAAV agreed that the liability to recompense for disturbance and other matters should arise wherever and whenever the loss could be shown to be caused by the CPO. They argued that disturbance caused by surveys should be recognised, as these are a compulsory imposition on owners and occupiers of affected property. ACES stated that the trigger point and mechanism would require careful consideration. LSS stated that it may well be that the scheme had impacted by way of disturbance prior to the making of the CPO, which needed to be carefully considered. SSE stated that if this date were to be brought forward this would also put an onus on the claimant to mitigate loss and discourage unreasonable claims.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
6. Craig Connal QC	Yes. Points of this kind can cause practical difficulties. I can think of one case on our files at present where the lack of agreement that the local authority will pay the cost of professional advice is holding up what might well have been constructive discussions on the acquisition of property, which was not otherwise objected to in principle.

7. West Lothian Council	Agreed. A landowner may be disadvantaged should they, for example, seek legal advice and the CPO does not proceed.
10. Renfrewshire Council	Must be reasonable costs incurred as a consequence.
12. Society of Local Authority Lawyers and Administrators in Scotland	This seems equitable.
13. Strutt & Parker LLP	Agreed, this makes sense. Please note however, our comments in respect of withdrawal of notices.
14. John Watchman	2.7 One matter that ought to be considered is clarity about compensation for time etc. lost in handling matters pertaining to any proposed compulsory acquisition by those that receive a personal notice of compulsory acquisition and regarding professional fees incurred by them. The position is clear regarding fees for a relevant local public inquiry including a CAAD inquiry (expenses follow success) and in relation to negotiation and settlement compensation (entitled to reasonable professional fees). There is a lack of clarity about reimbursement of fees and compensating the recipient of a notice about compulsory acquisition relating to both the opportunity costs (such as loss of time of recipient of compulsory acquisition notice in considering papers etc.) and costs of advice that may be sought about the general position and more specific advice about whether or not to oppose the proposed compulsory acquisition. 2.8 There is clearly a perception about an inequality of arms and a perception of unfairness that the state has created the situation in which a person is expected to address the proposed compulsory expropriation (this could simply be by simply engaging with acquisition authorities and dealing with enquiries before an order is made and considering relevant papers and taking a decision about whether to oppose the proposed compulsory acquisition). It seems to me that if the state creates the situation in which a person may reasonably be expected to seek legal and other related professional advice about rights and options then the state should reimburse the persons costs in considering matters and reasonable professional fees for seeking advice. In many instances this approach would be beneficial to the state too as progress may be slowed up if the person receiving a personal notice of compulsory acquisition does not have the benefit of professional advice.
16. Scottish Compulsory Purchase Association	In light of our comments in response to proposal 122, this proposal is supported.

20. SSE plc	We agree with the recommendation that abortive costs should be covered by statute as the construct of equivalence should not leave a landowner with unnecessary costs as a consequence of a potential compulsory purchase being withdrawn. However, the landowner must properly and reasonably mitigate loss.
21. District Valuer Services	Yes – subject to test of reasonableness.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
24. Shona Blance	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	No this does not appear to be appropriate and could encourage parties to rack up costs simply because they are recoverable. Compensation is paid from the public purse and so the new statute should not, without good justification, seek to increase the likely compensation costs of promoting a scheme.
30. Isobel Gordon	Agreed, this makes sense. Please note however, our comments in respect of withdrawal of notices.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	We agree.
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	We agree with this proposal. The acquirer should be responsible for all the reasonable costs incurred by the claimant. Often schemes fail to go ahead due to changing political and financial priorities. Where landowners and businesses have incurred costs due to an abortive scheme, they should be compensated for those costs.

40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	For the reasons set out in the Discussion Paper, the Faculty of Advocates agrees with this proposal.
44. Scottish Property Federation	We agree.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	At engagement events stakeholders consistently complained about the amount of time they were forced to divert from their own business, to allow them to deal with questionnaires, access requests, etc. for which they were not reimbursed if that particular route was not chosen.
Analysis	
Explanation of proposal	Presently the law does not appear to cover costs incurred by a landowner in respect of a compulsory acquisition which does not ultimately go ahead. This proposal suggested that compensation for such costs should be paid.
Summary of responses and analysis	25 consultees responded to this proposal, and 24 agreed with it. Only NG disagreed, and stated that it could encourage parties to rack up costs simply because they are recoverable. JW said there was a lack of clarity about reimbursement of loss relating to both opportunity costs and costs of advice. He noted that there was a perception about inequality of arms and unfairness in a situation created by the state where a person was expected to address the proposed CP, including engaging with the AA and dealing with enquiries before the CPO was made, and considering relevant papers and deciding whether to oppose the order. He argued that if the state created this situation then the state should reimburse the costs for considering matters and taking reasonable professional advice, which would, in many instances, be beneficial to the state, as progress may be slowed up if a person does not have the benefit of professional advice. DVS, notwithstanding their response to question 122, agreed with this proposal, subject to a test of reasonableness.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Is it necessary to be so specific? If it is an identifiable loss caused by the CPO and is not too remote, it should be recoverable.
7. West Lothian Council	Agreed, if it can be clearly shown that the loss of development potential was directly attributable to the proposed CPO.
10. Renfrewshire Council	No. Should be limited purely to the loss incurred. Lost development potential is a market value question not disturbance.
13. Strutt & Parker LLP	The consultation process in respect of many schemes gives rise to a negative perception of values along route corridors. Proposed schemes do influence Planning Authorities' thinking such as occurred in respect of a solar farm application before Angus Council planning. [https://planning.angus.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=N618EMCFG1B00] Protection of routes in planning policy also denies landowners the opportunity to develop. The potential injustice is illustrated in *Strang Steel –v- The Scottish Ministers*.
16. Scottish Compulsory Purchase Association	It is considered that in many cases even the mere threat of compulsory acquisition creates a negative perception of property and that blight begins to occur: in addition, it can and does influence the thinking and policies of Local Planning Authorities Thus, whilst the onus of proof would rest with the landowner subject to a reasonable test, it is suggested that any such losses caused as a result of lost development potential should form a legitimate heading of (disturbance) compensation.
20. SSE plc	We believe that claimants should be able to recover costs associated with redevelopment works which cannot be fulfilled as a consequence of a CPO but not the potential loss unless full planning permission and all other necessary consents had been previously secured by the claimant and that proposed development had already commenced. Likewise the onus on the claimant is to mitigate such losses so that they do not burden themselves with additional costs which could have been avoided or mitigated when knowledge of the potential CPO first arose. Where any losses are to be recovered, a

	high factual burden by the claimant must be satisfied.
21. District Valuer Services	No. This should already be included in the land value and compensated under rule 2 as the land value reflects the potential profitability of the land.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. That is the point of a full and fair assessment of the no scheme world, including the CAAD process. The scheme is one option as to the use of the land and should recognise the cost of the realistic alternative options that it precludes. The no scheme assumption should see losses arising from the prospect of the scheme taken into account.
24. Shona Blance	Yes.
25. East Ayrshire Council	No.
26. National Grid plc	We do not consider that compensation for disturbance should be payable from before the confirmation of the CPO. Lost development potential should not be a disturbance cost – it is picked up in the planning assumptions or hope value attributed in determining the value of the land.
30. Isobel Gordon	In many cases the mere threat of compulsory acquisition creates a negative perception of property leading to blight. A potential CPO scheme can and does influence the thinking and policies of Local Planning Authorities (cf the Seagreen influence in the determination for a solar farm scheme at Tealing in Angus – Angus Council planning application 14/00428/FULM). Any losses caused as a result of lost development potential should form a legitimate heading of compensation.
31. Association of Chief Estates Surveyors Scottish Branch	The general principle that losses should be claimable is supported – development loss would be part of the Market Value and care needed to avoid double counting as disturbance.
35. Shepherd and Wedderburn	Yes.
36. Scottish Power Ltd	Given that this will only apply in exceptional specialist circumstances, we are unable to offer detailed comment at this time.
38. MacRoberts LLP	Yes, although possibly tempered by a test that there was some reasonable likelihood that planning permission would have been pursued/obtained, and/or some evidence of intention on the part of the claimant to realise value from development potential.

39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	This seems reasonable and we agree.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We believe that this should be the case if it can be proven.
45. Scottish Power Energy Networks Holdings Ltd	Given that this will only apply in exceptional specialist circumstances, we are unable to offer detailed comment at this time.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	This question sought to address loss of development potential. Cases decided thus far are inconclusive and indicate that there will be a high factual burden to be satisfied. In considering this question readers are also referred to Chapter 13, which looks in detail at establishing development value.
Summary of responses and analysis	22 consultees responded to this question. 15 answered in the affirmative. Five answered "no". Two (SP and SPEN) stated that they were unable to offer detailed comment as this would only apply in exceptional circumstances. From the negative responses, DVS, RC and NG pointed out that compensation for such losses should be included in the land value

	and compensated under rule 2. JRR asked whether it was necessary to be so specific. If there is an identifiable loss caused by the CPO, which is not too remote, it should be recoverable. S&P, IG and SCPA referred to the problems with protection of routes in planning policy denying landowners the opportunity to develop. SSE, while agreeing that claimants should be able to recover costs associated with redevelopment works which could not be fulfilled as a consequence of a CPO, thought that full planning permission and all other necessary consents would have to have been secured and the development already commenced. MacR thought that a test relating to the likelihood of planning permission might be a possibility and also some evidence of intention. ACES, while agreeing that such losses should be recoverable, pointed out that development loss would be part of market value and that care needed to be taken to avoid double counting.

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

(Paragraph 16.50)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, subject to the normal tests for disturbance.
6. Craig Connal QC	On one view the reference to "wider" losses is the incorrect approach. Once the new wording is settled on, all losses falling within it should be payable.
7. West Lothian Council	Agreed. However, these will need to be considered carefully in order to avoid investment owners manipulating the statute in order to claim greater compensation.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	We believe it should include such provision. This is a logical extension of the Planning & Compensation Act 1990.
16. Scottish Compulsory Purchase Association	It is considered that payment for disturbance should not necessarily be restricted to the occupier of the property and indeed the Planning Compensation Act 1990 permits property investors to recover all reasonable costs if an alternative or replacement property investment is purchased within a given timescale. Thus, it is considered that this

	principle has already been established and thus it is fair to suggest that investment owners, who are by definition not occupiers, should be entitled to claim for all reasonable costs and expenses incurred as a direct consequence of the compulsory purchase or indeed a threat of compulsory purchase of their interest.
21. District Valuer Services	Yes – if further loss can be demonstrated as a result of the scheme then investment owners should be able to claim. It is also considered the present 1 year time limit for reinvesting should be increased to six years in line with other claims.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes – there is no reason for excluding them from the justice of the approach taken.
25. East Ayrshire Council	If this is introduced the elements to be incorporated within the wider range of disturbance compensation should be clarified.
30. Isobel Gordon	We believe it should include such provision.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We consider that there is merit in an amendment similar to the 1963 Act amendment.
42. Scottish Water	Yes, investors such as “Buy to Let” investors will require to relocate or dispose of furniture, etc. and also will incur re-letting costs.
43. Faculty of Advocates	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).

44. Scottish Property Federation	We think that this should be the case – it appears to us to be unfair that an investor cannot fully claim compensation for loss of return where CPO is concerned.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Although investment owners have some rights in terms of the 1963 Act, it has been suggested that the law does not cover all the losses which an investment proprietor may incur. This question was designed to address this.
Summary of responses and analysis	18 consultees responded to this question. Only one (RC) said no, and gave no reason. 17 consultees answered yes. SCPA pointed out that the 1991 Act permitted property investors to recover all reasonable costs if an alternative property investment was purchased within a specific period, so therefore considered that the principle had already been established by that Act. DVS considered that the one year period in the 1991 Act should be extended to six years.

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

(Paragraph 16.57)

Respondent	
1. Professor Jeremy Rowan Robinson	Given the complexity of corporate structures this will always be a difficult area but, given that, the present approach seems to work satisfactorily.
7. West Lothian Council	On a practical level, the council agrees that the current rules work satisfactorily. As the Discussion Paper highlights, ownership and possession of property may be divided between more than one company in a corporate group. The rule that disturbance payment is restricted to loss caused to an occupier in possession may mean that the company most adversely affected by a CPO is unable to recover disturbance compensation. As noted in the Discussion Paper, in some circumstances, courts may be willing to look at the reality behind the corporate structure. It would be useful to have express provision in order to make it clear that it is possible to look at the reality behind the corporate structure.

13. Strutt & Parker LLP	We do not believe these operate satisfactorily. We have experienced a growing pattern of acquiring authorities analysing title before accommodating an injurious affection claim and taking a strict approach to claims in order to reduce liability for compensation. In particular, SSE on the Beauly Denny line have focused on partnerships owning properties. The issue is one of 'land take' affecting a legal title only, and if there is a related property which is clearly connected to the property on which the land take has occurred, but is owned under separate title, any claim to this 'unconnected' property will be rejected. One example we encountered was a sporting estate on which the owner built his own house. Rather than encumber the whole estate with the mortgage this was separated and forms a separate title. The house is surrounded by the estate and clearly considered in practice as an estate property. SSE argued that because the house formed a separate title to the rights acquired from the remainder of the estate it could not form part of the subjects considered within the injurious affection claim for the Beauly Denny Line. Other examples on the Beauly Denny line include a farm owned by a partnership of four siblings. Each of the siblings has a house to which they have personal title. The injurious affection claims on these properties were disallowed because they were owned under separate titles. Similar issues have arisen in respect of the Fochabers bypass where farming partners in an affected business had personal title to their own houses. The DV considered these were in effect Part 2 claims. Despite the bypass having opened in spring 2012 the DV is still resisting claims in respect of these properties. In a similar instance a poultry unit affected by the AWPR is under a separate legal title but connected with an adjoining farm which sold wheat to the unit and used the poultry litter to offset fertiliser requirements. The DV is resisting a claim for loss of revenue and increased fertiliser costs on the farm following closure of the poultry unit because of the separate title despite the matter having been raised at the public inquiry as a significant issue for the holding. The value of this is in the order of £50,000 pa to the business.
16. Scottish Compulsory Purchase Association	It is considered that there is insufficient evidence/experience to form a judgement on this issue. Nevertheless, corporate structure is undertaken for a variety of good reasons including reduction of exposure to tax and ensuring that directors' and shareholders' interests are properly protected. Thus, claims for compensation should not necessarily be restricted, or indeed disallowed, only due

	to the fact that there has been a prudent corporate structure put in place. Equally, the cost of unwinding such structuring prior to any compulsory purchase may not be time and cost effective.
21. District Valuer Services	It is considered that there is insufficient evidence/experience to form a judgement on this issue however we are not aware of any cases where this has caused notable issues.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No. There are many reasons for restructuring a company and it can be costly in respects unrelated to the compulsory purchase to unwind them. There are also related points which particularly arise in an agricultural context. We have reports of acquiring authorities taking a very careful view of precise ownership as part of a strict approach to injurious affection claims - in practice following the Northern Irish decision in Cooper. In the rural world of individual and joint ownerships within families, it can be a matter of historic chance as to who owns the land taken but its effect on other land used by the same business may be ignored. An example from a road widening scheme saw a father and son own the strip taken but as the father alone owns the farmhouse immediately adjoining that strip (but with no land taken) was denied injurious affection, and only had a Part 1 claim. A similar pattern is reported with SSE on the Beauly-Denny line also rejecting claims for injurious affection claims for related property which is clearly connected to the property on which the land take has occurred, but is owned under separate title.
26. National Grid plc	Acquiring Authorities should not have to look into corporate structuring decisions. Corporate claimants should ensure that claims are made by all relevant entities and that the losses are correctly claimed by the relevant claimant.
30. Isobel Gordon	Subject to causation this may seem reasonable but we are aware that the current rules do cause issues with many corporate structures. A claim for compensation should not be restricted due to a prudent corporate structure in place. A flexible approach is necessary.
35. Shepherd and Wedderburn	Yes.
39. Scottish Land and Estates	Heritage property is sometimes owned under complex structures which can give rise to an artificially lower level of compensation than the real loss incurred. This imbalance needs to be redressed.

40. Law Society of Scotland	We do not consider that the current rules are sufficiently clear but acknowledge the complexity of legislating in this area.
42. Scottish Water	Yes.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Case law as a whole suggests that it will generally only be appropriate to pierce or lift the corporate veil where a corporate structure is a mere façade concealing the true facts. It has been suggested that there may be many reasons of tax, agricultural partnerships etc. where ownership may be split. This question sought views on whether the current law and practice operates satisfactorily with corporate structures.
Summary of responses and analysis	12 consultees responded to this question. Four (JRR, WLC, S&W and SW) thought the current rules worked satisfactorily. However five (S&P, CAAV, IG, SLE and LSS) thought that they did not. S&P and CAAV gave examples where hardship had ensued when the veil was not pierced. SCPA and DVS were undecided. NG thought that AAs should not have to look into corporate structuring decisions.

127. **Should the proposed new statute remove the impecuniosity rule as it has been established at common law?**

(Paragraph 16.69)

Respondent	
1. Professor Jeremy Rowan Robinson	I agree with your comment that equivalence requires some degree of flexibility and, by and large, tribunals and courts have applied that flexibility so as to achieve equivalence. The impecuniosity rule has been an exception but even here things seem to be moving in the right direction. I think action is required to ensure that the impecuniosity rule is dead in the water but, if guidance is being contemplated, that would be a better way forward than trying to legislate for different aspects of disturbance.
7. West Lothian Council	In order for disturbance claims to be treated fairly and reasonably this rule should be removed.
13. Strutt & Parker	Yes, given that the House of Lords effectively replaced it in *Lagden –v- O'Connor* with a test of "reasonable foreseeability", removal of this

LLP	rule would seem reasonable.
16. Scottish Compulsory Purchase Association	It is considered that any proposed new statute should remove this rule and that any new statute should ensure that all parties affected by compulsory purchase have a legitimate right to claim compensation for all reasonable costs and expenses incurred as a consequence of compulsory purchase or the threat of compulsory purchase.
20. SSE plc	We are of the opinion that every case should be assessed on its individual merits and that equivalence does require some degree of flexibility. Therefore every claimant must continue to mitigate loss on becoming aware of an impending compulsory purchase and a test of reasonable foreseeability should endure.
21. District Valuer Services	It is considered that any proposed new statute should remove this rule and that any new statute should ensure that all parties affected by compulsory purchase have a legitimate right to claim compensation for all reasonable costs and expenses incurred as a consequence of compulsory purchase or the threat of compulsory purchase.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	This seems reasonable. We agree that there should be some clarity given in the statute as to the applicability of a reasonable foreseeability test in disturbance payments.
42. Scottish Water	Yes.
43. Faculty of	The Discussion Paper notes that the impecuniosity rule can appear

Advocates	harsh, and does not sit well with the general principle 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.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	The impecuniosity rule in delict, stemming from a 1933 case, provided that losses are not recoverable in damages if they are attributable to a claimant's poor financial circumstances, rather than directly to the delict. The rule was applied by LTS but did not sit well with the principle of equivalence. More recent cases have effectively replaced the impecuniosity rule with a test of reasonable foreseeability. The DP discussed whether this should be dealt with by legislation or possibly non-statutory guidance, and asked whether any new statute should remove the rule.
Summary of responses and analysis	14 consultees responded to this question and all were in favour of removing the impecuniosity rule. JRR commented that although case law was moving in the right direction, action was required to ensure that the impecuniosity rule was dead in the water. He suggested that guidance would be a better way forward than trying to legislate for different aspects of disturbance. SSE commented that every case should be assessed on its own merits and that equivalence did require some degree of flexibility. Every claimant should continue to mitigate loss on becoming aware of an impending CP, and a test of reasonable foreseeability should endure.

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

(Paragraph 16.77)

Respondent	
1. Professor Jeremy Rowan Robinson	See my comments in answer to Q.127. I think this needs dealing with but could this also be dealt with by guidance? [Answer to question 127 I agree with your comment that equivalence requires some degree of flexibility and, by and large, tribunals and courts have applied that flexibility so as to achieve equivalence. The impecuniosity rule has been an exception but even here things seem to be moving in the right direction. I think action is required to ensure that the impecuniosity rule is dead in the water but, if guidance is being contemplated, that would be a better way forward than trying to legislate for different aspects of disturbance.]
7. West Lothian Council	Agreed on the proviso that it is clearly set out and defined in statute and that it is compensation based on the effect of the compulsory purchase on a person in particular circumstances.
10. Renfrewshire Council	No. Disturbance compensation is based upon their actual loss, and individual circumstances should not be taken into account.
13. Strutt & Parker LLP	It is our view that "personal circumstances" are relevant to loss under the general head of "disturbance" and should be taken into account. The circumstances of a claimant are relevant to the options open to him at the valuation date in respect of his taxation position. The suggestion for "compensation for the effect of the compulsory purchase on a person in those particular circumstances" would seem to somewhat overlap with the 'impecuniosity' query of the previous question.
16. Scottish Compulsory Purchase Association	It is recognised that to ensure an accurate definition of "personal circumstances" will prove highly challenging to the drafting of any new legislation. Nevertheless, it is considered that in principle a more liberal and flexible view with regard to the assessment of disturbance compensation requires to be adopted and thus the utilisation of "personal circumstances" should not be disallowed. Nevertheless, the concept of equivalence should be upheld and double-counting requires to be avoided.
17. Lands Tribunal for Scotland	**Q128 /9 - Personal Circumstances** We think there are always likely to be personal circumstances involved in disturbance claims, whereby a party's actings will require to be assessed objectively.
20. SSE plc	We are of the opinion that each claim has to be assessed individually

	on its own merits.
21. District Valuer Services	Yes; if it is clear that the claimant is not able to receive compensation for loss due to personal circumstances, this could be regarded as unfair. Compare with rules on compensation for delict.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. Disturbance and other matters flow naturally from the "personal circumstances" of the claimant and so should be taken into account since it is his circumstances that define the impact of the scheme on him and his options at the valuation date, including his taxation position. Ignoring them (and somehow creating a hypothetical claimant) would depart from the principle that he does not lose from the purchase.
26. National Grid plc	There is currently flexibility on the current system for personal circumstances to be taken into account when assessing compensation claims. Equivalent reinstatement, for example, offers one means of dealing with the need for special adaptations to property to meet specific personal circumstances of the claimant. It would be difficult to define "personal circumstances" in a statute without unintentionally causing hardship to some.
30. Isobel Gordon	We consider this important. Our scheme was not a lease of turbines as is usual but we ourselves developed the wind farm and are the owner operator. A liberal and flexible approach is necessary. It is our view that "personal circumstances" are relevant to loss under the general head of "disturbance" and should be taken into account. The circumstances of a claimant are relevant to the options open to him at the valuation date, to his taxation position. The suggestion for "compensation for the effect of the compulsory purchase on a person in those particular circumstances" would seem to somewhat overlap with the 'impecuniosity' query of the previous question.
31. Association of Chief Estates Surveyors Scottish Branch	Yes but with safeguards on equivalence and double counting.
36. Scottish Power Ltd	We agree with this proposal.
37. J Mitchell	**Injurious affection/disturbance** Many of the issues in our claim relate to the effect of the scheme on our retained business.

	Transport Scotland acquired an area of sand which formed a key area of our livery business in that it provided all weather exercise. The District Valuer is resisting any realistic payment compensation for the loss of this land. As I understand it, the issue is whether such loss would be reflected in the open market value of the land rather than the peculiar circumstances of our own business. We accept that definition of personal circumstances could be extremely difficult to draft in any new legislation, but consider that in principle a more liberal and flexible view with regard to the assessment of disturbance compensation requires to be adopted. The District Valuer is suggesting that disturbance should be addressed by looking at changes in our revenue for a period after the vesting date to enable the extent of the loss to be quantified. Whilst we accept that this may be a practical way forward, it does not address the fact that we are incurring substantial overdraft costs which the acquiring authority is refusing to recognise. This also gives rise to difficulties in respect of six year time limit compensation from the date of vesting.
38. MacRoberts LLP	Yes, although on an equitable basis to ensure that the claimant's personal circumstances are not being taken advantage of.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We do not consider that they should and note that there are other payments that are designed to offset hardship (e.g. home loss payments, which take account of the personal nature of dispossession).
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
45. Scottish Power Energy Networks	We agree with this proposal.

Holdings Ltd	
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	The law currently provides for the consideration of some personal characteristics of the claimant, but only to a very limited extent. The Law Commission for England and Wales found general support for the proposal to consider personal circumstances but expressed concern that the term "personal circumstances" would require clear definition. The law in Australia allows for consideration of circumstances "peculiar to the person, suffered or incurred by the person as a direct, natural and reasonable consequence of the compulsory acquisition." This question sought views on taking personal circumstances into account in Scotland.
Summary of responses and analysis	20 consultees responded to this question, and 17 answered "yes". Two answered "no". RC stated that disturbance compensation was based upon actual loss and individual circumstances should not be taken into account. LSS stated that there were other payments designed to offset hardship, such as HLPs, which took account of the personal nature of dispossession. NG stated that there was current flexibility in the system for personal circumstances to be taken into account. It would be difficult to define personal circumstances. Those answering "yes" had varying reasons and many wanted clear drafting. JRR thought that this might be dealt with by guidance. WLC agreed with taking personal circumstances into account on the basis that this was clearly set out and defined in statute, and that compensation was based on the effect of a CP on a person in particular circumstances. SCPA recognised that drafting may be challenging, but stated that, in principle, a more liberal and flexible view with regard to the assessment of disturbance compensation should be adapted. They qualified this by stating that the concept of equivalence should be upheld and double counting avoided. These qualifications were echoed by ACES. CAAV noted that disturbance and other matters flowed naturally from the "personal circumstances" of the claimant, so should be taken into account, since it was the claimant's circumstances that defined the impact of the scheme on him and his options at the valuation date,

	including his taxation position. JM gave a clear example of where he believed his personal circumstances should have been taken into account, and the problems this had caused him. FoA suggested that section 43 of the 1973 Act was potentially open to challenge as discriminatory in relation to the age limitation of 60.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes. If losses can be claimed from that date, the duty to mitigate loss should start from that date.
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. This is reasonable.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We support this but have some practical concerns. In practice most landowners are reluctant to spend money on buildings which are to be compulsorily acquired. Often DVs reduce value on account of the appearance of buildings at the vesting date because of such failure to spend monies. A balance is required and the duty to mitigate in terms of *Lindon Print* should be from the date for entitlement to claim.
16. Scottish Compulsory Purchase Association	This proposal is supported on the basis that there is a general obligation to mitigate loss. Reference is made to previous responses to this issue in this paper.
17. Lands Tribunal for Scotland	We think there are always likely to be personal circumstances involved in disturbance claims, whereby a party's actings will require

	to be assessed objectively.
20. SSE plc	We believe that should statute allow a claimant to recover pre-acquisition losses, a claimant must be under a corresponding duty to mitigate such losses to accord with the test of equivalence.
21. District Valuer Services	See previous responses re date of valuation. If compensation can be claimed form this date then duty to mitigate should start at the same time.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes as a matter of principle. However, it can need tempering in practice. The recent introduction of the CAP's [Common Agricultural Policy's] new Basic Payment Scheme with its narrow definition of force majeure (excluding much compulsory purchase) has seen issues for compulsory purchase negotiations in which a strict approach to mitigation would often require disproportionate effort. In practice, most landowners are reluctant to spend money to maintain buildings which are to be compulsorily acquired but can then find that this leads to an argument over their value at the vesting date because of that failure to spend monies. A balance is required, perhaps struck by imposing the duty to mitigate from the date for entitlement to claim.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Claimants have a general duty to mitigate loss at all times.
30. Isobel Gordon	This would be unreasonable given compensation may only be payable from the date of entry.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed – core principle.
35. Shepherd and Wedderburn	Yes.
36. Scottish Power Ltd	We agree with this proposal.
38. MacRoberts LLP	Agreed. The claimant should be given adequate notice of their obligation to mitigate their loss, in terms clear enough to the lay-person as to what that means.
39. Scottish Land	Yes.

and Estates	
40. Law Society of Scotland	This seems reasonable and we agree with this statement generally. However, we consider that it could result in unduly harsh consequences for claimants as, until the CPO and GVD are made, there is no certainty that the land will be acquired. The duty should not be a particularly high one with the claimant only being required to take reasonable steps.
42. Scottish Water	Yes.
43. Faculty of Advocates	For the reasons set out in the Discussion Paper the Faculty of Advocates supports this proposal.
44. Scottish Property Federation	The claimant is not the person causing the CPO – we have reservations with the proposal to impose a duty to mitigate loss therefore – after all what appears to be reasonable actions to mitigate to an acquiring authority may not be reasonable to a claimant in terms of disrupting their normal business in order to mitigate the loss associated with a CPO that they did not instigate.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	Questions 122-124 addressed pre-acquisition loss. The view of the SLC is that if claimants are able to recover pre-acquisition losses from a point before the CPO is confirmed, they should be under a corresponding duty to mitigate loss from that point. The DP proposed that claimants should be under a duty to mitigate loss in terms of compensation for disturbance, from the date of publication of the making of the CPO.
Summary of responses and analysis	24 consultees responded to this proposal. 21 agreed with it. Of those who did not agree, IG stated that it would be unreasonable, given that compensation may only be payable from the date of entry. SPF pointed out that the claimant was not the person causing the CPO, so had reservations about the proposal to impose a duty to mitigate loss. They pointed out that what may appear reasonable to an AA, may not appear so to a claimant, in terms of disruption to their normal business in order to mitigate a loss associated with a

	CPO which they did not instigate. LTS thought that there were always likely to be personal circumstances whereby a party's actings would require to be assessed objectively. Of the 21 who agreed with the proposal, S&P pointed out that there were practical concerns. In practice, most landowners were reluctant to spend money on buildings which were to be compulsorily acquired. However, district valuers often reduced the value of buildings at the vesting date due to their appearance. S&P felt that a balance was required and that any duty to mitigate should run from the date of entitlement to claim. SCPA and NG stated that there was a general duty to mitigate loss. CAAV agreed with the proposal in principle, but referred to the recent instruction of the Common Agricultural Policy's new Basic Payment Scheme with its narrow definition of force majeure where a strict approach to mitigation would often require disproportionate effort. They reiterated the comments of S&P regarding the reluctance to spend money on buildings about to be compulsorily acquired, and then running into arguments with district valuers over values at vesting date. LSS pointed out that although this proposal may seem reasonable, it could result in harsh consequences for claimants as, until the CPO and GVD were made, there was no certainty that the land would be acquired. Therefore they felt that the duty should not be a particularly high one, with the claimant only being required to take reasonable steps.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes, agreed.
7. West Lothian Council	No. Extinguishment costs should be paid if these are less than the relocation costs.
10. Renfrewshire Council	No. Looking to compensate for the loss.
13. Strutt & Parker LLP	We agree with the Commission's remarks at 16.92 that the evidential onus be on the party looking for extinguishment of the business and

	that relocation compensation should be available even when this exceeds the total value of the business.
16. Scottish Compulsory Purchase Association	This proposal is supported.
20. SSE plc	We agree that such cases are likely to be rare but statute should make it clear that relocation compensation may be available even where this exceeds the total value of the business. However it must be noted that the greater the disparity, the more closely the claim should be considered to ensure that the business does intend to relocate rather than seek to profit from a higher level of claim.
21. District Valuer Services	Yes – in accordance with the decision in Shun Fung so subject to a reasonableness test.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Compensation is being paid from the public purse and so any compensation payments must be justifiable. The acquiring authority must also demonstrate that it has obtained value for money. Equally a claimant should not be able to insist on financial betterment from the CPO.
30. Isobel Gordon	We agree with the Commission's remarks at 16.92 that the evidential onus is on the party looking for extinguishment of the business and that relocation compensation should be available even when this exceeds the total value of the business.
31. Association of Chief Estates Surveyors Scottish Branch	The principle should be total value is the ceiling for compensation.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.

39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	For the reasons set out in the Discussion Paper the Faculty of Advocates supports this proposal.
44. Scottish Property Federation	Yes – this should be possible where it is appropriate.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	Where a property which is being used for business purposes is compulsorily acquired, there are two possible bases for compensation. Where the claimant is able to relocate, compensation will be on the basis of relocation costs. Where relocation is impossible or impractical, compensation will be assessed on the basis of extinguishment of the business. While the latter may be rare, this proposal sought to make clear that even in a situation where the costs of relocating a business were higher than the value of the business, compensation for relocation may still be available.
Summary of responses and analysis	19 consultees responded to this proposal and 15 agreed with it. Of the four who opposed the proposal, WLC stated that extinguishment costs should be paid if those were less than relocation costs. RC was opposed on that the basis that compensation should compensate for the loss. NG said that compensation was being paid from the public purse and so any compensation payments must be justifiable. ACES suggested the principle that the ceiling for compensation should be the total value of the business.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	This is another example where a lot will turn on particular circumstances and flexibility is desirable. Is this another area where guidance might help (see Q.127 and 128 above)?
7. West Lothian Council	Agreed. The council does not propose modifications.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	We agree with the Commission's leaning towards disturbance is very definitely the "default setting" with extinguishment only being a last resort. We agree with the finding at 16.96 that it is often difficult to assess disturbance compensation until the scheme is complete, especially when relocation of a business is involved.
16. Scottish Compulsory Purchase Association	It is considered that it would be of assistance for such rules to be set out in any proposed new statute. These rules, by definition, would have to be fairly general in nature but that the "default position" would be that disturbance compensation for the displacement of a business would be on the basis of relocation and unless a good argument is presented that the basis should be that of total extinguishment. Further, Section 43 of the Land Compensation (Scotland) Act 1973 gives statutory authority to those business owners aged over 60 to claim business disturbance on the basis of total extinguishment: it is considered that this right should be protected and that 60 remains the appropriate age.
20. SSE plc	We recognise that compensation on the basis of relocation will usually be in the best interests of both parties and therefore any proposed legislation should perhaps include for a general assumption that compensation should be paid on a relocation basis and that evidential onus should be on the party which seeks to argue that compensation should be on the basis of total extinguishment of the business. [Response to question 130 We agree that such cases are likely to be rare but statute should make it clear that relocation compensation may be available even where this exceeds the total value of the business. However it must be noted that the greater the disparity, the more closely the claim should be considered to ensure that the business does intend to relocate rather than seek to profit from a higher level of claim.]
21. District Valuer	No – likely to either be too short and hence restrictive or too long if

Services	encompassing all existing case law. Current flexibility is preferable.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. There should be a very strong presumption here that disturbance arising from the scheme will be paid, rather than see the business treated as extinguished. Relocation can mean that final assessment of costs will often be delayed.
25. East Ayrshire Council	Yes.
30. Isobel Gordon	We agree with the Commission's leaning towards disturbance as very definitely the "default setting" with extinguishment only being a last resort. We agree with the finding at 16.96 that it is often difficult to assess disturbance compensation until the scheme is complete, especially when relocation of a business is involved.
31. Association of Chief Estates Surveyors Scottish Branch	Yes – principle should be relocation unless extinguishment justified such as by claimant's age or if total cost at ceiling limit.
35. Shepherd and Wedderburn	A rebuttable presumption that compensation should be based on relocation of the business seems to us to be a sensible starting point. The presumption could be rebutted in cases where the evidence at the time showed that the relocation was likely to have such a detrimental impact on profit that a reasonable businessman in the circumstances of the claimant would not proceed with the relocation.
39. Scottish Land and Estates	Yes. Relocation can also mean a delay in final assessment of costs.
40. Law Society of Scotland	We agree that they should. This is a complex area and we would not wish to offer modifications at this stage.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish	We feel that it will be difficult to fully capture the appropriate checks

Property Federation	and balances implied in the discussion on disturbance loss. The factors applicable can greatly vary between strong and weak economic environments, market sectors and the circumstances of the business in question.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	It has been suggested that the principles relating to the relocation and extinguishment bases of disturbance compensation should be set out in statute. The DP suggested that the current rules may benefit from modernisation, and asked a two part question:- ● Should the rules regarding disturbance compensation for displacement of a business be set out in the proposed new statute? ● If the answer is yes, then what modifications would consultees wish to see?
Summary of responses and analysis	17 consultees responded to this two part question. 13 consultees agreed that the rules should be set out in statute. Of those who did not agree, JRR felt that this was another situation where flexibility was desirable, and that guidance might be helpful, given that much will turn on particular circumstances. RC, DVS and SPF were also opposed to setting out the rules in statute. DVS argued that any provision was likely to be either too short, and therefore restrictive, or too long, if taking into account all existing case law, so they preferred the current flexibility. SPF thought that it would be difficult to fully capture the appropriate checks and balances implied in the discussions on disturbance costs. SPF pointed out that the factors applicable could greatly vary between strong and weak economic environments, market sectors and the circumstances of the business in question. For the second part of the question, dealing with modifications, S&P agreed that the "default setting" should be relocation, with extinguishment only as a last resort. SCPA, SSE, CAAV, IG, ACES and S&W agreed with this principle. SCPA wished to retain 60 as the age from which extinguishment compensation may be claimed in terms of section 43 of the 1973 Act, as it gives statutory authority to those business owners aged over 60 to claim business disturbance on the basis of total extinguishment.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	There is a lot to be said for compensating for actual rather than anticipated loss and this may benefit acquiring authorities as much as claimants; but in fairness to the acquiring authority there needs to be some limit to how long this process can go on for. It would be interesting to know how the New Zealand provision (which is very open ended) has worked in practice. It's been going since 1981.
7. West Lothian Council	Agreed. Business loss resulting from the relocation of the business made necessary by the CPO may not be fully determined until the business has moved and sufficient time has elapsed to allow the loss to be quantified.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	The valuation date should generally be the vesting date but this should not preclude claimants from claiming disturbance prior to this date subject to the usual rules of cause and effect.
16. Scottish Compulsory Purchase Association	It is considered that the valuation date for disturbance compensation should be the vesting date on the basis that there is a single compulsory purchase system involving a General Vesting Declaration procedure. However, this valuation date should not preclude claimants being able to claim reasonable disturbance compensation that may have been incurred some considerable time prior to vesting i.e. any time after any approach has been made by an acquiring authority. Reference is made to previous responses to this issue in the paper, particularly to the "three-stages".
17. Lands Tribunal for Scotland	**Q132-3- Disturbance and Dates** At present this issue can be dealt with under the flexible LTS procedures; i.e. in practice a claimant may seek to reserve its right to come back once the disturbance costs are known. We have experience of disturbance claims coming forward for proof many years after the acquisition, such as for loss of development opportunity, which could not have been established at the time of the acquisition. We are cautious about primary legislation cutting across this flexibility. Also, in practice it is difficult to separate "disturbance" from "scheme world" valuations so we would be cautious about any attempt to compartmentalise disturbance claims.

20. SSE plc	We agree that the assessment of disturbance cannot be fully assessed until such time as the dispossession and potential relocation of the business has had effect. We support the adoption of the New Zealand situation whereby business loss resulting from the relocation of the business made necessary by the taking or acquisition which loss shall not be determined until the business has moved and until sufficient time has elapsed since the relocation of the business to enable the extent of the loss to be quantified. This would also address the concerns in respect of Q.130.
21. District Valuer Services	It is considered that the valuation date for disturbance compensation should be the vesting date. However, this valuation date should not preclude claimants being able to claim reasonable disturbance compensation that may have been incurred prior to vesting where an approach has been made by an acquiring authority, or where it is reasonable to do so.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	While the valuation date should generally be the vesting date this should not preclude valid claims for earlier disturbance subject to causation being shown.
25. East Ayrshire Council	No.
26. National Grid plc	No it should be the date of vesting.
30. Isobel Gordon	We consider that the valuation date for disturbance compensation should be the vesting date on the basis that there is a single compulsory purchase system. However, this valuation date should not preclude any claimants being able to claim reasonable disturbance compensation that may have been incurred some considerable time prior to vesting i.e. any time after any approach has been made by an acquiring authority subject to the usual causation rules.
31. Association of Chief Estates Surveyors Scottish Branch	Should be as at vesting date but with provision as discussed earlier for pre CPO cost recovery.
35. Shepherd and Wedderburn	Yes. We think that it should be possible for the parties to agree an assumed disturbance value at the time of acquisition but, in the absence of such agreement, the level of disturbance compensation should be quantified after the event. We do, however, suggest that in order to mitigate the impact of disturbance on an affected party, provisions should exist for allowing that party to receive early

	advance payments prior to completion of the scheme. We would suggest that the new legislation includes a swift dispute resolution procedure to allow that level of advance compensation to be determined in the absence of agreement of the parties.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	We consider that the valuation date for disturbance compensation should be different from the valuation date where the GVD procedure is used. We also note that some of the elements making up a disturbance claim (e.g. professional costs) will be incurred after the vesting date.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We believe that a broader period of time than the valuation date is probably correct but there needs to be a cut-off point at some stage for the loss to be finalised. Subject to further review we think that a point of one year following the relocation of the business should be sufficient to provide evidence of impact of disturbance where a claim is brought forward by the dispossessed landowner.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	It has been held that the valuation date for the compulsorily acquired land is the date of vesting, where the GVD procedure is used. At the end of the notice period specified in the GVD (minimum of 28 days) the land will vest in the AA. Therefore, the vesting date will often precede the dispossession of the landowner, and consequently, the disturbance. It may be difficult to assess disturbance until the dispossession has actually taken place, and it may, therefore, be unfair to assess disturbance at the same time as compensation for the value of the land. New Zealand, as a comparison, does not assess business loss resulting from relocation until the business has moved and, if the circumstances so require, sufficient time has elapsed since relocation. This question asked whether the valuation date for disturbance compensation should be different from the valuation date for the

	compulsorily acquired land.
Summary of responses and analysis	19 consultees responded to this question. 10 thought that the dates should not be different. Eight thought that they should be. LTS stated that this situation could currently be dealt with under flexible LTS procedures, as a claimant may seek to reserve their right to come back once the disturbance costs are known. They were cautious about primary legislation cutting across this flexibility, and also about any attempt to compartmentalise disturbance claims. S&P thought that the valuation date should generally be the vesting date, but that this should not preclude claimants from claiming disturbance prior to this date. SCPA DVS, CAAV, IG and ACES agreed with this principle. RC, EAC, NG and SW thought there should be no difference in the dates, without giving further details. WLC, on the other hand, argued that business loss may not be fully determined until the business has moved and sufficient time has elapsed to allow the loss to be quantified. SSE agreed with this principle and supported the adoption of the New Zealand model. S&W stated that, in the absence of agreement at the time of acquisition, the level of disturbance compensation should be quantified after the event. In order to mitigate the impact of disturbance, provisions should exist to allow a party to receive early advance payments prior to completion of the scheme. They suggested introducing a swift dispute resolution procedure for advance payments. JRR thought that there was a lot to be said for compensating for actual rather than anticipated loss, and that this might benefit AAs as well as claimants, but, in fairness to AAs, there should also be some limit on how long the process goes on.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Wouldn't this be covered by Q.132 above?

7. West Lothian Council	Agreed. This is reasonable.
10. Renfrewshire Council	Yes. Appellant can claim relocation expenses, if this is agreed, and up to 90% of the acquiring authority's value. However, the finalised compensation will only be determined once relocation has occurred.
13. Strutt & Parker LLP	The use of the words "…will only be determined when sufficient time has elapsed…" suggests a different valuation date and raises uncertainty regarding when a claim may be resolved. In practice parties tend to make/accept part payments from the point at which a claim was due with the extent of loss over an extended period being used to assess and agree the full extent. We have concerns about the use of the word "only" in the question which seems to narrow the position further. A flexible approach to assessment of loss is important.
16. Scottish Compulsory Purchase Association	It is suggested that it should be made so clear. It is the experience of members of the SCPA that the time-frame can sometimes be measured in years before the full extent of business loss is crystallised and thus can be properly and accurately quantified. This, in turn, potentially runs into the time-scale difficulty for making a timeous application to the Lands Tribunal and could cause problems for claimants of following this approach relative to the existing method.
17. Lands Tribunal for Scotland	[**Q132-3- Disturbance and Dates** At present this issue can be dealt with under the flexible LTS procedures; i.e. in practice a claimant may seek to reserve its right to come back once the disturbance costs are known. We have experience of disturbance claims coming forward for proof many years after the acquisition, such as for loss of development opportunity, which could not have been established at the time of the acquisition. We are cautious about primary legislation cutting across this flexibility. Also, in practice it is difficult to separate "disturbance" from "scheme world" valuations so we would be cautious about any attempt to compartmentalise disturbance claims.]
20. SSE plc	We would refer you to our response to statement 132. [Response to proposal 132 We agree that the assessment of disturbance cannot be fully assessed until such time as the dispossession and potential relocation of the business has had effect. We support the adoption of the New Zealand situation whereby business loss resulting from the relocation of the business made necessary by the taking or acquisition which loss shall not be determined until the business has

	moved and until sufficient time has elapsed since the relocation of the business to enable the extent of the loss to be quantified. This would also address the concerns in respect of Q.130.]
21. District Valuer Services	IF this means that no advance payment could be made then this may cause serious problems for businesses in dealing with the cost of relocation where losses are made but not determined until a later date. In practice this is better dealt with by making a detailed claim at vesting allowing an accurate advance payment to be made with further claims being made as additional information becomes available along with further applications for advance payments as required.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes, as it may take time for the full consequences of a CPO for a business to become clear. The important larger point here is to maintain a flexible approach to assessment of loss. More narrowly, if "only be determined" here simply means the conclusion of the process of assessment (without changing basic principles) then this seems appropriate. In practice, parties tend to make/accept part payments from the point at which a claim was due with the extent of loss over an extended period being used to assess and agree the full extent.
24. Shona Blance	Yes otherwise fair compensation will be difficult to assess. However given the time that does elapse between the CPO and payment, in our case 7 years, there would have to be a means whereby certain elements of the compensation could be paid once it has been agreed or else the payment process has to be speeded up.
25. East Ayrshire Council	Yes.
30. Isobel Gordon	This seems to raise uncertainty regarding when a claim might be payable and when it might be resolved.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	Our answer to this question is similar to 132. It should be possible at the very least to secure an advance payment towards relocation of the business based on what the parties agree (or a third party determines) are the likely costs of relocation.
36. Scottish Power Ltd	We agree with this proposal.

38. MacRoberts LLP	Yes.
40. Law Society of Scotland	This seems reasonable, but the period of time should strike a balance between achieving this and not resulting in hardship to the claimant.
42. Scottish Water	Yes, provided that the acquiring authority can make advance payments of up to 100% in the interim.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Yes.
45. Scottish Power Energy Networks Holdings Ltd	We agree with this proposal.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Question 133 was a follow up to question 132. If consultees rejected the suggested change in question 132, they were unlikely to accept the suggestion in question 133. In the event a majority rejected the suggestion of different dates in question 132 and, when answering question 133, simply referred to their answer to question 132.
Summary of responses and analysis	21 consultees responded to this question. S&P stated that, in practice, parties tended to make/accept part payments from the point at which a claim was due, with the extent of loss over an extended period being used to assess and agree the full extent. DVS were concerned that this question suggested that no advance payment could be made, and pointed out that this would cause serious problems for businesses in dealing with the cost of relocation where losses are incurred but not determined until a later date. They suggested that this would be better dealt with by making a detailed claim at vesting, allowing an accurate advance payment to be made, with further applications for advance payments being made when additional information becomes available. CAAV stated that the important point here was to maintain a flexible

	approach to assessment of loss. LSS, while agreeing that this question showed a reasonable approach, said the length of time should strike a balance between achieving this and not resulting in hardship to the claimant. JRR, LTS, SSE, and S&W simply referred to their answer to question 132. A number of responses expressed concern that the use of the word "only" in the question might prevent early settlement of claims.

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

(Paragraph 16.101)

Respondent	
1. Professor Jeremy Rowan Robinson	Agreed.
7. West Lothian Council	Agreed, as it would now appear to be obsolete.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	Agreed, the arbitrary nature of the discretion could lead to dispute and criticism.
16. Scottish Compulsory Purchase Association	This proposal is supported.
20. SSE plc	We agree that Section 38 of the 1963 Act should be repealed.
21. District Valuer Services	Agreed.
23. Central Association of Agricultural Valuers and Scottish	Yes.

Agricultural Arbiters and Valuers Association	
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes as it would appear obsolete.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	Section 38 of the 1963 Act provides for discretionary payments by AAs to tenants. Sections 34 and 35 of the 1973 Act introduced mandatory disturbance payments to tenants, so section 38 of the 1963 Act is now obsolete, and the DP proposed repealing it.
Summary of responses and analysis	19 consultees responded to this proposal and all agreed with it.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Agreed.
7. West Lothian Council	Agreed. This appears to be reasonable.
10. Renfrewshire Council	Yes
13. Strutt & Parker LLP	Yes, this proposal seems to be fairly sensible.
16. Scottish Compulsory Purchase Association	It is considered that such disturbance payments should be retained.
20. SSE plc	We agree that Sections 34 and 35 of the 1973 Act should be retained.
21. District Valuer Services	Yes
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
26. National Grid plc	Yes other than discretionary payments. If a person is not legally entitled to a disturbance payment, it is not clear in what circumstances a discretionary payment would be paid by the acquiring authority, particularly as compensation is paid from the public purse and as the acquiring authority should act consistently when dealing with compensation claims.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.

35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree, they should be retained.
42. Scottish Water	Yes.
43. Faculty of Advocates	Yes, the Faculty of Advocates considers that disturbance payments along these lines should be retained.
44. Scottish Property Federation	Yes.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Section 34 of the 1973 Act provides that, where a person in lawful possession of land is displaced from the land in consequence of the compulsory acquisition, and they do not have a compensatable interest, they are entitled to a disturbance payment. Under section 34(4) the AA may make a discretionary disturbance payment even if there is no entitlement to such a payment under the section. Section 35 of the 1973 Act provides that the disturbance payment is to include reasonable removal expenses. Where a person was carrying on a business the disturbance payment will also include any loss sustained by disturbance to the trade or business. This question asked whether these sections should be retained.
Summary of responses and analysis	17 consultees responded to this question, and all agreed that these sections should be retained. However, NG questioned whether the right to make a discretionary payment should be retained, as compensation is paid from the public purse and AAs should act consistently when dealing with compensation claims.

136. **Should the LTS have jurisdiction in relation to any question arising with regard to disturbance payments, whether mandatory or discretionary?**

(Paragraph 16.104)

Respondent	
1. Professor Jeremy Rowan Robinson	Agreed.
7. West Lothian Council	Agreed. This would allow compensation to be dealt with in the one place.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	The LTS should have jurisdiction and discretionary rights should extend to acquiring authorities. The issue of discretionary powers should be retained albeit acquiring authorities are not usually minded to use such powers, as it gives an acquiring authority the right and justification to use such powers if minded to do so.
16. Scottish Compulsory Purchase Association	It is considered that the LTS should have such jurisdiction. However, it is considered that whilst the concept of discretionary payments should be retained, experience shows that almost without exception an acquiring authority will not be minded to use its discretionary powers especially with regard to the payment of compensation monies.
17. Lands Tribunal for Scotland	**Disturbance Payments/LTS Jurisdiction** We agree.
20. SSE plc	We believe that the provisions in England and Wales should be mirrored in the new statute.
21. District Valuer Services	It is considered that the LTS should have such jurisdiction. However, it is considered that whilst the concept of discretionary payments should be retained, experience shows that almost without exception an acquiring authority will not be minded to use its discretionary powers especially with regard to the payment of compensation monies.
23. Central Association of Agricultural Valuers	Yes.

and Scottish Agricultural Arbiters and Valuers Association	
25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	Yes in relation to any disputes. However see our response above regarding discretionary payments. [Answer to question 135 Yes other than discretionary payments. If a person is not legally entitled to a disturbance payment, it is not clear in what circumstances a discretionary payment would be paid by the acquiring authority, particularly as compensation is paid from the public purse and as the acquiring authority should act consistently when dealing with compensation claims.]
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	This would appear to be sensible and we agree that they should be retained.
42. Scottish Water	Yes.
43. Faculty of Advocates	Yes, the Faculty of Advocates considers the LTS should have jurisdiction in each instance.
44. Scottish Property Federation	We are unsure that the LTS would be the right body to make a proper assessment upon appeal of a disturbance loss – this may therefore need to be returned to the courts.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	Any dispute as to the amount of a disturbance payment is to be determined by the LTS. Scots law has been interpreted differently from the law in England and Wales, where the Lands Tribunal may determine disputes on the quantum of both mandatory and discretionary payments. In contrast, the LTS is not entitled to rule on discretionary payments, and the only available remedy is judicial review. This question asked whether the LTS should be given jurisdiction in relation to discretionary payments too.
Summary of responses and analysis	20 consultees responded to this question, with 19 agreeing that LTS should have jurisdiction over both mandatory and discretionary payments. S&P, SCPA and DVS all noted that AAs are not usually minded to use the discretionary power. However, SPF were unsure that LTS would be the correct body to properly assess a disturbance loss, and suggested that jurisdiction for this may need to be retained by the courts.

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)

Respondent	
7. West Lothian Council	The council would suggest an increase to 3 years to bring it in line with the current period of validity of a confirmed CPO.
10. Renfrewshire Council	No. Current rules should remain.
13. Strutt & Parker LLP	We consider that there should be a sliding scale for compensation based on residency.

16. Scottish Compulsory Purchase Association	It appears not to be significantly disputed that there should be an additional payment made to the occupier of a residential property that has been compulsorily acquired (equally, we consider that there is as strong, or indeed stronger, argument that an additional payment in respect of occupiers of business/commercial/agricultural properties should also be made). Accordingly, the issue at stake in this question is how that additional payment should be determined for residential properties: at the very least, it should be straightforward to understand and calculate. One method would be in respect of the premium that should be added to the Rule 2 element of the compensation and this response is further developed in respect of our responses to questions 138, 139 and 140 below. Arguably, the minimum period of residence of one year is too short a period and there could be a sliding scale related to the amount of Home Loss Payment due i.e. the longer the occupant has been in occupation, the higher the payment: on balance, it is considered that there should be a minimum period of residence for occupiers and that it should be three years prior to the vesting date and accordingly an owner-occupier would receive a Home Loss Payment based on a mix of the value of the property acquired and length of occupation. A tenant in each case would receive the minimum amount provided, of course, he/she had been in occupation for at least three years prior to vesting.
21. District Valuer Services	No need to change this – it is considered unlikely anyone would purchase a property threatened by CPO simply in order to get a HLP.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No. If anything, we see an argument for the minimum period to be removed to retain vitality in the market and so help owners and occupiers adjust more readily, in effect by transferring their present entitlement tone parties who are willing to step into their shoes. That also accommodates such issues as inheritance. *Continued discussion from General Comments* **b) The Process** Under the present CPO regime a landowner 'sells' his property to a third party not knowing the price he will be paid for the property or even when he may receive such monies. He will receive no interest on any sums due from the time he is dispossessed until the time his claim may eventually be resolved. He is not entitled to any payment for the stress or inconvenience this may cause him or his family. We are not aware of any other situation where a landowner would willingly enter into such an agreement.
25. East Ayrshire Council	It might be useful to increase the minimum period of residence to try and reduce opportunistic buyers from purchasing property with a view

	to receiving compensation following the making of a CPO. The minimum period could be extended to try and resolve this problem. Would 5 years be appropriate?
31. Association of Chief Estates Surveyors Scottish Branch	Yes – use of 3 years and sliding scale is supported.
38. MacRoberts LLP	Yes. Increase to 2 years.
39. Scottish Land and Estates	No.
40. Law Society of Scotland	No, it should remain as one year.
42. Scottish Water	No.
43. Faculty of Advocates	The Faculty considers that this is ultimately a question of policy.
44. Scottish Property Federation	We are not convinced that the current system of compensation fully addresses the loss and inconvenience caused to a homeowner or farm owner. We suspect this is again an area where further review is required which will ultimately require a political view to be taken on a number of issues. For the purposes of this discussion paper we have at this point no further comments in this area.
Further responses, either made informally or at engagement events	Differing views were expressed at engagement events regarding the period of residency. The main focus of the discussions was the expansion of payments to commercial owners/occupiers.
Analysis	
Explanation of question	The 1973 Act introduced HLPs and FLPs. These payments are similar in nature to solatium, are not directly referable to any financial loss caused by the CP and are intended to reflect personal inconvenience and distress. The current mandatory HLP requires a minimum period of residence of one year and this question asked whether that period should be increased.
Summary of responses and analysis	14 consultees responded to this question. Six consultees thought that the period should be extended while six consultees thought that it should not. FoA stated that this was ultimately a question of policy. SPF were not convinced that the current system of compensation fully addressed the loss and inconvenience caused to a home or farm owner. Of those who thought that the period should be extended, WLC and ACES thought the qualifying period should be three years. EAC suggested five years and MacR suggested two years. S&P and ACES suggested a sliding scale based on length of residency. SCPA favoured a sliding scale with a minimum period of residency for

	occupiers of three years. DVS stated that there was no need for change and that, contrary to the suggestion in the DP, they considered it unlikely that anyone would purchase a property threatened by a CPO simply to obtain a HLP.

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

(Paragraph 17.21)

Respondent	
1. Professor Jeremy Rowan Robinson	See answer to Q140. [Answer to question 140 I don't not see that an owner's home loss is greater simply because the market value of their property is greater. This payment needs to be simple and I would be against individual assessment. I think a flat rate payment is probably the easiest option and leave it to the Ministers to decide when it should be reviewed.]
4. Jeremy Law	I accepted a compulsory purchase order for a family home located in an area of outstanding scenic beauty, not just my description, but one shared by no less a body than the Scottish Tourist Board. Albeit a two bed-roomed cottage, a grand country house could have stood proudly in the surrounding private grounds. We were home to an abundance of indigenous wild life and over several years, had the privilege of nurturing several families of red squirrels – a recognised endangered species in Great Britain. There are probably quite a few homes in Scotland whose property could be described as idyllic, this was certainly one such. With its private tarmacadamed 80 metre driveway and a gated access opening directly on to the A9 road with over an acre of mature gardens overlooking the river Tay, without even the remotest chance of flood. The ancient cathedral city of Dunkeld, a mere 15 minute riverside walk away, a main line rail link to London but a five minute drive from our door. Perth; recently awarded city status, a 12 mile uncongested drive away and the international hubs of Edinburgh and Glasgow within an hour by rail, car, bus or train. My home was absolutely and totally unique thus falling completely within your own description "not susceptible to measurement in money". Indeed, every visitor would make that envious observation. Notwithstanding all of the foregoing, my Home Loss Payment was precisely that which I would have received if I had resided in a

	former council property on a sprawling urban estate. Not for one moment am I suggesting that could not similarly be a cherished home, but as a means of deciding a monetary award for its loss, it is sadly lacking in both sense and reason. You recognise the value of the home to the owner may go beyond strict market value, but fail to observe said recognition when calculating the payment, covering any supposed shortfall with the Home Loss Payment. This is calculated at 10%, but in Scotland ONLY, to a maximum of £15,000.00. In England, the loss of one's home is calculated with very much more sympathy to the home loser by a firmly stated percentage of the value of the property. Being forced to abide by this ruling denied me at least a further £20,000.00 compensation. This country masquerades under the title of UNITED Kingdom, further qualified in a recent referendum. My question is very simple; in the prevailing circumstances, why is the loss of my cherished home deemed to be greater in England than in Scotland. Your discussion paper identifies other criteria – *general issues 17.4 and 17.5* – prior to 1919 where a cpo might be beneficial to financial investors. With particular regard to the above paragraph, my own investigations through a noted civil engineering company, revealed that purchase of my property would save construction costs in excess of 1.5 million pounds in additional groundworks and cpo's on other properties, which would need to have been bought if Transport Scotland had failed to secure my property and been compelled to navigate round it. In my opinion, these circumstances were sufficient grounds for a payment significantly in excess of the current market value and quite possibly enabled me to purchase a suitable property in the immediate Dunkeld area instead of moving far away from it. Item 17.8 states the Scottish Ministers have the power to alter the thresholds for Home Loss Payments at any time. If there is no wish to exercise this option as a general policy, then in my opinion there should be the opportunity for people in my predicament to appeal for a greater payment to, at the very least, match that which is available in England. I trust the foregoing might be helpful in your deliberations, but your debate should definitely raise the following questions:- 1. Is 10% of the property value a fair basis on which to calculate the loss of one's home. 2. Does it represent an equitable outcome to all parties. 3. Should the percentage be a higher rate. 4. Should there be a recognised sliding scale.

	5. Should there be a right to appeal.
7. West Lothian Council	Agreed.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	Home loss payments in Scotland are miserly in comparison to those in England and Wales. In England the maximum payment is £50,000 [currently £53,000]. In Scotland, as a direct consequence of Ministers' unwillingness to revise payments to keep pace with property values, it is £15,000. We do not support a fixed maximum in that this is likely to be eroded over time as has been the case in the existing provisions. We consider a sliding scale on a percentage of market value (say up to 10% would be more equitable with a minimum of say, £3,000).
16. Scottish Compulsory Purchase Association	Whilst it could be argued (with justification) that the current Home Loss Payment in Scotland is miserly and iniquitous in comparison to England/Wales, it does nevertheless work efficiently in practice. Thus, it is suggested that if a Home Loss Payment system is to continue, then a percentage linked to market value should be retained although that percentage would fluctuate dependent upon length of occupation.
21. District Valuer Services	Yes – whether the percentage paid need to be reconsidered is a matter of public policy although our experience is that HLP (and the introduction of owners/occupier's loss in England) has done nothing to speed up the settlement process.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. A figure of at least 10 per cent appears a general means of recognising the issues here without requiring further assessment. However, Scotland has left the ceiling on home loss payments at a much lower level than elsewhere in the United Kingdom. In England, the maximum payment has been regularly revised and is now £50,000 [currently £53,000]. In Scotland, it has been left at £15,000. There should not be a maximum.
25. East Ayrshire Council	Would suggest proposal 140 be introduced. [Question 140 asked whether a system should be introduced, either for a flat rate payment or for a payment individually assessed in each case.]
31. Association of Chief Estates Surveyors Scottish Branch	Yes.

38. MacRoberts LLP	No.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	We agree and note the current maximum and minimum.
42. Scottish Water	Yes.
43. Faculty of Advocates	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).
44. Scottish Property Federation	No comments further to our answer to proposal 137. [Answer to question 137 We are not convinced that the current system of compensation fully addresses the loss and inconvenience caused to a homeowner or farm owner. We suspect this is again an area where further review is required which will ultimately require a political view to be taken on a number issues. For the purposes of this discussion paper we have at this point no further comments in this area.]
46. Hendersons Chartered Surveyors	*[from general response]* Changes are needed such as with those made in the English CPO system notably home loss.
Further responses, either made informally or at engagement events	Participants at engagement events focussed on the fact that home loss payments in Scotland had not risen in line with those in England and Wales.
Analysis	
Explanation of question	The current law is set out in section 28(1) of the 1973 Act, as substituted by section 71(3) of the 1991 Act. This provides that the amount of HLP for an "owner's interest" is equal to 10 per cent of the market value of the interest, subject to a maximum limit of £15,000 and a minimum of £1,500. A flat rate of £1,500 applies in any other case. SMs have the power to alter the maximum and minimum levels at any time by secondary legislation although, to date, they have chosen not to do so. It is worth noting that in England and Wales, figures for home loss have been reviewed regularly and currently stand at a maximum of £53,000 and minimum of £5,300. This question asked whether a prescribed percentage should remain as the basis for the HLP. The DP discussed possible alternatives,

	such as a flat rate payment as is used in Australia.
Summary of responses and analysis	17 consultees responded to this question. Ten agreed that HLPs should be calculated as a percentage of market value. Four (JRR, MacR, EAC and FoA) opposed this. JRR favoured a flat rate payment as being simpler than individual assessment, and did not see that an owner's home loss was greater simply because the market value of their property was greater. EAC favoured either a flat rate or individual assessment. JL wanted payments to match those in England and Wales. He shared his own personal experience and raised interesting issues including comparison with England, appeal rights and whether development costs savings to an AA due to the purchase of particular land, could be taken into account to increase the compensation paid. HCS also advocated the system in England and Wales. SPF favoured further review in this area. S&P did not support a fixed maximum as it was likely to be eroded over time, and suggested a sliding scale, based on length of residency, on a percentage (up to 10%) of market value, and with a minimum of, say, £3,000. JL, S&P, SCPA and CAAV all noted the higher payments in England and Wales.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	See answer to Q140. [Answer to Q140:- I don't not see that an owner's home loss is greater simply because the market value of their property is greater. This payment needs to be simple and I would be against individual assessment. I think a flat rate payment is probably the easiest option and leave it to the Ministers to decide when it should be reviewed.]
7. West Lothian Council	Agreed. It should reflect inflation.

10. Renfrewshire Council	Increase based on inflation seems reasonable.
13. Strutt & Parker LLP	This would seem reasonable because successive Scottish Governments have proved reluctant to adjust these in the past.
16. Scottish Compulsory Purchase Association	It is considered that there should be no maximum or, if there was to be a maximum, then it should be set at a high level. There should be a minimum payment (say £3,000) and, thus, any new legislation should ensure that the maximum/minimum payment is subject to regular review every three years.
21. District Valuer Services	No – this should remain a matter of public policy. As explained above our experience is that the introduction of BLP/OLP in England has not lead to a notable decrease in the period taken to settle claims
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	If a maximum is imposed, primary legislation should first make a substantial increase in the figure and then provide for its annual indexation. That should anyway apply to the minimum.
25. East Ayrshire Council	See proposal 140. [Question 140 asked whether a system should be introduced, either for a flat rate payment or for a payment individually assessed in each case. Answer to question 140 Yes.]
31. Association of Chief Estates Surveyors Scottish Branch	The process for how and when this would be reviewed should be defined.
40. Law Society of Scotland	This seems reasonable.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	No comments further to our answer to proposal 137. [Answer to question 137 We are not convinced that the current system of compensation fully addresses the loss and inconvenience caused to a homeowner or farm owner. We suspect this is again an area where further review is required which will ultimately require a political view to be taken

	on a number of issues. For the purposes of this discussion paper we have at this point no further comments in this area.]
Further responses, either made informally or at engagement events	Stakeholders at various events expressed a desire to see a statutory requirement for indexation of figures for home/farm loss payments.
Analysis	
Explanation of question	If the answer to question 139 agreed with continuing to calculate the HLP at a percentage of market value, this question asked whether primary legislation should provide for periodic review or automatic increase to reflect inflation.
Summary of responses and analysis	13 consultees responded to this question. Nine consultees answered "yes". DVS answered "no". JRR wanted a flat rate payment and EAC wanted either a flat rate or individual assessment. SPF wanted further review in this area.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	I don't not see that an owner's home loss is greater simply because the market value of their property is greater. This payment needs to be simple and I would be against individual assessment. I think a flat rate payment is probably the easiest option and leave it to the Ministers to decide when it should be reviewed.
7. West Lothian Council	No.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	A flat rate payment would overpay some and underpay others, and an individually assessed payment could result in significant disputes. We favour a sliding scale as set out above.
16. Scottish Compulsory Purchase Association	In response to the above three questions on Home Loss payments, it is considered that the system should be easy to understand and efficient to operate. Further, it is suggested that the approach continues to be based on a percentage of the market value of the acquired property but with interaction/greater regard to the length of residence prior to acquisition- as this was an important criteria behind why Home Loss Payments were introduced in the first

	instance. Thus, consideration should be given to the Home Loss Payment being more related to length of occupation prior to acquisition but with there being a minimum three year qualifying period of continuous occupation prior to acquisition. Further, it is considered that, in addition to a Home Loss Payment for residential properties (and indeed other loss payments for other types of properties- see below), greater recognition needs to be made of the fact that the acquisition of the property interest is compulsory in nature and that there should be a premium added to the Rule 2 element - as was the case prior to 1919 - and any new legislation should incorporate such a premium.
21. District Valuer Services	Individual assessment would be unnecessarily expensive and complex – whether or not a flat rate payment should be introduced is again a matter of public policy.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	A flat rate payment would be too crude a way to recognise the problems here. An individually assessed payment would require a statement of principles as to the basis of claim which would then promise significant disputes. The present percentage payment basis is a pragmatic answer that would be improved by removing the maximum.
25. East Ayrshire Council	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	Current system understood. Concept of a flat rate could be considered as part of recognition of the compulsory nature of the acquisition – the 'pre 1919' factor.
38. MacRoberts LLP	Yes. A person's personal and sentimental attachment to their home should not be valued differentially based on the value of the bricks and mortar.
40. Law Society of Scotland	We refer to our response at question 139 above. [Answer to question 139 This seems reasonable.]
42. Scottish Water	No.
43. Faculty of Advocates	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.

44. Scottish Property Federation	No comments further to our answer to proposal 137. [Answer to question 137 We are not convinced that the current system of compensation fully addresses the loss and inconvenience caused to a homeowner or farm owner. We suspect this is again an area where further review is required which will ultimately require a political view to be taken on a number of issues. For the purposes of this discussion paper we have at this point no further comments in this area.]
Further responses, either made informally or at engagement events	At engagements there appeared to be general agreement that individual assessment would place too heavy an administrative burden on AAs.
Analysis	
Explanation of question	As an alternative to calculating HLP as a percentage of market value, this question asked whether a flat rate or individual assessment would be appropriate.
Summary of responses and analysis	14 consultees responded to this question. Eight opposed a flat rate or individual assessment. Three were in favour of a flat rate (JRR, EAC and MacR). DVS stated that individual assessment would be unnecessarily expensive and complex and that it was a matter of public policy whether or not a flat rate should be introduced. SPF thought that the matter merited further review. FoA thought that this was a policy question but observed 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. As one of the majority opposing a flat rate or individual assessment, SCPA considered that the system should be easy to understand and efficient to operate. They suggested retaining the percentage of market value, but with a greater regard to length of residence. CAAV stated that the present percentage was a pragmatic answer that could be improved by removing the maximum.

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)

Respondent	
7. West Lothian Council	Agreed, in order to be more equitable for loss of farm land.
9. David Strang Steel	There are significant issues regarding assessment of farm loss payments: - • farm loss payments on the basis of average annual profit from the use of the land for agricultural purposes. This could be problematic after a few poor years, or where there is significant non-agricultural income. • deduction of imputed rent figure, whether or not the farm is rented. Again problematic. • if the land acquired is worth more than that given up, the farm loss payment will be reduced by that amount. This seems unreasonable. We consider that there is justification of an additional premium based on a percentage of market value to be paid in CPO situations as is the case in other jurisdictions.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	There are significant issues regarding assessment of farm loss payments:- • Farm loss payments on the basis of average annual profit from the use of the land for agricultural purposes. This could be problematic after a few poor years, or where there is significant non-agricultural income. • Deduction of imputed rent figure, whether or not the farm is rented. Again problematic. • If the land acquired is worth more than that given up, the farm loss payment will be reduced by that amount. This seems unreasonable. We consider that a more flexible system should be introduced, either on a percentage of the OMV of the acquired land (whether tenanted or not) given the disruption will be the same.
14. Scottish Compulsory Purchase Association	The calculation of the Farm Loss Payment is significantly different to that of a Home Loss Payment although the underlying philosophy of both Payments is primarily the same i.e. to reflect the upset of losing one's home/farm. However, it is rare for such a Payment to be made as it is rare for a whole farm to be compulsorily purchased. However, a Payment should also be made to the occupier where part-only of a farm is compulsorily acquired. It is considered that a consistent approach to Home Loss Payments and Farm Loss Payments should be adopted and thus the calculation of a Farm Loss Payment should be applied where the

	whole or part of the farm is compulsorily acquired (by whatever method) and should be undertaken by way of a similar approach to our response to questions 137-140 above. The Payment would be to the occupier under the same three year occupational qualifying period; there would be a minimum payment (say £3,000) which would be reviewed every three years (ideally at the same time as Home Loss Payments) and the Payment would be based on a percentage of the market value of the interest of the property acquired. Equally, there would be a maximum payment but, as with Home Loss payments above, it should be set at a fairly high level.
20. SSE plc	We believe that the current provisions relating to farm loss payments do not require any amendments.
21. District Valuer Services	These are rare in practice as only payable when entire property is taken so no need to amend.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	There are significant issues regarding assessment of farm loss payments:- • Farm loss payments are assessed on the basis of average annual profit from the use of the land for agricultural purposes. This reduces payments where there are a few poor years but the disruption may be no less. • That basis ignores significant non-agricultural income for diversification for which location may be more significant and harder to replace. • An imputed rent figure is deducted, irrespective of real circumstances. Again problematic. • If the land acquired is worth more than that given up, the farm loss payment will be reduced by that amount. This seems unreasonable. We consider that the nature of farmland market, including the extreme difficulty in finding replacement land to rent warrants a farm loss system but the present system needs review. A simple approach could use a percentage of the market value of the acquired land - whether it is tenanted or not as the business disruption will be similar.
24. Shona Blance	Yes.
26. National Grid plc	It should be up to the agricultural landowner to demonstrate its loss.
34. DJ Hutchison	There are significant issues regarding assessment of farm loss payments:- • farm loss payments on the basis of average annual profit from the use of the land for agricultural purposes. This could be problematic after a few poor years, or where there is

	significant non-agricultural income. • deduction of imputed rent figure, whether or not the farm is rented. Again problematic. • if the land acquired is worth more than that given up, the farm loss payment will be reduced by that amount. This seems unreasonable. We consider that there is justification of an additional premium based on a percentage of market value to be paid in CPO situations as is the case in other jurisdictions.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	This seems reasonable. We consider that there is a case to introduce greater flexibility and to make the existing provisions less onerous on the agricultural landowner.
42. Scottish Water	Yes.
43. Faculty of Advocates	Yes.
Further responses, either made informally or at engagement events	Stakeholders stated that farm loss payments were overly complicated. They favoured overall change to cover agricultural and business interests.
Analysis	
Explanation of question	Special rules apply for payments to persons in occupation, and with an "owner's interest" in agricultural land. Section 31 of the 1973 Act provides that where an owner-occupier of an agricultural unit is displaced in consequence of a CPO, and, not more than three years after displacement, begins to farm somewhere else in GB, he is entitled to receive a FLP from the AA. Calculating the payment involves complex valuation rules and this question asked whether that should change.
Summary of responses and analysis	15 consultees responded to this question. 12 agreed that the provisions relating to FLPs should be amended. Three wanted no change. WLC supported change so that the system could be more equitable for loss of farm land. DSS, S&P, CAAV and DJH stated that FLPs raised significant issues, including: ● FLPs are calculated on the basis of average annual profit, which could be problematic after a few poor years or if there was significant non-agricultural income; ● the deduction of an imputed rent figure, whether or not the farm

	was rented, was problematic; ● if the new land acquired was worth more than that given up, the FLP was reduced by that amount, which they viewed as unreasonable. SCPA considered that a consistent approach should be adopted to both HLPs and FLPs. They stated that the calculation of a FLP should be applied whether the whole or part of a farm was compulsorily acquired. They suggested a minimum three year occupational qualifying period, and minimum and maximum payment levels, with the payment based on a percentage of market value of the property. Of the three who did not want change, RC and SSE did not give reasons. DVS said that this situation was rare in practice as a FLP was only payable when the entire property was taken, and so there was no need to amend the provisions on FLPs.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	It would be a lot easier just to have one flat rate payment rather than several separate payments to acknowledge the particular loss arising from compulsory acquisition. I can see the arguments for a home loss payment and for a farm loss payment but, having researched compensation by business claimants in the past, there seems an equally strong argument for what in England is referred to as a 'basic loss payment' and an 'occupier's loss payment'. Once you add these to the list you might as well have one single payment. It would be a lot simpler.
7. West Lothian Council	Agreed. This would provide transparency and consistency.
9. David Strang Steel	Yes, would simplify matters significantly and minimise disputes. We see no reason however why this should be confined to home and farm and not extend to other cases. Business loss is payable since 2003 in England but similar legislation was not enacted in Scotland. We consider there is a strong argument for a premium over market value to be paid in CPO situations which may contribute to a more streamlined process.

13. Strutt & Parker LLP	Yes, would simplify matters significantly and minimise disputes. We see no reason however why this should be confined to home and farm and not extend to other cases. Business loss has been payable since 2003 in England but similar legislation was not enacted in Scotland. We consider that there is a case to be made for a statutory uplift to market value to be applied to all cases of compulsory acquisition, returning the situation to that which existed before 1919, in recognition of the fact that the seller is unwilling. The uplift under the Land Clauses Consolidation (Scotland) Act 1845 in practice was to award market value plus 10% for urban properties and for rural properties 20%. (Rowan-Robinson J (1990) Compulsory Purchase and Compensation; The Law in Scotland.) This model continues to be upheld on the Isle of Man. A premium was recommended in the 2001 Scottish Executive's research paper on CPO reform [the Murning Review]. We are aware that Aberdeen University are currently comparing CPO practices across the world. We consider that a study of the cost benefit of such a proposal would provide justification for the level of uplift. We are unsure that a 10% uplift would be sufficient to remove some of the resistance to CPOs. Offering a statutory uplift to market value would give some certainty to the parties about how "attractive" the offer had to be in order for it to be reasonable to proceed with a purchase by agreement in the shadow of compulsory powers.
16. Scottish Compulsory Purchase Association	It is considered that the new statute should in fact go further and include a loss payment to the occupier for any type of property acquired. Business Loss Payments have existed in England and Wales for over ten years now and a similar Payment should be introduced in Scotland to cover occupiers of all types of property not covered under residential and farms above. As above, there should be a minimum qualifying period (say three years), a minimum payment (say £3,000) subject to a three year review and the Payment should represent a percentage of the market value of the interest in the property acquired. Equally, there should be a maximum payment but, as above, it should be set at a fairly high level. It is re-iterated at this point that in addition to the above-described supplementary payments there should be a premium added to the Rule 2 element to reflect the fact that the acquisition is indeed of a compulsory nature. See previous responses to this issue.
20. SSE plc	We believe that any changes should take cognisance of the range of available payments within England and Wales to ensure uniformity

	across the Country.
21. District Valuer Services	We agree with the current HLP/FLP policy – whether there is a need for BLP/OLP is a matter for public policy but we do not consider introducing such payments will make settlements quicker or easier to reach and this is supported by DVS experience south of the border.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. We propose that (as in England since 2003) business loss should also be a head of claim.
25. East Ayrshire Council	Agreed.
26. National Grid plc	We do not support this in relation to farm loss. All compensation claims must be evidenced and justified. No comments in relation to home loss.
30. Isobel Gordon	Yes, would simplify matters significantly and minimise disputes. We see no reason however why this should be confined to home and farm payments and not extend to other cases. Business loss is payable since 2003 in England but similar legislation was not enacted in Scotland. We consider that there is a case to be made for a statutory uplift to market value to be applied to all cases of compulsory acquisition, returning the situation to that which existed before 1919, in recognition of the fact that the seller is unwilling. This model continues to be upheld in some other jurisdictions, including on the Isle of Man where the Acquisition of Land Act 1984 states that the value of land is: "…the amount which the land if sold in the open market by a willing seller might be expected to realise, with an addition of 10 per cent. on account of the acquisition being compulsory". We are not convinced that a 10% uplift would be sufficient to remove some of the resistance to CPOs and therefore remove some of the costs involved in forcing through a scheme. We understand from the workshop meeting we attended as part of this consultation process that Aberdeen University are currently comparing CPO practices across the world. We consider that a study of the cost benefit of such a proposal would provide justification for the level of uplift.
34. DJ Hutchison	Yes, would simplify matters significantly and minimise disputes. We see no reason however why this should be confined to home and farm and not extend to other cases. Business loss is payable since

	2003 in England but similar legislation was not enacted in Scotland. We consider there is a strong argument for a premium over market value to be paid in CPO situations which may contribute to a more streamlined process.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	This seems reasonable.
42. Scottish Water	Agreed.
43. Faculty of Advocates	Agreed.
44. Scottish Property Federation	We believe there should be some statutory compensation for disturbance and non-financial loss.
46. Hendersons Chartered Surveyors	Changes are needed such as with those made in the English CPO system notably home loss.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	The DP recognised that it would be sensible to have a system which was easily understood, and proposed introducing a single payment for each of home loss and farm loss, to deal with all aspects of non-financial loss. Despite referring to the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), the DP did not address BLPs and OLPs which were introduced by that Act for England and Wales, and which provide for loss payments to businesses.
Summary of responses and analysis	18 consultees responded to this proposal. 15 agreed with it, but of those, eight referred to the provisions introduced in England and Wales by the 2004 Act, which cover BLPs and OLPs as well as HLPs and FLPs. NG disagreed with the proposal and stated that all compensation claims must be evidenced and justified. Two did not respond specifically to this question. JRR had previously researched compensation for business claimants and found that there were arguments for having a BLP and an OLP that were equally as strong as for having HLPs and FLPs. Therefore it would be preferable to introduce one single payment, to cover all situations. HCS stated that changes were needed to bring Scotland in line with

	the English system. On the more general issue of a payment for non-financial loss, S&P considered that there was a case for a statutory uplift to market value, to be applied to all cases of CP, returning to the situation which existed before 1919, in recognition of the fact that the seller was unwilling. They pointed to the uplift under the 1845 Act, namely 10% for urban properties and 20% for rural properties, and that this model still operates on the Isle of Man. They further referred to the Murning Review which recommended paying a premium. SCPA considered that new legislation should go further than home loss and farm loss. They referred to the business loss payments which have operated in England and Wales for over ten years and suggested that similar payments should be introduced in Scotland. They agreed that there should be a premium added to the market value (rule 2) element to reflect the fact that the acquisition is compulsory. SSE believed that any changes should take cognisance of the range of payments available in England and Wales to ensure uniformity across GB. DVS stated that the introduction of business loss payments was a matter for public policy but did not consider that introducing such payments would make settlements quicker or easier to reach, as supported by their experience south of the border.

143. **Sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted.**

(Paragraph 18.4)

Respondent	
7. West Lothian Council	Agreed. As a result of the Lands Tribunal for Scotland many of these provisions are no longer required. This should be dealt with in the new statute.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory	This proposal is supported.

Purchase Association	
20. SSE plc	We would agree with this proposal.
21. District Valuer Services	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Agreed. All disputes in relation to compensation should be dealt with by the LTS.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	We agree.
41. Judges of the Court of Session	We agree that the sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted. We have no comments on the remaining issues raised in chapter 18; it seems to us that the Lands Tribunal for Scotland and those who appear before it regularly will be in the best position to provide a considered view.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees that superseded and redundant dispute resolution provisions within the 1845 Act should be repealed and not re-enacted.
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of proposal	Relevant provisions of the 1845 Act: Section 20 provides that if no agreement is reached by the parties on the value of land compulsorily acquired, or the compensation payable, the parties can refer the matter to arbitration. Section 21 provides for disputes over claims not exceeding £50 to be decided by a sheriff, unless parties agree to arbitration. Section 22 provides for the method of settling compensation disputes by the sheriff. Section 23 allows for the claimant to insist upon arbitration where the compensation claimed or offered is over £50. Sections 24 to 36 contain the procedural provisions relating to arbitration under the Act. Sections 37 to 49 contain the procedural provisions relating to determination of compensation by jury. The LTS was established with effect from 1 March 1971, and many of the provisions in the 1845 Act relating to the settlement of disputes by arbitration and juries are now redundant. The DP proposed that the sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted.
Summary of responses and analysis	19 consultees addressed this proposal, and all agreed that the provisions in the 1845 Act relating to the process of dispute resolution, should be repealed and not re-enacted. NG considered that disputes in relation to compensation should be dealt with by the LTS. FoA considered that superseded and redundant dispute resolution provisions in 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)

Respondent	
6. Craig Connal QC	My own view, for what it is worth, is that the Tribunal offers a mix of formality (where required) and informality which is capable of dealing with most cases more than adequately. In endeavouring to review the Tribunal's procedures should be borne in mind – particularly

	based on experience in the English courts – of an increase in party litigants (or litigants in person in England). This has tended to increase cost and delay in many cases rather than the reverse. In many instances representation (obviously of a suitable quality!) can shorten and focus the issues by eliminating the irrelevant and focussing on what truly matters. The siren-call therefore to simplify should be viewed with a degree of caution.
7. West Lothian Council	The council has not been involved in LTS procedures in relation to determining disputed compensation claims. However, it would be useful if the procedure was as quick as possible with the use of case management.
8. Brian Reeves	ADVANTAGES & DISADVANTAGES OF ADR v LTS Some of these are dealt with in the SCPA response to Q.144 ; the length of time for LTS cases, high cost, the engagement of Counsel, and the risk of the claimant losing and resultant cost. There is the perception it is a potentially intimidating forum even prior to the case getting there ; as a result many claimants will not be prepared to go down that route and simply settle. Accordingly justice is denied. I spoke at our first CPA Scottish Conference on the subject of 'Access to Justice ' in conjunction with Lord Dervaird and Andrew Mackenzie, CEO of the Scottish Arbitration Centre. My own view is that Arbitration is a better alternative route, with a single Arbitrator appointed by the RICS or the Scottish Arbitration Centre. In saying that I still consider that major cases should still be dealt with by the LTS as an Upper Tribunal. An Arbitrator as the Lower Tribunal 'could conduct less major cases aided by the Arbitration (Scotland) Act 2010. The procedure would be speedy, much less expensive, and more 'user friendly'. I do not consider Mediation appropriate. Nor Adjudication. Expert Determination has often been suggested, but the Arbitration (Scotland) Act 2010 does not apply to Experts and there is no right of appeal. Using Arbitration is easily the best route, with appeals to the Lands Tribunal a possibility worthy of consideration. EVIDENCE OF COSTS IN ADR v LTS Clearly the evidence of Costs of ADR in Compensation Cases is not readily available, since these are exclusively dealt by LTS. My experience is normally in the field of Rent Review Arbitration, though often the Rentals themselves can be sizeable, over £1m pa; occasionally over £2m pa. The Costs of dealing with an Arbitration at those levels could involve an Arbitrator's Fee of say £25; normally Hearings are not required, but when they are, many involve only the Surveyor for each side

	(adopting the role of Expert Witness or Surveyor Advocate). Rarely is legal input required, and very, very rarely Counsel. The whole procedure is much less formal before 1 Arbitrator,(normally documents-only procedure), than before the Lands Tribunal. The very phrase 'Lands Tribunal for Scotland' is sufficient to strike fear into most claimants and hence the tendency to settle. This is a little unjust since I know certain Members of LTS well - they are highly experienced and carry out a first class role; but LTS better suited to major cases only. Indeed if some of the other responsibilities are transferred to the LTS as suggested in the Consultation Paper, then that would sit well with their role as an Upper Tribunal and allow the run of the mill cases to be allocated to separate Arbitrators.
13. Strutt & Parker LLP	We note at [paragraph] 18.16 [of the DP] the six months comment from LTS that '*some straightforward cases can be concluded within six months'* inferring that is quite a short time. This may be quite a long time for agents and claimants. We do not however share the view of RICSS in this regard. We consider that the delays in the CPO process are not entirely due to the LTS. It is our experience on the AWPR that most delays (and frustration) arises from the handling of claims by the DV; most often because they have not been instructed timeously by the acquiring authority or are unable to obtain the information required. One DV told us *"I can deal with a claim as quickly as you want"* but has imposed significant delays by failing to respond to issues timeously. In another instance on the AWPR a £nil advance payment was made because the DV concerned had had "…*insufficient time to investigate the planning situation".* In our experience acquiring authorities resist written only submissions in favour of a full hearing. This significantly ramps up costs requiring the engagement of professional legal advice in response to acquiring authorities' approach. This is a significant disincentive for claimants and therefore an obstruction to fair settlement of compensation. The LTS should be given flexibility in deciding the appropriate method for determining a dispute. The current 0% interest payable on outstanding claims is a significant frustration to claimants and is a barrier to quick resolution of compensation; this can be readily addressed. In England a rate of 1% over base is being considered (https://www.gov.uk/government/consultations/improving-the-compulsory-purchase-process). This is neither sufficient to incentivise prompt payment by acquiring authorities nor adequate to recompense a reasonably creditworthy claimant for his cost in borrowing money (as he may to do in the interim). The standard rate

	used in commercial contracts is more often at around 4 per cent over base and the rate of interest on late commercial payments suggested on the GOV.uk website is 8 per cent over base (https://www.gov.uk/late-commercial-payments-interest-debt-recovery/charging-interest-commercial-debt). We consider that application of commercial rates of interest coupled with a limiting of the power to award costs against a claimant in CPO cases would go a long way towards addressing any delays in the system. ADR options should be available for smaller claims.
16. Scottish Compulsory Purchase Association	The shortcomings include:- • The length of time involved; six months and considerably more are common. • The potential costs involved; in many cases the fear of losing the case and also potentially being responsible for the other party's costs is a significant factor in the decision-making process of a claimant who will be against an acquiring authority who is perceived to have "bottomless pockets" and may use this to its advantage. • As the LTS acts as a quasi-court then there is usually a necessity to employ high-level professional legal advice which would incorporate at least a commercial lawyer if not also junior or senior QC. The appointment of such professionals adds to the costs. • Appearance at a Hearing can be a very intimidating experience- for both professionals and non-professionals alike. Notwithstanding the above, it is considered that the Lands Tribunal may still be the appropriate forum to settle disputes but all other forms of dispute resolution should be available i.e. arbitration, adjudication and mediation as it is in the interest of all parties to have disputes settled in a time and cost efficient manner. The experience of SCPA members is that the parties often seek extensions of agreed timescales once in the court process. This further exacerbates matters, particularly for the claimant and (since mid-2009) with no interest accruing, there is little incentive for the acquiring authority to have the claim resolved timeously. It is submitted that there should be set timetables for progressing claims agreed at a procedural hearing held within one month of the claim being submitted and that hearings must take place no later than six months after the claim has been submitted. Just cause would require to be shown for any extensions of time which are sought. The Lands Tribunal should encourage greater utilisation of written representations.

17. Lands Tribunal for Scotland	[Comments on paragraph 18.11] [LTS] always welcomes comments whereby its procedures could be improved.
20. SSE plc	We have no relevant experience to be able to comment on this point.
21. District Valuer Services	The shortcomings include:- • The length of time involved; six months and considerably more are common. • The potential costs involved; in many cases the fear of losing the case and also potentially being responsible for the other party's costs is a significant factor in the decision-making process of a claimant who will be against an acquiring authority that is perceived to have "bottomless pockets" and may use this to its advantage. • As the LTS acts as a quasi-court then there is usually a necessity to employ high-level professional legal advice which would incorporate at least a commercial lawyer if not also junior or senior QC. The appointment of such professionals adds to the costs. • Appearance at a Hearing can be a very intimidating experience- for both professionals and non-professionals alike. Notwithstanding the above, it is considered that the Lands Tribunal may still be the appropriate forum to settle disputes but that it should be possible to deal with certain "straightforward" cases by means of written submissions to reduce costs.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The essential principle here is that if access to dispute resolution is feasible then there may actually be fewer disputes as that knowledge will encourage better behaviour and earlier settlement. The concerns are: • the time taken • the potential costs • the extent to which the formalities require high level legal representation for what may be straightforward valuation issues. Seeing the LTS as the most appropriate general forum we urge a substantial liberalisation and diversification of its processes to answer these points. With the wide variety of claims and the increased volume of infrastructure work, the LTS needs to be open to the use of a varied suite of suitable procedures including simplified and informal ones as well as written-only representations alongside the more formal

	hearings required for major cases or where evidence is more seriously at issue. Where acquiring authorities resist written-only submissions in favour of a full hearing, this significantly increases costs and delay, deterring claimants and so obstructing a fair settlement of compensation. The time taken by disputed cases extends the effect of the scheme on the individuals affected taking more time out of their lives and businesses. If such a liberalised regime of procedures can be developed, the LTS should be given flexibility in deciding the appropriate method for determining a dispute while ADR options from arbitration to mediation should be available for smaller claims. We consider that application of commercial rates of interest coupled with a limiting of the power to award costs against a claimant in CPO cases would also go a long way towards addressing any delays in the system.
26. National Grid plc	The process can take a long time and can be expensive for all parties. The process should be simplified and streamlined, with clear and fixed timescales.
31. Association of Chief Estates Surveyors Scottish Branch	Generally works well but could consider: Time and costs. Delay with submissions.
35. Shepherd and Wedderburn	We have no particular concerns over the operation of the LTS. We do, however, suggest, as mentioned above, that the CAAD process should be controlled by the LTS through appointment of Reporters rather than by Scottish Ministers.
40. Law Society of Scotland	The LTS is the forum of last resort and cases can be complex. The adoption of a stricter timetable for pleadings would probably accelerate cases. Perhaps simpler cases or those of lower value can be fast-tracked? This is a highly specialised area and the LTS is very much a specialist court and this is to be acknowledged and welcomed.
42. Scottish Water	None.
43. Faculty of Advocates	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.
46. Hendersons Chartered Surveyors	[Paragraph 10 of the response] 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, e.g. 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. [Paragraph 12 of the response] 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.
Further responses, either made informally or at engagement events	Notwithstanding concerns about delays and cost, it was considered that LTS may still be the appropriate forum to settle disputes. However, all other forms of dispute resolution should also be available e.g. arbitration, adjudication and mediation, as it was in the interest of all parties to have disputes settled in a timely and cost efficient manner. LTS should encourage greater use of written representations. Parties often sought extensions of agreed timescales once in the LTS process. There should be a set timetable for progressing claims. being submitted, and just cause would require to be shown for any extensions of time. Attendees considered that while the LTS had stated that it could go out on circuit, attendees had no experience of this actually happening. It was suggested that the LTS could be sitting in Aberdeen for the AWPR claims. One attendee noted that three cases had gone to the Lands Tribunal in England for a decision on surveyors' fees and that this could have been better dealt with by arbitration.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	**Shortcomings in the current LTS procedures raised by consultees** These included: • The length of time involved; at least six months and often considerably longer. • The LTS acts as a quasi-court, so it is usually necessary to employ professional legal representation, comprising at least a commercial lawyer, and often junior and/or senior counsel, adding to costs. • The potential costs involved; in many cases the fear of losing the case and potentially being responsible for the other party's costs is a significant factor in the decision-making process of a claimant, who is facing an AA which is perceived to have "bottomless pockets",

	which it may use to its advantage. • Appearance at a hearing can be a very intimidating experience for both professionals and non-professionals. **General suitability of LTS to deal with disputed compensation claims** Many consultees, despite the shortcomings, considered that LTS is still the appropriate forum to settle disputes. CC took the view that LTS offered a mix of formality (where required) and informality, which was capable of dealing with most cases more than adequately. CAAV viewed LTS as the most appropriate general forum, and urged a substantial liberalisation and diversification of its processes to answer concerns about time taken, potential costs and the need for legal representation, even for what may be a straightforward valuation. They considered that the wide variety of claims and increased volume of infrastructure work, required LTS to be open to the use of varied suitable procedures, including simplified and informal ones, written-only representation and more formal hearings which would be required for major cases or where the evidence was a more significant issue. LSS noted that cases can be complex, that this was a highly specialised area, and that it should be acknowledged and welcomed that LTS was a specialist court. FoA considered that, from their perspective, LTS was accessible and there was flexibility in adopting procedures that reflected a degree of formality appropriate to the case at hand. It was inevitable that some cases would require the involvement of counsel or solicitors and the use of expert witnesses, and, in such cases, formal adversarial procedure was merited. **Delays** CC noted that an increase of party litigants in the English courts had tended to increase delay in many cases. His view was that representation could shorten and focus issues by eliminating the irrelevant and focusing on what matters. S&P took the view that even in cases where proceedings concluded within six months, this may be seem a long time for agents and claimants. S&P considered that many of the delays in advance payment claims experienced by them in AWPR, were caused by the District Valuer, rather than LTS. The DV had often not been instructed timeously by the AA or was unable to obtain the information required. S&P also blamed the lack of interest payable on advance payments,

	for causing delays. They suggested that applying commercial rates of interest to delayed payments, coupled with limiting the power to award costs against a claimant, would reduce delays. SCPA referred to the lack of interest on advance payments. In addition, in the experience of members, parties often sought extensions of agreed timescales in the court process, which further exacerbated matters, particularly for the claimant. There should be set timetables for progressing claims, agreed at a procedural hearing, to be held within one month of the claim being submitted. Hearings should take place no later than six months after the claim had been submitted, with just cause requiring to be shown for any extensions of time which were sought. LTS should encourage greater utilisation of written representation. CAAV noted that AAs resisting written representation in favour of a full hearing, had significantly increased costs and delay, deterring claimants and obstructing a fair settlement of compensation. The time taken by disputed cases extended the impact of the scheme on individuals affected. LSS suggested that adopting a stricter timetable for pleadings would probably accelerate cases, and that simpler cases or those of lower value could be fast tracked. FoA explained that, in terms of the overall timescales for a decision, it was not uncommon for LTS proceedings to be initiated and then sisted or continued in order to allow further discussion between parties. Carrying out discussions under the shadow of the LTS could be useful for bringing about a negotiated settlement. It might also be useful to provide a target decision date, based upon an indicative timetable, where a case was proceeding. **Costs** CC noted that an increase of party litigants in the English courts, had tended to increase cost in many cases. His view was that representation could shorten and focus issues by eliminating the irrelevant and focusing on what matters. S&P referred to their experience of AAs resisting written representation in favour of a full hearing. This significantly ramped up costs, requiring the engagement of professional legal advice in response. This was a significant disincentive for claimants and an obstruction to fair settlement of compensation. LTS should be given flexibility to decide the appropriate method for determining a dispute. DVS stated that LTS may be the appropriate forum to settle disputes but that it should be possible to deal with certain “straightforward” cases by written representation to reduce costs. CAAV stated that where AAs resisted written-only submissions in

	favour of a full hearing, this significantly increased costs and delay. FoA did not consider that LTS fees were too high, but recognised that an unsuccessful party in a complex case may be faced with very high exposure to expenses. **Alternative Dispute Resolution** BR argued that arbitration was a better alternative than LTS cases, with a single arbitrator appointed by RICSS or the Scottish Arbitration Centre. However, he considered that major cases should still be dealt with by the LTS, as an Upper Tribunal. An arbitrator would act as the "Lower Tribunal", so could conduct less major cases aided by the Arbitration Act, with decisions appealable to the LTS. He argued that this procedure would be speedy, much less expensive, and more 'user friendly'. He did not consider other types of ADR (mediation and adjudication) to be appropriate. S&P considered that ADR should be available for smaller claims. SCPA considered that, while the LTS may still be the appropriate forum to settle disputes, all other forms of dispute resolution should be available, as it was in the interest of all parties to have disputes settled in a timely and cost efficient manner. CAAV considered that if access to ADR was feasible, there might actually be fewer disputes as it would encourage better behaviour and earlier settlement. If a liberalised regime of procedures could be developed, this should give LTS flexibility in deciding the appropriate method for determining disputes, with ADR available for smaller claims. **Miscellaneous** S&W had no particular concerns over the operation of the LTS, but suggested that the CAAD process should be controlled by the LTS through the appointment of Reporters rather than by SMs. A few consultees had not been involved in LTS procedures in relation to determining disputed compensation claims. Of these, WLC considered that the procedure should be as quick as possible with the use of case management.

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)

Respondent	
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. This would provide consistency.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	Agreed. This makes sense, especially as the cases would almost certainly be of lower value than those referred to the LTS.
16. Scottish Compulsory Purchase Association	This proposal is supported.
17. Lands Tribunal for Scotland	We agree that disputes about short tenancies should be dealt with by the LTS.
20. SSE plc	We would suggest that this is appropriate.
21. District Valuer Services	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	Agreed.
26. National Grid plc	Yes, this seems to be an historic anomaly. All disputes in relation to compensation should be dealt with by the LTS.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.

43. Faculty of Advocates	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.
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	None required.
Summary of responses and analysis	20 consultees addressed this proposal and unanimously agreed with it. WLC considered that this would provide consistency. S&P stated that the cases would almost certainly be of lower value than those currently referred to the LTS. NG suggested that all disputes about compensation should be dealt with by the LTS. FoA considered that this would provide greater continuity in decision-making and give parties confidence that the dispute would 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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
6. Craig Connal QC	The real question here is the knowledge of the time limit which in my experience is very limited, most probably because in the vast majority of cases it simply does not arise. However the [Discussion] Paper, for instance para 18.23, highlights the number of circumstances in which that might not be the case. Restatement of the law should perhaps allow an opportunity for greater clarification. [General Comments on Chapter 18] This may be a somewhat esoteric point but the six year rule is not

	well-known. It is possible to envisage a number of circumstances in which for one reason or another, matters have not come to a conclusion in that time.
7. West Lothian Council	Agreed. This would provide clarity.
9. David Strang Steel	This would seem reasonable. We consider that it is not always possible to determine the extent of a claim until a scheme is completed and it might be better to consider a period of 6 years from a date of 'declared completion'.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	We consider that it is not always possible to determine the extent of a claim until a scheme is completed and it might be better to consider a period of 6 years from a date of 'declared completion'. This would require an acquiring authority to publish a "declared completion" date in the same manner as the original CPO. Some flexibility should be afforded the LTS to hear claims outwith this period on exceptional circumstances. In one case currently before the LTS, a claim had to be lodged and sisted to allow revenue figures to be gathered in support of the claim for loss of wind turbines.
16. Scottish Compulsory Purchase Association	It is considered that it should be made clear that the six year time limit (if indeed that is the appropriate limit) commences on the date of vesting for both the lodging of a claim and any reference to the Lands Tribunal in the case where the compensation is disputed. In addition, cross-reference is made to the utilisation of a formal declared date of completion which can be used in connection with Part 1 claims.
20. SSE plc	We would agree that this adds certainty and clarity for parties.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The experience of larger schemes with more complex impacts taking time to evidence suggests that this may not now be the right approach which might perhaps be better founded using a period of 6 years from a date of 'declared completion'. This would require an acquiring authority to publish a "declared completion" date in the same manner as the original CPO.

	Alternatively, some flexibility should be afforded the LTS to hear claims outside this period in exceptional circumstances.
25. East Ayrshire Council	The date of vesting would appear to be appropriate as this will be clearly defined.
26. National Grid plc	Yes. This would provide clarity and certainty for both acquiring authorities and affected parties. The six years should apply to both lodging a claim and referring the matter to the LTS where there is a dispute.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Agree.
34. DJ Hutchison	This would seem reasonable. We consider that it is not always possible to determine the extent of a claim until a scheme is completed and it might be better to consider a period of 6 years from a date of 'declared completion'.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	It would be sensible for this statutory time bar to be stated in terms and we consider that it would be important to highlight this critical deadline**.**
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We support improving the clarity of time limits for compensation claims and the new Statute offers an appropriate opportunity to deliver this clarity.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and	22 consultees responded to this question and 20 answered in the affirmative. Two consultees (S&P and CAAV) suggested an

analysis	alternative approach. Of those who agreed, CC considered that the knowledge of the time limit was very limited, probably because in the vast majority of cases it simply did not arise, but acknowledged that it might occur in the scenarios considered in paragraph 18.23 of the DP. SCPA considered that it should be made clear that the six year time limit (if that is the appropriate limit) commences on the date of vesting for both the lodging of a claim and any reference to LTS in the case where the compensation is disputed. In addition, cross-reference should be made to the utilisation of a formal declared date of completion which could be used in connection with Part 1 claims. [Part 1 of the 1973 Act gives additional entitlement to compensation for depreciation caused by the use of the works, resulting from physical factors such as noise, vibration, smell etc.] EAC stated that it would be appropriate for the relevant date to be the date of vesting as this will be clearly defined. WLC said that this would bring clarity. NG thought this would provide clarity and certainty for both AAs and affected parties. The six years should apply to both lodging a claim and referring the matter to the LTS where there is a dispute. FoA and SPF argued that setting this out in the new statute would improve clarity about the date from which the six year period would run. LSS considered that it was important to highlight this critical deadline. Two consultees (DSS and DJH), while answering in the affirmative, considered that it was not always possible to determine the extent of a claim until a scheme was completed and it might be better to consider a period of six years from a date of 'declared completion'. S&P and CAAV agreed with a period of six years from a date of "declared completion". Their experience of larger schemes with more complex impacts taking time to evidence, suggested that using the date of vesting or the date when the claimant first knew, or could reasonably have expected to have known, of the date of vesting, may no longer be the right approach. An AA should require to publish a "declared completion" date in the same manner as the original CPO. They also considered that some flexibility should be afforded to the LTS to hear claims outwith this period in exceptional circumstances. To support their argument that the current time limit is not effective, S&P referred to a current case before the LTS, where a claim had to be lodged and sisted to allow revenue figures to be gathered to support the claim for loss of wind turbines.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
6. Craig Connal QC	The real question here is the knowledge of the time limit which in my experience is very limited, most probably because in the vast majority of cases it simply does not arise. However the [Discussion] Paper, for instance paragraph 18.23, highlights the number of circumstances in which that might not be the case. Restatement of the law should perhaps allow an opportunity for greater clarification.
7. West Lothian Council	Agreed. This would provide consistency.
9. David Strang Steel	We agree that standardisation would assist.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	We agree that standardisation would assist.
16. Scottish Compulsory Purchase Association	In response to a number of questions above, our position is that there should be a single compulsory purchase system incorporating a General Vesting Declaration and a vesting date and thus a notice to treat procedure should not be involved. Thus, our answer to question 146 above is pertinent.
20. SSE plc	As per proposal 146, we would agree.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.

25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	Yes if there is to be more than one method of implementing a CPO. Again that would provide clarity and certainty and also consistency.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Agree.
34. DJ Hutchison	We agree that standardisation would assist.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	Yes, we agree**.**
42. Scottish Water	Yes.
43. Faculty of Advocates	Yes, for the sake of clarity.
44. Scottish Property Federation	Yes.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	21 consultees considered this question and 20 answered in the affirmative. SCPA considered that there should be a single CPO system, without any option for a notice to treat. Four consultees (CC, NG, FOA and WLC) considered that this would provide clarity and certainty and also consistency. Three consultees (DSS, S&P and DJH) argued there would be benefit in standardisation. CC considered that the knowledge of the time limit was very limited, probably because in the vast majority of cases it simply did not arise, but acknowledged that it may occur in scenarios considered in paragraph 18.23 of the DP. NG agreed, if there is to be more than one method of implementing a CPO.

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

(Paragraph 18.23)

Respondent	
1. Professor Jeremy Rowan Robinson	As it is the date for lodging, rather than settling a claim, which is subject to the time limit, I should have thought it could be shorter. But if disturbance is to be based on actual rather than anticipated loss, it will probably be necessary to provide for a longer time limit for disturbance.
6. Craig Connal QC	The real question here is the knowledge of the time limit which in my experience is very limited, most probably because in the vast majority of cases it simply does not arise. However the [Discussion] Paper, for instance paragraph 18.23, highlights the number of circumstances in which that might not be the case. Restatement of the law should perhaps allow an opportunity for greater clarification. [General Comments on Chapter 18] I was involved in what is probably the leading case on the rule (*Royal Bank of Scotland v Clydebank Council*). The argument which failed was that the only function of the rule was to cut off the right to have a dispute determined by the Lands Tribunal. Since the point had never been reached where compensation had been offered and a dispute arose, the right to compensation remained. In the context of the taking of property on a compulsory basis, particularly having regard to a modern, rights-influenced, approach, it respectfully seems to me to be an odd conclusion that an authority can accept that it has acquired the property of the subject, accept that it has not paid compensation, but rely on a procedural rule to prevent any requirement to pay compensation. I appreciate that six years is not an unusual figure for a time limit (for instance the general prescription period in England and Wales) but in the context of the taking of property - assuming that it is admitted - I do wonder whether the right to obtain compensation for the taking of that property ought, in effect, to be imprescriptible. The intention in the *RBS* case had been to argue that, if it was once accepted that the right remained, the local authority would be obliged, in good faith, to both value the interest and make an offer of compensation. That they acted in good faith would be verifiable and challengeable, if need be by judicial review. The only difficulty which might arise would be if a *bona fide* offer of compensation were to be rejected in which case the jurisdiction of the Lands Tribunal had been excluded. However, *bona fides* was capable of being challenged (for example by the failure to include within compensation the value of part of the site or something of that kind) and a decision could be struck down on normal judicial review principles and the authority required to

	revisit it.
7. West Lothian Council	The six year time limit appears to be reasonable.
9. David Strang Steel	We consider there should be a single CPO system.
10. Renfrewshire Council	Consideration should be given to shortening the time limits.
12. Society of Local Authority Lawyers and Administrators in Scotland	Consideration should be given to shortening the time limits.
13. Strutt & Parker LLP	It is considered that there should be consistency with regard to time limits, if not, then confusion may arise. In the vast majority of cases (but not necessarily in each and every case), claimants will be aware that their interest in property has been compulsorily acquired and that there is a right to claim compensation- as the acquiring authority should be under a statutory obligation to make this quite clear to all claimants. Equally, it is not unreasonable that there should be a time limit within which that claim should be lodged. Accordingly, the time limit should coincide with the six year time limit from the date of vesting to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation. However, there may be rare occasions where, for whatever reason, a claimant is not aware that his/her property interest has been compulsorily acquired until some time after vesting but this should not fundamentally preclude the right to claim compensation; also, the six year time rule for an application to the Lands Tribunal should only commence from the date that the claimant was aware that his/her interest had been compulsorily acquired. Nevertheless, it would be incumbent on the claimant to fully demonstrate why such a late claim is being made. We are currently instructed in a situation where National Grid have installed a pipeline some 250m away from the acquired location which should be covered by such circumstances.
16. Scottish Compulsory Purchase Association	It is considered that there should be consistency with regard to time limits, if not, then confusion may arise. In the vast majority of cases (but not necessarily in each and every case), claimants will be aware that their interest in property has been compulsorily acquired and that there is a right to claim compensation- as the acquiring authority should be under a statutory obligation to make this quite clear to all claimants. Equally, it is not unreasonable that there should be a time limit within which that claim should be lodged. Accordingly, the time limit should coincide with the six year time limit from the date of vesting to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation. However, there may be rare occasions where, for whatever reason, a

	claimant may not be aware that his/her property interest has been compulsorily acquired until some time after vesting but this should not fundamentally preclude the right to claim compensation; also, the six year time rule for an application to the Lands Tribunal should only commence from the date that the claimant was aware that his/her interest had been compulsorily acquired. Nevertheless, it would be incumbent on the claimant to fully demonstrate and justify why a late claim is being made.
20. SSE plc	No changes are suggested to the time limit.
21. District Valuer Services	It is considered that there should be consistency with regard to time limits, if not, then confusion may arise. In the vast majority of cases (but not necessarily in each and every case), claimants will be aware that their interest in property has been compulsorily acquired and that there is a right to claim compensation - as the acquiring authority should be under a statutory obligation to make this quite clear to all claimants. Equally, it is not unreasonable that there should be a time limit within which the claim should be lodged. Accordingly, the time limit should coincide with the six year time limit from the date of vesting to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Time limits should be consistent, if only to avoid confusion. The time limit for lodging a claim should coincide with the six year time limit from the date of vesting to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation. However, there may be rare occasions where, for whatever reason, a claimant is not aware that his property interest has been compulsorily acquired until some time after vesting (this may include cases where other land was taken instead for a pipeline). That should not fundamentally preclude the right to claim compensation and so the six year time rule for an application to the Lands Tribunal should only commence from the date that the claimant was aware of the acquisition but it should be incumbent on the claimant to demonstrate why such a late claim is being made.
26. National Grid plc	The current time limit of 6 years seems to be appropriate.
30. Isobel Gordon	There should be consistency with regard to time limits to avoid confusion. In the vast majority of cases (but not necessarily in each and every case), claimants will be aware that their interest in property has been compulsorily acquired and that there is a right to claim compensation. There should however be a statutory obligation on the acquiring authority to make this quite clear to all claimants.

	It is not unreasonable that there should be a time limit within which that claim should be lodged. Accordingly, the time limit should coincide with the six year time limit from the date of vesting/Notice of Treat to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation. We were faced with this in respect of our compensation claim. We had to lodge an application and then sist proceedings in order to allow us to gather the necessary evidence to support our claim from the performance of the turbines that we were actually able to install following the scheme. There may be other occasions where, for whatever reason, a claimant is not aware that his/her property interest has been compulsorily acquired until sometime after vesting but this should not fundamentally preclude the right to claim compensation. The six year time rule for an application to the Lands Tribunal should only commence from the date that the claimant was aware that his/her interest had been compulsorily acquired or the completion of the scheme.
31. Association of Chief Estates Surveyors Scottish Branch	No changes required.
34. DJ Hutchison	We consider there should be a single CPO system.
35. Shepherd and Wedderburn	We do not believe that any particular changes require to be made in relation to the time limit to claim compensation. We would recommend that any document served on affected parties in relation to the compulsory purchase of their land make it clear what time limits apply in relation to lodging claims for disputed compensation.
40. Law Society of Scotland	Six years may be considered to be too long in most cases. If a settlement is to be agreed then it is likely to have been agreed in less than six years in all but the most complex cases. Bringing evidence after that time can add to the cost. There needs to be adequate time for these discussions but a period of 5 years, in line with the prescription period in Scotland, would appear adequate. We do not believe that any change is necessary.
42. Scottish Water	None.
43. Faculty of Advocates	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).
44. Scottish	Six years is a time limit and not a target for compensation to be

Property Federation	agreed. We are drawn to the idea of a three year limit to be set.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	20 consultees responded to this question. Five consultees (S&P, SCPA, DVS, CAAV and IG) thought that there should be consistency with regard to time limits to avoid confusion. They also thought that the AA should be under a statutory obligation to make it clear to all claimants that they have a right to claim compensation. There should be a time limit for claims to be lodged to the LTS (six years from the date of vesting). Four of those consultees (S&P, SCPA, CAAV and IG) thought there should be some provision to allow for late claims. Three of those (S&P, SCPA and CAAV) considered that the claimant would have to fully demonstrate why such a late claim was being made, such as when a claimant was not initially aware that the land had been acquired by a CPO. IG considered that the six year time limit should only commence from the date that the claimant became aware of the interest being acquired compulsorily, or the completion of the scheme. She observed that she had needed to lodge and sist her case, in order to allow her to comply with the time limit, but then have sufficient time to gather the evidence necessary to support her claim. Six consultees (WLC, SSE, NG, S&W, SW and FoA) thought that the current six year time limit was reasonable. FoA accepted that the six year time limit was appropriate, because of the potential time elapse in quantifying a claim. They noted that this would not prevent a claim being brought earlier, if appropriate, and argued that the culture of working towards the time limit, and allowing claims to drift, needed to be avoided. LSS observed that six years may be considered too long in most cases as a settlement was likely to have been agreed within that period in all but the most complex cases. They suggested that five years, in line with the prescription period in Scotland, would be adequate to allow discussions. Four consultees (JRR, RC, SOLAR and SPF) considered that the time limit should be shorter. JRR argued that the time limit could be shorter as it related to the date of lodging, rather than the date of settling, a claim. However, if disturbance were to be based on actual

	rather than anticipated loss, it would probably be necessary to provide for a longer time limit for disturbance. SPF stated that the six years was a time limit and not a target for compensation to be agreed, so suggested reducing this to three years. CC thought that a restatement of the law would be an opportunity for greater clarification. He believed that there was very limited knowledge of the time limit because it did not arise in the majority of cases, although he acknowledged that paragraph 18.23 of the DP highlighted a number of circumstances in which it might arise. While six years was not an unusual time limit, he suggested that obtaining compensation for the taking of a property right should be imprescriptible. S&W recommended that any document served on the affected parties in relation to the CP of their land, must make it clear what time limits applied in relation to lodging claims for disputed compensation. DSS and DJH considered that there should be a single CPO system.

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

(Paragraph 18.23)

Respondent	
6. Craig Connal QC	Yes. Circumstances could well arise in which it would be regarded as equitable for compensation still to be paid. See the discussion above. [General comments on Chapter 18 can be found in the answers to questions 146 and 148]
7. West Lothian Council	Agreed. This would allow some flexibility.
9. David Strang Steel	We consider discretion to extend the time limit will lead to extensions becoming the norm. We do not support this proposal.
10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker	Such discretion should not be given in that it is likely to delay

LLP	determination.
16. Scottish Compulsory Purchase Association	It is considered that the Lands Tribunal for Scotland should be given such discretion in exceptional circumstances - see the response to question 148 above. [Answer to question 148 It is considered that there should be consistency with regard to time limits, if not, then confusion may arise. In the vast majority of cases (but not necessarily in each and every case), claimants will be aware that their interest in property has been compulsorily acquired and that there is a right to claim compensation- as the acquiring authority should be under a statutory obligation to make this quite clear to all claimants. Equally, it is not unreasonable that there should be a time limit within which that claim should be lodged. Accordingly, the time limit should coincide with the six year time limit from the date of vesting to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation. However, there may be rare occasions where, for whatever reason, a claimant may not be aware that his/her property interest has been compulsorily acquired until some time after vesting but this should not fundamentally preclude the right to claim compensation; also, the six year time rule for an application to the Lands Tribunal should only commence from the date that the claimant was aware that his/her interest had been compulsorily acquired. Nevertheless, it would be incumbent on the claimant to fully demonstrate and justify why a late claim is being made.]
17. Lands Tribunal for Scotland	We agree that some disturbance claims take many years to be capable of quantification. We agree it would be sensible for there to be a discretion to extend time limits in defined circumstances, since the alternative is for unquantified claims to be made and then sisted for many years. However there would need to be safeguards to prevent authorities being faced with stale claims long after the event.
20. SSE plc	We do not agree with this proposal, as this would undermine the principle of certainty which is important to the process.
21. District Valuer Services	Yes. It is considered that the Lands Tribunal for Scotland should be given such discretion in exceptional circumstances.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Save for the situation where the claimant did not know of the acquisition, the need of certainty suggests there should be no discretion.

25. East Ayrshire Council	Yes.
26. National Grid plc	No.
30. Isobel Gordon	We had to lodge our claim in the LTS to avoid being time barred but before we had sufficient evidence of the performance of the remaining turbines to justify our claim.
31. Association of Chief Estates Surveyors Scottish Branch	No.
32. Scottish Borders Council	Agree that if there is a statutory time limit period particularly if this is reduced from six years to two or three years that the LTS should have discretion to extend the time limit in some circumstances.
34. DJ Hutchison	We consider discretion to extend the time limit will lead to extensions becoming the norm. We do not support this proposal.
35. Shepherd and Wedderburn	Provided sufficient clarity on the time limit is given to affected parties, we do not envisage that discretion would be required.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	We consider that it may be helpful to provide that the LTS can, in exceptional circumstances, accept claims outwith the six year time limit. However, there are arguments both ways here. On one view an extension of the period has some advantages, particularly in complex cases. On the other hand, there is advantage in certainty, particularly for applicants, and an inflexible deadline can focus minds. If an extension would only be used in the most complex cases, the resources available to such applicants are likely to be such that making the application to the LTS is not unfeasible anyway. There is also something to be said for the fact that preparing the application can in itself focus minds on the strengths and weaknesses of the applicant's position.
42. Scottish Water	No.
43. Faculty of Advocates	The Faculty favours a simple and clearly understood time limit, albeit one that reflects the points made in the preceding response. [Answer to question 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).]
44. Scottish Property Federation	Yes.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	23 consultees responded to this question, with 13 answering in the affirmative and 10 disagreeing. Of those who answered in the affirmative, CC considered that circumstances could arise when it would be regarded as equitable for compensation to still be paid. WLC considered that the discretion would allow some flexibility. SCPA and DVS suggested that the LTS should be given discretion in exceptional circumstances. LTS agreed that some disturbance claims take many years to be capable of quantification. It would be sensible to have a discretion to extend time limits in defined circumstances, since the alternative would be for unquantified claims to be made, and then sisted, for many years. There would need to be safeguards to prevent authorities being faced with stale claims long after the event. IG referred to her case, where she had required to lodge and sist a claim in the LTS, to avoid being time barred, before she had been able to obtain sufficient evidence of the performance of the remaining wind turbines to justify her claim. SBC thought that this discretion would be particularly important if the statutory time limit were reduced from six to three or two years. LSS considered that it might be helpful to provide that the LTS could, in exceptional circumstances, accept claims outwith the six year time limit. An extension of the period had some advantages, particularly in complex cases. However there was also advantage in certainty, particularly for applicants, and an inflexible deadline could focus minds. Preparing the application could, in itself, focus minds on the strengths and weaknesses of the applicant's position. If an extension would only be used in the most complex cases, the resources available to such applicants were likely to be such that making an application to the LTS would not be unfeasible anyway. Of the 10 consultees who disagreed, DSS expressed concern that this would lead to extensions becoming the norm. S&P argued that the discretion would be likely to delay determination. SSE considered that the discretionary power would undermine certainty.

	CAAV thought that, for certainty, there should be no general discretion, save for when the claimant did not know of the acquisition. S&W did not envisage that discretion would be required provided there was sufficient clarity on the time limit given to affected parties. FoA favoured a simple and clearly understood time limit.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	I think greater discretion would be helpful.
6. Craig Connal QC	This is unnecessary. The discretion available already is appropriate.
7. West Lothian Council	Agreed. Otherwise the process could operate harshly against claimants.
9. David Strang Steel	This proposal would follow the provisions of the 2010 Act [Arbitration Act] which, under Rule 62 of the Scottish Arbitration rules, requires the Arbitrator when making an Award of expenses to have regard to the principle that expenses should follow a decision made in favour of a party except where this would be inappropriate in the circumstances. The principles for the exercise of such measure of discretion were set out by Lord Woolf in the English case of *AEI Rediffusion Music Ltd v Phonographic Performance Ltd.* These are:- "Costs are at the discretion of the Courts They should follow the event except where it appears to the Court that in the circumstance some other order should be made. The general rule does not cease to apply simply because the successful party raised issues or makes allegations on which he fails but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole part of his costs. Where a successful party raises issues and makes allegations improperly or unreasonably the Court may not only deprive him of his costs but may order him to pay the whole or part of the

	unsuccessful party's costs." The Court of Appeal in England has recently held that the burden of proof is on the unsuccessful party to show that there should be any departure from the general rule that costs follows success, the fundamental principle being that any departure is not justified unless it had been shown that the successful party had acted unreasonably and added to the costs of the dispute. We believe that this should be enshrined in legislation regarding costs.
10. Renfrewshire Council	No. Expenses should be proportionate and if a claimant pursues a claim and does not succeed in obtaining the higher claim they do so at their own risk.
13. Strutt & Parker LLP	In drafting recommendations and legislation for a revised CPO regime the Law Commission should clearly state the obligation for the reimbursement of professional costs. This should broadly follow the provisions of the 2010 Act [Arbitration (Scotland) Act 2010] which, under Rule 62 of the Scottish Arbitration rules, when making an Award of expenses requires the Arbitrator to have regard to the principle that expenses should follow a decision made in favour of a party except where this would be inappropriate in the circumstances. The principles for the exercise of such measure of discretion were set out by Lord Woolf in the English case of *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* ([1999] 1 WLR 1507) approving an earlier judgement by Nouise LJ in *Re Elgindata Ltd No2* [1992] 1 WLR 107. These are:- "a) Costs are at the discretion of the Courts. b) They should follow the event except where it appears to the Court that in the circumstance some other order should be made. c) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs. d) Where a successful party raises issues and makes allegations improperly or unreasonably the Court may not only deprive him of his costs but may order him to pay the whole or part of the unsuccessful party's costs." The Court of Appeal in England has recently held that the burden of proof is on the unsuccessful party to show that there should be any

	departure from the general rule that costs follows success (Halsey v Milton Keynes General NHS Trust; Steel v (1) Joy (2) Halliday (2004) (LTL 11/5/2004) EWCA (Civ) 576 CA (Civ Div), the fundamental principle being that any departure is not justified unless it had been shown that the successful party had acted unreasonably and added to the costs of the dispute. In a CPO dispute a claimant would not have incurred any such cost were it not for the CPO. We consider costs should fall to be awarded against the acquiring authority save in exceptional circumstances where the LTS decide that a claimant has acted wholly unreasonably.
16. Scottish Compulsory Purchase Association	It is considered that the Lands Tribunal for Scotland should be given wider discretion with regard to the award of reasonable expenses and that each case requires to be decided on its own merits.
17. Lands Tribunal for Scotland	We think care needs to be applied here. It would be helpful to know the background to section 11 [of the 1963 Act] being introduced. One does not wish to encourage unnecessary litigation where an acquiring authority has made a reasonable offer which was not, and was never very likely to have been "beaten". There will be many cases where the loss in value is within a range of reasonable opinion. Therefore, a change in the rules could mean that so long as a claimant holds a professional opinion at the higher end of the spectrum, he will have nothing to lose by litigation while the authority maintain an offer based on an opinion at a lower level. In this scenario the claimant is still acting "reasonably" by not settling. The result could be that for authorities to avoid litigation they will always have to make an offer at the high end of the scale. But it may be such an outcome is to be preferred as a matter of policy, and depending upon the discretion given to the Tribunal the claimant would still be risking not getting a recovery of his own expenses in such a situation. We therefore agree that the problem of a narrowly defeated but reasonable claim, if indeed it is a problem, could be addressed by some softening in the language of section 11. One familiar issue with section 11(2) is that there are often arguments as to the point when a claim is sufficiently detailed so to expect the authority's offer to be made. Nevertheless we think the provision is very useful in requiring claimants to specify their claim in appropriate detail.
20. SSE plc	We would suggest that such an extension could encourage claimants to raise vexatious claims. Any award of expenses should have regard to the conduct of claimants.

21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. By contrast to many other disputes, a claimant in a CPO dispute would not have incurred any such costs were it not for the CPO (which he would not have provoked) and so the LTS should have this discretion, albeit taking account of where a claimant has acted unreasonably. The CAAV and SAAVA represent many of those acting for claimants and urge that the new legislation for a revised CPO regime should clearly state the obligation for the reimbursement of reasonable professional costs reasonably incurred by the claimant in protecting and representing his position in response to the CPO.
25. East Ayrshire Council	Discretion is useful and allows the LTS to take into account a variety of circumstances whilst still having the ability to determine expenses based on the facts and circumstances of individual cases.
26. National Grid plc	Yes the rules should be amended to allow the LTS a wider discretion, however this discretion needs to be exercised carefully to avoid encouraging unreasonable claims or increasing the number of cases referred to the LTS. If the process itself was less costly that may also be beneficial.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	I would agree that it would be reasonable to amend the rules to allow the LTS a wider discretion on this issue.
34. DJ Hutchison	The LTS should be given such discretion. A claimant should only be awarded costs against him if he raised matters upon which he fails which have significantly increased the length or cost of the proceedings or raises issues improperly or unreasonably. It should be borne in mind that any claimant did not choose to have a CPO imposed upon him and should be free to properly pursue the compensation upon which he is entitled.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	Yes, we do consider that the LTS should be provided with a wider discretion to make such awards. However, this should also be balanced against time and expense wasted by parties either not been given as full information as they might have been, or not having taken legal advice when they could/should have done.

42. Scottish Water	No.
43. Faculty of Advocates	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 [question 151 on PEOs].
44. Scottish Property Federation	We support enabling discretion for the LTS but it is important that the landowner has the right to seek the appropriate level of compensation.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	The current rules on expenses are set out in section 11 of the 1963 Act, which provides:- "(1) Where either— (a) the acquiring authority have made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Lands Tribunal to that claimant does not exceed the sum offered; or (b) the Lands Tribunal is satisfied that a claimant has failed to deliver to the acquiring authority, in time to enable them to make a proper offer, a notice in writing of the amount claimed by him, containing the particulars mentioned in subsection (2) of this section; the Lands Tribunal shall, unless for special reasons it thinks proper not to do so, order the claimant to bear his own expenses and to pay the expenses of the acquiring authority so far as they were incurred after the offer was made or, as the case may be, after the time when in the opinion of the Lands Tribunal the notice should have been delivered. (2) The notice mentioned in subsection (1)(b) of this section must state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated.

	(3) Where a claimant has delivered such a notice as is mentioned in subsection (1)(b) of this section and has made an unconditional offer in writing to accept any sum as compensation, then, if the sum awarded to him by the Lands Tribunal is equal to or exceeds that sum, the Lands Tribunal shall, unless for special reasons it thinks proper not to do so, order the acquiring authority to bear their own expenses and pay the expenses of the claimant so far as they were incurred after his offer was made. (4) The Lands Tribunal may in any case disallow the cost of counsel. (5) Where the Lands Tribunal orders the claimant to pay the expenses, or any part of the expenses, of the acquiring authority, the acquiring authority may deduct the amount so payable by the claimant from the amount of the compensation, if any, payable to him. Some consultees suggested changes along the lines of rule 62 of the Scottish Arbitration Rules (Arbitration Act, section 7 and Schedule 1), which provides: "(1) The tribunal may make an award allocating the parties' liability between themselves for the recoverable arbitration expenses (or any part of those expenses). (2) When making an award under this rule, the tribunal must have regard to the principle that expenses should follow a decision made in favour of a party except where this would be inappropriate in the circumstances. (3) Until such an award is made (or where the tribunal chooses not to make such an award) in respect of recoverable arbitration expenses (or any part of them), the parties are, as between themselves, each liable— (a) for an equal share of any such expenses for which the parties are liable under rule 60, and (b) for their own legal and other expenses. (4) This rule does not affect— (a) the parties' several liability for fees and expenses under rule 60, or (b) the liability of any party to any other third party."
Summary of responses and analysis	22 consultees responded to this question, of which 17 agreed and four disagreed. LTS considered that if there was a problem of narrowly defeated but reasonable claims, this could be addressed

	by some softening in the language of section 11 of the 1963 Act. Of the 17 who agreed, JRR thought that greater discretion would be helpful and WLC argued that, without it, the process could operate harshly against claimants. S&P considered that the legislation should clearly state the obligation for the reimbursement of professional costs. DSS and S&P noted that the proposed new discretion would follow the provisions of rule 62 of the Scottish Arbitration Rules (section 7 of, and Schedule 1 to, the Arbitration Act) which requires the Arbitrator, when making an award of expenses, to have regard to the principle that expenses should follow a decision made in favour of a party except where this would be inappropriate in the circumstances. They also noted that the principles for the exercise of such discretion were set out in the English case of *AEI Rediffusion Music Ltd v Phonographic Performance Ltd*. The Court of Appeal in England had also held that the burden of proof was on the unsuccessful party to show that there should be any departure from the general rule that costs follow success, and departure was not justified unless it had been shown that the successful party had acted unreasonably and added to the costs of the dispute. DSS believed this should be enshrined in statute. Three consultees (S&P, CAAV and DJH) noted that the claimant would not have incurred any such costs were it not for the CPO. S&P considered that costs should fall to be awarded against the AA, except for exceptional circumstances where the LTS decided that a claimant had acted wholly unreasonably. DJH agreed, arguing that a claimant should only have awarded costs against him if he had raised matters on which he subsequently failed, which significantly increased the length or cost of proceedings, or had raised issues improperly or unreasonably. CAAV considered that there should be a discretion available to the LTS, unless the claimant had acted unreasonably, and urged that the new statute should clearly state the obligation for the reimbursement of all professional costs reasonably incurred in responding to the CPO. SCPA and EAC supported the LTS being given a wider discretion as each case required to be decided on its individual merits. NG and LSS, while agreeing with the wider discretion, warned that it would need to be exercised carefully. NG wanted to avoid encouraging unreasonable claims or increasing the number of cases referred to the LTS. It would be beneficial if the process itself was less costly. LSS considered that the discretion should be balanced against the time and expense wasted by parties either not being given as full information as they might have been, or not

	taking legal advice when they could/should have done. FoA asserted that this discretion was likely to be controversial, and would reflect the interests of the party affected. However they agreed with the reasoning in paragraphs 18.24 to 18.26 of the DP, and stated that the 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). They also considered that the potential exposure to expenses could be regulated by an order made at an early stage of proceedings (see question 151 on PEOs). LTS stated that they would not wish to encourage unnecessary litigation where an AA had made a reasonable offer which was not, and was never very likely to have been, "beaten". There would be many cases where the assessment of loss in value was within a range of reasonable opinion. Therefore, this suggested change in the rules could mean that, so long as a claimant held a professional opinion at the higher end of the spectrum, he would have nothing to lose by litigation while the AA maintained an offer based on an opinion at a lower level. In this scenario, the claimant would still be acting "reasonably" by not settling, resulting in AAs having to always make an offer at the high end of the scale to avoid litigation. However, such an outcome might be preferred as a matter of policy. Depending upon the discretion given to the LTS, the claimant would still risk not recovering his own expenses. If there was an issue of narrowly defeated but reasonable claims, this could be addressed by some softening in the language of section 11. Four consultees (CC, RC, SSE and SW) disagreed with introducing the wider discretion. CC thought it was unnecessary as the discretion currently available was already appropriate. RC considered that expenses should be proportionate and if a claimant pursued a claim and did not succeed in obtaining the higher claim, they did so at their own risk. SSE thought that an extension of the discretion could encourage claimants to raise vexatious claims, but that any award of expenses should have regard to the conduct of claimants.

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)

Respondent	
6. Craig Connal QC	No. The justification for PEOs and other circumstances is not applicable to this type of case.
7. West Lothian Council	Agreed. This may help to resolve inequality of arms issues and any sense of injustice felt by claimants in having to take part in a dispute not of their choosing.
9. David Strang Steel	This would follow Rule 65 of the Scottish Arbitration Rules. [Rule 65 of the Scottish Arbitration Rules (Arbitration Act, Schedule 1 and section 7) provides: "(1) A provisional or part award may cap a party's liability for the recoverable arbitration expenses at an amount specified in the award. (2) But an award imposing such a cap must be made sufficiently in advance of the expenses to which the cap relates being incurred, or the taking of any steps in the arbitration which may be affected by the cap, for the parties to take account of it."] The wording of this question is however of concern. It suggests that claimants are being unreasonable in their representation which is not our experience. In the PI the AWPR team comprised of a team of professional advisors led by Senior Counsel. Faced with such, any affected party has to seek adequate professional representation to stand a reasonable chance – the same is true in respect of compensation claims.
10. Renfrewshire Council	Yes.
13. Strutt & Parker LLP	We have some concerns regarding the wording of this question which appears to suggest that claimants may be adding to the costs of hearings. It is our experience that it is acquiring authorities who habitually add to costs by refusing to agree written representations only and engaging senior counsel etc. for hearings. We believe that an acquiring authority should not be entitled to reclaim its expenses in a compensation dispute save in exceptional circumstances. Such a proposal should follow Rule 65 of the Scottish Arbitration Rules [see DSS's answer above] but lead to potential disputes/cost and time in considering and hearing parties in respect of such any such order (which should of course apply to both parties). The cost of such a hearing should be borne by the acquiring authority.

16. Scottish Compulsory Purchase Association	It is considered that such provision i.e. protective expenses orders should be introduced. One of the main criteria in deciding as to whether or not an application to the Lands Tribunal for Scotland should be lodged is the issue of costs but all such applications will require to be carefully scrutinised.
20. SSE plc	Such provisions should be applied only in cases where hardship is shown.
21. District Valuer Services	This currently exists in the form of a Protective Expenses order and should only be available for a point of public interest.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	While seeing merit in reserve powers for the LTS to limit the expenses of either or both an acquiring authority or a claimant in particular case (in the manner available to an arbitrator under the 2010 Act), we are concerned that is expressed solely in terms of claimants on whom a CPO has been imposed. A claimant's costs can be increased by the actions of acquiring authorities (as where they refuse to agree written-only representations or engage senior counsel for hearings). We believe that the default position should be that an acquiring authority should not be entitled to reclaim its expenses in a compensation dispute save in exceptional circumstances.
25. East Ayrshire Council	This would seem to be reasonable, provided appropriate scrutiny was provided.
26. National Grid plc	Yes, although an application for the equivalent of a protective expenses order would need to be carefully scrutinised to ensure that they do not encourage frivolous, vexatious or unreasonable claims. Again if the process was less costly and quicker this may be less of an issue.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	I would submit that giving the LTS greater flexibility in terms of proposal 150 strikes the correct balance in terms of expenses. I would not agree that the LTS should be able to impose protective expense orders. Protective Expense Orders ("PEO") can place a significant burden on Local Authorities, on what can thereafter turn into a protracted, expensive case. Making PEOs available may also encourage disputes that are currently resolved out with the LTS to be taken there and also discourage an early reasonable settlement to be reached. It is not the Council's view that the LTS should be given the power

	to make a PEO, but if it is given this power then the test to be met should be in line with the common law for PEOs. In our view the statutory test for PEOs in Environmental appeals sets the threshold for obtaining a PEO unreasonably low.
34. DJ Hutchison	In the PI the AWPR team comprised a team of professional advisors led by Senior Counsel. Faced with such, any affected party has to seek adequate professional representation to stand a reasonable chance – the same is true in respect of compensation claims.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes.
40. Law Society of Scotland	This seems reasonable. On an equality of arms point where the acquiring authority is well funded, this may have a role to play.
42. Scottish Water	No.
43. Faculty of Advocates	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).
44. Scottish Property Federation	A Protective Expenses Order is likely to be required in circumstances where expenses could become unmanageable for claimants. It should be borne in mind that the claimant is only claiming because of a CPO that is being imposed on them. However, we share the misgivings that PEOs can encourage frivolous claims and therefore their award must be rigorously scrutinised.
46. Hendersons Chartered Surveyors	Paragraph 10 of General Comments 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 that 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, e.g. 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. Paragraph 12 of General Comments 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 that 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.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.

Summary of responses and analysis	20 consultees responded to this question, 17 of which agreed that the LTS should be able to make a PEO at an early stage, to limit the expenses of a claimant in appropriate cases. Three disagreed. Of those who agreed, WLC considered that this might help to resolve inequality of arms issues and any sense of injustice felt by claimants in having to take part in a dispute not of their choosing. SCPA considered that PEOs should be introduced as the issue of costs was one of the main criteria in deciding whether or not to apply to the LTS. SCPA, EAC, NG and SPF indicated that such applications would require to be carefully scrutinised to avoid frivolous, vexatious or unreasonable claims. SSE suggested that such provisions should be applied only in cases where hardship was shown. DVS believed that PEOs should only be available for a point of public interest. DSS and S&P had some concerns regarding the wording of this question, as it appeared to suggest that claimants might be adding to the costs of hearings. In their experience, AAs habitually added to costs by refusing to agree written-only representations and by engaging senior counsel for hearings. CAAV also noted that a claimant's costs can be increased by the action of AAs. S&P and CAAV thought that the default position should be that AAs should only be entitled to reclaim expenses in exceptional circumstances. S&P considered that the proposal should follow rule 65 of the Scottish Arbitration Rules, and the cost of any hearing on the PEO should be borne by the AA. SPF stated that a PEO was likely to be required where expenses could become unmanageable for claimants, and noted that the claimant would only be claiming because a CPO was being imposed on them. LSS argued that PEOs may have a role to play on an equality of arms point where the AA was well funded. FoA considered that the threat of CP in the public interest might justify the use of a PEO (in the same way that Orders are made under Chapter 58A of the Court of Session Rules for claims falling under the provisions of the Aarhus Convention on Access to Justice). They noted the need to reach an appropriate balance between the private and public interests. Careful consideration would be required as to the appropriate level of "cap" to apply (and any cross-cap). A PEO in a CP situation was unlike a claim under the Aarhus Convention as, fundamentally, the claimant was seeking to protect a private interest (albeit one upon which the public interest

	may have an impact). Therefore, any PEO protection introduced 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). HCS referred to many in the agricultural community not being sufficiently well-resourced, especially elderly parties who were bamboozled and genuinely fearful of the layers of bureaucracy and administrative threat in the CP process. He asked for the onus of responsibility to shift to AAs to act competently and proficiently, in a timely manner and to compensate fully. Most claimants could not fund modern actions against AAs, who had the resources of the public purse to mount an almost unlimited defence. Costs of referring to the LTS should be met by the AA, unless frivolous or unreasonable. Three consultees (CC, SBC and SW) disagreed with introducing PEOs. CC argued that the justification for PEOs was not applicable to this type of case. SBC considered that it would be preferable to introduce greater flexibility for the LTS to award expenses, as suggested in question 150 of the DP. PEOs may discourage an early, reasonable settlement from being reached and could put a significant burden on AAs, with cases thereafter becoming protracted and expensive. If PEOs were to be introduced, the test should be in line with the common law for PEOs rather than the statutory test in environment appeals, which, in their view, was set unreasonably low.

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

(Paragraph 18.29)

Respondent	
7. West Lothian Council	Agreed. This would provide clarity.
9. David Strang Steel	No, as this may unfairly rule out claims not following such format. If however such a measure is introduced, the acquiring authority must be under a clear obligation to properly inform all potential claimants of the advance payment procedure and the prescribed form. The courts must also be given some discretion in determining claims which do not strictly follow the prescribed format.

10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We do not agree with any proposal for a prescribed format as it may unfairly rule out claims not following such format. If however such a measure is introduced, the acquiring authority must be under an obligation to properly inform all potential claimants of the advance payment procedure and the prescribed form.
16. Scottish Compulsory Purchase Association	On balance, this proposal is not supported. The main reason for an Advance Payment is one of speed to reduce any element of financial hardship on the claimant. Whilst it is accepted that acquiring authorities require sufficient detail of the claimant and the claimant's claim, this information should all be incorporated within the compensation claim form which many acquiring authorities in Scotland have developed over the years; indeed, it is suggested that there should be a standard Scotland-wide compensation claim form. Thus, the formal compensation claim form requires to be completed and submitted up front (even though the compensation amount claimed on the form may not be stated other than "to be negotiated under the Compensation Code") and all that would be required thereafter is an Advance Payment application letter.
20. SSE plc	We would agree that this would be to the benefit of all parties, but particularly the claimant.
21. District Valuer Services	Not agreed however it is suggested that there should be a standard Scotland-wide compensation claim form. Thus, the formal compensation claim form requires to be completed and submitted up front and this should include a detailed claim for compensation. Assuming this had been submitted all that would then be required would be a simple written request.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Members' experiences with the AWPR suggest there are major problems in practice with the operation of the advance notice procedure. Despite serving payment requests, we are advised that Transport Scotland failed to pay claims for an advance payment timeously, apparently having no procedures to do so. Wider experience points to acquiring authorities' assessment of claims on a cautious basis leaving affected parties out of pocket. Thinking it likely that requiring a prescribed form will simply lead to technical challenges that it has not been used by claimants who, whether for good reason or ignorance, do not use the exact form, we do not agree with this proposal. If, however, it is adopted, then the law must require the acquiring

	authority to advise all potential claimants of the advance payment procedure and supply copies of the prescribed form. That form should then be accepted as the foundation for subsequent claims rather than the claimant having to issue multiple advance payment requests. We suggest that the combination of providing a form to applying for advance payment, a period (say, 21 days) for the acquirer to request more information and a realistic rate of compound interest on late payments following a 90 day notice might help to improve the timeliness of handling claims for an advance payment of compensation.
25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	We would support this. This will encourage the correct information to be supplied to the acquiring authority to allow claims for advance payments to be dealt with.
30. Isobel Gordon	We do not agree with this proposal as it may unfairly rule out claims not following such format. If however such a measure is introduced, the acquiring authority must be under an obligation to properly inform all potential claimants of the advance payment procedure and the prescribed form. We consider that a process should be introduced whereby claims are stated in an approved format to assist payment of advances but there must be appropriate sanction for non-payment or for wilful under assessment of the claim.
31. Association of Chief Estates Surveyors Scottish Branch	Not required.
32. Scottish Borders Council	Prescribed claim form to claim an advance payment would be useful.
34. DJ Hutchison	No, as this may unfairly rule out claims not following such format. If however such a measure is introduced, the acquiring authority must be under a clear obligation to properly inform all potential claimants of the advance payment procedure and the prescribed form. The courts must also be given some discretion in determining claims which do not strictly follow the prescribed format. The Acquiring Authority must also ensure such claims are processed timeously.

35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	This seems reasonable. This may also assist with perceptions of accessibility of the LTS.
42. Scottish Water	Yes.
43. Faculty of Advocates	Agreed.
44. Scottish Property Federation	There should be a prescribed form to ensure consistency - we agree with this proposal.
Further responses, either made informally or at engagement events	At engagement events consultees suggested that there should be a standard compensation claim form with a GVD and that, although some AAs did this anyway, it might be helpful to have a standard one that was used by all AAs which would provide all the information required to start the claim.
Analysis	
Explanation of proposal	Under section 48 of the 1973 Act, claimants who have lost possession of their property on CP are entitled to an advance payment, amounting to 90% of the level of compensation either as agreed by the parties or as estimated by the AA. Currently there is no prescribed form for an advance payment and AAs have been criticised for not dealing with claims timeously. This proposal suggested that there should be a prescribed form.
Summary of responses and analysis	21 consultees responded to this proposal. 13 agreed with it and eight disagreed. Of the consultees who agreed, WLC argued that a prescribed form would provide clarity. SSE stated that it would be to the benefit of all parties, particularly the claimant. NG thought that it would encourage the correct information to be supplied to the AA to allow claims for advance payments to be dealt with. SBC thought a prescribed form would be useful. LSS thought that this seemed reasonable and that it may also assist with perceptions of accessibility of the LTS. SPF believed there should be a prescribed form, to ensure consistency. Eight consultees (DSS, S&P, SCPA, DVS, CAAV, IG, ACES and DJH) disagreed with the proposal that there should be a prescribed form. Five of those (DSS, S&P, CAAV, IG and DJH) were concerned that that this may unfairly rule out claims not following the prescribed format. IG considered that there should be a process introduced for

	claims to be stated in an approved format to assist payment of advances, alongside appropriate sanction for non-payment or for wilful under-assessment of the claim. CAAV thought that AAs should be required to advise all potential claimants of the advance payment procedure and supply copies of the prescribed form. If a prescribed form were to be introduced, DSS, S&P, CAAV and DJH considered that the AA must be under a clear obligation to properly inform all potential claimants of both the advance payment procedure and the prescribed form. DSS also argued that LTS should be given some discretion to determine claims which did not strictly follow the prescribed format. SCPA and DVS preferred the introduction of a standard Scotland-wide compensation claim form which would require to be completed and submitted up front. Thereafter, a claimant would simply require to submit an advance payment application letter.

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

(Paragraph 18.31)

Respondent	
7. West Lothian Council	Agreed. An example is where businesses or home owners incur relocation expenses before the acquiring authority takes possession.
9. David Strang Steel	In our situation we were not able to serve a blight notice (as it was development land rather than agricultural land) and so was precluded from raising funds until the GVD has been issued, it would have been fairer for a payment to have been made sooner if requested.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	Compensation should be due immediately upon temporary access for investigative works etc. with interest payable on such claim from that date.
14. John Watchman	9.1 Unless a claimant indicates otherwise, an acquiring authority should be required to make payment of advance payments on the basis of the acquiring authority's estimated value no later than the date the acquiring authority takes entry to land. This would make the acquiring authority focus on valuation and cash flow issues early on in the compulsory expropriation process. It would also allow a claimant an opportunity to defer payment if that were considered to

	be in the claimant's best interests. 9.2 Negotiations for agreement of compensation could proceed in parallel and, failing agreement; matters can be pursued before the Lands Tribunal for Scotland.
16. Scottish Compulsory Purchase Association	It is considered that on the basis that there would be a single compulsory purchase system involving a General Vesting Declaration procedure then there is no reason to incorporate within any new statute a requirement on an acquiring authority to make an Advance Payment prior to vesting. However, as set out in the response to Response 122 (initial/early land investigative works) where there may be compensation due at that stage in the process, then the opportunity to apply for an Advance Payment may/would arise, particularly if there is a dispute as to the amount of compensation due at that time.
20. SSE plc	We would agree that this may be appropriate in particular circumstances.
21. District Valuer Services	No – no need for change, can be done on a discretionary basis currently if justified.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Compensation should be due immediately upon temporary access for investigative works etc. with interest payable on such claim from that date.
26. National Grid plc	It is likely that it would be difficult for an acquiring authority to be able to make an advance payment before taking possession from a governance perspective. In addition if the GVD procedure or the new unitary procedure is used, it is difficult to see how the need to make advance payments before taking possession would arise.
31. Association of Chief Estates Surveyors Scottish Branch	Concept of compensation for pre CPO period is supported but not clear if this should be as an Advance Payment.
32. Scottish Borders Council	No.
34. DJ Hutchison	This appears reasonable.
35. Shepherd and Wedderburn	Yes. See our comments above in relation to questions 132 and 133. [Answer to question 132] Yes. We think that it should be possible for the parties to agree an assumed disturbance value at the time of acquisition but, in the

	absence of such agreement, the level of disturbance compensation should be quantified after the event. We do, however, suggest that in order to mitigate the impact of disturbance on an affected party, provisions should exist for allowing that party to receive early advance payments prior to completion of the scheme. We would suggest that the new legislation includes a swift dispute resolution procedure to allow that level of advance compensation to be determined in the absence of agreement of the parties. [Answer to question 133] Our answer to this question is similar to 132. It should be possible at the very least to secure an advance payment towards relocation of the business based on what the parties agree (or a third party determines) are the likely costs of relocation.
38. MacRoberts LLP	Yes, where the owner is suffering interim financial disadvantage as a direct result of the CPO process.
40. Law Society of Scotland	This may not be desirable and there would need to be safeguards for repayment if title was not taken.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Yes, we believe the burden of compensation should lie with the acquiring authority rather than homeowners and businesses that will typically have less access to finance and are being placed in a potential situation of hardship.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	19 consultees responded to this question, with nine agreeing that there were such circumstances and seven disagreeing. S&P, CAAV and ACES looked at the question from the perspective of the pre-CPO process.

	Nine consultees (WLC, DSS, JW, SSE, DJH, S&W, MacR, FoA and SPF) agreed that there were circumstances in which an AA should be required to make an advance payment before taking possession. WLC and S&W suggested an advance payment should be paid where businesses or home owners incurred relocation expenses before the AA took possession. S&W considered that early advance payments might be paid by an AA in order to mitigate the impact of disturbance on an affected party. DSS referred to the unfairness of being precluded from raising funds until the GVD was issued, as they were unable to serve a blight notice (as their land holding was development land rather than agricultural land). JW considered that an AA should be required, unless a claimant indicated otherwise, to pay advance payments, on the basis of the AA's estimated value, no later than the date the AA takes entry to land. This would make the AA focus on valuation and cash flow issues early on in the CPO process, and would also allow a claimant an opportunity to defer payment if that were considered to be in the claimant's best interests. FoA believed that the AA should be required to make such an advance payment where the claimant was taking reasonable steps to mitigate loss by relocating before possession. SPF believed that the burden of compensation should lie with the AA, rather than homeowners and businesses which would typically have less access to finance and were being placed in a potential situation of hardship. MacR also supported an advance payment where the owner was suffering interim financial disadvantage as a direct result of the CPO process. Seven consultees (RC, SCPA, DVS, NG, SBC, LSS and SW) argued that there were no circumstances in which an AA should be required to make an advance payment before taking possession. DVS argued that there was no need for change and that early payments could currently be made on a discretionary basis if justified. LSS considered that this may not be desirable and that there would need to be safeguards for repayment if title was not taken. SCPA and NG referred to the new single procedure, under which there would not be a need for such payments before vesting. S&P, CAAV and ACES considered the question from the

	perspective of the pre-CPO process. S&P and CAAV said that compensation should be due immediately upon temporary access for investigative works, with interest payable from that date. ACES supported compensation for the pre-CPO period but were not sure whether it should be an advance payment.

154. **Should it be competent for the LTS to provide an enforceable valuation figure for an advance payment?**

(Paragraph 18.33)

Respondent	
7. West Lothian Council	Agreed. This would provide clarity.
9. David Strang Steel	We consider that such a procedure would be cumbersome and by the time LTS make an order, it might be irrelevant and a waste of all parties' time. We consider it would be better to have some legislative compulsion for realistic advance payments to be made within the due period. The response to a 90 day notice is a good indication to any claimant of the stance of the acquiring authority in respect of compensation. It was the failure of the Scottish Ministers to provide a realistic figure in response to our 90 day notice and subsequent failure to amend that stance in the light of information provided that led us to lodge the LTS action. There is also a potential issue with regard to 90 day notices. There appears to be a view that a landowner has to serve a 90 day notice and that this triggers a review of the compensation payable. Acquiring authorities appear to be under the impression that there is no duty on them to update compensation payments despite a DV increasing his opinion of the compensation claim. This would lead to the ridiculous proposition that a claimant has to raise multiple 90 day notices to obtain realistic advances as a claim progresses. Any new legislation should place a clear duty on acquiring authorities to make advances as a claim progresses (with an appropriate sanction in the event of a failure to do so). Any acquiring authority should not be surprised (as the Scottish Ministers claimed to be) at any referral of a claim to the LTS if a response to a 90 day notice is inadequate. We are aware of other cases on the AWPR where landowners are raising LTS actions as a consequence of unrealistic advance payments.

10. Renfrewshire Council	Yes.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	We consider that such a procedure would be cumbersome and by the time LTS make an order, it might be irrelevant and a waste of all parties' time. We consider it would be better to have some legislative compulsion for realistic advance payments to be made within the due period.
16. Scottish Compulsory Purchase Association	It is fair to state that in many instances the three month period within which an application for an Advance Payment requires to be assessed made and paid is not followed and equally there is very limited redress in such circumstances. Nevertheless, it has to be recognised that the payment of compensation at any stage involves taxpayers' money and there requires to be a proper and fit audit system in place before any such monies are paid. Equally, as stated in our response to proposal 152 above it is considered that discretion with regard to the extent of the amount of any Advance Payment rests solely with the acquiring authority and that it has to be fully satisfied prior to any monies being paid. Accordingly, it is considered that the involvement of the Lands Tribunal for Scotland would not significantly assist in this particular issue – rather, acquiring authorities should have a higher degree of statutory requirement to undertake the assessment of an advance payment more timeously and, if not, then "stick" methods require to be employed.
17. Lands Tribunal for Scotland	We agree it would be possible to introduce some form of procedure to require advance payments to be made on the basis of an enforceable valuation by the LTS. There are however certain issues about doing so. Any valuation would be an interim valuation. Therefore some test would need to be devised as to the likelihood of the final claim reaching the amount of the interim valuation. Presumably the LTS would require to consider competing valuations rather than undertake an inquisitorial role. If the LTS was, at a final hearing, to be asked to differ from its earlier opinion of value, perhaps triggering a repayment, then there is a risk that the members who determined the earlier valuation would be conflicted.
20. SSE plc	We would agree that this seems appropriate.
21. District Valuer Services	This would be time consuming and expensive so is not considered useful however there should be a mechanism to ensure an advance is paid in accordance with the existing time limits
23. Central	Unless an accelerated route is provided, this proposal appears

Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	cumbersome. By the time LTS makes an order, it might be irrelevant and a waste of all parties' time. We prefer a direct legislative obligation for realistic advance payments to be made within the due period.
25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	It is not clear how this would work in practice. Given that compensation is being paid out of the public purse, the valuation of the advance payment needs to be transparent and there needs to be a clear audit trail. Any advance payment should be based on the acquiring authority's estimate. It is not acceptable for the acquiring authority to make an overpayment in the hope that the claimant will pay it back. If the issue is the failure of acquiring authorities to pay then it is not clear that this proposal would improve matters.
30. Isobel Gordon	We consider that such a procedure would be cumbersome and by the time LTS make an order, it might be irrelevant and a waste of all parties' time. We consider it would be better to have some legislative compulsion for realistic advance payments to be made within the due period. We consider that acquiring authorities require a proper incentive for settling claims timeously. At the moment the 0% interest is a positive invitation on any acquiring authority to delay as in many instances they would be paying more for the cost of capital.
31. Association of Chief Estates Surveyors Scottish Branch	No.
34. DJ Hutchison	Such a procedure would be cumbersome and by the time LTS make an order, it may well be irrelevant and a waste of all parties' time. The acquiring authority's response to a 90 day notice is a good indication to any claimant of the stance of the acquiring authority in respect of compensation. Any acquiring authority should not be surprised (as the Scottish Ministers claimed to be) at any referral of a claim to the LTS if a response to a 90 day notice is inadequate. A landowner has to serve a 90 day notice and only then does this appear to trigger a review of the compensation payable. Acquiring authorities appear to be under the impression that there is no duty on them to subsequently update compensation payments. A claimant therefore has to raise multiple 90 days notices to obtain realistic advances as a claim progresses. Any new legislation should place a clear duty on acquiring authorities to make advances as a claim progresses (with an

	appropriate sanction in the event of a failure to do so).
35. Shepherd and Wedderburn	Given the purpose of the advance payment is often to alleviate immediate hardship, the LTS's procedure for this would have to be streamlined to ensure swift resolution of the issues.
38. MacRoberts LLP	Yes, in the absence of agreement.
40. Law Society of Scotland	We consider that this may be helpful, however this may be problematic. If the LTS is to provide an enforceable valuation figure for an advance payment, then how will the LTS maintain its impartiality in such cases? It would need to be carefully implemented to avoid suggestions of favouring one party over the other. The valuation would need to be provided externally, but that in itself may give rise to difficulties if the same firm or individual happened to be instructed by an applicant or respondent in a different case.
42. Scottish Water	No.
43. Faculty of Advocates	To make advance payments workable, it is thought that it should be competent for LTS to provide an enforceable valuation figure.
44. Scottish Property Federation	When enforcement is required we would support the case for the LTS to be employed.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	20 consultees responded to this question. 10 agreed that it should be competent for the LTS to provide an enforceable valuation figure for an advance payment, and 10 disagreed. Of those who agreed (WLC, RC, SOLAR, LTS, SSE EAC, S&W, MacR, FoA and SPF), WLC considered this would provide clarity. MacR considered that it should be competent in absence of agreement between the parties. FoA considered that it should be competent for LTS to provide an enforceable valuation figure, to make advance payments workable. SPF supported the case for the LTS to be employed when enforcement was required. S&W considered that the LTS's procedures would have to be streamlined to ensure swift resolution, as the purpose of advance payments was to alleviate immediate hardships. LTS agreed that, while it would be possible to introduce some form

	of procedure to require such advance payments to be made on the basis of an enforceable valuation by them, there would be certain issues about doing so. Any valuation would be an interim valuation, so some test would need to be devised as to the likelihood of the final claim reaching the amount of the interim valuation. They assumed that they would require to consider competing valuations rather than undertake an inquisitorial role. If they were asked at a final hearing to differ from an earlier opinion of value, perhaps triggering a repayment, there was a risk that the tribunal members who had determined the earlier valuation might be conflicted. Of those who disagreed, five (DSS, S&P, CAAV, IG and DJH) argued that the procedure would be cumbersome and, by the time LTS made an order, it might be "irrelevant" and a waste of time for all involved. DSS, CAAV and IG considered it would be better to have some legislative compulsion for realistic advance payments to be made within the due period. DSS and DJH also referred to a potential issue with 90-day notices. AAs seemed to be under the impression that there was no duty on them to update compensation payments despite a DV increasing their opinion of the compensation claim. Any new legislation should place a clear duty on AAs to make advances as a claim progresses (with an appropriate sanction for failing to do so), to avoid claimants having to raise multiple notices to reflect the increased valuation. SCPA recognised that compensation involved taxpayers' money, and that the discretion with regard to the extent of the amount of an advance payment, rested solely with the AA, which had to be fully satisfied before making any payment. Therefore, they did not believe that involving LTS would significantly assist. DVS considered that this would be too time consuming and expensive to be considered useful, but that there should be a mechanism to ensure payments are made within the existing time limits. NG were not clear how this would work in practice, as the valuation of the advance payment needed to be transparent, with a clear audit trail. The payment should be based on the AA's estimate. If the issue was the failure of AAs to pay then it was not clear did how this proposal would improve matters.

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)

Respondent	
7. West Lothian Council	The council proposes that the interest rate should be 4% above Bank of Scotland base rate. It is reasonable that the authority should be liable for an increased rate if payment is delayed.
9. David Strang Steel	The statutory interest rate payable has been 0% since 2009 whereas, like most landowners, we incur interest on our overdraft at 3% over base and arrangement fees. A penal rate of interest is essential for the validity of the advance payment process, otherwise why would they pay timeously. It is for the acquiring authority to ensure that is has proper valuation and payment procedures in place prior to exercising compulsory powers. It is our experience that this simply was not the case in respect of the AWPR despite the time Transport Scotland had to do so (8 years). To encourage acquiring authorities to make proper assessment of compensation timeously in response to such notices it would seem reasonable that they be required to pay interest on the basis set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002 on any balance outstanding from the date that payment under a 90 day requires should have been made.
10. Renfrewshire Council	Statutory interest seems appropriate.
13. Strutt & Parker LLP	The statutory interest rate payable has been 0% since 2009 whereas most overdrafts are 3% over base. A penal rate of interest is essential for the validity of the advance payment process. The standard rate used in commercial contracts is more often at around 4 per cent over base and the rate of interest on late commercial payments is 8 per cent over base as set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002: It is for the Acquiring Authority to have adequate valuation and payment procedures in place. It is however our experience of the AWPR that of advance notice requested not one payment was made timeously because this had not been addressed in advance. In a number of instances on the AWPR Transport Scotland made advanced payments of £Nil in circumstances where their agents (the VOA) had *"…insufficient time to investigate the claim" (*perhaps because they had not been instructed timeously). Such failures make a mockery of the process of advance payment requests and effectively might mean that landowners are bankrolling schemes. To encourage acquiring authorities to make proper assessment of

	compensation timeously in response to such notices it would seem reasonable that the acquiring authority pay interest on a penal rate on the basis on any balance outstanding from the date that payment under a 90 day request should have been made. In the event that an affected party is incurring a loss greater than this it should be open for this to form a separate Head of Claim. This would properly balance the interests of CPO powers and those of affected parties.
16. Scottish Compulsory Purchase Association	It is considered that the statutory interest to be paid on Advance Payment should be say 4% above Bank of England Base Rate and "stick" methods require to be employed if the Payment is made late, as discussed above. Further, at present the interest calculation is undertaken by way of a simple interest method and it is suggested that an annual compound interest method should be adopted.
20. SSE plc	We would consider that the statutory interest rate is most appropriate.
21. District Valuer Services	Interest should be payable at the statutory rate and a penalty rate would appear to be a practical way of ensuring prompt payment. [Additional Comments dated 22.12.2015] Having read the English Consultation Paper since the DVS submission was made, we can see the advantage of having a minimum rate of interest; we doubt if it was ever envisaged that the statutory rate would be Nil, and it would certainly not be unreasonable to provide a minimum rate of interest.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The statutory interest rate payable has been 0% since 2009. That does not serve as a discipline for the process – instead, it makes the claimants a cheap source of finance for acquires. That rate does not reflect the cost of borrowing - most overdrafts are 3% over base. A significant rate of interest is essential for the validity of the advance payment process. The standard rate used in commercial contracts is more often at around 4 per cent over base and the statutory rate of interest on late commercial payments is 8 per cent over base as set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002. To encourage acquiring authorities to make proper assessments of compensation timeously in response to such notices it would seem reasonable that the acquiring authority pay interest on a penal rate on the basis on any balance outstanding from the date that payment under a 90 day request should have been made. In the event that an affected party is incurring a loss greater than

	this it should be open for this to form a separate Head of Claim. This would properly balance the interests of CPO powers and those of affected parties.
25. East Ayrshire Council	Existing interest payment rates should remain. The acquiring authority should not be responsible for an increased rate if payment is delayed.
30. Isobel Gordon	The statutory interest rate payable has been 0% since 2009 whereas most overdrafts are 3% over base. A penal rate of interest is essential for the validity of the advance payment process. The standard rate used in commercial contracts is more often at around 4 per cent over base and the rate of interest on late commercial payments is 8 per cent over base as set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002. It is for an acquiring authority to have adequate valuation and payment procedures in place in anticipation of such requests. In our case NG took no steps to deal with the advance payment request. We understand from landowners affected by the AWPR not one payment has been made timeously following such notice. Such failures make a mockery of the process of advance payment requests and effectively might mean that landowners are bankrolling schemes. To encourage acquiring authorities to make proper assessment of compensation timeously in response to such notices it would seem reasonable that they pay interest on the basis on any balance outstanding from the date that payment under a 90 day request should have been made. In the event that an affected party is incurring a loss greater than this it should be open for this to form part of any claim. At the moment acquiring authorities use the wording of the current legislation to argue that any claim for a higher rate because of an overdraft situation is not competent. This behaviour by acquiring authorities should be proof alone of the attitude landowners face, not only are they not minimising the loss to the claimant they are ignoring the statute legislation as there is no penalty.
31. Association of Chief Estates Surveyors Scottish Branch	This should be dealt with by use of a Statutory Instrument. A nominal increase over Base rate is appropriate.
34. DJ Hutchison	The statutory interest rate payable has been 0% since 2009 whereas, like most landowners, we incur interest on our overdraft at 3% over base and arrangement fees. A penal rate of interest is essential for the validity of the advance payment process, otherwise

	why would they pay timeously. It is for the acquiring authority to ensure that it has proper valuation and payment procedures in place prior to exercising compulsory powers. It is our experience that this simply was not the case in respect of the AWPR despite the time Transport Scotland had to do so (8 years). To encourage acquiring authorities to make proper assessment of compensation timeously in response to such notices it would seem reasonable that they be required to pay interest on the basis set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002 on any balance outstanding from the date that payment under a 90 day request should have been made.
38. MacRoberts LLP	Base lending rate.
40. Law Society of Scotland	We think that judicial interest is too high. We suggest a figure related to base rate, though bearing in mind that someone who is in need of the advance payment may not be able to borrow at commercial rates. However, we consider that the interest rate should be sufficient to encourage the acquiring authority to pay within a reasonable time.
43. Faculty of Advocates	The Faculty of Advocates considers that the rate of interest currently provided for should be increased in the event of late payment.
Further responses, either made informally or at engagement events	At engagement events attendees considered that there needed to be a higher rate of interest paid on advance payments. They suggested 3 to 4% over base rate. Attendees also suggested an increased rate of interest for advance payments if payment was delayed, and suggested 8% over base rate.
Analysis	
Explanation of question	The statutory rate of interest to be paid on a delayed advance payment is linked to the Bank of England's base rate ("base rate"). Since 2009 it has been 0%. The rate of judicial interest to be paid on awards made by the LTS is prescribed by regulations made under section 40 of the 1963 Act, and is calculated at 0.5% below base rate. This question has two parts. Firstly, it asked what rate of interest should be paid on advance payments. Secondly, it asked whether an AA should be liable for an increased rate of interest if payment is delayed.
Summary of responses and	15 consultees responded to this question.

analysis	14 considered the first part: • At what rate should interest be paid on advance payments? 10 considered the second part: • Should an AA should be liable for an increased rate if payment is delayed? Of the 14 consultees who considered the first part, three (RC, SSE and EAC) thought that the current statutory rate of interest should remain. MacR considered that the interest rate should be the base rate and ACES suggested a nominal increase over base rate. LSS thought that judicial interest would be too high but suggested that the figure should be related to base rate and that it should be sufficient to encourage the AA to pay within a reasonable time. DVS doubted that it was ever envisaged that the statutory rate would be nil, and suggested that it would be reasonable to provide a minimum rate of interest. The remaining seven suggested either 4% or 8% over base rate, as the appropriate interest rate for late payments. Of these, five consultees (WLC, S&P, SCPA, CAAV and IG) suggested 4%. DSS and DJH suggested that judicial interest of 8% would encourage AAs to properly assess compensation timeously in response to advance notices. 10 consultees considered the second part of this question, whether an AA should be liable for an increased rate if payment was delayed. Nine stated that AAs should be liable for an increased rate of interest if payment was delayed. EAC disagreed. Of the nine consultees (WLC, DSS, S&P, SCPA, DVS, CAAV, IG, DJH and FOA) who agreed, three (S&P, CAAV and IG) thought that the increased interest rate should be 8% over base rate, referring to the Late Payment Regulations in coming to this figure. Four consultees (DSS, S&P, IG and DJH) supported a higher rate of interest on delayed payment and discussed the issues surrounding advance payments relating to the AWPR, suggesting that they arose due to the failure of the AA to organise an advance payment regime. DSS and DJH added that the failure to have a proper valuation and payment procedure in place prior to the exercising of compulsory power, meant they did not receive their advance payment for a number of years. Five consultees (DSS, S&P, CAAV, IG and DJH) noted that the current rate paid by AAs did not reflect the current cost of borrowing, with most overdrafts incurring interest at 3% over base rate and arrangement fees. Furthermore, landowners will be subject to

	higher interest rates for loans taken out by them due to the delay in receiving their payments. IG commented that the behaviour of AAs was causing the problems faced by landowners, as AAs were not minimising the loss to claimants and were also ignoring the legislation, as there was no penalty. SCPA suggested that delayed payments should attract compound interest. In the engagement events there was also support for compound interest from many of the contributors. In addition, in the submissions covering interest generally (proposals 53 to 55) a number of stakeholders asked for compound interest. EAC disagreed with the second part of this question and stated that the AA should not be responsible for an increased rate if payment was delayed.

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)

Respondent	
7. West Lothian Council	Agreed. This appears to be reasonable.
10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We agree with this proposal. A payment made to the party holding security may result in penalties. If this does occur then this should form part of any disturbance claim (which we understand is accepted by the DV in such circumstances).
16. Scottish Compulsory Purchase Association	It is our experience that the practical implementation of Section 48 (6) of the 1973 Act is inconsistently applied by acquiring authorities in Scotland – some rigorously enforce the requirements of the Section whilst others appear to be ignorant or ignore the requirement. In addition, it requires to be recognised that in many compulsory acquisitions of lands there will be a heritable security or

	mortgage or similar held over the property. Notwithstanding the above, it is considered that on the basis that an interest in property has been acquired and if an application for an Advance Payment is made, then there should be no reason why an acquiring authority should not make an Advance Payment – that payment may be made wholly to the claimant if there is no mortgage etc. held over the property or partly to the claimant/heritable security holder or wholly to the heritable security holder where a mortgage etc. is in place The provisions of the above section should not be used by acquiring authorities to make no payment at all following an Advance payment application. Further, from a practical point of view it is considered prudent that any landowner affected by a Compulsory Purchase Order which is subject to a heritable security, mortgage etc. should formally contact the lender in order to forewarn the lender of the impending situation and that appropriate discussions take place. It is considered that it would be in the mutual interests of both the landowner and the lender for an Advance Payment to be made.
20. SSE plc	This may be appropriate in certain circumstances, having regard to the terms and balance of the security.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. A payment made to the party holding security may result in penalties. If this does occur then this should form part of any disturbance claim (a point that we understand is accepted in practice).
25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	Yes.
30. Isobel Gordon	We agree with this proposal. However a payment made to the party holding security may result in penalties under certain mortgage / security arrangements. If this does occur then this should form part of any disturbance claim.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.

38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	We see no difficulty with this. It could be prejudicial to applicants whose land is subject to a security otherwise.
42. Scottish Water	Yes.
43. Faculty of Advocates	Agreed.
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	Section 48(6) of the 1973 Act provides that no advance payment is to be made in relation to land which is subject to a heritable security, the principal of which exceeds 90% of the estimated compensation. It was proposed that, where the land is subject to a security, and all the parties agree (AA, landowner, and creditor), it should be competent for an advance payment to be made to the landowner.
Summary of responses and analysis	19 consultees responded to this proposal and unanimously agreed with it. Three consultees (S&P, CAAV and IG) considered that where a payment to the security holder resulted in penalties, this should form part of any disturbance claim (which they understood the DV would accept, in such circumstances). The experience of SCPA members was that, in practice, s 48(6) of the 1973 Act was inconsistently applied by AAs. It needed to be recognised that many cases of CP will involve properties subject to a heritable security. They considered that an AA should be able to make an advance payment, either partly to the claimant and heritable security holder, or wholly to the heritable security holder, where there is a heritable security. There was no justification for a rule that no payment could be made, and it would be in the mutual interests of both lender and landowner for the advance payment to be made. SSE considered that it may be appropriate to make such an advance payment in certain circumstances, having regard to the terms and balance of the security. LSS argued that if this proposal were not followed, it could be prejudicial to applicants whose land was subject to a security.

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)

Respondent	
7. West Lothian Council	Agreed. This appears to be reasonable.
9. David Strang Steel	Like many fellow landowners affected by the AWPR, Transport Scotland failed to deal with our 90 day notice timeously. Notwithstanding the LTS decision, Transport Scotland still have not settled the claim at the time of writing [5 June 2015], despite the fact that the judgement was issued in October 2014 and all outstanding matters have been resolved. There is no incentive for them to do so. Where the conduct of an acquiring authority has failed to comply with such a notice then it is reasonable that a higher interest rate prevail. Notwithstanding any statutory basis of interest the legislation must not rule out any entitlement for a claimant to seek a higher rate interest as part of a disturbance payment if that is what he suffers as a consequence of the Scheme. It is currently argued by DVs that such a claim is incompetent because of the existence of the statutory rate notwithstanding the fact that claimants may be incurring bank costs well over such interest rate provisions, such as arrangement fees and bank charges.
10. Renfrewshire Council	a) No. b) Yes.
13. Strutt & Parker LLP	Oddly these proposals do not mention the suggestion of RICS that 3% interest above base rate should always be paid rather than the matter having to go to LTS for this to be awarded. This does not invalidate the LTS having the discretion under points (a) and (b), but should not be forgotten. Albeit determining unreasonable conduct on the part of an acquiring authority is difficult, where conduct has been unreasonable (such as a failure to deal with 90 day notices timeously or reasonably) then a higher rate should prevail. It would seem reasonable that an acquiring authority pay interest on the basis set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002 from

	the date that payment should have been made. Notwithstanding any such basis of interest the legislation must not rule out any entitlement for a claimant to seek interest as part of a disturbance payment. It is currently argued by DVs that such a claim is incompetent notwithstanding the fact that the lack of compensation payment and delays in dealing with claims is resulting in claimants incurring bank costs well over statutory interest provisions. We refer to the Scottish Arbitration Rule 50 in respect of the powers to award interest etc. available to an arbitrator which we consider should be conferred on the LTS in respect of CPO disputes.
16. Scottish Compulsory Purchase Association	(a) It is considered that the issue of statutory interest is best dealt with via statute and that interest accrues from the date of vesting or from the date of entry if agreed earlier or from the date that compensation should have been in respect of the investigative works costs- see the responses to Response 122 and question 153. (b) Determining unreasonable conduct by an acquiring authority may prove to be difficult and expensive and, as above, statute should deal with this matter.
20. SSE plc	We disagree with this proposal, as this goes against the requirement for certainty.
21. District Valuer Services	(a) It is considered that the issue of statutory interest is best dealt with via statute and that interest accrues from the date of vesting or from the date of entry if agreed earlier or from the date that compensation should have been paid – with the rate payable being a matter of public policy. (b) Determining unreasonable conduct by an acquiring authority may prove to be difficult and expensive but is considered likely to be a factor considered when fees are determined.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	The simplest answer would be for the acquiring authority to pay interest on the basis set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002 from the date that payment should have been made – as the Scottish Government and Parliament expect of any other commercial body. Notwithstanding any such basis of interest, the legislation must not rule out any entitlement for a claimant to seek interest as part of a disturbance payment. The LTS should have at least the same powers as those given to an arbitrator by Scottish Arbitration Rule 50 to award interest.

25. East Ayrshire Council	Regarding (a) what benefit would this bring and (b) how would unreasonable conduct be established?
26. National Grid plc	a) Interest should be applied from the date of vesting. The LTS should not discretion in this regard. b) It may be difficult to demonstrate that there has been unreasonable conduct by the acquiring authority. In addition it is subjective. Given that compensation is paid from the public purse we do not think that this is appropriate.
30. Isobel Gordon	Where the conduct of an acquiring authority has been unreasonable (such as a failure to deal with 90 day notices timeously or reasonably) then a higher rate should prevail. It would seem reasonable that an acquiring authority pay interest on the basis set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002 from the date that payment should have been made. Notwithstanding any statutory rate basis of interest the legislation must not rule out any entitlement for a claimant to seek a different rate of interest as part of a disturbance payment, such as in cases where the claimant incurs a greater interest. It is currently argued by DVs that such a claim is incompetent notwithstanding the fact that the lack of compensation payment and delays in dealing with claims is resulting in claimants incurring bank costs well over the current statutory interest provisions.
31. Association of Chief Estates Surveyors Scottish Branch	No.
32. Scottish Borders Council	The current 0.5% below the base rate remains reasonable. I do not think that LTS should have discretion on these issues. Current approach is reasonable.
34. DJ Hutchison	Like many fellow landowners affected by the AWPR, Transport Scotland failed to deal with our 90 day notice timeously. The legislation should not rule out any entitlement for a claimant to seek a higher rate interest as part of a disturbance payment if that is what he suffers as a consequence of the Scheme. It is currently argued by DVs that such a claim is incompetent because of the existence of the statutory rate notwithstanding the fact that claimants may be incurring bank costs well over such interest rate provisions, such as arrangement fees and bank charges.
35. Shepherd and Wedderburn	(a) We agree; and (b) We agree.

38. MacRoberts LLP	Yes.
40. Law Society of Scotland	(a) Yes. (b) This is usually taken into account in expenses rather than interest, and that seems more appropriate.
42. Scottish Water	No.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	Although stakeholders at engagement events discussed interest and penalties, such discussion did not include reference to specific LTS powers.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	18 consultees responded to this two part question. 17 consultees addressed part (a). Eight agreed that the LTS should be able to award interest from a date earlier than its award, eight disagreed, and one (EAC) asked what benefit introducing this discretion would bring. Of the eight consultees who agreed (WLC, S&P, CAAV, IG, S&W, MacR, LSS, FoA), S&P, CAAV and IG argued that it was reasonable for an AA to pay interest from the date that payment should have been made. S&P referred to the suggestion from RICS that interest of 3% over base rate should always be paid, without the need to apply to the LTS. S&P and CAAV referred to rule 50 of the Scottish Arbitration Rules (Section 7 of and Schedule 1 to the Arbitration Act) which gives powers to arbitrators to provide interest from a date earlier than the award, and considered that the LTS should have at least the same powers available in awarding interest. Of the eight consultees who disagreed (RC, SCPA, SSE, DVS, NG, ACES, SBC and SW), SCPA and DVS considered that this would be best dealt with by statute, with interest accruing from the date of vesting, or date of entry if agreed earlier, or the date that compensation should have been paid in respect of investigative works. DVS noted that the rate payable was a matter of public

	policy. SSE disagreed with giving the LTS discretionary powers, as it would go against certainty. NG suggested that interest should be applied from the date of vesting, and the LTS should not have discretion in this regard. 19 consultees addressed part (b). 10 agreed that the LTS should have discretion to increase the rate of interest due to unreasonable conduct by the AA. Eight disagreed and one (EAC) asked how unreasonable conduct would be established. Of those who agreed, SCPA, S&P and IG stated that, although determining unreasonable conduct was difficult, a higher rate of interest should prevail where it had occurred. Of those who disagreed, DVS noted that determining such conduct may prove difficult and expensive, and it was likely to be a factor considered when fees were determined. SBC believed that the current approach was reasonable and LTS should not have such discretion. SEE agreed, arguing that it would undermine certainty. NG noted that it might be difficult to demonstrate unreasonable behaviour by the AA, and that it was subjective, so did not believe that the discretion would be appropriate, given that compensation was paid from the public purse. LSS noted that unreasonable conduct was usually taken into account in expenses rather than interest, which seemed more appropriate. Five consultees (DSS, S&P, CAAV, IG and DJH) argued that, notwithstanding any statutory basis of interest, a claimant should also be entitled to seek a higher rate of interest as part of a disturbance payment. Several stated that District Valuers currently argued that such a claim was incompetent because of the existence of the statutory rate, notwithstanding that claimants may be incurring additional bank costs such as arrangement fees and bank charges.

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)

Respondent	
6. Craig Connal QC	Determination by a flexible and speedy procedure before an Expert Tribunal is of the essence of the Lands Tribunal system and bears considerable similarities to arbitration. It is not immediately apparent why arbitration or similar forms would be preferable.

	Mediation may be of assistance particularly where a log jam has developed with one party not moving from what is perceived to be an unjustifiable position or there is some "personality conflict" causing difficulty. That could be broken by the use of the neutral chairman which the mediator represents. However, I have no experience of this being used in cases of this kind. [General Comments] Somewhere in the process it would potentially aid the speed and efficiency immeasurably if a mechanism could be found for requiring compensation to be discussed and perhaps even for some swift form of arbitration on the principles of such compensation, if contentious, so that these matters could be swept out of way early (or at a minimum key decisions be taken on them).
7. West Lothian Council	The council has not been involved in disputes in compulsory purchase cases by either method. Accordingly, the council is unable to highlight any advantages/disadvantages other than those already set out in the Discussion Paper.
8. Brian Reeves	ADVANTAGES & DISADVANTAGES OF ADR v LTS Some of these are dealt with in the [S]CPA response to Q.144; the length of time for LTS cases, high cost, the engagement of Counsel, and the risk of the claimant losing and resultant cost. There is the perception it is a potentially intimidating forum even prior to the case getting there ; as a result many claimants will not be prepared to go down that route and simply settle. Accordingly justice is denied. I spoke at our first CPA Scottish Conference on the subject of 'Access to Justice 'in conjunction with Lord Dervaird and Andrew Mackenzie, CEO of the Scottish Arbitration Centre. My own view is that Arbitration is a better alternative route, with a single Arbitrator appointed by the RICS or the Scottish Arbitration Centre. In saying that I still consider that major cases should still be dealt with by the LTS as an Upper Tribunal. An Arbitrator as the 'Lower Tribunal 'could conduct less major cases aided by the Arb. (S) Act 2010. The procedure would be speedy, much less expensive, and more 'user friendly'. I do not consider Mediation appropriate. Nor Adjudication. Expert Determination has often been suggested, but the Arbitration (S) Act 2010 does not apply to Experts and there is no right of appeal. Using Arbitration is easily the best route, with appeals to the Lands Tribunal a possibility worthy of consideration.
9. David Strang Steel	ADR may be cheaper than the LTS and may be suited to lower value claims.

13. Strutt & Parker LLP	It is generally perceived that arbitration would be more cost effective in smaller value disputes and it should be open for the parties to agree ADR.
16. Scottish Compulsory Purchase Association	Each individual case should be decided on its own merits, but, as set out in our response to question 144 above, it is considered that all forms of dispute resolution require to be made available. [Answer to question 144 The shortcomings include:- • The length of time involved; six months and considerably more are common. • The potential costs involved; in many cases the fear of losing the case and also potentially being responsible for the other party's costs is a significant factor in the decision-making process of a claimant who will be against an acquiring authority who is perceived to have "bottomless pockets" and may use this to its advantage. • As the LTS acts as a quasi-court then there is usually a necessity to employ high-level professional legal advice which would incorporate at least a commercial lawyer if not also junior or senior QC. The appointment of such professionals adds to the costs. • Appearance at a Hearing can be a very intimidating experience - for both professionals and non-professionals alike. Notwithstanding the above, it is considered that the Lands Tribunal may still be the appropriate forum to settle disputes but all other forms of dispute resolution should be available i.e. arbitration, adjudication and mediation as it is in the interest of all parties to have disputes settled in a time and cost efficient manner. The experience of SCPA members is that the parties often seek extensions of agreed timescales once in the court process. This further exacerbates matters, particularly for the claimant and (since mid-2009) with no interest accruing, there is little incentive for the acquiring authority to have the claim resolved timeously. It is submitted that there should be set timetables for progressing claims agreed at a procedural hearing held within one month of the claim being submitted and that hearings must take place no later than six months after the claim has been submitted. Just cause would require to be shown for any extensions of time which are sought. The Lands Tribunal should encourage greater utilisation of written representations.]
17. Lands Tribunal for Scotland	See response to question 159**.**

20. SSE plc	We believe that both options have merits and could be retained.
21. District Valuer Services	Each individual case should be decided on its own merits, however our experience is that the cases that get as far as Tribunal are often too complex for ADR and parties are often entrenched. The LTS is expensive but by a process of adjustment forces parties to agree what they can prior to the hearing. Our understanding is that the Upper Chamber in England requires some form of ADR to have been tried before cases will be heard but this does not appear to be reducing the number of referrals to the court. There might be merit in asking parties to get their case independently reviewed by a third party expert who has had no prior involvement in the case. It might be helpful if the LTS could determine whether a case can proceed by written submission only. My understanding is that, at present, this can only happen if both parties agree, and acquiring authorities rarely if ever agree to this. If the LTS were able to rule that, irrespective of one party's view, the case should proceed by written submission, then that would potentially save substantially in costs.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Arbitration or expert determination may commonly be more cost effective in smaller value disputes. There should be encouragement for the parties to agree on mediation where this is not inappropriate.
25. East Ayrshire Council	There would appear to be more options available through ADR which may be quicker and cheaper than referring to the LTS. Allowing resolution of disputes by ADR would perhaps free up LTS time.
26. National Grid plc	ADR is not usually successful. See our earlier comments on the LTS process. [Response to question 144 The process can take a long time and can be expensive for all parties. The process should be simplified and streamlined, with clear and fixed timescales.]
34. DJ Hutchison	ADR may be cheaper than the LTS and may be suited for lower value claims or where specific items of claim remain disputed.
40. Law Society of Scotland	Reference to the LTS has the advantage of procedural certainty and the same decision-maker each time. ADR can be a cheaper and more efficient process but it is often private and there is an

	advantage to there being a body of publicly available decisions on a topic like this. In addition, it is more difficult to appeal a decision following ADR, and the only appeal is to the Court of Session on restricted grounds. This would be more expensive and time consuming. There may be advantage in the LTS having power to remit to ADR but we question this being a requirement.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	At engagement events one attendee noted that three cases had gone to the Lands Tribunal in England for a decision on surveyors' fees and that this could have been better dealt with by arbitration.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	15 consultees responded to this question. CC stated that determination by a flexible and speedy procedure before an expert tribunal was of the essence of the Lands Tribunal system and bore considerable similarities to arbitration. It was not clear why ADR would be preferable, although mediation might assist where one party had an entrenched position. It might aid speed and efficiency if a mechanism could be found to require compensation to be discussed, perhaps using some swift form of arbitration, to deal with those matters early in the process. Four consultees (BR, SCPA, DVS and CAAV) considered the disadvantages of the LTS to be:- • length of time of cases, • high costs, • the engagement of Counsel, • the risk of the claimant losing, with the resulting costs, and • the perception that it is an intimidating forum. SCPA considered that LTS was the appropriate forum for determining disputes and that ADR should also be available. SCPA noted that, with an interest rate of zero per cent since mid-2009, there was little incentive for AAs to resolve claims timeously. They

	considered that, from the date a claim is submitted to the LTS, a hearing to set out the timetable for progressing the claim should take place with one month, and the hearing itself within six months. Just cause would have to be shown for any time extension. They also wanted the LTS to encourage more written representation. DVS noted that the cases that progressed to the LTS were often too complex for ADR, and had parties who were entrenched. Although cases were expensive, parties could agree some matters in advance. While the Upper Chamber in England required some form of ADR, it did not appear to have reduced the number of cases. DVS considered that it would be helpful, and could reduce costs and delay, if the LTS were able to determine that a case should proceed by written representation only. At present, both parties had to agree. FoA agreed that ADR should not be compulsory. BR preferred arbitration, rather than the LTS, for less major cases, with a single arbitrator appointed by RICS or the Scottish Arbitration Centre, and leaving the LTS as an Upper Tribunal. He argued that arbitration would be speedy, much less expensive, and more 'user friendly'. He did not consider other types of ADR to be appropriate. DSS and DJH agreed that ADR may be cheaper than the LTS, and suitable for lower value claims or where specific items of claim remained disputed. S&P commented that arbitration was perceived generally to be more cost-effective in smaller value disputes and it should be open for the parties to agree ADR. SSE believed that both options had merits and should be retained. CAAV believed that arbitration or expert determination may be more cost-effective in smaller value disputes, and that parties should be encouraged to agree to mediation where appropriate. EAC noted that there appeared to be options available through ADR which might be quicker and cheaper that the LTS. Using ADR might free up LTS time. NG considered that ADR was not usually successful, but wanted the LTS process to be simplified and streamlined, with clear and fixed timelines. LSS noted that a reference to the LTS had the advantage of procedural certainty and the same decision-maker each time. Although ADR could be cheaper and more efficient, it was often private and there was an advantage to having a body of publicly available decisions on this topic. It was more difficult to appeal a

	decision following ADR, with the only appeal being to the Court of Session on restricted grounds, which would be more expensive and time consuming. They considered that there may be advantage in the LTS having the power to remit cases to ADR but questioned whether this should be a requirement.

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)

Respondent	
7. West Lothian Council	The council has not incurred such costs and is unable to provide evidence of costs.
8. Brian Reeves	EVIDENCE OF COSTS IN ADR v LTS Clearly the evidence of Costs of ADR in Compensation Cases is not readily available, since these are exclusively dealt by LTS. My experience is normally in the field of Rent Review Arbitration, though often the Rentals themselves can be sizeable, over £1m pa; occasionally over £2m pa. The Costs of dealing with an Arbitration at those levels could involve an Arbitrator's Fee of say £25k ; normally Hearings are not required, but when they are, many involve only the Surveyor for each side (adopting the role of Expert Witness or Surveyor Advocate). Rarely is legal input required, and very very rarely Counsel. The whole procedure is much less formal before 1 Arbitrator,(normally documents-only procedure), than before the Lands Tribunal. The very phrase 'Lands Tribunal for Scotland' is sufficient to strike fear into most claimants and hence the tendency to settle. This is a little unjust since I know certain Members of LTS well - they are highly experienced and carry out a first class role; but LTS better suited to major cases only. Indeed if some of the other responsibilities are transferred to the LTS as suggested in the Consultation Paper, then that would sit well with their role as an Upper Tribunal and allow the run of the mill cases to be allocated to separate Arbitrators.
9. David Strang Steel	Our costs for taking our claim to the LTS were around £250,000. The Land Accountants have also advised that our legal costs in formulating our account are not reclaimable, a further cost of seven thousand pounds, our award of expenses circa £200,000. The judicial scale of expenses is lower than lawyers currently charge so a further cost to the affected party.

10. Renfrewshire Council	No.
13. Strutt & Parker LLP	There seems to be a lack of information on the cost of arbitration, presumably just in relation to compulsory purchase because of the dearth of such cases.
16. Scottish Compulsory Purchase Association	References to the Lands Tribunal vary in complexity but it is not unreasonable to suggest that as a minimum, each party can incur £25,000 on professional fees; further, a norm may be closer to £50,000 and there will be cases where the costs are considerably higher. Costs by way of the various forms of ADR would, as a general rule, be 50% of the above.
17. Lands Tribunal for Scotland	[General Comments on Chapter 18] The LTS would make the following general comments which are hoped may assist in understanding the background. It always welcomes comments whereby its procedures could be improved. The LTS benefits from flexible rules which allow for informal case management. Its approach to case management depends upon the type of case involved, which might range from the taking of a small portion of garden to very large areas of commercial land. For example in one recent severance case in Aberdeen of fairly modest value, it was possible to deal with pressing case management issues, which had not been able to be informally resolved by email correspondence with the Tribunal clerks, by means of conference call with a tribunal member. No change in the rules was required for this to happen. The case itself was heard in Aberdeen. On the other hand large and complex cases have required procedural hearings in Edinburgh and necessitate the appearance of senior counsel on both sides. The LTS has powers regarding citation of witnesses and recovery of documents. The hearings themselves are conducted with formality; i.e. witnesses are put on oath, which is believed to be commensurate with the importance and type of issues involved. The type of issues before the LTS naturally involve valuation and there is usually a background of continuing negotiation between parties. This leads to the cases usually being marked by a high degree of cooperation between professional representatives. Very often the time a case takes to get to a hearing is largely dictated by parties themselves, since parties have a good idea how long it will take to prepare pleadings and prepare and disclose all relevant documents and reports. It follows that the LTS's timetables are largely set in a consensual manner, which vary depending upon the type and complexity of case. In cases where we are aware that one of the parties has complained of undue delay, it may be because the

	other party has not been professionally represented. There has been an omission to carry out basic preparation work which has a knock on effect on later progress. Reasons for delays are numerous and can often relate to the nature of the case itself; e.g. where an authority subsequently decides to change the statutory order in question so as to reduce loss and inconvenience to claimants, resulting in a claim "starting again". The standard LTS hearing fee is £50 for every £5,000 lump sum awarded, but not less than £155 per sitting day, up to a maximum of £5,000. It is understood the Sheriff Court charges £214 per day, and the Court of Session charges £90 per half hour for a hearing before a single judge which is the equivalent of £900 for a five hour sitting day. For a low value claim, or indeed any claim, it is possible for the LTS to determine a case by reference to documents only, so long as parties agree to not having a hearing. As discussed later there are rules regarding awarding expenses which the LTS is bound by statute to apply: cf section 11 of the 1963 Act. [General Comments on Paragraph 18.6] At present in compensation cases the LTS would usually sit with both a legal member, who will be an experienced QC, and a surveyor member who will be an experienced FRICS. [General Comments on Paragraph 18.7] The LTS regularly sits outwith Edinburgh for convenience of parties, although for longer evidential hearings with experts it is usually more convenient to all parties for it to sit in Edinburgh. If it sits outwith Edinburgh it seeks accommodation in local sheriff courts where this is possible. It usually undertakes site visits. [General Comments on Paragraph 18.10 – LTS] We understand it remains the intention of the Lord President and the Scottish Parliament for the LTS to become an Upper Tribunal.
20. SSE plc	We have no relevant evidence to provide any particular view.
21. District Valuer Services	References to the Lands Tribunal vary in complexity but it is not unreasonable to suggest that as a minimum, each party can incur £25,000 on professional fees; further, a norm may be closer to £50,000 and there will be cases where the costs are considerably higher. Costs by way of the various forms of ADR would, as a general rule, be rather less than this, although we have no comparisons which would allow us to state how much less the costs

	of ADR would be.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	While there is little recent experience of arbitration in rural maters in Scotland (following the changes to dispute resolution made by the Agricultural Holdings Act 2003), the major modernisation of Scottish arbitration law achieved by the Arbitration (Scotland) Act 2010 offers serious opportunities for arbitration to be a practical means to settle many more "routine" compulsory purchase disputes, whether by agreement between the parties or at the direction/under the aegis of the LTS. In the context of current agricultural tenancy reform discussions, we have undertaken some comparison of costs of English and Welsh arbitrations under similar rental provisions with those of rental cases under the Scottish Land Court procedures. These showed that arbitration may typically cost less than a sixth of the cost of a Land Court case – and often much less. This especially the case as English and Welsh arbitrators have gained confidence in the statutory means available to manage and control cost awards. Expert determination, being less adversarial in its approach, can often be cheaper still. Mediation is a different approach being in some sense an extension of negotiation but in a framework and with assistance that may lead the parties to reach a package settlement, potentially covering more than might be subject to formal dispute procedures. If it fails, the parties who paid for the mediation still face the costs of the next step in dispute resolution, however that may be done. In this we can see that the legislation could very usefully see the LTS: • positively encourage (but not insist on) mediation as a precursor to any litigation, • able to use arbitration and expert determination as alternative procedures under its authority (alongside simplified, informal and written-only procedures), • or, alternatively, encourage the use of arbitration and expert determination on a voluntary basis by the parties. The combination of those options should aid settlements, lower costs and ease the pressure of cases on the LTS – all improving timeliness.
34. DJ Hutchison	No.
40. Law Society of Scotland	We are not in a position to provide evidence, but would doubt on the whole that there would be much difference. Expert evidence is likely to be required either way, as is some form of representation.

	Lands Tribunal fees are low compared to a privately appointed arbiter or mediator.
42. Scottish Water	No.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	Attendees at engagement events thought that the LTS was expensive, and generally required the use of legal representatives, although these were not strictly needed. Some attendees favoured ADR while others considered that arbitration would still be expensive because legal representatives would still be needed for legal points. Attendees suggested that there was no legal aid available for public inquiries or the LTS which meant that landowners had to represent themselves or incur large costs. There was always a fear of incurring the other side's costs as well. They commented that this felt quite one-sided to landowners and that AAs tended to instruct counsel. It was stated that claimants do not recover all of their LTS costs, due to the judicial scale, so that the principle of equivalence does not seem to apply. In addition, it was asserted that DVs advise claimants that they can claim for either the cost of a surveyor, or for a solicitor, but not for both.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	15 consultees responded to this question and six (WLC, RC, SSE, EAC DJH and SW) were unable to provide any evidence of costs incurred in relation to resolving disputes by ADR or by reference to the LTS. Three of those (SSE, EAC and WLC) explained that they have either insufficient experience in CPO transactions to comment or had not incurred such costs. BR stated that the cost of ADR in compensation cases would not be readily available as these were exclusively dealt with by LTS. He provided some costs of Rent Review Arbitration where the rentals could be over £1m per annum or even £2m per annum. The costs of arbitration would involve the Arbitrator's Fee of around £25,000. Normally, hearings were not required. When they were, many involved only the surveyor for each side, who adopted the role of Expert Witness or Surveyor Advocate. The procedure was simpler, involving documents only, in front of one arbitrator. He considered

	that the LTS would be better suited to hear major cases only and would sit well with the role of an Upper Tribunal, as they were highly experienced and carried out a first class role. DSS had no evidence of ADR but confirmed that his costs of going to the LTS were £250,000. He was advised that the legal costs in formulating his account, of £7,000, were not reclaimable. Therefore his total costs were not covered by the award of expenses, of around £200,000. The judicial scale of expenses was lower than the fees normally charged by lawyers, thus forming a further cost. S&P noted the lack of information on costs of arbitration, probably due to the dearth of such cases. SCPA and DVS noted that, for LTS cases, each party could incur minimum costs of £25,000 for professional fees but that the norm might be closer to £50,000. SCPA suggested that the costs of ADR, as a general rule, would be 50% of those figures. DVS believed ADR costs would be rather less than for LTS cases, but had no comparisons to allow them to give precise figures. LTS explained that the standard LTS hearing fee was £50 for every £5,000 lump sum awarded, but not less than £155 per sitting day, up to a maximum of £5,000. The Sheriff Court charged £214 per day, and the Court of Session charged £90 per half hour for a hearing before a single judge, totalling £900 for a five hour sitting day. It was possible for the LTS to determine a case by reference to documents only, so long as parties agreed to not having a hearing. LTS provided general information to assist in understanding the background of how it worked. It was stated that the LTS benefited from flexible rules, which allowed for informal case management and that its approach to case management depended upon the type of case involved. They added that the LTS had powers regarding citation of witnesses and recovery of documents, as well as conducting hearings with formality, which was commensurate with the importance and type of issues involved. They noted that the LTS timetables were largely set in a consensual manner depending on the type and complexity of the case. They noted that reasons for delays were numerous and could often relate to the nature of the case itself. LTS provided further comments which are set out in full in their submission. CAAV had undertaken, in relation to agricultural tenancies, a comparison of costs of English and Welsh arbitrations under similar rental provisions to those of rental cases under the Scottish Land Court procedures. This showed that arbitration may typically cost less than a sixth of the cost of a Land Court case, and often much less. They noted that this was especially the case as English and Welsh arbitrators had gained confidence in the statutory means

	available to manage and control costs. Expert determination could be even cheaper, being less adversarial. If mediation was used and failed, the parties who had paid for the mediation still faced the costs of the next step in dispute resolution. LSS had no evidence on costs, but doubted that there would be much difference between ADR and the LTS. Expert evidence and some form of representation would be required either way and LTS fees were low compared to a privately appointed arbiter or mediator. FoA did not think that, in principle, a properly managed case referred to the LTS should prove more expensive than arbitration or other ADR in a comparable case, although there were many variables, which were difficult to assess in the abstract. In an informal response, it was stated that claimants do not recover all of their LTS costs, due to the judicial scale, so that the principle of equivalence does not seem to apply to these costs, notwithstanding that it should. In addition, it was asserted that DVs advise claimants that they can claim for either the cost of a surveyor, or for a solicitor, but not for both, whereas there are cases where both costs should be allowed.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
6. Craig Connal QC	Yes. As far as I have been able to ascertain, these are rarely the subject of contentious dispute but I have had the dubious advantage of being involved in the past in a matter which touched very closely on these Rules. The first point which arises out of that example, is that I can see evident utility in the enshrining of the Rules, so-called, in statute. In the case in question, there was evident resistance to the application of the "rules", one argument being that they were merely guidance not binding in any particular instance. That simply led to unnecessary debate and confusion. Either they should apply or they should not, but the matter should be clear. It would also be of assistance if it could be made clear to which

	bodies the rules apply. Given the varying nature of compulsory purchase arrangements in modern times, logic would suggest that any property acquired by compulsory purchase, by anyone, should be due to be returned to the original owner if no longer required (subject of course to payment of then current market value). I recollect that in the case with which I was concerned, the party involved was a Health Board. While technically part of the Crown, the Board had of course its own governmental arrangements and was not, at least initially, attracted at all to the proposition that it required to return the property to a former owner.
7. West Lothian Council	Agreed. This would provide clarity.
9. David Strang Steel	Yes, avoids the disputes noted in the text, we believe this should be nominal value to encourage Acquiring Authorities to properly assess their actual need in respect of any CPO.
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Yes, with clear guidelines.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	Yes. This would avoid the disputes noted by the Commission. It must be recognised that if land acquired compulsorily is no longer required for that purpose and are surplus there must be a right of pre-emption to the previous owner or his successors in title. Further, the acquiring authority must not be able to gain financially from the transaction, i.e. the price to be paid on any buy-back should be on the same basis as the compensation assessment. The acquiring authority should not be able to argue "ransom value" as was Transport Scotland's clear attempt in *Strang Steel –v- The Scottish Ministers* where land acquired for the A90 was used to 'ransom' a claim for supermarket potential. The direct consequence of that dispute was for us to include potential ransom as a head of claim in other cases leading to conflict with the DV. This could be dealt with in the conveyancing of such land permitting access or service wayleaves etc. and in a duty for an acquiring authority to mitigate the effects of a scheme on affected landowners.
16. Scottish Compulsory Purchase Association	It is considered that the Crichel Down Rules are put on a statutory footing – whether the land was acquired by a central government department, local authority or other body having compulsory purchase powers. The Rules should be applied consistently. It should be recognised that the compulsory purchase of private

	property rights does impose a significant imposition and thus if the relevant lands are no longer required for a public work and have been formally declared surplus, then such a right of pre-emption should exist in all circumstances. Further, it is considered that the acquiring authority should not gain financially from any buy-back at the expense of the previous owner. The price to be paid on the buy-back should be on the same basis as the compensation assessment (it is accepted that values will alter in any intervening period) and where a "ransom strip" situation has developed the acquiring authority should not be able to argue that the price to be paid reflects that ransom. In the first instance, both the acquiring authority and the previous landowner should obtain valuations of the land and the price to be paid then be subject to negotiation; in the event that a suitable price cannot be agreed then the matter should be referred to the Lands Tribunal to decide. Whilst the above is a majority view, the alternative view is that the Crichel Down Rules as existing should be maintained.
20. SSE plc	We disagree with the proposal, and believe that the CPO process should adequately compensate landowners for the land. For the reasons stated in our response to proposal 96, we do not believe that it is appropriate to continue to burden the land with pre-emption rights. [Answer to question 96] We believe that the provisions [of Part V of the 1963 Act] should be repealed. Acquiring authorities will be under a duty to obtain best value from land, and that may include further development of small areas of land which were not fully developed under the initial scheme. Furthermore, the principle of equivalence means that the former landowner should not benefit from any further increase in value of the land, and there are risks to the acquiring authority of further costs for remote claims some time after the initial acquisition – this strikes at the certainty required by statutory authorities. Finally, the difficulty in enforcing such provisions should be taken into account. However, if equivalent provisions are to be retained or included in new legislation, we would strongly recommend that these are time limited.
21. District Valuer Services	No – we do not believe that it is necessary for this to be placed on a statutory footing. Only where the land has been unused for the scheme (i.e. not substantially changed) should it be included in the requirement to offer land back to the original owner. The Crichel Down rules should only apply where the land is similar to when it was acquired. Assuming full compensation has been paid then the purchase of

	any land by the previous owner should be at full market value reflecting any special value if this would be reflected in the market. Compulsory powers are available for bodies to acquire that land which is required for a specific scheme and they should only be empowered to acquire the minimum required for the scheme. In cases where they have acquired more than is necessary for the scheme, it is sometimes because the former owner has served an objection to severance, which has resulted in the acquiring authority buying more than they would have wished. In that case, it is clearly inequitable that the former owner, who required the authority to buy more land, is then given the right to buy back any surplus, although the acquiring authority may wish to do so in any event if there is no other potential purchaser.
22. Glasgow City Council	I do not have a strong view on this. If it were to be placed on a statutory footing I think that provision should be made for the scenario where the original purpose may not have been delivered but there is an alternative proposal for the land which is legitimate in the context of CPO by way of say an application to the Scottish Ministers that this alternative proposal is to be treated as if it were the original purpose. In addition, it should be clarified whether the right of pre-emption is to be exercised on sale only or sale or grant of a long lease.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. The original Crichel Down case arose from political recognition of a moral principle here – that when land that has been taken by compulsion for a public purpose is no longer needed for that purpose the first claim on it is by the original owner (and descendants). This has a particular relevance to much rural work as compulsory purchase is typically often of only a part of a continuing farm to which the land taken would still be relevant. The acquiring authority should not be able to gain financially from its use of these privileged powers and so the price to be paid on any buy-back should be assessed on the same basis as the original compensation. The acquiring authority should not be able to argue “ransom value” in this assessment. [General Comments on Chapter 19 Crichel Down Rules] As a preliminary comment, we are increasingly seeing land taken for CPO projects is not limited to what is immediately required for the project but also additional land for more extensive landscaping and mitigations works. HS2 is seeing land taken for replacement

	woodland planting on least a ten to one ratio.
24. Shona Blance	Yes with the caveat that the right of pre-emption should apply in all circumstances and not be limited i.e. not just [paragraph] 19.7 [of the DP] bullet points 1 and 2, but 3 and 4 as well.
25. East Ayrshire Council	This would seem to be a reasonable approach.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	No. Adequate to have a policy circular on this. Should not be an absolute statutory requirement.
34. DJ Hutchison	Yes, avoids the disputes noted in the text, we believe this should be nominal value to encourage Acquiring Authorities to properly assess their actual need in respect of any CPO.
35. Shepherd and Wedderburn	Yes.
36. Scottish Power Ltd	[General Comments on Crichel Down Rules] We support enhanced flexibility by granting an acquiring authority temporary access for works such as pre-construction survey for a limited period. However we question the appropriateness of the approach, set out in paragraphs 2.71 to 2.73 [of the DP, relating to the temporary possession and use of land]. We consider that an alternative would be to expand the Crichel Down Rules to strengthen the obligation on the acquiring authority to return the land to the affected landowner. This would bring an increase in protection which could allow additional land, granted as part of any CPO, to be afforded additional/temporary rights or acquisition of a more expansive area of land to facilitate the construction process. Under the current process there is a risk that, in seeking to minimise the amount of land acquired, the acquiring authority does not acquire enough land or rights because of a lack of detailed information available at the point when the CPO is sought or the proposed technology or planned implementation changes during project development and implementation. We also highlight that, under the Electricity Act 1989 (as amended), there are various powers of access available to generation licence holders relative to surveys and other activities. We would not support any variation to those existing rights.
37. J Mitchell	[General Comments on Crichel Down Rules] At present we have direct access from our property to the Milltimber Brae. The scheme will result in the loss of that direct access and therefore potential for the acquiring authority to ransom any future

	development of our property, as Transport Scotland apparently attempted in respect of land at Stonehaven. We consider given that Transport Scotland have acquired an area of 14 acres and which forms an all-weather exercise route in order to alter levels, there should be a statutory obligation on them to offer it back on the same basis as compensation was computed. An acquiring authority should not be able to benefit financially from a compulsory acquisition.
38. MacRoberts LLP	Yes – it is unsatisfactory at present because there is no obligation to apply the Rules which gives rise to uncertainty.
39. Scottish Land and Estates	We agree that something akin to the rules should be contained within statute. There is no justification for the State to retain land that was purchased by compulsion, or threat of compulsion, when the use for which it was bought has ceased or been abandoned. A statutory requirement to offer it back to the original owner needs to be put in place. However, the current non-statutory Crichel Down rules are inadequate and uncertain. There should be no time limit on the obligation to offer compulsorily acquired property back to the original owner. Because of the historical valuation context of the compulsory purchase system, land was bought for the public good at less than its true open market value. It is fair and proper that once the purpose for which it was acquired has ceased or been abandoned, then the original buyer should have the option to buy it back on the same basis as it was sold, with no additional clawback provisions for the vendor.
40. Law Society of Scotland	We consider that this depends on the answer to question 161. If the rules are to be made statutory and, in particular, if they are to be applied to private sector organisations who hold land which was purchased under compulsory powers, then legislation may be necessary. In the event that the rules were to be placed on a statutory footing, then consideration would need to be given as to how they would sit with other pre-emptive rights such as community right to buy.
41. Judges of the Court of Session	We can see advantages in having the rules for giving former owners of compulsorily acquired land rights of pre-emption where the land is no longer required placed on a statutory footing. While the Crichel Down Rules are well known, their precise application is not clear in all circumstances, and we can see considerable virtue in providing legislative certainty. Nevertheless, it is clear that the Rules apply to a wide range of situations, and it may be that an element of discretion is appropriate to allow the maximum flexibility in their application.

42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	We support the case for putting the Rules onto the statute book in order to achieve consistency and transparency.
45. Scottish Power Energy Networks Holdings Ltd	[General Comments on Crichel Down Rules] We support enhanced flexibility by granting an acquiring authority temporary access for works such as pre-construction survey for a limited period. However we question the appropriateness of the approach set out in paragraphs 2.71 to 2.73 [of the DP relating to the temporary possession and use of land]. We consider that an alternative would be to expand the Crichel Down Rules to strengthen the obligation on the acquiring authority to return the land to the affected landowner. This would bring an increase in protection which could allow additional land, granted as part of any CPO, to be afforded additional/temporary rights or acquisition of a more expansive area of land to facilitate the construction process. Under the current process there is a risk that, in seeking to minimise the amount of land acquired, the acquiring authority does not acquire enough land or rights because of a lack of detailed information available at the point when the CPO is sought or the proposed technology or planned implementation changes during project development and implementation. We also highlight that, under the Electricity Act 1989 (as amended), there are various powers of access available to licence holders relative to surveys and other activities. We would not support any variation to those existing rights.
Further responses, either made informally or at engagement events	There were mixed views on whether the Crichel Down Rules should be placed on a statutory footing. Some thought it would be best if they were all contained in a comprehensive statute, while others wanted them to remain on a non-statutory footing. However, at the SCPA Conference in 2014, stakeholders agreed that the Rules should be included in the new statute.
Analysis	
Explanation of question	The Crichel Down Rules set out a non-statutory procedure to give former owners the opportunity to repurchase land which had been compulsorily acquired from them, when it is no longer required, and before the AA seeks to sell it on the open market. The Rules are currently set out in SG Planning Circular No 5/2011.
Summary of responses and	28 consultees responded to this question. 22 answered in the affirmative, three disagreed, two (SP and SPEN) suggested an

analysis	alternative and GCC did not have a strong view. Of the 22 consultees who considered the Rules should be placed on a statutory footing, CC believed there was evident utility in doing so, to avoid resistance which he had experienced from an AA, which had argued the Rules were merely guidance and therefore not binding in any particular instance. To avoid unnecessary debate and confusion, it should be made clear whether or not the Rules applied and to which bodies they applied. Four consultees (S&P, SCPA, CAAV and JM) considered that it must be recognised that the former owner has a right of pre-emption in all circumstances, regardless of which AA acquired the land, and that the AA must not gain financially from any buy-back by claiming ransom value. S&P and JM referred to the case of *Strang Steel v The Scottish Ministers*. SCPA suggested that both the AA and the former owner should get valuations of the land and try to negotiate the price and, if this failed, the matter should be referred to the LTS. CAAV referred to the original Crichel Down case, following which there was political recognition of a moral principle that land taken by compulsion for a public purpose, which was no longer needed for that purpose, should be offered initially to the original owner (or their descendants). This had particular relevance to rural work where the land compulsorily purchased was often part of a continuing farm to which the land would still be relevant. They also commented that, increasingly, land taken for CPO projects was not limited to what was immediately required for the project, but also included additional land for more extensive landscaping and mitigation works. The HS2 project was taking land for replacement woodland planting at a ratio of at least ten to one. MacR and FoA considered that the lack of a statutory footing had resulted in uncertainty. WLC considered that placing the Rules on a statutory footing would provide clarity. SPF believed that it would provide consistency and transparency. NHS considered that there should also be clear guidelines. Three consultees (DSS, S&P and DJH) suggested that placing the Rules in statute would result in fewer disputes. DSS and DJH believed that the land should be transferred back for a nominal value, to encourage AAs to properly assess the land actually needed in respect of any CPO. SB considered that rights of pre-emption in favour of the original landowner should apply in all circumstances of CP and should not be limited in any way.

	SLE considered that there was no justification for the State to retain land which was purchased by compulsion, or threat of compulsion, when the use for which it was bought no longer existed. They stated that the current Rules were inadequate and uncertain, and there should be no time limit on the obligation. Due to the historical valuation context of the CP system, land had been bought for the public good at less than true open market value. It was fair and proper that once the purpose had ceased, the original buyer should have the option to buy it back on the same basis as it was sold, with no additional clawback procedures. LSS considered that the answer to this question depended on the answer to question 161. Legislation may be necessary if the Rules were to be applied to private sector organisations which hold land which was purchased under a CPO. If the Rules were put on a statutory footing, there would need to be consideration given as to how this would sit with other pre-emptive rights such as community right to buy. JCoS could see advantages in putting the Rules on a statutory footing, as, although the Rules were well known, their precise application was not clear in all circumstances, and they could see considerable virtue in providing legislative certainty. However, it might be that an element of discretion was appropriate to allow the maximum flexibility in their application. Three consultees (SSE, DVS and SBC) disagreed with placing the Rules on a statutory footing. SSE considered that the CPO process should adequately compensate landowners for the land. They referred to their comments on proposal 96 (repealing provisions relating to compensation where there was permission for additional development after the CP) and confirmed their view that it was not appropriate to continue to burden the land with pre-emption rights. DVS considered that the Rules should only apply if the land had been unused for the scheme, and had not substantially changed. The land should be offered back at full market value, reflecting any special value, assuming that full compensation was paid for it. In cases where an AA had acquired more land than necessary for the scheme, due to the owner serving an objection to severance, it would be inequitable for the former owner to be given a right to buy back the land, although the AA might choose to sell it back if there was no other potential buyer. SBC considered that it was adequate to deal with the matter by a policy circular and that it should not be a statutory requirement. GCC did not have a strong view on this but suggested that if it were placed on a statutory footing, provision should be made for the scenario where the original purpose may not have been delivered

	but there was an alternative proposal for the land which was legitimate in the context of the CPO. This could be dealt with by an application to the SMs that the alternative proposal should be treated as if it were the original. GCC also sought clarification of whether the right of pre-emption would be exercised on sale only, or on sale or grant of a long lease. SP and SPEN considered that, as an alternative to proceeding by statute, the Rules could be expanded to strengthen the obligation on the AA to return the land to the former owner. This would bring an increase in protection which could allow more land, obtained as part of the CPO, to be given additional or temporary rights, or the acquisition of a larger area to facilitate construction. Currently there was a risk of the AA not buying enough land, due to a lack of detailed information when the CPO was sought, or the planned implementation changing during project development and implementation.

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

(Paragraph 19.9)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. This would provide consistency.
9. David Strang Steel	We believe this would be fair and reasonable. To provide that this would only be in the case of land acquired compulsorily could lead to a requirement for affected landowners having to resist CPOs in order to have such protection.
10. Renfrewshire Council	Yes – but only for a defined period.
11. NHS Central Legal Office	No.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	We believe it should.
16. Scottish Compulsory	It is our view that the Rules should apply to all land acquired by any

Purchase Association	means of compulsion.
20. SSE plc	We refer to our answer to proposal 160.
21. District Valuer Services	Not necessarily. It would have to be properly considered alongside other legislation, such as Community Empowerment to clearly set out which prospective purchaser has primacy.
22. Glasgow City Council	I think not in respect of *pro indiviso* interests unless each of the parties seeks to re-acquire. This may already be an exception.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
24. Shona Blance	Yes as above. [Answer to question 160 Yes with the caveat that the right of pre-emption should apply in all circumstances and not be limited not just 19.7 bullet points 1 and 2 but 3 and 4 as well.]
25. East Ayrshire Council	This would seem to be reasonable.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
34. DJ Hutchison	We believe this would be fair and reasonable.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes – if your land is taken for statutory purposes and then not used, you should be able to get it back.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	The current wording of the Rules can give rise to confusion as to their status. In particular what is meant by bodies being "expected to apply" or "recommended to apply" the Rules? Although the court in the case of *Findlay's Executor v West Lothian Council* [2006] CSOH 188 found that the interpretation of the Rules was primarily a matter for the decision-maker, the case pre-dates the Supreme Court decision in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13. The interpretation of the Rules would, it is submitted in light of the Tesco case, be a matter of law. Consideration should

	perhaps be given to providing greater clarity on the application of the Rules.
42. Scottish Water	Yes.
43. Faculty of Advocates	For the reasons given, the Rules should apply to all land acquired by, or under threat of, compulsion. [Answer to question 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.]
44. Scottish Property Federation	We believe that on balance if land has been subject to compulsion then yes, its former owners should have a right of pre-emption.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	None required.
Summary of responses and analysis	22 consultees answered this question. 20 answered in the affirmative (with GCC and LSS qualifying their response) and two (NHS and DVS) disagreed. Of the consultees who agreed, WLC considered this would provide certainty while DSS and DJH believed it would be fair and reasonable. DSS noted that if this were not provided for, it could lead to affected landowners having to resist CPOs in order to have such protection. RC considered that this should only apply for a defined period. MacR considered that if land were taken for statutory purposes and then not used, the landowner should be able to get it back. Two consultees (NHS and DVS) disagreed. DVS argued that the Rules should not necessarily apply to all land so acquired, and noted that it would have to be properly considered alongside other legislation, such as Community Empowerment, to clearly set out which prospective purchaser had primacy. GCC stated that the Rules should not apply in respect of pro indiviso interests unless each of the parties sought to re-acquire. LSS noted that the current wording of the Rules could give rise to confusion as to their status (e.g. what is meant by a body being "expected to apply" or "recommended to apply" the Rules?). Consideration should be given to providing greater clarity on the

	application of the Rules.

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)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
6. Craig Connal QC	[Answer to question 162] No. The stated reason for not changing the position (i.e. increased administration) does not hold water. There is no reason why the administration of finding the owners from whom the property has been compulsorily acquired should be any different depending on what has happened in the land since acquisition. [General Response to Chapter 19] Another issue may be whether the rule which prevents the return under Crichel Down of property which has materially changed should apply. In the context in which the Rules originated from wartime exigencies, the typical example was likely to be, for instance, a large house used for some other purpose and then no longer required, thus capable of being returned as a large house. The example with which I was concerned was, I recollect, some form of military encampment acquired for hospital purposes, the effect being to leave the same buildings in use and therefor capable of being returned at the end of the requirement. It is at least for consideration whether once buildings, or whatever other development has taken place, are no longer required they should sensibly be offered for return to the original landowner. After all, if market value is paid why should it matter?
7. West Lothian Council	Agreed. This appears to be reasonable.
9. David Strang Steel	"Changed in character" is a very subjective test made even more difficult by the expiry of time. In our case plans of the 1982 land-take show that a wide strip was taken to the field access west of the road itself. The land was regraded to adjust levels in order to allow the road to be constructed. A track now exists, providing access from the B979 to Field 52 (which would otherwise have been landlocked by the scheme). The track was constructed over this land at the expense

	of the Scotland Office as part of accommodation works carried out following the 1982 CPO. These accommodation works were referred to in the 1984 receipt by the Sluie Trust (our predecessors in title) in favour of the Secretary of State. Even in cases where the land has changed in character, such as having buildings, dwellings or trees planted upon it should be offered back. There may be a very good reason for a landowner to be able to have back land taken for mitigation works etc.
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Yes.
13. Strutt & Parker LLP	"Changed in character" is a very subjective test made even more difficult by the expiry of time. Some of the land acquired in respect of the Fochabers bypass was merely re-graded and could be returned to agriculture. Even in cases where the land has changed in character, such as having buildings, dwellings or trees planted upon it should be offered back. There may be a very good reason for a landowner to be able to have back land taken for mitigation works etc. In our experience, the acquiring authority often fails to properly manage land taken for mitigation works or control vermin leading to ongoing issues on retained land. There are issues where land acquired for a road scheme has been used to ransom subsequent owners. (cf *Strang Steel-v- Scottish Ministers*)
16. Scottish Compulsory Purchase Association	It is considered that, generally speaking, there should be no limitation with regard to cases where land has been compulsory acquired although "material change" requires to be accurately defined. Whilst a right of pre-emption would exist, it would be up to the previous landowner to decide whether or not he/she/it would wish to exercise such option.
20. SSE plc	If a pre-emption right must be included, this appears to be a sensible limitation, although we would question the difficulty in identifying land or parts of land which could be considered to have undergone no change.
21. District Valuer Services	Yes.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers	No. Even in cases where the land has changed in character, such as having buildings, dwellings or trees planted upon it should be offered back. It would be unattractive to see a change in character

and Scottish Agricultural Arbiters and Valuers Association	used to justify the acquiring authority seeking a ransom value from the original owner. The option should lie with the dispossessed landowner, not the acquirer. As the acquiring authority often fails to manage land taken for mitigation works or control vermin, to the detriment of the claimant's retained land, there anyway may be good reasons for the landowner have that land back.
24. Shona Blance	NO.
25. East Ayrshire Council	This would seem to be reasonable.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
32. Scottish Borders Council	Yes.
34. DJ Hutchison	"Changed in character" appears to be a very subjective test.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes – if for example a hospital or waste water treatment works has been constructed on the land it would be odd and unexpected if the original owner was to be offered it back.
39. Scottish Land and Estates	No.
40. Law Society of Scotland	There is a lack of an explicit philosophy for the Rules which makes it difficult to form a logical conceptual framework for exceptions to them. On the assumption, however, that the intention is to enable former owners to re-use land for the purposes which they previously used it for, then the basis for offering back the land might be said to be removed if there is a material change to the character of the land.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
44. Scottish Property Federation	The scope of the Rules should be reviewed although at this stage we do not wish to suggest, ahead of a review, any particular widening or further restrictions.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	At present former owners are only invited to repurchase if the land has not materially changed in character. Views were requested on whether that requirement should continue.
Summary of responses and analysis	24 consultees responded to this question. 13 answered in the affirmative and considered that 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. Nine disagreed and two expressed more general views on the Rules. Of the 13 consultees who agreed, WLC considered that this appeared to be reasonable. SSE considered this to be a sensible limitation if a pre-emption right must be included, although they questioned the difficulty in identifying land or parts of land which could be considered to have undergone no change. MacR considered that it would be odd and unexpected if the original owner were to be offered back, for example, a hospital or waste water treatment works which had been constructed on the land. Nine consultees (CC, DSS, S&P, SCPA, CAAV SB, DJH, SLE and FoA) argued against the requirement that the land must have undergone no material change since the date of acquisition. CC did not accept the argument that removing this requirement would increase administration, as the process of finding the former owner would be the same, regardless of what had happened to the land. In addition, if market value was paid by the former landowner then the change undergone should not matter. Three consultees (DSS, S&P and DJH) considered that "changed in character" was a very subjective test, made even more difficult by the expiry of time. CAAV considered that the option should lie with the dispossessed landowner and not the acquirer. DSS and S&P considered that the land should always be offered back as there

	might be good reasons for the former owner to take it back, such as to mitigate ongoing issues for their retained land being caused by the AA. S&P noted that there were instances where land acquired for a road scheme had been used to ransom subsequent owners. CAAV did not wish to see a change in the land's character being used by an AA to justify seeking a ransom value from the original owner. SCPA stated that, generally, there should be no limitation where land had been compulsorily acquired, although "material change" would require to be accurately defined. Where the option to buy back existed, it should be up to the previous owner to decide whether they wished to exercise it. FoA did not consider that material change in the character of the land was a factor which should displace the obligation to offer land back. It was 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). The increased administrative burden on the AA would be reasonable given the imposition on private interests in the public interest. A simple obligation to offer back surplus land would avoid any unilateral decision by the AA as to what was a material change in character. LSS and SPF expressed general views. LSS stated that there was a lack of an explicit philosophy for the Rules which made it difficult to form a logical conceptual framework for exceptions to them. If the intention was to enable former owners to re-use land for the purposes which they previously used it for, then the basis for offering back the land might be said to be removed if there was a material change in the character of the land. SPF suggested that the scope of the Rules should be reviewed and, ahead of that review, they did not wish to suggest any changes.

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

(Paragraph 19.12)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes.
7. West Lothian Council	Agreed that the current provisions are satisfactory.
9. David Strang Steel	We do not consider these satisfactory. At the moment we understand that surplus land is offered to other

	Government departments or to conservation bodies before being offered to the successors of those from whom it was acquired.
10. Renfrewshire Council	No
11. NHS Central Legal Office	Yes.
13. Strutt & Parker LLP	These are probably satisfactory.
16. Scottish Compulsory Purchase Association	It is considered that the current provisions are satisfactory.
20. SSE plc	Again, if such a right must be provided for, we would suggest that the interest be limited to the proprietor from whom the land was acquired.
21. District Valuer Services	No. In some circumstances, acquiring authorities can be left guessing who would be the successor. Consider the case where all other land formerly owned by the deceased was sold to a third party prior to their death, there is some lack of clarity as to whether or not it is necessary to offer back the land to the party who may have inherited it.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	These are probably satisfactory.
25. East Ayrshire Council	They seem to be satisfactory.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
34. DJ Hutchison	We do not consider these to be satisfactory. At the moment we understand that surplus land is offered to other Government departments or to conservation bodies before being offered to the successors of those from whom it was acquired. It ought to be offered where use by the Acquiring Authority only is surplus to requirements.
35. Shepherd and Wedderburn	Yes.

38. MacRoberts LLP	We would suggest that if the original owner is deceased, the only other party who should be offered the land is the current owner of the "remaining land" not acquired – and only if there is a mutual boundary with that land and that remaining land remains in the same use as it was in at the time of acquisition.
40. Law Society of Scotland	These are considered to be satisfactory.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty is not aware of there being deficiencies in the current approach, but would defer to the experience of others.
44. Scottish Property Federation	We believe this should be subject to review.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Not required.
Summary of responses and analysis	20 consultees responded to this question. 13 agreed that the current provisions, setting out the interests which qualify for an offer to buy back land, were satisfactory. Six consultees (DSS, SSE, RC, DVS, DJH and MacR) disagreed and SPF considered that this area of law should be subject to review. Those who agreed did not provide further comment. Of those who disagreed, DSS and DJH considered that it was not satisfactory that surplus land was first offered to other Government departments or conservation bodies before being offered to the successors of those from whom it was originally acquired. SSE argued that if such a right must be provided for, it should be limited to the proprietor from whom the land was acquired, and not apply to successors. DVS considered that in some circumstances, AAs could be left guessing the identity of the successor. There needed to be clarity as to whether the obligation to offer back land would transfer to a party who had inherited it, where all other land held by the former owner had been sold, prior to their death, to a third party. MacR suggested that if the original owner was deceased, only the current owner of the remaining land should be offered the land, and only where there was a mutual boundary between the acquired and

	retained land, and the retained land remained in the same use as it had been at the time of the compulsory acquisition.

164. **Should the same time limit apply in relation to the obligation to offer back land, regardless of the type of land acquired, and how long should that time limit be?**

(Paragraph 19.15)

Respondent	
1. Professor Jeremy Rowan Robinson	Yes. I should have thought 25 years would be reasonable.
6. Craig Connal QC	Yes. I do not have the knowledge to fix a figure.
7. West Lothian Council	Agreed. The obligation to offer back should last for 25 years after the date of acquisition.
9. David Strang Steel	We would support a limit to ease administrative burden but this should be 20 years.
10. Renfrewshire Council	Would look to limit the period, offer back when acquired 10 or less years before, failing this offer to the open market.
11. NHS Central Legal Office	Yes.
13. Strutt & Parker LLP	The time limit should be 20 years.
16. Scottish Compulsory Purchase Association	To ease the administrative burden, it is considered that the same time limit should apply in respect of all types of land and that time limit should be 25 years.
20. SSE plc	If such a right is to be included, we would suggest that the same rules should apply regardless of land type, but that the time period should be limited to no more than 10 years.
21. District Valuer Services	To ease the administrative burden, it is considered that the same time limit should apply in respect of all types of land and that time limit should be 25 years.
22. Glasgow City Council	Probably.
23. Central Association of Agricultural Valuers and Scottish	A uniform time limit of 20 years should apply.

Agricultural Arbiters and Valuers Association	
25. East Ayrshire Council	Although there are different time limits, it doesn't seem that an unduly onerous administrative burden will arise by keeping all three time limits. If it is thought to be easier, one time limit could be introduced. No strong views on how long the time limit should be.
31. Association of Chief Estates Surveyors Scottish Branch	Yes. Suggest 25 years.
32. Scottish Borders Council	Simplifying the time limits would be helpful. I would suggest for all non – agricultural land that obligation to offer back should only last for 10 years after the date of acquisition. In respect of agricultural land 25 years from the date of acquisition does seem appropriate.
34. DJ Hutchison	It should remain an obligation and within the Title.
35. Shepherd and Wedderburn	Yes. A period of 25 years seems reasonable.
38. MacRoberts LLP	Leave as is.
39. Scottish Land and Estates	There should not be a time limit.
40. Law Society of Scotland	Although there may be a justification in principle for agricultural land being subject to a longer time limit, it is administratively simpler to have a single time limit for all land.
42. Scottish Water	Yes.
43. Faculty of Advocates	In the interests of clarity and certainty, yes. The period of 25 years seems appropriate.
44. Scottish Property Federation	Again the detail of the rules should be subject to review before they are placed on a statutory footing. However, we support the notion that the different characteristics of land make it unlikely that the same time limit is appropriate for all types of land.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Different time limits apply to the obligation to offer back land depending on whether the land is agricultural or non-agricultural.

	(a) For agricultural land - (i) if purchased prior to 1 January 1935, the obligation has prescribed. (ii) if purchased between 1 January 1935 and 20 October 1992, the obligation remains in perpetuity. (iii) if purchased on or after 20 October 1992, the obligation remains for 25 years from the date of acquisition. (b) For non-agricultural land - the obligation remains for 25 years from the date of acquisition. This two part question asked, firstly, whether a time limit on the obligation to offer back should apply to all types of land, and, secondly, what that time limit should be.
Summary of responses and analysis	23 consultees responded to this question. 18 considered that the same time limit should apply regardless of the type of land acquired, three (SBC, MacR and SPF) disagreed and two (SLE and DJH) wanted no time limit. Of the 18 who agreed that a time limit should apply to all types of land, seven (JRR, WLC, SCPA, DVS, ACES, S&W, FoA) suggested 25 years would be appropriate. Three (DSS, S&P and CAAV) suggested 20 years and two (RC and SSE) 10 years. Those in favour of a single time limit stated that it would easier be to use, would simplify the administrative burden and provide clarity and certainty. EAC considered that although having different time limits did not seem to be an unduly onerous administrative burden, a single limit could be introduced. Three consultees (SBC, MacR and SPF) disagreed with introducing a single time limit. SBC was in favour of simplifying the limits, and suggested introducing limits of 10 years from the date of acquisition for non-agricultural land and 25 years from the date of acquisition for agricultural land. MacR wanted to retain the current time limits. SPF supported the view that that different time limits would be appropriate for land with different characteristics. SLE considered that there should be no time limit for any type of land acquired. DJH considered that the obligation to offer back land should remain an obligation within the title.

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

(Paragraph 19.15)

Respondent	
7. West Lothian Council	The council's proposal is that the obligation to offer back should last for 25 years after the date of acquisition in all cases.
9. David Strang Steel	See above. [Answer to question 164 We would support a limit to ease administrative burden but this should be 20 years.]
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Yes – 10 years.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	See above. [Answer to question 164 The time limit should be 20 years.]
16. Scottish Compulsory Purchase Association	See our response to question 164 above. [Answer to question 164 To ease the administrative burden, it is considered that the same time limit should apply in respect of all types of land and that time limit should be 25 years.]
20. SSE plc	The period should match the period noted above, and hence these rights would now fall away. [Answer to question 164 If such a right is to be included, we would suggest that the same rules should apply regardless of land type, but that the time period should be limited to no more than 10 years.]
21. District Valuer Services	Yes - See response to Q164

	[Answer to question 164 To ease the administrative burden, it is considered that the same time limit should apply in respect of all types of land and that time limit should be 25 years.]
22. Glasgow City Council	Probably.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No.
25. East Ayrshire Council	See above comment. [Answer to question 164 Although there are different time limits, it doesn't seem that an unduly onerous administrative burden will arise by keeping all three time limits. If it is thought to be easier, one time limit could be introduced. No strong views on how long the time limit should be.]
32. Scottish Borders Council	Yes, in terms of simplifying matters perhaps a blanket time limit of 25 years from 30 October 1992 to ensure that those parties are no worse off than anyone whose land has been purchased post 30 October 1992.
34. DJ Hutchison	No.
35. Shepherd and Wedderburn	Depending on the timing of any legislation, we suggest that the 25 year rule should apply here as well.
38. MacRoberts LLP	No leave as is – to make such a change would be retrospective in effect.
39. Scottish Land and Estates	No.
40. Law Society of Scotland	For property acquired under historical CPO powers, application of the Rules can be a significant burden, even in terms of ascertaining whether the land was originally used for agricultural purposes. The introduction of a time limit for pre 1992 purposes would seem sensible.
42. Scottish Water	Yes.
43. Faculty of Advocates	There should be no separate time limit for land purchased between these dates. [Answer to question 164

	In the interests of clarity and certainty, yes. The period of 25 years seems appropriate.]
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	This question is linked with question 164.
Summary of responses and analysis	20 consultees responded to this question. 16 considered that the current obligation to offer back in perpetuity land compulsorily acquired between 1 January 1935 and 30 October 1992, should be subject to a time limit, while four disagreed. Many of the consultees who agreed with introducing a time limit, wanted to apply the same time limit referred to their answer to question 164 of the DP. Five consultees (WLC, SCPA, DVS, S&W and FoA) suggested 25 years, DSS and S&P suggested 20 years and NHS and SSE suggested 10 years. SBC suggested that introducing a blanket limit of 25 years from 30 October 1992 might simplify matters, and ensure that those parties were no worse off than anyone whose land had been purchased after that date. LSS suggested that introducing a time limit for pre-1992 cases seemed sensible as, for property acquired under historic CPOs, the Rules could be a significant burden, even in terms of ascertaining whether the land had been originally used for agricultural purposes. Four consultees (CAAV, DJH, MacR and SLE) disagreed with introducing a time limit. MacR considered that a change to time limits would have a retrospective effect.

166. **Should the seven exceptions to the obligation to offer back, currently provided for in the Rules, be retained and are there other exceptions which should be included?**

(Paragraph 19.16)

Respondent	
7. West Lothian Council	The current exceptions should be retained. The council does not propose any other exceptions.
9. David Strang Steel	There should be no exception but there should be an obligation on the acquiring authority in respect of the process of declaring land

	surplus to requirements.
11. NHS Central Legal Office	Yes.
13. Strutt & Parker LLP	We understand that after land is declared surplus it is offered round Government departments. We accept the need for exceptions in respect of other government departments or local authorities but are less certain for the need to retain the other exceptions.
16. Scottish Compulsory Purchase Association	It is considered that most of the seven exceptions (but perhaps not nos. 3 and 4) to the obligation to offer back should be retained on the basis that the land has been formally declared surplus by the acquiring authority.
20. SSE plc	We consider that the seven situations are appropriate, but would also suggest the inclusion of a right for an acquiring party to transfer ground to other parties who have compulsory purchase powers (this would be a widening of the first ground).
21. District Valuer Services	Yes.
22. Glasgow City Council	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No – the acquirer has declared the land surplus for its purposes. It was not taken for general public purposes. If it is wanted for other purposes, then statutory procedures should be used for that.
24. Shona Blance	No in the interest of fairness to the landowner should have an absolute right of pre-emption.
25. East Ayrshire Council	There does not seem to be any reason why the rules should not be retained.
31. Association of Chief Estates Surveyors Scottish Branch	Seven exceptions should be retained.
32. Scottish Borders Council	Yes the seven exceptions should be retained.
34. DJ Hutchison	There should be no exception but there should be an obligation on the acquiring authority in respect of the process of declaring land surplus to requirements.
35. Shepherd and Wedderburn	The rules seem adequate at present,
38. MacRoberts LLP	Leave as provided in the Rules

40. Law Society of Scotland	The existing exceptions are considered satisfactory.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	The current exceptions to the general obligation to offer back are: 1. where the land is needed by another department, i.e. it is not, in a wider sense, surplus to Government requirements. 2. where it is decided that, for reasons of public interest, the land should be disposed of as soon as is practicable to a local authority or other body with CP powers. 3. where the area of land is so small that its sale would not be commercially worthwhile. 4. where it would be mutually advantageous to the department and an adjoining owner to effect minor adjustments in boundaries through an exchange of land. 5. where it would be inconsistent with the purpose of the original

	acquisition to offer the land back. 6. where a disposal is in respect of either: a. a site for development or redevelopment, which has not materially changed since acquisition, and which comprises two or more previous land holdings; or b. a site which consists partly of land which has been materially changed in character, but with another part which has not, and there is a risk of a fragmented sale of such a site realising substantially less than the best price that can reasonably be obtained for the site as a whole. 7. where the market value of land is so uncertain that clawback provisions would be insufficient to safeguard the public purse and where competitive sale is advised by the department's professionally qualified, appointed valuer and specifically agreed by the responsible Minister. This two part question asked, firstly, whether the seven exceptions currently provided for in the Rules should be retained, and, secondly, whether other exceptions should be introduced.
Summary of responses and analysis	20 consultees responded to the first part of this question. 13 agreed that all seven exceptions should be retained, while five disagreed. S&P and SCPA wanted to retain only some of the exceptions. S&P accepted the need for exceptions in respect of offering the surplus land to other government departments or local authorities but were less certain of the need to retain the other exceptions. SCPA considered most exceptions should be retained, except for the third and fourth exceptions. Five consultees (DSS, CAAV, SB, DJH and FoA) considered that there should be no exceptions to the obligation to offer back land. CAAV considered that, as the land was not taken for general public purposes, it should be returned if the AA declares it surplus for its purposes. If the land is wanted for other purposes, fresh statutory procedures should be used. SB stated that, in the interest of fairness to the landowner, the landowner should have an absolute right of pre-emption. FoA considered that, as a general principle, there should be an obligation to offer back surplus land, and unrelated exceptions should not deprive the former owner of the opportunity to repurchase. If any of the exceptions were to be retained (whether specific or more general) the onus should rest with the AA to establish a clear justification in the public interest. In support of this,

	FOA quoted Bingham L.J. in *R v Commission for the New Towns, ex parte Tomkins*. DSS and DJH considered that there should be no exceptions and, in addition, there should be an obligation on the AA in respect of the process of declaring land surplus to requirements. WLC and SSE directly addressed the second part of this question, which asked whether other exceptions should be included. WLC did not propose any other exceptions. SSE suggested widening the first rule by including a right for an AA to transfer land to other parties who have CP powers.

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)

Respondent	
7. West Lothian Council	Agreed. This appears reasonable.
9. David Strang Steel	This should be retained.
11. NHS Central Legal Office	Yes.
13. Strutt & Parker LLP	This should be retained.
16. Scottish Compulsory Purchase Association	It is considered that this procedure could be retained.
20. SSE plc	We do not feel that such provisions are necessary.
21. District Valuer Services	Yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.

34. DJ Hutchison	This should be retained.
35. Shepherd and Wedderburn	Yes.
42. Scottish Water	Yes.
43. Faculty of Advocates	Where there are practical difficulties which prevent the land being offered back then it is accepted that special procedures should be retained.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Paragraph 23 of, and Annex I to, the Rules, set out special procedures to deal with land being offered back where boundaries of agricultural land have been obliterated. This question asked whether these provisions should be retained.
Summary of responses and analysis	13 consultees responded to this question. 12 considered that the special procedure relating to the obliteration of boundaries in agricultural land should be retained. SSE did not feel such provisions were necessary.

168. **Do time limits in the current Rules to carry out the process to offer back land operate satisfactorily?**

(Paragraph 19.21)

Respondent	
6. Craig Connal QC	[Answer to question 168] The time limits are less critical than a proper understanding of the financial consequences of the passage of time. [General Response to Chapter 19] A series of practical issues arise which might also conveniently be dealt with. For instance, the date at which the transfer is required could be clarified. If that date, was, for instance, the date when land was declared as surplus, then in the real world transfer on that date is highly unlikely, and the legal consequences of the passage of time ought to be considered. If there are buildings, who is responsible for their maintenance in their condition at the relevant date? What are the consequences if they are not so maintained? Does the

	landowner require to be compensated for the consequences of any delay in transfer? These are all matters which were at issue in the case with which I was concerned (*Robertson v The Secretary of State)*. I offer no particular views as to what, in the public interest, ought to be the ruling on these points save to say that they were ones which caused considerable concern to those involved. These instances may involve individuals who have reluctantly had, possibly through predecessors in title, valued property taken from them. Matters can become ones of emotional attachment, thus a degree of clarity and sensitivity might be required in any formulation.
7. West Lothian Council	The proposal set out in the Discussion Paper that an overall time limit of up to eight months should be allowed for the process appears reasonable.
9. David Strang Steel	This does not appear unreasonable.
11. NHS Central Legal Office	No.
13. Strutt & Parker LLP	We do not consider that this process operates satisfactorily and the time limits should be extended.
16. Scottish Compulsory Purchase Association	It is considered that the existing time limits do pose administrative implications particularly with regard to identifying and contacting previous landowners. Thus, the proposal that the overall time limit be extended to (at least) 8 months is not unreasonable.
21. District Valuer Services	The timescales should strike a fair balance between the right of the public body to dispose of surplus land and giving the former owner the opportunity to acquire the land. If the former owner is interested in acquiring the land, perhaps there could be a register of up to date interests. In the event that the former owner does not provide their details for such a register, then they can be assumed to be no longer interested. The acquiring authority should only have to write to those parties whose details appear on the register. The responsibility for ensuring the details are up to date should rest with the former owner. This should then enable the public body to easily contact those interested parties at the appropriate time. This should help to cut down the timescales for concluding the transaction.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No. The time limits should be extended.

34. DJ Hutchison	This does not appear unreasonable.
38. MacRoberts LLP	No experience of this but it may be possible to follow the example of the tenant right to buy legislation.
39. Scottish Land and Estates	The current rules are inadequate as noted in the UK Government's own document of 2000 [DTLR Report].
40. Law Society of Scotland	The views expressed in the DTLR Report [para 5.9] on whether the timescales are realistic are considered equally valid in Scotland. In particular, the 2 month time limit for a former owner to confirm whether they wish to purchase the property has practical difficulties. Receipt of the formal notice may be the first time the former owner has received an indication that the land is surplus and it may be difficult to obtain the requisite advice and, in the case of non- natural persons, to make the required decision.
42. Scottish Water	Yes.
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	The current procedures for disposal are set out in paragraphs 18 to 25 of the Rules. Those which directly affect time limits are:- Paragraph 18 - where the address of a former owner is known, and notice has been served, the former owner has two months within which to intimate their intention to purchase and a further three months to agree terms and price. Paragraphs 19 and 20 - provide for advertising where the address of the former owner is unknown. Paragraph 21 - provides that where the address of a former owner is unknown, at least two months must have passed after the necessary advertisement, before proceeding. This question asked whether the current time limits operate satisfactorily.
Summary of responses and	14 consultees responded to this question. 13 consultees either suggested a change or agreed with the proposal for change set out in

analysis	paragraph 19.21 of the DP. SW stated that the current time limits in the Rules operated satisfactorily. Seven consultees (WLC, NHS, S&P, SCPA, CAAV, SLE and LSS) disagreed. S&P considered the time limits should be extended. WLC and SCPA considered that it would be reasonable to extend the overall time limit to eight months. SLE and LSS considered the DTLR report which considered the current timescales inadequate. LSS considered that there were practical difficulties with the two month time limit for a former owner to confirm whether they wished to purchase. The formal notice may be the first time the former owner has received any indication that the land is surplus and it may be difficult to obtain the required advice and, in the case of non-natural persons, make the required decision, within that period. CC considered the time limits were less critical than a proper understanding of the financial consequences of the passage of time, and set out other practical issues that could be conveniently dealt with: • Clarification of the date at which the transfer is required. If the date is the date the land is declared surplus, there needs to be consideration of the passage of time. • If there are buildings, who is responsible for their maintenance at the relevant date? • What are the consequences of not maintaining the buildings? • Does the landowner require to be compensated for the consequences of any delay in transfer? DVS considered that the time limits should strike a fair balance between the right of the AA to dispose of surplus land and giving the former owner the opportunity to buy it back. They suggested that there should be a register of up-to-date interests for former owners, and if the former owner did not provide their details, it would be assumed that they were no longer interested. MacR considered that it might be possible to follow the example of the tenant right to buy legislation. FoA considered that there needed to be a balance of effective administration with practical considerations, and the overall time limit might 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)

Respondent	
1. Professor Jeremy Rowan Robinson	If the claw back provision in s.31 is to be dropped, it would seem reasonable to drop this provision too. Some years ago, I encountered a problem with the valuation of land being returned under the Crichel Down Rules. Land was compulsorily acquired for a road scheme but some of it eventually turned out to be surplus to requirements and was offered back under the Rules. However, the acquiring authority argued that the land to be returned now formed a ransom strip providing access to the former owner's land and they would only return the land at ransom strip value. As the compulsory acquisition created the situation in which the ransom strip was formed, that seemed inequitable. I understand that that example is by no means unique. I don't know if this situation has cropped up in your deliberations.
7. West Lothian Council	Agreed. 10 years appears appropriate.
9. David Strang Steel	No time limit should apply. The acquiring authority should not gain financially and there should be no limit to Clawback. Surplus land should be returned to the landowner if not used for the scheme.
11. NHS Central Legal Office	Yes – as short as possible.
13. Strutt & Parker LLP	No time limit should apply. Surplus land should be returned to the landowner if not used for the scheme.
16. Scottish Compulsory Purchase Association	It is the general view that the acquiring authority should not gain financially and that the previous owner should be able to reap any windfall profit if in the intervening time if the land now has development potential/value and thus there should be no claw-back provision or time limit. However, there is a counter-argument that where there has been (significant) public expenditure resulting in betterment then claw-back provisions are pertinent.
20. SSE plc	We consider that a 10 year time limit is appropriate.
21. District Valuer Services	Any clawback provisions should be negotiated as they would be in any market transaction. The alternative for the public body would be selling the property on the open market, in which case they would be seeking the best deal they can achieve – either by maximising the price or through a clawback where planning etc. is uncertain. This should be no different, it is simply to a selected purchaser. However, the benefit to the former owner is that they are offered an

	off-market opportunity to acquire. It is not that they acquire at less than market value or should be able to benefit from changes to the property or the planning situation that occurred when the property was in public ownership.
22. Glasgow City Council	10 years is probably appropriate.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No time limit should apply. Surplus land should be returned to the landowner if not used for the scheme. The acquirer should not benefit financially from uses unrelated to those for which the land was taken.
25. East Ayrshire Council	East Ayrshire Council has entered into clawback agreements for 40 years whereby if there is any uplift in the value of the price because of changes in planning permission, the Council will be entitled to 100% of the value of any uplift for 20 years and 50% of the value of any uplift for the remaining 20 years.
34. DJ Hutchison	No time limit should apply. The acquiring authority should not gain financially and there should be no limit to clawback. Surplus land should be returned to the landowner if not used for the scheme.
35. Shepherd and Wedderburn	We are not convinced that clawback provisions should be retained in relation to land disposed under the Crichel Down Rules. The Landowner in question will already have had to pay market value for the land and that will reflect any element of hope value which exists at the time of disposal.
38. MacRoberts LLP	No – too complex for statute – should be valued taking account of hope value.
40. Law Society of Scotland	We refer to our responses at questions 96 and 97. If the equivalent to Part V is to be retained with an amended timescale, it seems reasonable in principle for similar timescales to apply to land sold back to former owner under the Rules. Question 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? In the interests of fairness to potential claimants, we consider that it should not be repealed and should be re-enacted. Question 97 If not, should the period for considering subsequent planning

	permission remain as 10 years? We consider that 10 years strikes a reasonable balance in time to enable the claimant to receive additional compensation should a planning event occur which increases the value of land which would not have been in contemplation when his claim was settled.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees that in principle clawback provisions should be time limited.
44. Scottish Property Federation	The discussion paper makes the point that this provision is analogous to the rights of landowners to seek compensation for a period of time for potential planning permission – therefore we suspect that it will be appropriate for these two time limits to be linked so if the landowner's rights are limited to a shorter time period then so should be the time period available to the relevant public (or successor) authority.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Clawback provisions are generally recognised by the property market as a necessary mechanism to protect the public purse. Currently, paragraph 25 of the Rules sets out that, as a general rule, AAs should obtain planning consent before disposing of property which has development potential. If the planning position cannot be established prior to disposal, the disposing department will include clawback provisions in its terms of sale. This question asked whether the clawback provisions should be time limited.
Summary of responses and analysis	18 consultees responded to this question. Nine agreed that clawback provisions should be time limited and three disagreed. Six (JRR, DSS, S&P, SCPA, CAAV, and S&W) considered there should be no time limit as the clawback provisions should not apply. Of the nine consultees who considered there should be some time limit on clawback provisions, four (WLC, SSE, GCC, and LSS) considered 10 years to be appropriate. LSS considered the time scale should be the same as the period set out in s31 of the 1963 Act, which provides for the landowner to claim compensation, up to 10 years after the CPO, for planning permission which is subsequently granted in respect of their land (See questions 96 and

	97 of the DP). SPF suggested that it would be appropriate for these two limits to be the same, so that if the landowner's rights are limited to a shorter period, the same change should be made to the AA's rights. NHS argued the time limit should be as short as possible. SW and FoA, while agreeing that there should be a time limit, did not provide a figure. EAC referred to clawback agreements entered into by them for 40 years in terms of which they are entitled to 100% of the value of any uplift, as a result of changes to planning permission, for the first 20 years, and 50% of any uplift for the remaining 20 years. DVS did not agree that the clawback provisions should be time limited and considered that they should be negotiated in the same way as in any market transaction, and not set out in statute. The AA would be seeking the best price on the open market, either by maximising the price or through clawback where planning is uncertain. The former owner would simply be given an off-market chance to buy back their property. MacR considered that this area was too complex for statute and, instead, development value should be calculated taking account of hope value. JRR considered that if the clawback provision under s 31 of the 1963 Act for the previous landowner were to be abolished, then so should this provision. He noted a situation where land was taken under a CPO for a road scheme but later turned out to be surplus to requirements. When it was offered back under the Rules, the AA argued that the land formed a ransom strip to the former owner's land and would only return it at ransom strip value. As the CP created the situation, that seemed inequitable and he understood this example was not unique. S&W considered that the landowner would have been paid market value for the land, which would reflect any element of hope value which existed at the time of disposal. Five consultees (SCPA, DSS, S&P, DJH and CAAV) argued that the AA should not gain financially and the land should be returned to the landowner if not used for the scheme. CAAV argued that the AA should not benefit financially from any use of the land which was unrelated to the use for which the land was taken. However, SCPA noted a counter argument from some of their members that, where there had been significant public expenditure resulting in betterment, clawback provisions were pertinent.

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

(Paragraph 19.26)

Respondent	
6. Craig Connal QC	Yes.
7. West Lothian Council	Agreed. The LTS has experience of dealing with a wide range of compulsory purchase issues.
10. Renfrewshire Council	Yes.
11. NHS Central Legal Office	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes.
13. Strutt & Parker LLP	We agree that the LTS should have jurisdiction. It might however be worthwhile to allow the parties to refer the matter to arbitration under the 2010 Act.
16. Scottish Compulsory Purchase Association	This proposal is supported.
17. Lands Tribunal for Scotland	We agree.
20. SSE plc	Yes, we agree that this is an appropriate approach.
21. District Valuer Services	Agreed.
22. Glasgow City Council	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes but, as aired above there should be provision for the LTS to have the case management powers to direct that a dispute is to go to arbitration or expert determination as well as to encourage mediation.
25. East Ayrshire Council	This would seem to be a reasonable approach.
26. National Grid plc	Yes this is supported.
31. Association of Chief Estates Surveyors Scottish	Yes.

Branch	
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	Yes, we agree.
38. MacRoberts LLP	Agreed.
40. Law Society of Scotland	In principle, there may be a benefit in having such matters determined by the LTS. However, that would seem to be dependent on the Rules being placed on a statutory footing, with greater clarity being given on the circumstances in which they need to be applied.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees that the LTS should have jurisdiction to resolve such disputes.
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of proposal	Not required.
Summary of responses and analysis	22 consultees responded to this proposal and all agreed that the LTS should have a general jurisdiction to resolve disputes which arise in relation to the disposal of surplus land, although LSS qualified their agreement. WLC referred to the LTS's experience of dealing with a wide range of CP issues. S&P suggested that it might be worthwhile to allow the parties to refer the matter to arbitration under the Arbitration Act. CAAV argued that there should also be provision for the LTS to have case management powers to direct that a dispute must be referred to arbitration or expert determination as well as to encourage mediation. LSS stated that, in principle, there might be a benefit to having such matters determined by the LTS, but it would seem to be dependent on the Rules being placed on a statutory footing, with greater clarity being given on the circumstances in which they needed to be applied.

171. **Should section 89 of the 1845 Act be repealed and not re-enacted?**

(Paragraph 20.4)

Respondent	
7. West Lothian Council	Agreed. The provision is redundant. An action for recovery of heritable property using the summary cause procedure could be used. This could be clarified in the new statute.
10. Renfrewshire Council	No it should be retained.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	It is considered that this section should be repealed and not re-enacted.
20. SSE plc	We agree that the provisions should be repealed, given the overlap with other procedures available.
21. District Valuer Services	Yes.
22. Glasgow City Council	If there is confidence that this is covered elsewhere then yes.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	If section 89 of the 1845 Act is included in the definition of summary cause as outlined in the discussion paper and if, in practice, acquiring authorities are using the court procedure anyway, there would not seem to be any reason why section 89 should be retained.
26. National Grid plc	Yes on the basis that it would appear to be redundant in practice.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Yes – seems to be redundant.

39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	Yes, we agree
42. Scottish Water	Yes
43. Faculty of Advocates	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.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Section 89 of the 1845 Act provides that where land is compulsorily acquired and the owner or occupier refuses to move, the AA may apply to the Sheriff, who may order possession of the land. The DP noted that various enabling Acts provided their own statutory enforcement provisions, and also that AAs often simply raised an action for recovery of heritable property, using the summary cause procedure. The DP quoted *Glasgow Airport Limited v Chalk*, as authority for s 89 being included in the definition of summary cause in s 35(1) of the Sheriff Courts (Scotland) Act 1971. The DP suggested that s 89 of the 1845 Act was redundant in practice and should be repealed.
Summary of responses and analysis	18 consultees responded to this question. 16 agreed that section 89 be should repealed and not re-enacted. Two (RC and FoA) disagreed. RC said it should be retained, and FoA was not convinced that the provision should be repealed, pointing out that s 89 was 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)

Respondent	
7. West Lothian Council	Agreed. This would provide clarity.

10. Renfrewshire Council	Agreed.
12. Society of Local Authority Lawyers and Administrators in Scotland	Agreed.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	This proposal is supported.
20. SSE plc	We would agree with this proposal.
21. District Valuer Services	Yes.
22. Glasgow City Council	Agree.
25. East Ayrshire Council	This would seem to be reasonable.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed.
32. Scottish Borders Council	Agree.
35. Shepherd and Wedderburn	We agree.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	Yes, we agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	It is agreed that this amendment would remove any doubt over the matter.
44. Scottish Property Federation	We agree.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of proposal	In discrete, city-centre developments it is common for AAs to make a CPO on behalf of private sector commercial third parties. The AA acts as an agent and the third party indemnifies the AA in respect of compensation and all other costs. Under current legislation, it is not clear whether the AA or the third party would be able to rely on enforcement procedures under section 89 of the 1845 Act or summary cause procedure. The DP proposed that the new legislation makes it clear that a third party under a back-to-back agreement with an AA, is entitled to enforce possession by virtue of the CPO.
Summary of responses and analysis	18 consultees responded to this proposal and all agreed with it.

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

(Paragraph 20.10)

Respondent	
1. Professor Jeremy Rowan Robinson	I should have thought that harmonisation was desirable.
7. West Lothian Council	It should be brought into line with compensation for other interests.
13. Strutt & Parker LLP	We do not consider this section works satisfactorily.
16. Scottish Compulsory Purchase Association	It is considered that the section does not work satisfactorily.
20. SSE plc	We have no particular view relative to the application of this section in practice.
21. District Valuer Services	It is considered that the section does not work satisfactorily.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	No.

43. Faculty of Advocates	The Faculty of Advocates considers that any replacement system is a matter of policy.
44. Scottish Property Federation	We believe the opportunity for some harmonisation is welcome while respecting the loss incurred on holders of short leases, or of leases with less than a year to expire, may experience.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	Section 114 of the 1845 Act provides for compensation for short tenancies, i.e. those of a year or less, or those which run from year to year. The DP explained the different treatment of these short tenancies in the case of (1) a notice to treat and (2) a GVD, and also the position with agricultural short tenancies. The DP referred to paragraphs 8.52-8.54, and proposal 68 which proposed that the rules on short tenancies should be rationalised. This question asked whether the current rules in section 114 work satisfactorily.
Summary of responses and analysis	Nine consultees responded to this question. Seven answered to the effect that section 114 does not work satisfactorily. FoA considered that any replacement system was a matter of policy. SSE had no particular view on the application of the section in practice.

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)

Respondent	
7. West Lothian Council	If such a likelihood is contained in the tenancy agreement then it should be taken into account.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	Yes, this seems to be more equitable, and experience elsewhere has shown it to be a reasonable assumption to make.
16. Scottish Compulsory Purchase	It is considered that the likelihood of a continuation/renewal of a short tenancy should be taken into account in assessing the compensation. It is recognised and accepted that each case would

Association	have to be decided on its own merits and particular circumstances. Indeed, a short-term tenancy may have only been entered into due to the knowledge of a threat of compulsory purchase that, in its absence, a longer-term lease would have been established. Further, it should be appreciated that there are significant differences as between residential lettings (Short Assured Tenancies) and commercial lettings.
20. SSE plc	We note that it is not possible to definitely ascertain whether or not the tenancy would have continued. Short tenancies inherently carry a risk to the tenant that they could be terminated, and the proposed legislation should recognise that.
21. District Valuer Services	The principle of equivalence suggests that the likelihood of renewal should be taken into account. The SLC is referred to the position which currently applies where s35 of the 1973 Act applies. The current position is that if a short tenancy is allowed to expire, then compensation is given under s35 of the 1973 Act. This states specifically that "regard shall be had to the period for which the land…may reasonably have been expected to be available for the purposes of his trade or business". However, this should be contrasted with the position where an occupier with a short tenancy has it taken before expiry, and in this case compensation is given under s114 of the 1845 Act. That Act, however, has no equivalent assumption to that in the 1973 Act, and compensation is therefore limited to the value of the unexpired term. The occupier would therefore perhaps be compensated for only the few months remaining of the tenancy, with no regard being had to the period for which he might have been expected to remain. This is clearly inequitable, and the 3 same assumptions as are contained in the 1973 Act should apply to the position in s114, 1845 Act cases. It is recognised and accepted that each case would have to be decided on its own merits and particular circumstances.
22. Glasgow City Council	This is difficult but on balance I do not think that this likelihood of continuation or renewal should be taken account of; the tenant occupies under the terms of the lease and will have made his choices in part informed by the terms of the lease.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. The assessment should be based on the claimant's realistic expectation of continued occupation of the land. In this vein, much fairer justice would be done to many tenants if the decision in Bishopsgate Space Management Ltd v London Underground Ltd regarding s.20 of the English Compulsory Purchase Act 1965 could be reversed as we see that it could be

	followed in Scotland. This decision sees the tenant treated as though his tenancy would end by the landlord taking advantage of the earliest possible date to do so. While there will always be some specific instances where circumstances would see early repossession, this is inherently implausible as a general assumption in the real world, in which owners have chosen to let properties for an income. If they wanted them back, they would not have let them, however much they may also have reserved the possible power to do so. The practical effect of following that assumption is that the tenant's business and interest would commonly be undervalued, often substantially so, so limiting his ability to re-establish himself. The compensation should be based on the reasonable expectation as to the period, short or long, that the business would actually remain in occupation.
29. Brodies LLP	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	Yes.
38. MacRoberts LLP	Yes – but (a) assess on the basis of what a "market landlord" rather than the "actual landlord" would agree having regard to the market at the date of compensation and (b) also take into account the likelihood of a break notice being exercised.
39. Scottish Land and Estates	Yes.
40. Law Society of Scotland	This would seem to be a reasonable approach.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Yes, there should be cognisance taken of the likelihood of renewal and the consequent loss of this expectation for the parties involved.
Further responses, either made informally or at engagement events	None.
Analysis	
Explanation of question	The case of *Bishopsgate Space Management –v- London Underground* decided that it had to be assumed as a matter of law

	that a short tenancy would end on the earliest day on which the landlord could bring it to an end. This had been the law in Scotland since the 1903 case of *Lynch –v- Glasgow Corporation*. The *Bishopsgate* case also held that, for the purposes of assessing loss, no account was to be taken of any possibility which may have existed that the tenancy might have been renewed. The application of this rule puts the short tenant at a significant disadvantage when compared to owner-occupiers. It could be particularly harsh for a tenant who, due to having formed a good relationship with their landlord, had been lax in obtaining a formal option to renew. Comparative research shows that the likelihood of renewal of a lease is one of the factors taken into account in Australia and Canada. The Law Commission for England and Wales, in Law Com 286, paragraph 5.3, favoured taking this into account.
Summary of responses and analysis	16 consultees responded to this question. 11 stated that account should be taken of the likelihood of renewal. Of the five who disagreed, RC and SW did not give reasons. WLC thought that account should only be taken if it was contained within the tenancy agreement. SSE stated that short tenancies inherently carried a risk to the tenant that they could be terminated and the proposed legislation should recognise that. GCC thought that this was a difficult issue but, on balance, they were against it being taken into account. Of those in favour of account being taken, DVS stated that the principle of equivalence suggested this should happen. S&P stated that it would be more equitable. FoA agreed that the principle of equivalence should apply. CAAV stated that the assessment should be based on the claimant's realistic expectation of continued occupation of the land. MacR answered "yes" but stated that the assessment should have regard to the market and take into account the likelihood of a break notice being exercised.

175. **Provision along the lines of sections 99 to 106 of the 1845 Act should be included in the proposed new statute.**

(Paragraph 20.23)

Respondent	
7. West Lothian Council	Agreed. These provisions are clear and should be included in the

	proposed new statute.
10. Renfrewshire Council	Yes, although consideration should be given to clarifying the requirements in cases where the principal and interest due under the security exceed the value of the affected property.
12. Society of Local Authority Lawyers and Administrators in Scotland	Yes, although consideration should be given to clarifying the requirements in cases where the principal and interest due under the security exceed the value of the affected property.
13. Strutt & Parker LLP	We support this proposal.
16. Scottish Compulsory Purchase Association	We support this proposal.
20. SSE plc	We agree that equivalent provisions should be included.
21. District Valuer Services	Yes.
22. Glasgow City Council	Agreed.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes.
25. East Ayrshire Council	This would seem to be reasonable.
26. National Grid plc	This is supported.
31. Association of Chief Estates Surveyors Scottish Branch	Yes
32. Scottish Borders Council	Agree
35. Shepherd and Wedderburn	We agree.
38. MacRoberts LLP	There should be a power to get the court to sign a discharge if the creditor can't be found or refuses to sign.
40. Law Society of Scotland	We agree.
42. Scottish Water	Yes.
43. Faculty of Advocates	The Faculty of Advocates agrees.
44. Scottish Property Federation	We agree.

47. The Royal Bank of Scotland plc	[From paragraph 3 of the general response – also noted at question 175] The second area where we feel that there is a need for change is in relation to payments of compensation amounts which are insufficient to repay the borrower's outstanding loan. As discussed, situations do arise where customers whose properties are subject to a CPO do not receive sufficient compensation to enable them to repay their outstanding loan in full. The result of this is that the customer and the bank are left in an unsecured position. We obviously work with our customers to find the best outcome for this situation, however, it can in theory lead to litigation, an adverse credit entry for customers and a potential loss for the bank. These outcomes can have a major bearing on customers and their future financial position. This appears inequitable for all parties. As the intention of compensation in respect of compulsory purchase is to replace the loss that the landowner has suffered we see no reason why borrowers should be left in this unenviable position through no fault of their own. We would, therefore, welcome a change in law to avoid this unfair situation of customers, solely as a result of their property being subject to a compulsory purchase order, facing major financial issues which they otherwise would not have faced.
Further responses either made informally or made at engagement events.	SLC met with representatives of RBS, the Bank of Scotland, Halifax and the Council of Mortgage Lenders ("CML"). All expressed concern that current legislation did not oblige AAs to notify lenders of CPOs. They questioned how lenders could carry out their duty to their customers without this knowledge.
Analysis	
Explanation of proposal	Sections 99 to 106 of the 1845 Act provide for the situation of an AA acquiring land where the land is subject to a heritable security. Section 99 provides that the AA may purchase or redeem the interest of any existing security by paying the security holder the principal and interest due on the security together with any expenses and charges and six months' additional interest. The security holder must then transfer its interest to the AA. Section 99 also provides that the AA may notify the security holder that they will pay off the principal and interest at the end of a period of six months. When this is paid, the security holder must discharge its interest in the land. Section 100 allows the AA to deposit the money in a bank and obtain title in the event that the security holder fails to co-operate. Section 101 provides that, in negative equity situations, the amount to be paid to the security holder "shall be settled by agreement". Failing agreement, the amount to be paid will be settled in the same way as disputed compensation. Section 102 provides for depositing money in

	a bank in that situation. Section 103 provides for the situation where the land taken is part of a wider parcel of land and the part acquired is not sufficiently valuable to cover the loan, interest and costs. The amount to be paid is to be agreed, which failing, determined in the same way as disputed compensation. Section 104 provides for depositing money in a bank in that situation. Section 105 provides for the AA having to pay charges for early termination, and section 106 provides for compensation for the security holder's loss of interest.
Summary of responses and analysis	20 consultees responded to this proposal. 19 agreed with it and one (RBS) disagreed. RC and SOLAR, while agreeing, felt that consideration needed to be given to clarifying the requirements in cases where the principal and interest due under the security exceeded the value of the affected property. MacR wanted to include a power for the court to sign a discharge of a standard security if the creditor could not be found or refused to sign. RBS disagreed with the proposal and wanted to see a change in the law to avoid any customer being paid insufficient compensation to pay off their loan in a negative equity situation. They considered this could lead to litigation, an adverse credit rating for customers and the bank being left in an unsecured position.

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)

Respondent	
7. West Lothian Council	Agreed. It would be unfair if tax costs arising from the CPO could not be recovered.
9. David Strang Steel	Yes. A landowner normally has a choice of when to dispose of property and the tax regime will influence such a decision. Where land is acquired compulsorily a landowner has no such option and this should be taken into account in assessing disturbance. In our case because of issues in respect of notice of severance discussed above we may lose the opportunity to claim Entrepreneurs relief.

	In addition, taxation needs to be amended such that rollover relief extends to investment in a building on remaining land.
10. Renfrewshire Council	No.
13. Strutt & Parker LLP	Yes. A landowner normally has a choice of when to dispose of property and the tax regime will influence such a decision. Where land is acquired compulsorily an affected party has no such option and this should be taken into account in assessing disturbance. All flexibility is lost. The issue is further complicated that the compensation is not broken down as is treated as a part disposal at the date of vesting when at that date the claimant may be unable to reinvest elsewhere because he has not received payment. It should be noted however that this is linked to the personal circumstances of the claimant. In addition, taxation needs to be amended such that rollover relief extends to investment in a building on remaining land. The issue is illustrated in a recent AWPR claim referred to the LTS where the claimant was elderly and looking to cut back on the hard work of running the farm on a day to day basis. In anticipation of that position they created a tax effective set up whereby they would eventually move from the older, larger property in their ownership to a more modern, manageable custom built property. This property was however affected by the AWPR and the CPO in respect of it created an immediate Capital Gains Tax (CGT) liability for the claimant. But for the CPO that capital gains tax liability would not have arisen either now or in the future. On the death of the claimant no CGT would be payable and the base value for CGT would have been re-set at date of death value. The CGT liability could have been avoided if the claimant had been able to reinvest the whole compensation for the subjects in a replacement property. That the replacement property had to be acquired within 3 years of the compensation being agreed and that the Applicants did not reside in the replacement property for 6 years. Rather than settle the compensation claim the DV has suggested that the claimant sell the older property to fund the purchase of a replacement property. This would result in an inheritance tax (IHT) exempt asset being replaced by an IHT chargeable asset. Further, due to the proximity of the AWPR it would be a bad time to sell as this property has been blighted by the scheme and could only be sold at a substantially reduced price. The delay in settling the claim has hindered the claimant's ability to purchase a replacement property to the extent that it is now more than likely that they will require to move to the replacement property

	which they purchase within 6 years of that purchase and the CGT tax liability will accordingly arise. Given the claimant's age and health it is unreasonable to expect the claimant, following reinvestment in a replacement property to lease and thereafter move into, to have to wait a further six years in a situation which is likely to be detrimental to their health before making their move. If Transport Scotland had settled the claim at the time they indicated that they would, prior to the CPO, it is possible that the 6 years would now be nearing its end and the CGT liability would not be an issue. In addition, the CPO acquisition of the property will cause an additional IHT liability. Prior to the acquisition and in accordance with the claimant's tax planning set up, the farmland would have obtained agricultural relief and as such would have been exempt from inheritance tax. The dwelling house would have obtained agricultural relief and as such may have been exempt from IHT. Unless the compensation is reinvested in a replacement property which is an IHT exempt asset, the acquisition of the farmland and dwelling house creates a future IHT which would not have otherwise arisen.
16. Scottish Compulsory Purchase Association	It is considered that any such liability should be recoverable under "disturbance" compensation. The fact that the acquisition is of a compulsory nature means, by definition, that the future planning of the ownership and occupation of property is outwith the control of the proprietor. Thus, in the "no scheme world" a proprietor can take whatever prudent action is necessary in order to avoid or reduce any liability for tax on a disposal etc.: that flexibility is lost by way of compulsory purchase. Thus, as a counter-balance it is considered that the recovery of any exposure to tax is a fair adjustment.
20. SSE plc	We do not feel that it is appropriate that acquiring authorities be liable for tax liabilities. The compensation paid should already reflect the value of the property if it was sold on the open market, and so the landowner would be no worse off. Ascertaining tax affairs is a difficult proposition and reduces the certainty on cost required by the acquiring authority. We also note that on the vast majority or most controversial of cases (primary residences for example) there would be no capital gains tax liability in any event.
21. District Valuer Services	If the additional tax liability is solely due to the scheme, in fairness it should be claimable – recent case law (*Bishopsgate Parking No 2 v Welsh Ministers* (2012)) opened up the possibility but in many cases the CPO changes the date tax is payable rather than creates the liability so clarity would be helpful. It is possible that, following that case, it is claimable at present anyway, but any drafting which mentions this should be carefully worded to reflect the expectation that the compulsory acquisition brings forward a tax liability which would otherwise have been payable at some time in the future, so

	not all of the tax should necessarily be paid.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. These liabilities arise from actions that the claimant did not intend but which are forced on him by the CPO for reasons unrelated to him and over which he has no control.
25. East Ayrshire Council	This would seem to be reasonable.
29. Brodies LLP	Yes.
31. Association of Chief Estates Surveyors Scottish Branch	Agreed
34. DJ Hutchison	Yes. A landowner normally has a choice of when to dispose of property and the tax regime will influence such a decision. Where land is acquired compulsorily a landowners has no such option and this should be taken into account in assessing disturbance. In our case because of issues in respect of notice of severance discussed above we may lose the opportunity to claim Entrepreneurs relief. In addition, taxation needs to be amended such that rollover relief extends to investment in a building on remaining land.
35. Shepherd and Wedderburn	Yes.
38. MacRoberts LLP	Not any tax liability - restrict to the value of the lost opportunity to mitigate tax liability.
39. Scottish Land and Estates	Yes. This is particularly the case as the landowner is in a situation not of his or her making.
40. Law Society of Scotland	Yes.
42. Scottish Water	No.
43. Faculty of Advocates	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.
44. Scottish Property Federation	Yes, we believe that this is equitable. Again, it is not the landowner's fault that the tax is crystallised at this stage to a probably disadvantageous degree to their personal circumstances.
Further responses, either made informally or at engagement events	None.

Analysis	
Explanation of question	For landowners, CP can have significant tax implications, removing their ability to forward plan, and may result in a higher or earlier tax liability. Capital Gains Tax and inheritance tax planning are mentioned in the DP. The case of *Bishopsgate Parking (No. 2) Ltd v Welsh Ministers* held that compensation for disturbance could, in principle, include an amount to cover any such tax liability. This question asked whether this should be set out expressly in any new statute.
Summary of responses and analysis	19 consultees responded to this question. 15 agreed that tax liability should be recoverable under the head of disturbance. S&P gave a detailed example from the AWPR which demonstrated various issues which might arise with Capital Gains Tax and Inheritance Tax. DJH stated that he had suffered a loss of opportunity to claim Entrepreneurs' Relief. DSS also referred to a prospective issue with a claim for Entrepreneurs' Relief, and stated that rollover relief required to be amended to extend to investment in a building on retained land. Both SCPA and DVS agreed that tax liability incurred as a result of the CP, should be recoverable. DVS referred to the case of *Bishopsgate Parking (No. 2) Ltd v Welsh Ministers* as authority for this. Of those who disagreed, RC and SW gave no reason. SSE stated that they did not feel that it was appropriate for AAs to be liable for tax liabilities, and that compensation paid should already reflect the value of the property if it was sold on the open market. They stated that ascertaining tax affairs was a difficult proposition and would reduce the certainty on costs required by AAs. MacR stated that the provision should not allow for recovery of "any" tax liability but rather should be restricted to the value of the lost opportunity to mitigate tax liability.

177. **Are there any other aspects of the current compulsory purchase system, not mentioned in this Paper, to which consultees would wish to draw our attention?**

(Paragraph 20.29)

Respondent	
1. Professor Jeremy Rowan Robinson	I have two general comments. First of all, I share the Commission's view that the current legislation is not fit for purpose and that a modern, comprehensive statutory restatement is long overdue (Q.1, p.4). Notions of simplicity, clarity, efficiency and effectiveness would seem to be the drivers of change. That apart, you also seek views on whether the current law works satisfactorily so that you can consider

	whether to recommend change. My comment is that, in the final paper, you may need to consider setting down some measure of satisfaction or some objective against which to judge the adequacy of the system or some standard against which you can assess the proposals for change that you receive. Such measure, objective or standard would show why you accept some changes and reject others. I realise that, at the end of the day, the measure is a matter of political choice and that it has changed over time; but it should be possible to draw out such measure from the way in which the system has evolved (both legislatively and judicially) up to the present time. For example, changes to the procedural arrangements to be considered under Part 2 might be judged against some notion of balance or of fairness to the parties; for Part 3, which considers changes to the compensation arrangements, the very generalised concept of equivalence might provide a guide so that you are giving effect to what you understand to be the intention of the legislation. Secondly, I appreciate the difficulty in deciding what to include and what to exclude from your review. I think you are probably right to exclude consideration of utility way leaves, although you do mention them in passing. This is an area badly needing attention and it is an area where the question of 'justification' looms large; but it is probably best left to a later date. Incidentally, I accept that there are difficulties in seeking to attach to an enforced statutory regime the attributes of a consensual contract such as a lease and I note your firm rejection of the idea; but that is exactly what statutory rights akin to servitudes and wayleaves try to achieve and some of them are every bit as complex as some leases. They create a continuing relationship carrying rights and obligations.
2. Antony C O Jack	5. Justification. It seems to me that the fundamental issue of CP is that of the public interest over the individual interest of those affected. Therefore I am confused why your Discussion Paper at Paragraph 1.19 excludes justification for compulsory purchase for reason of focus on procedure. It seems to me that justification is step one of the procedure. Without satisfaction of the initial test of justification CP becomes a shopping trolley for those whom seek to abuse the process, and the 'Schedule of Lands to be Purchased' a shopping list in what appears to be akin to a "trolley-dash". A form of legalized plunder, under the excuse of compensation. In terms of your Discussion Paper's focus on procedure, I am also confused why your Paper at Paragraph 2.2, intends to deal with those aspects currently dealt with in primary legislation, when detailed procedure is normally contained in subordinate legislation. Though it is noted that Paragraph 2.3 admits that subordinate legislation governs implementation. It seems to me that Paragraph 2.3 plays with words, surely subordinate legislation lays out detailed procedure that governs the implementation of those procedures by the promoter. Your Paper expressed consciousness that the Scottish Minister make

	subordinate legislation. That would usually be on the advice of their officials, albeit there is a little used procedure by which elected members can seek, within a limited time window, to annul subordinate legislation, as I understand it. At Paragraph 2.10 your Discussion Paper states your view that wayleaves and airspace lie well outside the scope of the project. I do not understand this, in terms of the CPO/s I am subject to that involves airspace acquisition. **Example 1.** 2014 CPO [1] & [2] included the purchase of airspace surrounding the building boundary, and in places outside the site boundary. The Statement of Reasons [SoR] explains the need of the airspace for oversailing. However the crane plan, implied by the Order Map and the SoR, was as I could understand it, totally unworkable. The Schedule's entry for Order Land number 43 also appears defective. Further in the CPO process authorised in August 2009, that was stopped during the recession: the 2009 authority's interest fell within that boundary. There was no reason given or discernible for the change between 2009 and 2014. What however was much more troubling was that our tenement property was left off the Order Map, and the airspace being sought for compulsorily purchase was set at a level that included airspace within 8 of the tenement's flats; the common stair; and roof space. The only deduction I could come up with is that: the airspace: a) was not required to deliver the scheme, and b) was therefore being sought for some other reason. The reasons that I have so far deduced being : i) to threaten us as a feign to putt us off another issue; or ii) to permanently dominate the surrounding airspace to prevent completion or a neighbor building an adjacent building removing their light or view; or iii) so that if the tenement was destroyed as a result of the developer's plan to excavate some 24 metres vertically downwards some 4 or 5 metres from our 18th century foundations the Developer would have some right over the future of the destroyed tenement's plot. The consequences of such an Order being confirmed unaltered by the Minister would I suspect have blighted our property for years whilst the "conveyancing implications" were sorted out; and permanently blighted in terms of both repairs and ownership issues. Allegedly as a result of objections, the Acquiring Authority has put Order Land number 43 into some sort of limbo. These issues lead to some comments… 10. 'Promoter Blackmail'. The Discussion Paper repeatedly mentions, as does Government Guidance, the issue of making an Order to persuade an owner to come to the table [i.e. paragraph 2.63 "shadow of compulsion"]. I also note in relation to airspace what is written at Paragraph 2.10: "the conveyancing implications of the compulsory purchase of airspace". In these terms the Scottish Government whilst giving technical advice in a letter dated 6 August 2014 to the Acquiring Authority stated:

	plot 28A or Plot 28B shown on the maps. This plot (and others) seeks to acquire airspace. It is not 1--% certain whether airspace can be separately owned (see Stair vol 1 from page 174 on the law of separate tenements written by Kenneth Reid). People do take different views on this and There is the potential that such views may be voiced in objection to any Order promoted. Ultimately is a matter for the Council to be satisfied that they are content with the approach they are taking but we wish to be assured that the issue has been considered in advance of the Order being made. Scottish Government emailed letter dated 6 August 2014 [stair's reference confusing – taken from revision?] The Acquiring Authority's undated response [of 8 September 2014] to the Scottish Government in regard to the Airspace of the Order being exampled included: 2. AIRSPACE 2.1 The Scottish Government made reference to Kenneth Reid's Text on the law of separate tenements and sought assurance that consideration has been given to whether airspace can be separately owned. 2.2 The section of Kenneth Reid's The Law of Separate Tenements which is relevant to the issue of whether airspace can be owned separately form the solum of the ground beneath the airspace is the section of the Physical Limits of the Estate Owned – in particular para 198. Professor Reid does not make a suggestion that airspace cannot be owned separately from the solum of the ground beneath it. What Professor Reid does is explain the *coelo usque ad centrum* Rule (landownership extends from the centre of the earth to the heavens), but is not saying that airspace can only be owned along with the ground beneath it. 2.3 Professor Reid does say specifically that 'Ownership *a coelo usque ad centrum* is subject to the qualification that minerals, tenement flats and certain other types of property may have been broken off into separate ownership'. It is universally accepted, for example, that ownership of a tenement flat involves ownership of the airspace which it occupies quite separately from the ground beneath and that, if the tenement burns down, the flat owner still owns the airspace regardless of whether or not they have any rights in the ground. 2.4 There is plenty of evidence of leases and other rights of Airspace being registered in the Land Register. The following link to the Keeper's RoT manual where the final section of para 8.1.4 makes it clear that the Keeper does accept applications for registration of airspace alone (see sub-para (a)): http://www.ros.gov.uk/public/about_us/foi/plans22.htm. The above documents, released under a Freedom of Information request, indicate some uncertainty in the issue of airspace, as does the phrase at paragraph 2.10 of your Discussion Paper quoted above.

	Given this apparent uncertainty, in this case about airspace, I am concerned with the issue of a CP promoter making a CPO seeking the purchase land in a manner that appears to be both uncertain and fundamentally unjust – ***for the purposes of a threat***. Such behavior would seem to be contrary to the public interest, and a display of bad faith. **11.** In these terms I am concerned with the issue of prior engagement about a CPO, and issue your Paper is completely silent upon. In the exampled Order : that a CPO was to be made in clear public knowledge in terms of the Acquiring Authority's publication of their agendas, reports and minutes. However it had not been picked up/published by the press [that I am aware of], or by anyone in our tenement [*except in 2007/8 when we were assured that we would not be affected by such an Order*]. Furthermore Scottish Government Circular 6/2011 guidance at paragraphs 4 and 5, clearly advises early engagement. Indeed advice was given in previous Scottish Development Department Circular 42/1976 [18 June] at Paragraph 3, though the advice appears to be worryingly inconsistent – akin to 'shock engagement': 3. In some cases, for example large urban sites in multiple ownership, it might be appropriate to seek compulsory powers before attempting to purchase by agreement. Those affected, in particular residential occupiers and small business users, should however be given the fullest and earliest possible explanation of the authority's proposals. Though an agent has apologized for no prior engagement, that does not forgive it. In these terms I find some dissonance in the timings of the procedure, and in your Discussion Paper. **31.** Finally, your Paper at Chapter 2 explains special procedures in relation some lands, such as Ancient Monuments. Whereas I understand that consideration of the CP of an 'A' listed building [or part of its curtilage/environment] is part public interest, and part planning. My concerns in this letter relates [sic] to a fully used 'A' listed building, and in these terms I am wondering whether, it [sic] terms of new CP legislation, whether listed buildings [that are not in need of repair] can be given some additional protection in terms of falling victim to Developer pressed schemes. These buildings are part of our heritage, and in particular for Edinburgh, as a World Heritage Site, there is a public concern as to what is happening to some of these listed buildings.
3. Stan Edwards	I believe that Scotland's CPO problems are more basic and fundamental. It was noted that the discussion paper does not cover justification for CPOs (beginning of Chapter 3 noted). Being a Welshman I feel comfortable in making a nationalist orientated comment. The problem lies in Scotland not tracking English CPO legislation perhaps gearing up for a time when Scotland would go it

	alone. Wales tracked the law but the guidance is still in draft after 10 years – it is like pulling teeth. However I am comforted by the fact that Wales will be closely aligned with Circular 06/04 which itself is under review. I noted that, when in discussion with the Scottish civil service, on the preparation of the Scottish CPO Guidance there appeared much background political /civil service pressure to make CPOs easier by diluting the guidance notwithstanding that it may put it at odds with sound CPO principles regarding individuals proprietary rights. To the external observer it seems that Scotland (pre devolution vote) was bent on being distinctive not wishing to take on board anything coming out of England, never minding that it may have merit. Scotland's politics still seems to have a progressive flavour but is now (for a while) firmly under the overarching cover of UK law. I have drawn an example to make the point. The T&CP (Scotland) Act 1997 could have prudently followed the empowerment changes to the T&CPA 1990 in 2004 in England and Wales which was specifically to make a whole swathe of general CPO power easier to apply. Much case law has evolved because of it. In your discussion document you mention the Argos case, the underlying CPO of which, New Street Station, was successful under the post 2004 Act. The T&CP (Scotland) Act 1997 is still like the unamended English version with the words 'suitable' and 'required' instead of the more flexible 'think will facilitate' let alone there not being the safe-guarding 'well being' factors. In England to make CPOs available for the community all that was needed was an addition to the Appendices (KA) of Circular 06/04 and use the T&CPA 1990 as amended. In Scotland because there is not that underlying flexibility in CPO power it set its course on the Community Empowerment (Scotland) Bill. Empowering the community is dangerous when it should be the local authorities alone who promote CPOs. My concern is that although there is much in the discussion document that aligns with England and Wales, Scottish CPO empowerment will take Scottish CPOs on a course of divergence only to find that they are ultimately challenged somewhere in the Supreme Court. Whereas I can generally agree with much in the discussion document, the problem lies in what was omitted – a robust review of empowerment and justification.
5. National Trust for Scotland	We would stress that the powers – bestowed in section 22 of the National Trust for Scotland Order Confirmation Act 1935 – to declare land held by us for the benefit of the nation to be inalienable form an important part of our ability to fulfil our charitable purpose. The special conditions of which you write (from the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947) are that:

	"A compulsory purchase order shall, in so far as it authorises the compulsory purchase of land which is the property of a local authority, or has been acquired by statutory undertakers, not being a local authority, for the purposes of their undertaking or of land belonging to the National Trust for Scotland which is held by the Trust inalienably, be subject to special parliamentary procedure in any case where an objection has been duly made by the local authority or the statutory undertakers or the National Trust for Scotland, as the case may be, and has not been withdrawn." For information, the Crofters (Scotland) Act 1993 also makes reference to our special conditions, albeit in relation to right to buy. We strongly support the continuation of our special parliamentary process and ability to grant inalienability in legal statute. We note your comments: "It is not possible to say the same about the continued application of special parliamentary procedures to the acquisition of land held inalienably by the National Trust for Scotland (although had that been perceived to be a problem, there was an opportunity to change the position when the National Trust for Scotland (Governance) Act 2013 was before the Scottish Parliament). The current situation represents a considered adjustment of the usual position to reflect the particular importance of National Trust land to the public at large." The NTS Governance Act 2013 was a private Act of Parliament drafted to focus solely on changes to our internal governance structure. As such it was not appropriate to use limited available parliamentary time for debate of wider issues, for example, the Trust's inalienable land. We strongly welcome your recognition of the importance of our ownership of land, and in particular inalienable land, as a means of protecting it for the nation, and that you do not intend to consider this position further in your review.
7. West Lothian Council	**General Comments** One new comprehensive statute in plain English would reduce the time spent by professionals in dealing with compulsory purchase and would also assist members of the public in understanding the process.
9. David Strang Steel	We write as landowners affected by the Fastlink section of the Aberdeen Western Peripheral Road ("AWPR"). **Background to our situation** Proposals for the AWPR have been under discussion for over 20 years. During winter 2001/2002 an Environmental Consultant was commissioned to carry out a Stage 1 Environmental Assessment, in accordance with the Design Manual for Roads and Bridges (DMRB),

	over a defined study area. The original preferred route, developed from this work over a period of 4 years, and announced in Spring 2005 would have affected the Camphill campus, a Rudolf Steiner school for children and young people with special needs. In December 2005, in response to lobbying against that route, the Scottish Ministers announced a different route involving a direct link, now known as the Fastlink, joining the A 90 at the Netherley junction to the NW Stonehaven. The Fastlink option route selection was developed between December 2005 and May 2006 when the preferred route was announced. All the 9 options were based on a link with the A 90 at the Netherley junction to the NW of Stonehaven. My brother and I owned land (known as Field 52) at that junction on which we had plans to develop a supermarket. The family had discussions with Transport Scotland at the time and, at a meeting on 28 August 2006, we were informed by them that the Stonehaven junction did not involve our property Shortly thereafter, at the 4" September 2006 we learnt of an alternative design of this junction which did affect our development plans. This was the design eventually forming the draft CPO. Transport Scotland refused to consider any alternative to that design, stating that it would delay implementation. As a consequence of such failings we had to spend in the order of £500,000 to fully develop our alternative junction design to present to the Public Inquiry which was held between 9th September and 10th December 2008. Closing submissions were lodged by 16th February 2009 and a report was submitted to Scottish Ministers on 30th June 2009. The Reporters were clearly concerned that any consideration of our option would affect the timings for delivery of the scheme. The Scottish Ministers in confirming the order concluded that Transport Scotland's option was preferable to the alternative designed and presented by ourselves. A CPO was made in 2010 with land vesting in the Ministers on 11th January 2013 following various appeals culminating in a Supreme Court hearing in July 2012. Notwithstanding the planning history of our site the Scottish Ministers offered compensation based on agricultural value at about £4,700 / acre and the matter was referred to the Lands Tribunal for Scotland (LTS). The LTS awarded compensation of £1.7M on the basis of the current legislation notwithstanding the fact that had the scheme not affected our property we would have been able to obtain planning consent and sell the land to Sainsbury for £10.25M. The stress caused by the route selection led to my father suffering a stroke following the public inquiry from which he never recovered. He

	died in 2011. You will understand therefore why we welcome reform to the current CPO legislation and why we consider the present regime is unfair on affected landowners. We comment on aspects of the questions raised in the consultation process dealing with aspects of the CPO process relevant to our situation based on our experience:- **Chapter 5 - Procedure for obtaining a CPO** The procedure for confirmation of CPOs by the Scottish Ministers has given rise to questions in our case. The Public Inquiry for the AWPR was presented with two alternative routes. The Reporter clearly recommended that the Scottish Ministers should consider carefully the compensation payable in respect of the AWPR preferred route, as against our Alternative. From evidence led at the LTS hearing, it appears that this recommendation was not followed when the Scottish Ministers confirmed the CPO. **Chapter 6 Challenging a (confirmed) CPO** Public schemes are frequently delivered by private companies (in our case Jacobs advised Transport Scotland on route selection, design and implementation). Private companies are not directly accountable to the community and are profit orientated. We therefore consider it important that there should be a clear statutory duty placed on acquiring authorities to carry out any work necessary leading to the preparation of a CPO such as in route selection or Environmental Impact Statements. There should be a clear duty of care towards affected parties. In their CPO application for the AWPR Transport Scotland relies upon work undertaken by Jacobs and the Scottish Agricultural Colleges (SAC). Much of that work appeared to have been insufficiently researched without due care and attention for affected parties. This gave rise to affected parties on the AWPR having to promote alternative junctions/routes which should have been properly considered as part of the route selection process. Examples of failing in the EIA include:- 1. It was stated by the managing agents at a meeting at Carlton House, Stonehaven on the 19th February 2008 that the design brief in respect of the AWPR only included one end point to the Fastlink – the existing link with the A90 at Mains of Ury. We have been informed that only two alternatives for this were considered. From our perception the current proposal for the Fastlink evolved following a meeting between the managing

agents and John Harrison, the Scottish Office roads engineer, on the 29th August 2006 and was decided by the 1st September when shown to Mr Robert Strang Steel. The EIA did not apparently consider any further wider options for the Fastlink route linking to the A90 and local roads into Stonehaven.

2. The original plans for the Stonehaven junction did not involve Field 52 as was made clear to us at a meeting on 28th August 2006.

   The EIA states that the land use on the neighbouring New Mains of Ury Farm was 3.2. At 37.3.6 the EIA states that there are *"" .isolated pockets of prime quality land of land capability Class* 3.1" but failed to mention any in the vicinity of the Stonehaven Junction. Indeed at 37.3.7 it referred to the Southern end of the Fastlink as being of land capability 3.2. The 1:50,000 Soil Survey of Scotland sheet 45 Stonehaven prepared by the Macaulay Land Use Research Institute (MLURI) clearly shows areas of 3.1 around this junction.

   The evidence of Dr Henderson for Transport Scotland at the PI was that sampling *"… in most cases … "* took place over 250 - 500 on both sides of the alignment. A linear sampling method was adopted at 100m intervals along the line of the route. It would appear that no land sampling took place to the east of the AgO (i.e. on our field). A field by field surveyor inspection of MLURI maps would have identified that the majority of the land in Field 52, and on land immediately to the west of the junction is classified 3.1 not 3.2.

   It would seem therefore that land use was only considered after route selection. This is a material issue given the reliance placed upon the land use in the ES to assist in route selection; DMRB clearly makes reference to the 1:50,000 MLURI maps as a tool in route selection.

   On this basis, Graham Kerf, at Appendix A37.2 of his Precognition to the Public Inquiry stated that the Land Use Classification was Macaulay LCA 3.2. This was shown to be incorrect by a detailed survey carried out by MLURI upon our instigation.

3. Contrary to the EIA provided by Transport Scotland Field 52 was in agricultural use.

   There is also reference to "… *winter and spring cereals, oil seed rape, potatoes, turnips and daffodils"* being grown on land reference 627 (Ury Estate -subsequently FM Developments). The interests of FM Developments to the east of the Netherley road is only in respect of the Megray Wood

	and the adjoining ground to the south of the Authorities road (cf Plots 3602 and 3608). This area is mainly gorse and some scrub birch and includes wetland from the Limpet Burn. It is classified land use 5.1 not 3.2 as set out in the EIA Appendix A37.2. Even a cursory inspection would have shown that this land was clearly not cultivated as is suggested in the EIA. 4. It was stated by SAC that remedy/offset measures for mitigation included compensation and it was upon this basis that Mr Kerr of SAC concluded that the Fastlink proposals of the AWPR would not affect the viability of any farm. In the AWPR EIA and in Mr Kerr's evidence in his supplementary Precognition of the 6 November at 8.0, Mr Kerr referred to his findings in the ES at 37.6 and to Appendix A37.2, but went on to say at 8.2 *" ... no commercial agricultural units will have their viability affected .."*. Mr Kerr suggested at the PI that the impact of the Fastlink on Field 52 was LOW. The purpose of any EIA is to inform on a particular proposal which may lead to a CPO and to incorporate into the scheme measures to avoid or mitigate adverse impacts. The elimination of adverse environmental impacts, or their reduction to an acceptable level is at the heart of the EIA process. One of the main purposes of an EIA is to ensure that potentially significant environmental effects of proposed projects are avoided or reduced as far as possible or practicable. The EIA however did not adopt this approach. Mr Kerr as part of the EIA assumed that remedy/offset measures for mitigation included compensation. Compensation is to address any losses arising out of any implemented scheme so as to place the claimant in the same position (insofar as financially possible) as he would have been before the scheme. On this basis Mr Kerr's adopted methodology was flawed in that under his approach differing schemes resulting in widely differing damage to agricultural interests would be given the same residual impact because he specifically incorporated financial compensation as mitigation. Proper consideration of alternatives was therefore not possible. It is not clear what (if any) prevention and reduction measures were considered as part of the EIA. For example I am aware that the siting of SUDS ponds on the neighbouring New Mains of Ury utilises the best land on that holding. This had been raised in meetings with the AWPR team. The evidence of John Riddell for the farmers at the PI identified alternative locations for these ponds which do not appear to have been considered

	in the final scheme. Mr Kerr's evidence was that the Fastlink would make no agricultural business unviable. Other witnesses for the Scottish Ministers relied upon this conclusion, which was clearly flawed, as did the Reporter (see paragraph 10.242). It is significant in respect of that statement to the PI that Transport Scotland subsequently accepted our notice of severance and that our farming business is now terminated. Transport Scotland have also accepted that other businesses are also unviable. We are aware of three farming businesses (along with our own) which have had to close as a direct consequence of the CPO. 5. It was alleged in the EIA that there was no prospect for development in the vicinity of the Stonehaven junction. If Jacobs did not properly consider soil sampling east of the A90 was their reference to lack of planning potential a result of not having considered Field 52 at all in the ES? After all there had been planning applications in respect of Field 52. The need for a large supermarket to satisfy an acknowledged retail deficiency had been identified in the 1999 Aberdeenshire Towns Shopping Study and was confirmed by the 2004 Aberdeen and Aberdeenshire Shopping Study and the 2006 Imagine Stonehaven Capacity Study. Field 52 had been identified as a possible location for development as early as 1995. By the time of the PI there was a live planning application for the erection of a class 1 retail store, petrol filling station, parking, servicing, access and internal roads. There were concluded missives for the sale of this site to a major retailer. In addition, FM Development entered into a Section 75 agreement with Aberdeenshire Council which effectively gave Aberdeenshire Council land adjoining Field 52 in lieu of their affordable housing liability which is a further indicator of the development potential of this land. This illustrates the poor quality and lack of diligence in work carried out as part of the AWPR EIA that led to the CPO. The process for selecting the Fastlink took 5 months and could not have been informed by any EIA which only appears to have been completed after the route was selected. It is no surprise therefore that much of the controversy over the AWPR centred on the Fastlink. Had the EIA been properly carried out the Fastlink may have been along the alternative route promoted by the Claimant. Stonehaven would have had its long awaited supermarket and the issue before the PI and the LTS would not have arisen resulting in considerable savings for the acquiring authority. We are very concerned that other CPO projects may give rise to similar issues (we note proposals for the improved A96 between Aberdeen and Inverness are being

	managed by the same agent. In effect those preparing EIA's etc. are experts whose professional judgement has to be relied upon by any Reporter. Those promoting schemes must have properly informed, weighted and considered alternatives. In any new legislation there should therefore be a clear duty on any acquiring authority to carry out such an assessment leading to the implementation of a CPO with due care and diligence and there should be clear sanctions for noncompliance. If agents for an acquiring authority adopt a partisan approach in respect of such work leading to any CPO process or refuse to consider alternatives put forward, the likelihood of challenge and potential injustice increases. It is entirely reasonable therefore to ensure that in any new CPO legislation that there should be such obligations. It is also an important facet where private property rights are being overridden. **Chapter 7 - Implementation of a CPO** In our case the LTS found that *"there* was *no reason to doubt that the Council would have granted planning* [for a retail store and petrol filling station] … .in *the no scheme world".* They went on to state *"on the balance of probability* [planning consent] *would have been granted on or before 2009".* Had this been the case we could have purified the missives at the time for a sale of the site to Sainsbury's for £10.25M. By the time of the GVD the potential sale price had fallen to £8M. In the event we were awarded only £1 7M based on hope value. It is difficult to escape the injustice of this situation. **Chapter 14 Valuation of land to be acquired - CAADs** In January 2009 we applied for a CAAD in terms of the provisions of sec 25 of the 1973 Act, as amended. This was in respect of a supermarket and petrol station. On 14 July 2009, Aberdeenshire Council granted a positive CAAD and added an observation on the possibility of use of the land for residential development. The Scottish Ministers appealed against that decision and on the 24 January 2011, the Scottish Ministers cancelled the initial CAAD in terms of sec 26 of the 1973 Act. In the LTS case it was not disputed that the critical issue was the question of whether or not there would have been planning permission for development of our land as a supermarket if there had been no scheme requiring the field. It was established that a supermarket of suitable size could have been built on the site and that there was "a *sustained need for* a *large scale supermarket in Stonehaven".* The need for a large supermarket to satisfy an acknowledged retail deficiency had been identified in the 1999 Aberdeenshire Towns Shopping Study and was confirmed by the 2004 Aberdeen and Aberdeenshire Shopping Study and the 2006 Imagine Stonehaven Capacity Study. Field 52 had been identified as a possible location for development as early as 1995.

	An application for planning permission was submitted to Aberdeenshire Council as planning authority on 18th October 2007. That application was never determined solely because of the AWPR proposal. In the no-scheme world, the Council would have had the opportunity to determine the application for planning permission for retail development in or before the end of 2009 and the LTS considered that it would probably have determined the matter by that time. The only technical objection to the planning application was by the Scottish Ministers because of the AWPR. In the no-scheme world the LTS concluded that it would have been very unlikely that the Scottish Ministers would have been objectors. Missives had been agreed with Sainsbury in 2009 for the sale of the land conditional on planning permission being granted for retail development at an agreed sum of £10.25 million. Essentially the question for the LTS was whether the relevant planning authority might have been expected to allow that consideration to dominate in the apparent absence of any better site. CAAD procedures can be referred to as evidence of what would have happened in an assumed no scheme world. The relevant planning authority received a report from the local officials supporting the grant of a CAAD. In that report all aspects of the proposed development were considered in the same way as would have been done in a report on an actual application for planning permission. The officials' advice was that there was no available site closer to the town centre which did not have a physical impediment to its development; that despite the difficulties with location it was likely that public transport would be able to access the Field 52 site: and that although some junction improvements might be needed, there was no suggestion that practical or engineering solutions could not be found to the identified traffic concerns. The planners view was that existing outlets would not be so affected that overall vitality and viability of the town centre would be at risk. The report also dealt with alternative developments and expressed the view that there was no reason to consider that the subjects were wholly unsuitable for residential development. Aberdeenshire Council granted the CAAD for retail development. The LTS saw no reason to doubt that the Council would have reached the same conclusion on the actual application for planning permission in a no scheme world. The acquiring authority challenged the grant of the CAAD and it was cancelled. The LTS had to consider the element of 'hope value' as a consequence. The changes introduced by section 232 of the 2011 Act in England do not apply here. The assessment of compensation differs markedly north and south of the Border. **Chapter 15 Consequential loss -retained land** The EIA acknowledged that the land take in respect of Field 52 would

leave other land in our ownership landlocked. Upon service of the GVD we served notice of severance.

An issue in respect of the subsequent valuation dispute was that compensation in respect of agricultural severance land is to be assessed on the basis that there is no permission for development in terms of section 50(5) of the 1973 Act. This provides that the compensation payable in respect of severance land following the acceptance by an acquiring authority of a counter-notice under sec 49, is to be assessed on the assumptions mentioned in section 5(2), (3) and (4) of the 1973 Act. Section 5(4) is in the following terms:

> *"It shall be assumed that planning permission would not be granted in respect* of *the relevant land or any part thereof for any development other than such development* as *is mentioned in subsection* (2) *above;* ..."

Provision is made in terms of section 50(3) for recall of the notice:

> *"at any time before the compensation payable .. . has been determined by the Lands Tribunal or at any time before the end of six weeks beginning with the date on which compensation is* so *determined".*

As a consequence of this drafting we would not have obtained full value had we proceeded with the severance notice. The notice was therefore withdrawn.

As a result of us not having disposed of all of our holding in this way we were not entitled to various tax reliefs which would otherwise have been available.

Chapter 17 Non financial loss

As a family we suffered a considerable degree of strain as a consequence of the CPO. My father's stroke was, we believe, caused by the stress induced by the CPO and the Public Inquiry. The CPO process does not recognise the stress caused to affected parties by the forcible acquisition of property. In our experience this is compounded by the attitude of acquiring authorities and their agents in the process who resist sensible alternatives and mitigation measures and fight claims for compensation. That strain remains in that most major schemes are design & build, meaning that having promoted and obtained the CPO, an acquiring authority hands it over to a developer to build. That developer will have tendered the lowest price for the scheme and will be attempting to make savings throughout. It is our experience that the acquiring authority attempt to abrogate their responsibility to the contractor which leads to more work and hassle.

Chapter 18 Process for determining compensation

A 90 day notice was served on the Acquiring Authority on the 31st

	January 2013. On the 8th April 2013 Transport Scotland gave notification of the DV's assessment of our claim and requested bank details etc. On the 27th April they acknowledged they had all the requisite details and we were paid £45,900 on the 1st May 2013 (being 90% of the DV's assessment of the claim of £51,000). There appears no good reason why any acquiring authority should not put procedures in place to ensure payment is made timeously -we know that this has been an issue elsewhere on the AWPR. The DV assessed the claim purely on agricultural value. He was made fully aware of our position in respect of hope value having been provided with information from our planning advisors by email on the 16th March 2013. At a subsequent meeting on the 3rd May 2013 to discuss the claim the DV expressed the view that there was hope value and that his understanding of the planning situation from Transport Scotland's planning advisors, Jacobs, that led to his valuation of £51 ,000 was incomplete and incorrect. He indicated that he would be independently investigating the matter with the planning authorities. He failed to do so. The DV's assessment of value was £51 ,000. He had been given market evidence of higher agricultural land values at the meeting of the 3rd May 2013 but not revised his opinion as to value despite promising to do so until a meeting with our agents on the 9th June 2014 when he agreed £70,000 based on £7,500/acre for the arable land and £2,500/acre for the woodland (to include timber). We understand that there may have been issues with the DV obtaining instructions from Transport Scotland but, whatever the reason, there appears to be no incentive on an acquiring authority to deal timeously with claims. At the LTS the DV gave evidence that there was no hope value whatsoever despite being aware that a considerable non-refundable deposit had been paid by Sainsbury's as part of the missives for sale. This brings into question the impartiality of the VOA. Even after the award delays incurred because Transport Scotland failed to deal timeously with the claim. There is simply no incentive for them to pay timeously with interest at less than base rate. In the LTS case we claimed the expenses incurred in relation to the CAAD application and the CAAD Appeal Inquiry of £130,233. This expense had been incurred as part of the consequences of properly establishing the compensation due as a result of the CPO. The Scottish Ministers resisted this claim on the grounds that it had been initiated before any compensation had been applied for. The LTS determined that they could make no award for the appeal but found in our favour in respect of the initial CAAD application. The LTS awarded all the costs of the LTS application to us, around £200,000. Transport Scotland offered compensation for our professional fees on

	the basis of Rydes Scale plus 25%. Rydes Scale was prepared by the Valuation Office Agency (VOA). In an announcement on 18 July 2002 the Office of the Deputy Prime Minister (ODPM -now DCLG) stated: ' ... . *there* is *widespread agreement that the archaic Rydes Scale for determining Surveyors' fees should be abandoned and that Surveyors should be reimbursed in full in line with all other professional advisers.* We *do not therefore intend to commission any further reviews* of *the non-statutory Rydes Scale, and expect that fees will normally be assessed henceforth on* a *reasonable basis agreed between the parties*." The Scottish Government appeared to ignore calls for a similar statement in respect of CPO fees in Scotland and continued to base all payments on Rydes Scale notwithstanding the anti-competitive nature of that scale. In 2010 organisations such as the Scottish Arbitrators and Valuers Association agreed scales with other acquiring authorities on the basis of the 1996 Scale (the last one prepared by the VOA) uplifted by 40% (and more recently to Rydes plus 50%) but Transport Scotland insisted on retaining the previous rate of Rydes plus 25% declining to change their basis of assessment. We understand that the VOA has advised Transport Scotland that Rydes plus 25% is not an appropriate basis for the reimbursement of professional fees. Notwithstanding this the Scottish Ministers are only offering landowners reimbursement of professional fees based on Rydes Scale with a 25% uplift notwithstanding any agreement between affected landowners and their agents. DV's, notwithstanding their impartial role, are following this line. At the LTS hearing we did not pursue this issue because of the time of so doing and as a consequence were only reimbursed professional fees on this basis. This illustrates the attitude of acquiring authorities in the CPO process which has brought the current system into disrepute. In drafting recommendations and legislation for a revised CPO regime the Law Commission should clearly state the obligation for the reimbursement of professional costs. **Chapter 19 Crichel Down Rules** The Scottish Ministers in our valuation dispute sought to ransom any potential supermarket on Field 52 by virtue of land which the Secretary of State for Scotland acquired from our predecessors in title for the purposes of the A92 Stonehaven Bypass. It is therefore now clear that landowners need to consider carefully the extent of any land take in a CPO in that any excess may be used to create a ransom at some point in the future. I understand that this is already a point of contention in other AWPR land acquisitions. To a certain extent such an issue could be addressed in modifications

	to the Crichel Down Rules. As both a landowner, farmer and chartered surveyor, having gone through this process, I believe I am uniquely placed to comment on the current CPO provision. There should be a one system arrangement for the process incorporating the fundamental democratic rights to object; the process must recognise private property and human rights. The use of CPOs should be strictly controlled and any CPO process should be properly carried out with due regard to those affected by the scheme. An acquiring authority should not be able to abrogate its responsibility to private firms and there must be sanctions for non-compliance. There should be a flexible and sympathetic compensation regime, recognising the problems arising between claimants and acquiring authorities inherent in the existing process. A premium over and above market value for land acquired would go a long way in breaking down the current antagonistic attitude towards schemes for those affected and would make the system smoother and easier.
13. Strutt & Parker LLP	**General comments** **a) The process** Under the present CPO regime a landowner 'sells' his property to a third party not knowing the price he will be paid for the property or even when he may receive such monies. He will receive no interest on any sums due from the time he is dispossessed until the time his claim may eventually be resolved. He is not entitled to any payment for the stress or inconvenience this may cause him or his family. We are not aware of any other situation where a landowner would willingly enter into such an agreement. **b) Design & Build** It is our experience that most major projects are not carried out by an acquiring authority but by private companies acting on their behalf. The traditional approach for construction projects consists of the appointment of a designer on one side, and the appointment of a contractor on the other side; the acquiring authority remaining in full control of the project and the land. The design & build procurement route changes this:- • Acquiring authority engages agents to design the scheme in general terms. For example, the design and promotion of the AWPR was carried out by Jacobs (who are also instructed in respect of the A96 improvements). It is they who carried out

	the actual design of the scheme and the requisite EIA's in accordance with the Design Manual for Roads and Bridges (DMRB) on behalf of Transport Scotland. It is they who are providing advice to the District Valuer in respect of disputes. • Having successfully promoted a scheme and obtained a CPO, it is now usual to put the work out to tender and for the scheme to be delivered on a design & build basis. • Prospective contractors tender a price to complete the design and construct the scheme. The tendering is usually competitive and the best "overall submission" should win (assessed on price, design, programme etc.) • The winning contractor carries out detailed design and construction through employed design consultants and sub-contractors. This may result in variations from previously discussed plans. • In terms of the contract control of acquired land often passes to the contractor for the build and thereafter the maintenance period (up 30 years in some cases). • The successful contractor is then responsible for the delivery of the scheme and its maintenance. The thinking is that in a design and build process the successful tender will give savings by tailoring their detailed design of the scheme using their particular experience and skill set. It may answer an acquiring authority's wish for a single point of responsibility in an attempt to reduce risks and overall costs but, from the point of view of affected parties, it enables the acquiring authority to attempt to abrogate its responsibility of the scheme to the contractor. The main issues of this process in relation to the current CPO regime are:- • The acquiring authority relinquishes control over design and implementation. This frequently gives rise to quality issues. • Adversarial attitudes between the contractor and the acquiring authority remain; these are perhaps worse than traditional contractor routes because of the large tender sums involved and the drive of the successful tenderer to save on costs. Affected landowners may be 'squeezed' in this process. • The acquiring authority is, in our experience, reluctant to agree any variation to the scheme after the contract is let because of the nature of the contract with the contractor.

	• The acquiring authority attempts to abrogate any responsibility regarding issues during the build to the contractor. The contractor as a private company tends to ignore the landowners affected by the scheme. This leaves the affected landowners in such schemes in an unenviable position adding to their costs in dealing with issues arising during the process. Current CPO legislation is more appropriate to the age where the acquiring authority itself designed, promoted then built the scheme. Any revised legislation must address the current practice and ensure that any agents for the acquiring authority have a clear responsibility in the CPO process. **c) Time taken in CPO process** We appreciate the aim of the proposals is to make the compulsory process clearer, fairer and faster. In so doing the process must also balance private property rights and public interest. We consider that timeliness is frequently a problem in compulsory purchase. Whilst this may be considered a concern to those promoting schemes it is also an issue for affected landowners. This may be due, for example, to undue delays in the planning or appeals process leading up to confirmation of a CPO, or conversely acquirers finding themselves short of time and so take undue haste in taking entry. During the period between announcement of a scheme and implementation, property in the vicinity of the proposed works (and any alternatives) is effectively blighted. We are also experiencing considerable delays in the assessment and payment of compensation. There is no effective means for a claimant to speed this up, save taking matters to the LTS (which is already occurring in respect of a number of AWPR claims). **d) Claimant's costs incurred before confirmation of a CPO** The long procurement process and tendency to consult on options, however desirable, leads to uncertainty for those property owners along the corridor of any scheme. Such 'blight' on alternative corridors exists until the actual route is finalised and remains in respect of the scheme until the vesting date. In the case of the AWPR the uncertainty remained from the date of the announcement of the alternative route in 2006 until the vesting date in 2013. The 'roadshow' for improvements to the A96 has already 'blighted' properties along the route options. This will continue until the scheme

	is delivered. Any revised legislation should contain clear duties on an acquiring authority towards affected parties during the design, promotion and implementation of any CPO scheme. **e) Taxation** There are a number of aspects of the interaction of the compulsory purchase regime with the taxation of property which can cause hardship to claimants and which could be ameliorated by Government intervention. In particular, the conversion of a property asset which might qualify for valuable reliefs from capital taxes into a sum of cash which would be fully taxable can be especially problematic in the rural property sector. **f) Other CPO issues** We note that the Law Commission do not propose to deal with:- i. Blight Blight was a key issue identified in the 2001 Scottish Executive Central Research Unit Paper *Review of Compulsory Purchase and Law Compensation.* There is a general acceptance that the promotion of, or indeed the threat of compulsory purchase, tends to act as a blighting effect on the marketability of property and associated value. This blight in practice arises as soon as a CPO corridor is announced. The timescales involved in the CPO process are long and this tends to exacerbate the effect of blight. Our experience is that it can prove extremely difficult for property owners to dispose of their properties in the vicinity of any CPO scheme. There are a number of strict criteria that have to be met prior to any Blight Notice being valid in current legislation. The default position of acquiring authorities on receipt of a Blight Notice is to reject that Notice on the basis that at least one criteria has not been met – and thus the Notice fails. The effect of not being able to dispose of one's principal asset or, alternatively, being left in limbo for a considerable time prior to compulsory acquisition is manifestly unjust. We consider that the circumstances within which a Blight Notice can be served should be considerably widened. Blight notices are currently restricted to owner-occupiers and there is a Rateable Value limitation for non-residential properties. Blight does not discriminate between different property types and values. We consider that the requirement that reasonable efforts be adopted to dispose of the property on the open market prior to a Blight Notice being able to be served should also be removed. This is especially so

	nowadays with regard to residential properties in Scotland as a consequence of the introduction in 2009 of the Home Report. Whilst such a Report tends to focus on the state of repair/condition of the property relevant factors, such as the threat of compulsory purchase, will also be taken into account and will undoubtedly affect marketability and value. It is common practice for potential purchasers of the property to view the Home Report online prior to undertaking any physical viewing of the property and the mere mention of even the threat of compulsory purchase tends to have the effect that the market quickly loses interest in the property. It should also be recognised that there is a cost to be borne by the residential property owner in instructing a Home Report. ii. Injurious affection where no land is taken Government has, on the one hand, recognised that blight does not stop at the boundaries of a public work but, on the other, has limited the amount of compensation to be paid in such circumstances; that amount is determined relative to the seven physical factors as stated in the Act and thus loss of view, privacy, amenity etc. are not compensatable. We consider that reform is also required in respect of these provisions. We consider that the compensatable items should be on the basis of full loss. We also consider that in any CPO the acquiring authority should be under a duty to consider the effect of the scheme on such properties and therefore be under a statutory obligation to reduce the effects of its public work by providing sound insulation and other mitigating works as circumstances dictate. Although not perhaps “core” these issues all form part of the CPO regime and we consider this should also be addressed as part of this reform. **PART 3. COMPENSATION** In theory no landowner should be disadvantaged by a CPO. He should receive the open market value of the right acquired. The issue is that many CPO projects are notorious for taking a very long time from inception to vesting. During this time properties are affected by the Scheme, well before there is any right to compensation. This pre-Scheme blight can easily last for decades and does not affect homeowners but also businesses. A clear example of this is the HS2 rail link in England. We are already experiencing similar effects following announcements of various routes as alternatives for the A96 improvements. In such cases properties and land can be almost impossible to sell, let

	alone at their true value, and businesses cannot plan development or expansion. In such instances such as the disposal of land or buildings to meet inheritance tax or to fund relocation, owners have no choice but to sell and CPO leaves them in an invidious and highly unfair position. Given deficiencies in the compensation regime it is little wonder that affected parties resist CPO. In the great majority of schemes, land acquisition is a small element of the cost involved, while delays in acquiring land can be very costly to the project. Allowing an acquiring authority to take an overall view of the matter would offer it a useful degree of freedom in the interests of the public purse. Where an attractive offer is made to a landowner, the acquisition process is, in our view, likely to be quicker and less contentious than if compulsory powers were used. This is likely to have a beneficial impact on schemes, allowing them to proceed more quickly and offering consequential cost savings as a result. Spending a little more money at the start of the scheme might save significant sums overall, as the Chancellor of the Exchequer observed in January to the Royal Economics Society: "*We should change our outdated compulsory purchase regime. Both the LSE Growth Commission and Chambers of Commerce have had the bright idea that, in some cases, if you pay people a little more you'd get planning a little quicker and the whole process could cost you less*." Taking this argument forward, we consider that there is a case to be made for a statutory uplift to market value to be applied to cases of compulsory acquisition, returning the situation to that which existed before 1919, when it was standard practice to allow a ten per cent uplift in the value of the land taken, in recognition of the fact that the seller is unwilling. This model continues to be upheld in some other jurisdictions, including on the Isle of Man where the Acquisition of Land Act 1984 states that the value of land is: *"…the amount which the land if sold in the open market by a willing seller might be expected to realise, with an addition of 10 per cent on account of the acquisition being compulsory".* **Valuation of land to be acquired - CAADs** Compensation for the value of land taken is generally in accordance with the planning position that would have been relevant absent the scheme. There are practical difficulties where planning consent is speculative. Normally where a sale is contemplative in such instances a landowner will sell at or about current use market value with a clawback in the

	event of a more valuable planning consent being obtained (often within a specified time span). Alternatively the landowner may enter into an option agreement with a developer. These options are denied a landowner subject to CPO. If land is sold without a clawback, values are subjective and may only be at a modest uplift on OMV (cf *Strang Steel –v- Scottish Ministers* where the LTS awarded 20% of developed value. *Spirerose* awarded 40%). CAADs are an important tool in assessing value. **PART 4: RESOLUTION OF DISPUTES; THE CRICHEL DOWN RULES; MISCELLANEOUS MATTERS** As agents we have encountered considerable difficulty with the payment of fees. We agree terms with our clients based on time upon receiving instructions but frequently find that acquiring authorities dispute such a fee basis in assessing compensation potentially leaving an affected party out of pocket. We consider any revised legislation must set out the basis for reimbursement of any professional fees incurred by affected parties as a consequence of a CPO scheme. Claimants' *'reasonably incurred'* fees and costs of putting the claim in response to a CPO are recoverable, effectively under Rule 6 of section 5 of the 1961 Act (Cf *London County Council –v- Tobin* [1959] 1 WLR 354; *McGee and Thomson –v- South Lanarkshire Council* SLT 2004). Until 2002 the so-called Rydes Scale was applied in the overwhelming majority of cases throughout the UK. Rydes Scale was prepared by the Valuation Office Agency (VOA) and in an announcement on 18 July 2002 the Office of the Deputy Prime Minister (ODPM – now DCLG) stated:- '….*there is widespread agreement that the archaic Rydes Scale for determining Surveyors' fees should be abandoned and that Surveyors should be reimbursed in full in line with all other professional advisers. We do not therefore intend to commission any further reviews of the non-statutory Rydes Scale, and expect that fees will normally be assessed henceforth on a reasonable basis agreed between the parties'*. (http://www.voa.gov.uk/corporate/Publications/Manuals/LandCompensationManual/sect5/c-lc-man-s5-pt2.html) This followed LT decisions in *Matthews –v- the Environment Agency* ([2002] RVR 16) and *Christos –v- Secretary of State for the Environment, Transport and the Regions* ([2003] RVR 191). The Scottish Executive research paper '*Compulsory Purchase and*

	Land Compensation' in 2001 called for a review of Rydes Scale. The Scottish Government however ignored such calls for a similar statement to ODPM in respect of CPO fees in Scotland. Many acquiring authorities in Scotland sought to continue Rydes Scale for convenience agreeing uplifts on the last version (Rydes Scale 1996). In 2010 organisations such as the Scottish Arbitrators and Valuers Association agreed scales with other acquiring authorities on the basis of the 1996 Scale uplifted by 40% (and more recently to Rydes plus 50%) but Transport Scotland insisted on retaining the previous rate of Rydes plus 25% declining to change their basis of assessment on the basis that surveyors were being adequately compensated due to "*the increase in land values*". RICS Scottish guidance on surveyors' fees provides a useful summary of issues arising in respect of fees (Calculation of surveyors' fees relating to the exercise of statutory powers in connection with land and property). The current RICS Guidance Note on fees states:- *The fee should in all cases be proportionate to the size and complexity of the claim, and be commensurate with the time, effort and expertise required to deal with the case*. We understand that the VOA has advised Transport Scotland that Rydes plus 25% is not an appropriate basis for the reimbursement of professional fees. Notwithstanding this it is our experience from the AWPR that the Scottish Ministers are only offering landowners reimbursement of professional fees based on Rydes Scale with a 25% uplift notwithstanding any agreement between affected landowners and their agents. DV's, despite their supposed impartial role, appear to be following the Transport Scotland line. In raising this issue one DV has stated in respect of the AWPR:- *"In relation to Rydes Scale, the RICS guidance mentions that the fee should be commensurate to the complexity of the case. This case would appear to be a simple one and as such I would see the Rydes plus 25% to be appropriate. In addition, my client, Transport Scotland has not given authority to agree anything more than a 25% uplift.* *Finally, the hourly rate is something that will have implications for all schemes throughout Scotland. Rates around my proposal have been agreed with other agents and if that is not acceptable to you, what you propose is something that we will have to consider carefully before replying to you further albeit that the fee for each case will have to be viewed on a case by case basis."* This despite the RICS and the LT in England having discarded such a basis for fee assessment! In *Robert Poole –v- South West Water Ltd*

	([2011]; UKUT 84 (LC); LCA/579/2010) a claimant sought fees based on time whereas the compensating authority offered a fee in line with the old Rydes Scale (1996) plus 20%. The LT held that the surveyor was justified in seeking to agree a time-related fee of £120/hr for 2007/2008 rather than one calculated by reference to the officially abandoned Rydes Scale and to charge for the time spent doing so. We accept that *Joshua –v- London Borough of Southwark* ([2014] UKUT 0511 (LC)) highlighted the risks of not agreeing fee terms with an acquiring authority and the importance of ensuring that fees are reasonable but, in our experience, an acquiring authority has little interest in agreeing fees. In *Strang Steel –v- the Scottish Ministers* this issue was not pursued before the LTS because of the time involved in so doing and as a consequence the claimant was only reimbursed professional fees on the basis of Rydes Scale. Surveyors' fees are now dealt with in the same way as those of lawyers, accountants or any other professionals who become involved in the assessment of CPO. The usual basis is *'quantum meruit*': an hourly rate reflecting the complexity and particular requirements of each case. Any new legislation should encapsulate this and take account of the wider issue of fees arising from cases such as *Smith –v Strathclyde Regional Council* (1982 SLT (Lands Tr) 2). Clearly the onus remains on the claimant to justify the claim. **Chapter 19 - Crichel Down Rules** Increasingly land take for CPO projects is not limited to what is immediately required for the project but involve land for landscaping and mitigations works. To illustrate the extent of this:- In a recent SSE electricity substation CPO the extent of the substation was 4.5 ha (11 acres) but a further 13 ha (32 acres) was required for landscaping. It would appear from our investigations that SSE made no attempt to mitigate the land take and merely offered to the planning authority an extensive area as part of their planning application in order to obtain speedy consent. On one 109 ha (270 acre) farm on the AWPR 17 ha (42 acres) were taken for roads and SUDS ponds, but an additional 6.97 ha (17.2 acres) were taken for landscaping and flood alleviation. **TAXATION (Response III)** I would like to draw the attention of the Law Commission to a situation that has arisen in two cases which is likely to come before the Lands

	Tribunal as part of an issue relating to equivalence. Most CPOs give rise to taxation issues. In accordance with Inland Revenue Note SP *8/1979,* I understand that agricultural disturbance claims will be assessed as a taxable receipt under Class 1 and 2 of Schedule D. Difficulties arise however with capital taxes arising out of compulsory purchase. The claimant is unable to control the timing of any disposal which. absent the scheme, he would be able to do as part of normal tax mitigation. Under the taxation Chargeable Gains Act 1992, capital gains tax (CGT) would seem to be payable in respect of any disposal consideration. Section 247 of the 1992 Act makes provision for rollover relief. Such relief is available if some or all of the disposal proceeds are reinvested by the claimant in a replacement property within a four year period starting 12 months before and ending three years after the date of disposal. The time at which the disposal is treated as being made for tax purposes is the time at which compensation is agreed or otherwise determined in terms of section 246 of the relevant case law "or *if earlier (but after the 20th April 1997) the time when the Authority enter on the land in pursuance of their powers".* This essentially means that unless the parties have agreed compensation, the date of vesting becomes the date at which the disposal is made, notwithstanding the fact that in the current climate it is highly unlikely that compensation can, or could be, agreed at that date. Effectively therefore a landowner has no funds with which to purchase alterative property to rollover any gain. A further anomaly occurs in respect of Section 17a of the 1963 Act which limits claims arising out of reinvestment out of the property (stamp duty, agent's fees etc.) to within *"the period of one year beginning with the date of entry".* The Claimant effectively has to pay CGT on any compensation received. The English Authority on this issue is *Bishopsgate Parking (No.2) Limited* [2012] UKUT 22 (LC) which related to the compulsory purchase of a car park. The owner had difficulty in finding a suitable replacement and was liable to CGT. The Tribunal decided that CGT was capable of being compensated. There is no Scottish authority on this issue but I am aware of a number of cases pending where this is a major issue. I feel that this is an area where clarity is required and which merits the Commission's attention. [Response dated 27 July 2015] I refer to Strutt and Parker's response dated 17th June 2015 in respect of the above, in which I raised concerns with regard to design and build. A recent issue with Transport Scotland further highlights our

	comments regarding acquiring authorities using design and build contracts as a means of abrogating responsibility for claims. Our clients, Aberdeen Endowments Trust, are a Charity that raises money to award grants to students at various educational institutions in the locality and owns land from which part of this income is obtained. Some of their land was acquired compulsorily for the AWPR. Last week we discovered that agents for Transport Scotland were parking on our client's property and taking access to the acquired land across retained land. We contacted the District Valuer to request that this stop and tried to discuss compensation. Their response was that as their Contractor had strayed outwith the acquired area, this was an issue that should be raised with them and not Transport Scotland. He stated that it was not a matter that could form part of our land compensation claim. We spoke to the Corporate Social Responsibility Manager for the CJV and the Site Foreman at the land concerned (Morrison Construction) who declined to know anything about the issue, blaming other contractors. This perfectly illustrates the point we were trying to make with regard to this issue in response to your consultation. *Donovan – v – Welsh Water* (1993) 67 P&CR 233; [1993] RVR 126, LT; [1994] 05 EG suggests that a contractor acts as agent for the acquiring authority and that whatever work was done on land carried out on that basis and that a claimant is entitled to seek compensation from the acquiring authority. Any dispute as to the authority of the contractor was a matter between the acquiring authority and the contractor and did not affect the acquiring authority's liability. We feel it important that this principle is carried through into any new legislation, given the increasing use of design and build. It is quite ridiculous that our client should be told to raise an expensive court action against a third party which is only present on his property because of the CPO. There is a casual link between this incursion and the CPO; indeed the contracting body only exists as a JV between various contractors to build the AWPR. [Response dated 4th September 2015 Most CPOs give rise to taxation issues. In accordance with Inland Revenue Note SP *8/1979,* I understand that agricultural disturbance claims will be assessed as a taxable receipt under Class 1 and 2 of Schedule D. Difficulties arise however with capital taxes arising out of compulsory purchase. The claimant is unable to control the timing of any disposal which. absent the scheme, he would be able to do as part of normal tax mitigation. Under the taxation Chargeable Gains Act 1992, capital gains tax (CGT) would seem to be payable in respect of any disposal

	consideration. Section 247 of the 1992 Act makes provision for rollover relief. Such relief is available if some or all of the disposal proceeds are reinvested by the claimant in a replacement property within a four year period starting 12 months before and ending three years after the date of disposal. The time at which the disposal is treated as being made for tax purposes is the time at which compensation is agreed or otherwise determined in terms of section 246 of the relevant case law "or *if earlier (but after the 20th April 1997) the time when the Authority enter on the land in pursuance of their powers".* This essentially means that unless the parties have agreed compensation, the date of vesting becomes the date at which the disposal is made, notwithstanding the fact that in the current climate it is highly unlikely that compensation can, or could be, agreed at that date. Effectively therefore a landowner has no funds with which to purchase alterative property to rollover any gain. A further anomaly occurs in respect of Section 17a of the 1963 Act which limits claims arising out of reinvestment out of the property (stamp duty, agent's fees etc.) to within *"the period of one year beginning with the date of entry".* The Claimant effectively has to pay CGT on any compensation received. The English Authority on this issue is *Bishopsgate Parking (No.2) Limited* [2012] UKUT 22 (LC) which related to the compulsory purchase of a car park. The owner had difficulty in finding a suitable replacement and was liable to CGT. The Tribunal decided that CGT was capable of being compensated. There is no Scottish authority on this issue but I am aware of a number of cases pending where this is a major issue. I feel that this is an area where clarity is required and which merits the Commission's attention.
14. John Watchman	2.2 The SLC Discussion Paper does not address certain specified aspects of compulsory purchase, Further there are some significant omissions in the SLC's discussion paper. For instance it does not refer to the seminal decision in *Bryan v United Kingdom* (1995) 21 EHRR 342 (see ECHR Article 6(1) referred to in section 5 below). Further it does not refer to the decision in *Stirling Plant (Hire and Sales) Ltd v Central Regional Council*, The Times, 9 February 1995 (cited in Scottish Planning Law (3rd edition, 2013), McMaster, Prior and Watchman) (see also (1995) 48 SPEL 21 ('Compulsory Purchase Procedure – Overhaul Needed') and 35). 2.4 It seems that the proposed new law should operate for the most common examples of compulsory acquisition such as compulsory purchase orders, believed to be such orders made under the Roads (Scotland) Act 1984 by the Scottish Ministers. It should also operate for foreseeable proposed changes. These include changes following on from the May 2014 Land Reform Review Group report

	'The Land of Scotland and the Common Good' including the proposed extension of compulsory purchase rights and having regard to the proposed 'Land and Property Information System'. 2.10 The SLC should also consider initiatives in other jurisdictions and approaches which may appear novel here – for instance those whose land is compulsorily expropriated being given a share in the 'marriage value' of the land assembled by compulsory expropriation. 7.3 Clarity should be provided about whether CPO appeal proceedings fall within the scope of Court of Session Rule 58A.
15. DLA Piper Scotland LLP	It is a mistake to exclude the conveyancing practicalities of airspace acquisition. The vast majority of CPOs are for road projects. A recurring issue with those is how to deal with acquisition of rights for bridges - is it a servitude or acquisition of airspace. If CPO law is being reformed it makes sense to tackle the main practical issues which are faced. This is one of them. The problem is partly the definition of "land" referred to on page 19. This only seems to allow for the acquisition of rights in airspace, not the acquisition of the airspace itself.
16. Scottish Compulsory Purchase Association	Whilst the Discussion Paper is extensive in nature it is not, however, wholly exhaustive. Accordingly, a number of aspects not covered so far are set out below:- **<u>1. Blight Notices</u>** There is a general acceptance that the promotion of or indeed the threat of compulsory purchase tends to act as a blighting effect on the marketability of property and associated value. Further, it is also generally accepted that the timescales involved with regard to any compulsory purchase case are long and this tends to exacerbate the effect of blight. Recent experience has indicated that it can prove extremely difficult for property owners to dispose of their properties where compulsory purchase is a threat or indeed more imminent. We have to perhaps accept that in order to respect the various positions of acquiring authorities and landowners, as well as the implication of the Human Rights Act, that the compulsory purchase process will be a relatively long period of time – although usually successful from an acquiring authority's point of view. The utilisation of Blight Notices has been in effect for several years now but there are a number of (strict) criteria that have to be met prior to such a Notice being valid. It is perhaps not unreasonable that the default position of acquiring authorities on receipt of a Blight Notice is to reject that Notice on the basis that at least one criteria has not been met – and thus the Notice fails. The effect of not being able to dispose of one's principal asset or alternatively being left in limbo for a considerable time prior to compulsory acquisition is manifestly unjust.

	Accordingly, it is considered that the circumstances within which a Blight Notice can be served should be considerably widened. In addition, the limitation that it is restricted to owner-occupiers and that there is a Rateable Value limitation for non-residential properties should also be improved as blight does not discriminate between different property types and values. In addition, it is also suggested that the requirement that reasonable efforts be adopted to dispose of the property on the open market prior to a Blight Notice being able to be served should also be removed. This especially so nowadays with regard to residential properties in Scotland as a consequence of the introduction in 2009 of the Home Report. Whilst such a Report tends to focus on the state of repair/condition of the property relevant factors, such as the threat of compulsory purchase, will also be taken into account and will undoubtedly affect marketability and value. It is common practice for potential purchasers of the property to view the Home Report online prior to undertaking any physical viewing of the property and the mere mention of even the threat of compulsory purchase tends to have the effect that the market quickly loses interest in the property. It should also be recognised that there is a cost to be borne by the residential property owner in instructing a Home Report. **2. McCarthy Rules** These Rules, which primarily deal with injury to property rights which have not been compulsorily acquired but are affected by a public work, are not well known or understood. An example would be the interference of access rights on land not owned by the affected party but that land has been compulsorily acquired. It is considered that whilst the implementation of these Rules rarely occurs, they should be incorporated within any new legislation - on the basis that a CPO should result in the compulsory purchase of all property rights and interests and that all owners/tenants of such rights and interests are entitled to claim compensation for any injury caused as a direct consequence of the CPO and public work. **3. Part 1 Claims, 1973 Act** These are claims for compensation to reflect the diminution in value of property affected by a public work where the property lies adjacent to or close by a public work but no land has been acquired. The 1973 Act places a number of severe limitations on such claims- both in terms of what types of public works are incorporated principally roads and airports, who can claim and the amount of compensation payable. Government has, on the one hand, recognised that blight does not stop at the boundaries of a public work but, on the other, has limited the amount of compensation to be paid in such circumstances; that amount is determined relative to the seven physical factors as stated in the 1973 Act and thus loss of view, privacy, amenity etc. are not

	compensatable. It is suggested that this right to claim compensation is widened to cover all public works and all properties affected but that loss remains restricted to the diminution in value caused by one or more of the seven physical factors as stated in the 1973 Act. Further, it is not unreasonable for this type of claim to be lodged after the public work has been completed and "the dust has settled" and thus the time-scales for claiming compensation as set out in the Act are sensible: as stated in some of the responses above, it is suggested that there is an obligation on acquiring authorities to announce a formal date(s) of completion of the public work and the six year limitation to apply to the Lands Tribunal in the case of disputed compensation runs from that date. Lastly, it is also suggested that an acquiring authority retains its statutory obligation to reduce the effects of its public work by providing sound insulation and other mitigating works as circumstances dictate.
17. Lands Tribunal for Scotland	The LTS does not underestimate the challenge of setting out a system which provides both certainty and fairness. Given the complexity of some of the disputes, which may to some extent be unforeseeable, we venture to suggest it may be appropriate for the new legislation to provide an express set of guiding principles within its own framework. That way the legislation can be given a purposive construction, and avoid some of the controversies which have beset the existing legislation. **Topics excluded** We understand that it is not proposed to consider wayleaves which may be acquired by statutory undertakers and others. Appendix B notes that various statutes providing for compulsory wayleaves such as the Gas Act 1986 and Electricity Act 1989 incorporate certain of the old Acts. If the old Acts are to be abolished, what does this mean for the wayleave statutes? Obviously the result would be anomalous if the old Acts remained applicable for wayleaves but are no longer "core" elements of the system.
18. Scottish Federation of Housing Associations	The Development Process and Access to Land 1.2.1 RSLs work with local authorities to identify potential housing sites for development, to meet needs identified in specific geographical locations or to address specialist needs. By this collaboration, Scottish Government subsidy is allocated to support land acquisition by housing associations for the development of affordable housing, mainly social rent. 1.2.2 Many sites are in towns and cities and are also combined with a regeneration agenda, where new housing can revitalise a run down and depressed community while improving health and well-being.

	1.2.3 Access to land acquisition opportunities can prove very difficult in identified areas. While local authorities and other public bodies can provide access to land banks, this is sometimes at a cost which makes development difficult, or is only useful where a consequential private sector acquisition proceeds as well. In addition, there is often particularly in rural areas, a need to target particular sites for development such as key sites to provide suitable accommodation for older people or people with disabilities. These keys sites, whilst they may be appropriately zoned as exception sites for affordable housing use only may not be deliverable for that purpose without the appropriate use of CPO powers which, in the experience of the writer has often been resisted in the past. 1.2.4 Other opportunities for site acquisitions lie with negotiations with the private sector – either companies or individuals. Developers are required in some cases to supply 25% of any development as social housing, although this is resisted in many instances. Sometimes sites are advertised or come up at auction, although this is the exception rather than the rule. 1.2.5 The time taken to secure acquisition opportunities can also cause problems as negotiations with a number of landowners can be extremely difficult, particularly where it is perceived that there is public money to support acquisition with each landowner anxious to secure the best price for themselves. **CPO Consultation** **Housing Associations and CPOs** 2.1.1 When confronted with a difficult land acquisition case, housing associations may consider asking the Local Authority which has prioritised the development in its strategic housing plans, to acquire the site using CPO powers in the public interest. 2.1.2 In practice, this is not considered an option however, because of the general perception that CPOs are difficult to achieve, time consuming and not guaranteed to succeed, depending on the political enthusiasm of members and experience of local authority property and development staff. 2.1.3 There is also a perception that any value attributed to a site through the CPO process may not reflect the true social housing development value, which in many cases is below private sector open market value in the event that a private developer acquired and developed the site for housing for sale. A higher valuation would result in the project being unworkable under the subsidy rules. 2.1.4 Housing associations accept that as third sector voluntary bodies, CPO powers given directly to them would conflict with the

	premise that deprivation of property rights through compulsory acquisition needs to be exercised by a democratically elected public body – local authorities or Scottish Government. The points raised in the Discussion Paper about challenges under human rights legislation are well made. In particular, the political decision to compulsorily purchase land in the public interest is a judgement which housing associations cannot make, unless there was some strong delegation of authority by a local authority, which seems unlikely and unworkable. 2.1.5 What Housing Associations need is clarity, speed and commitment to use existing CPO powers (and any subsequent administrative improvements or classification) to acquire land for affordable housing, through a valuation method which takes account of the reduced value generated by this use. 2.1.6 Having read through the Discussion Paper, the likelihood is that the processes used presently could probably be revised to meet these objectives, but a clear steer needs to come from the Scottish Government on the political support for using CPO powers where the acquisition of land compulsorily will enable an affordable housing project to proceed and provide much needed homes in communities around Scotland and in particular where it can be fairly demonstrated that intransigence of individual owners is holding up or permanently ruling out the development of key, strategic sites identified in the Local Development Plan as contributing to the social and economic progress of a community. The SFHA would be happy to work with its members to provide the Scottish Law Commission with examples of the type of land assembly problems which could be progressed by a fair and appropriate use of CPO powers. **3.1 Conclusion** 3.1.1 CPOs are currently seen as powers which exist, but which are rarely advanced as an option by local authorities to address land assembly and site acquisition problems.
19. Odell Milne	This is another rather obscure point rather akin to the point I raised previously with regard to common interest in water! As you will know, salmon fishings carry as a pertinent a common law right of access. In my view, the right of access that pertains to salmon fishings is not in the nature of a servitude; it is rather a form of *dominium* which cannot exist independently and does not comprise a separate feudal tenement in its own right. Cusine and Paisley in "*Servitudes and Rights of Way*" acknowledge that it is a "peculiar", "rare" and "obscure" property right (the other stated example of such a right in Scots Law being that afforded to landlocked property). I have always understood that the right is “more” than a real burden or condition although it does attach as an inseparable pertinent to

	another property right (i.e. to the salmon fishings). The right resembles a servitude in various respects - no requirement for creation by deed; limited to certain acts of possession with no right of ownership; a real right enforceable against everyone; and it must be exercised only in connection with the tenement to which it pertains and in the least burdensome manner. However, the right differs materially from a servitude in that it cannot be lost by negative prescription. I understand that there is a counter view that the right *is* a servitude rather than a property right but Cusine and Paisley are of the opinion that it is a property right of a special nature. For what it's worth, that has always been my understanding. So in my view this right is not a servitude nor a burden or condition and so far as I am aware, CP law does not make provision for its extinction. Moreover, it seems clear that if a servitude right of access is specifically granted or reserved to benefit the salmon fishings then the common law property right of access will come to an end. I cannot find any authority for the proposition that it would revive in the event of termination of the servitude right but, given that negative prescription does not apply to it and the general principles underpinning the law of access to salmon fishings (that they are a valuable commodity and separate heritable tenement that must be capable of being accessed by the owner), it seems to me that the common law right is likely to revive if the servitude right is extinguished. So, in summary, my view is that the right of access to salmon fishings is a special property right and constitutes a right which would cease on the grant of a specific right of access but would revive on the extinction of such a specific right. And the relevance of this to CP is as follows (in my personal view): 1. GVD/NTT/section 107 in respect of land which is subject to such a right does not extinguish the right – there is nothing explicit in the legislation that would achieve that and CP powers cannot be implied. 2. If there is contained in the title a specific servitude of access to benefit the salmon fishings (which has resulted in the extinction of the common law right prior to the CP), then if a GVD/NTT/Section 107 extinguishes the specific servitude right, that act of extinction may revive the common law right. 3. There is no method in CP law of extinguishing such a right – even if the authorising statute contains provision for the acquisition of rights in land or even the “creation” of new rights, the acquiring authority cannot acquire the common law right of access to the fishings unless

	the fishings themselves are acquired because the right cannot stand alone. I would be most interested in your thoughts. If I am right – maybe this is something that could be clarified in legislation.
21. District Valuer Services	Whilst the Discussion Paper is extensive in nature it is not, however, wholly exhaustive. Accordingly, a number of aspects not covered so far are set out below:- 1. Blight Notices There is a general acceptance that the promotion of or indeed the threat of compulsory purchase tends to act as a blighting effect on the marketability of property and associated value. Further, it is also generally accepted that the timescales involved with regard to any compulsory purchase case are long and this tends to exacerbate the effect of blight. Recent experience has indicated that it can prove extremely difficult for property owners to dispose of their properties where compulsory purchase is a threat or indeed more imminent. We have to perhaps accept that in order to respect the various positions of acquiring authorities and landowners, as well as the implication of the Human Rights Act, that the compulsory purchase process will be a relatively long period of time – although usually successful from an acquiring authority's point of view. The utilisation of Blight Notices has been in effect for several years now but there are a number of (strict) criteria that have to be met prior to such a Notice being valid. The effect of not being able to dispose of one's principal asset or alternatively being left in limbo for a considerable time prior to compulsory acquisition is manifestly unjust. Accordingly, it is considered that the circumstances within which a Blight Notice can be served should be widened. In addition, the limitation that it is restricted to owner-occupiers and that there is a Rateable Value limitation for non-residential properties should also be improved as blight does not discriminate between different property types and values. In addition, it is also suggested that the requirement that reasonable efforts be adopted to dispose of the property on the open market prior to a Blight Notice being able to be served should also be removed (particularly for to residential properties in Scotland as a consequence of the introduction in 2009 of the Home Report as the mere mention of even the threat of compulsory purchase may have the effect that the market quickly loses interest in the property) 2. McCarthy Rules These Rules, which primarily deal with injury to property rights which have not been compulsorily acquired but are affected by a public

	work, are not well known or understood. They derive from S6, Railway Clauses (Consolidation) (Scotland) Act 1845. An example would be the interference of access rights on land not owned by the affected party but that land has been compulsorily acquired. It is considered that whilst the implementation of these Rules rarely occurs, they should be incorporated within any new legislation. One issue is the position illustrated by the *Wildtrees Hotel* case, which itself contains a very lucid exposition of the case law and the inconsistencies in this area of law. For example, because of the way the case law has developed, an occupier who runs a business such as a hotel, pub or filling station, where the value of the subjects always reflects the value of the business, effectively gets compensation which includes any business loss. However, if the premises were used for a business such as a general store or some other general retail use, or industrial use, then compensation can be claimed only for the reduction in value of the premises, and any loss to the business is specifically excluded. I doubt that this was the original intention. It would be better if all business losses were claimable, whatever the use. It would also be helpful if the rules were clearly explained, as one of the reasons claims are rarely made is perhaps a lack of understanding of the circumstances when this can be claimed. 3. Part 1 Claims, 1973 Act These are claims for compensation to reflect the diminution in value of property affected by a public work where the property lies adjacent to or close by a public work but no land has been acquired. It is suggested that this right to claim compensation should cover all public works and all properties affected but that loss remains restricted to the diminution in value caused by one or more of the seven physical factors as stated in the 1973 Act. Further, it is not unreasonable for this type of claim to be lodged after the public work has been completed and "the dust has settled" and thus the time-scales for claiming compensation as set out in the Act are sensible: as stated in some of the responses above, it is suggested that there is an obligation on acquiring authorities to announce a formal date(s) of completion of the public work and the six year limitation to apply to the Lands Tribunal in the case of disputed compensation runs from that date. Lastly, it is also suggested that an acquiring authority retains its statutory obligation to reduce the effects of its public work by providing sound insulation and other mitigating works as circumstances dictate (Part 2 of the LC (S) A 1973).
22. Glasgow City Council	Just in case it is not covered it would be good to have certainty re the right to acquire by CPO the benefited proprietors' interests in burdens in property owned by the acquiring authority or the relevant third party

	in a back to back CPO. In relation to common/open space it would be useful to have a procedure for CPOing same which is part of the normal CPO procedure. **General Comments** I have not considered questions 74 to 159 at all because the subject is not one in respect of which I have detailed experience and although I have used the first person singular throughout, the responses in part reflect collective responses of the conveyancers at Glasgow City Council. Thank you for the quality of this Discussion Paper.
23. Central Association of Agricultural Valuers and Scottish Agricultural Arbiters and Valuers Association	Yes. In our opening remarks we regretted the omission of consideration of the issues of blight, injurious affection and Part 1 claims. Equally, the important place of the utilities in the world of compulsory purchase needs to be considered as part of this process. Omitting them omits perhaps the major area of work and so issues for affected parties and the reputation of the process. **2. General Comments** **a) Compulsory Purchase** Powers of compulsory purchase are a remarkable privilege granted by statute to enable an entity (in practice, the state or a state-sanctioned corporation) to use the force of law to enforce the taking of private property, whether someone's home, business or other land. Enhancing and broadening the state's powers to take private property beyond the narrow areas where it can clearly be warranted is harmful to the principles of the liberal market economy that support growth and endeavour. Affected property, often people's homes or the places where they make their livelihood and their largest single purchase, requires long term stability as does the investment market in property. Jeopardising that can intrude seriously on the affected people and more widely have adverse consequences for the economy in future. It is important on both these grounds that there be certainty in the process – powers should be defined and subject to time limits. Most affected parties are individuals and families for whom the procedures of compulsory purchase from original concept to final implementation can take a significant part of a life. That properly lays an onus on the body with that privilege to use it with care for those from whom it is taking their property. Ideally, much should be achieved by negotiation. Due process should always be

	followed. **c) Other CPO Issues** We note that the Law Commission does not propose to deal with: **i. Blight** Blight was a key issue identified in the 2001 Scottish Executive Central Research Unit Paper *Review of Compulsory Purchase and Law Compensation.* There is a general acceptance that the promotion of, or indeed the threat of compulsory purchase, tends to act as a blighting effect on the marketability of property and associated value. This blight in practice arises as soon as a CPO corridor is announced. The timescales involved in the CPO process are long and this tends to exacerbate the effect of blight. It can prove extremely difficult for property owners to dispose of their properties in the vicinity of any CPO scheme. Blight notices are currently restricted to owner-occupiers and are subject to a limitation by rateable value for non-residential properties. Yet, the blighting effect of a scheme does not discriminate between different property types, interests and values. There are a number of strict criteria that have to be met prior to any Blight Notice being valid in current legislation. The default position of acquiring authorities on receipt of a Blight Notice is to reject that Notice on the basis that at least one criterion has not been met – and thus the Notice fails. The effect of not being able to dispose of one's principal asset or alternatively being left in limbo for a considerable time prior to compulsory acquisition is manifestly unjust. We urge that the circumstances within which a Blight Notice can be served should be considerably widened. The requirement that reasonable efforts must have been made to dispose of a property on the open market before it is possible to serve a Blight Notice should also be removed. This is especially so nowadays with regard to residential properties in Scotland as a consequence of the introduction in 2009 of the Home Report. Whilst such a Report tends to focus on the state of repair/condition of the property relevant factors, such as the threat of compulsory purchase, will also be taken into account and will undoubtedly affect marketability and value. It is common practice for potential purchasers of the property to view the Home Report on-line prior to undertaking any physical viewing of the property. The bare mention of even a threat of compulsory purchase tends to destroy market interest in a property while the residential property owner will have incurred a cost in instructing the preparation of a Home Report.

	ii. Injurious Affection Where No Land is Taken Statute has, on the one hand, recognised that blight does not stop at the boundaries of a scheme but, on the other hand, has limited the amount of compensation that can be paid in such circumstances. Compensation can only be paid for the loss in value caused by the seven physical factors as stated in the Act and from no other cause arising from the scheme (such as a loss of a view, privacy or amenity) only because of the simple chance that no land has been taken from that property owner. Reform is also required in respect of these provisions. Compensation should be on the basis of full loss. For any CPO, the acquiring authority should be under a duty to consider the effect of the scheme on such properties and therefore be under a statutory obligation to reduce the effects of its public work by providing sound insulation and other mitigating works as relevant in the circumstances. **iii. Part 1 and Part 2 Claims** We note that the consultation document does not address the topic of Part 1 claims. Our members report that acquiring authorities are taking an increasingly defensive stance on Part 1 claims, even though there is evidence that properties are genuinely permanently adversely affected by new public works. The problem is that the current Tribunal system does not allow a "quick fix" hearing for these sorts of claims if the acquiring authority will not agree to a simplified procedure and so the complex and costly dispute resolution procedure can discourage claimants from pursuing a legitimate claim. One member reported that a number of Part 1 claims brought against Network Rail in the Midlands recently suffered exactly this fate. Whilst the Tribunal rules do allow for a pre-hearing costs award to cap fees for the applicant, this process itself can be costly and time consuming. We have real concerns that homeowners with genuine claims will not have access to justice unless there is an initial automatic referral to a simplified procedure in cases where points of law are not in dispute. Further, the omission of significant discussion of the powers and procedures of the utilities that form such a major part of compulsory purchase work is striking All these issues are parts of the whole CPO regime and should also be addressed as part of this reform. Excluding consideration of them is a serious omission. **g) Taxation**

	There are a number of aspects of the interaction of the compulsory purchase regime with the taxation of property which can cause hardship to claimants and which could be ameliorated by Government intervention. In particular, the conversion of a property asset which might qualify for valuable reliefs from capital taxes into a sum of cash which would be fully taxable (as, for example, on death) can be especially problematic in the rural property sector. While there is an alternative CGT roll-over relief regime for assessed gains made on CPO disposals (which may of course be nominal gains rather than real), this has at least two deficiencies in practice: - the time limits are absolute without the HMRC discretion available for the main form of roll-over relief - it is understood that, while gains can be rolled over into buying a new building, they cannot be rolled over into building a new building on retained land. The limited availability of convenient land for purchase in the rural market makes both these points difficult.
26. National Grid plc	In England there is a power for requisitioning information at the start of the CPO process in order to establish the identity of owners, tenants, and other benefitted parties. While it is not always necessary to resort to this power, it can be useful for acquiring authorities to have such a power. There is currently no equivalent power in Scotland.
28. Royal Town Planning Institute Scotland	While the detail of the new Compulsory Purchase legislation is of great importance, the Institute believes that some context or a preview to this would be useful, and is currently missing from the consultation document. It would be useful to set out why a CPO may be needed to make sure that all parties clearly understand the need for CPOs. It would also be important, as part of this, to set out the main reasons that people object to a CPO – on the merits of the proposal, as a bargaining position for compensation, or to make a point. These reasons, and perhaps others, have implications for how an objection to a CPO would be taken forward, and some guidance on this would be useful for all parties involved in the CPO process. RTPI Scotland believes that there should be an opportunity to object, however consideration must be given to the process as a whole, not only the CPO procedure, including the allocation of a site within the Development Plan, and the Development Management process. Recent and ongoing planning reform is seeing a transition to a plan-led system which is transparent, effective and efficient. The Development Plan allocates development across a plan area, and therefore establishes the principle of development for that use. It may be appropriate to set out within the Development Plan where there will

	be or may be a need for use of Compulsory Purchase powers. The Action Programmes which accompany adopted Development Plans could be a good place to include CPO opportunities, as these are regularly updated and monitored, and the flexibility of the Action Programmes could allow for amendments as and when necessary. It will be important to link the new CPO powers with infrastructure delivery and development effectively. Compulsory Purchase is one of the tools to enable development, and this will be more effectively done if it is linked with the planning system closely, and planning for infrastructure delivery. There is a role for Scottish Government in facilitating this. It is also important that the legislation is suitable and works for all users, one format for CPO which suits transport, may not suit planning and vice versa. The new legislation should be put in place with full input from all actors in CPO matters. Consideration should be made to the new body Historic Environment Scotland which will replace Historic Scotland from 1st October 2015. The role of HES will be different from that of Historic Scotland, as a Non-Departmental Public Body. When considering the historic environment and approving powers, it must be clear as to the role of HES and the separate role of Scottish Ministers. When considering legislation relating to allotments, we draw attention to the Community Empowerment (Scotland) Bill, passed by Parliament on 17 June 2015. This refers to powers for communities in relation to allotments, and may be an important consideration for CPO powers. The Institute suggests that the new legislation should be produced in tandem with guidance and good practice support to ensure that all users of CPO procedures are comfortable and confident with the new powers as they come into force.
30. Isobel Gordon	On the subject of taxation, be it Stamp Duty, VAT, Inheritance tax, Income tax or rates etc. the Acquiring authority should be liable to pay these as a result of CPO purchases. A prime example of this is our own case where we as a family with an intergenerational farm business that have been disturbed in our own rights to use our land should not incur tax costs that we would otherwise not have incurred but for the CPO process. ***General Comments*** As a family we have owned and farmed land in Kincardineshire for over 100 years. We write as landowners recently affected by a compulsory purchase scheme, albeit a CPO of rights under the Gas Act 1986 (as amended by the Gas Act 1995 and the Utilities Act 2000). Over the years we have had other experience of CPO powers being invoked by Transport Scotland, electricity and telecoms

	operators as well as Scottish Water over our property. In October 2002 Bell Ingram, a firm of land agents acting on behalf of National Grid (NG – then Transco), unannounced, approached us in order to reference a pipeline route. Bell Ingram was unable to confirm the exact route in that alternatives were being considered by NG at the time. They merely indicated that a pipeline might go through our farm. NG were there and then we were planning to build a wind farm, however this was not heeded. We sought details of the proposed routes from NG. We were told that two routes were under investigation and plans were enclosed in a letter dated 11th March 2003. Less than a month later, on the 8th April 2003, A Reynolds of Bell Ingram wrote to us seeking signatures on formal consents for one of two routes. By letter of the 17th March 2003 we reiterated our request for further information and were informed in a letter from Bell Ingram on the 20th March 2003 that plans for the routes were still "evolving"; clearly this draws into question why we should have been asked for a formal servitude at this stage. We received a compulsory purchase order (CPO) for a heritable and irredeemable servitude across our property on the 15th July 2003. Section 9 (3)(a) and Schedule 3 Parts I and III of the Gas Act 1986 (as amended by the Gas Act 1995 and the Utilities Act 2000) (the 1986 Act) empowered National Grid to acquire interests in land by the exercise of compulsory acquisition powers. At previous meetings with National Grid our agents had made it clear that our intention to develop a wind farm on the line of the pipeline. By letter dated 8 August 2003 we formally intimated an objection to that portion of overall route that crossed our property because of its effect on the existing land use and the potential threat to the future development of the property. With such CPO powers to hand, and the expense of legal or other representation not being a cost that can be recovered from the acquiring authority and the Environmental Impact Regulations that accompany such sizable schemes, the burden of questioning the reason of a particular route makes it virtually unfeasible for an alternative to be fully considered without great financial risk and the uncertainty of a Public Inquiry. The Scottish Ministers granted the CPO on 2nd June 2004 following the Inquiry in which the Reporter had found, in view of their evidence, that NG had "…demonstrated a clear and immediate need in terms of its licence obligations to increase the capacity of the existing system." This statement should be considered in the light of criticism of the need for the scheme by the industry regulator Ofgem shortly

	thereafter. In the event the pipeline was only built as far as Lochside near St Cyrus where that the pipe connects with an existing gas pipeline. The planned route further south was at some point cancelled by NG. NG had not acted in good faith and had both mis-led and mis-informed the Reporter about an earlier decision by shippers to land the gas by a pipeline from Norway to England instead of Scotland which had been made well over a year before the Public Inquiry. The Scottish Ministers likewise failed to investigate such a key component to prove the need and would or should have had access to such strategic information; however we as landowners did not. The burden to prove a need for a scheme before confirmation of a CPO for taking of lands or rights over lands should be greater and a means to compensate in the event that a CPO scheme fails or is cancelled before entry is taken. We subsequently applied for planning consent for a reduced wind turbine project in May 2006 as a result of the constraints imposed by the pipeline. A positive CAAD was obtained in respect of the servitude strip, however the process was delayed by NG who wrote to the planners that they wished the planners to consider the CAAD decision after a planning appeal made to the DPEA. Once granted the CAAD itself was then subject of an appeal raised by NG which they later withdrew. The construction work on the wind farm commenced in Spring 2011 and the four Siemens SWT 1.3MW turbines were erected in January 2012 and came into production in March 2012. We are clearly entitled to compensation for losses arising out of the laying of the pipe and these fall to be assessed as at the valuation date (7th June 2004), being the date of entry. NG was fully aware of the proposed wind farm on Clochnahill as is evident from the Reporter's findings at the Public Inquiry yet they claim that they were unaware of the turbine issue. A claim was lodged in the Lands Tribunal on 4th June 2009 and sisted to allow agreement to be reached and to enable us to gather data on the income generated by the built turbines because of the requirement to prove our loss. It is understood that NG's position in respect of the heads of claim relating to lost turbines is that £nil compensation is payable. The agricultural disturbance claim has been agreed between our agents and Messrs Bell Ingram acting for NG since September 2014. Notwithstanding this, NG has made no attempt to resolve the outstanding issues. A formal notice in terms of Section 48 of the Land Compensation (Scotland) Act was served on NG on 24th October 2014 by recorded delivery. There has been no response to this notice; this despite David Harper MRICS FAAV, a senior surveyor for NG, in an

	email dated 26th February 2015, stating that this would be dealt with. The claim is now preceding as a consequence of the acquiring authorities failings in this regard.
32. Scottish Borders Council	In some recent Planning Hearings the reporter has produced an agenda with a list of questions for each topic in advance of the hearing. While the list of questions does not limit the Reporters ability to ask others if required, it is highly useful in providing parties with advanced notice of the main questions so they can provide focussed clear responses. In my experience this further speeds up the Hearing sessions. I would suggest it would be useful to adopt this for CPO hearings (if this has not already occurred).
33. Shelter Scotland	The Scottish Empty Homes Partnership is funded by the Scottish Government and hosted by Shelter Scotland. We work with councils and their partners to help them develop policies and processes to bring private sector empty homes back into use. There are over 27,000 long term private sector empty homes in Scotland. The best practice process promoted by the partnership has several interlinked steps, the last of which is the plausible use of enforcement: 1) data collection – finding out where the empty homes are and who owns them 2) prioritising – which empty homes to spend time/resources on to meet council goals 3) advice and information – providing signposting advice to empty home owners as standard, how to rent, how to sell, how to refurbish 4) negotiation – more involved pro-active engagement with owners to encourage them to bring their property back into use 5) incentives – using council schemes such as Private Sector Leasing (PSL), rent deposit guarantee, empty homes loans, or grants to encourage owners to bring their property back into use 6) enforcement – where all else fails and the property is still presenting an issue for the community, using enforcement to encourage or force an empty home owner to bring their property back into use. Empty Homes Officers across the country have effectively used the first 5 steps to bring empty homes back into use but have reported that even where all positive steps to bring empty homes back into use have failed and the property is causing a detriment to the community they still find it difficult to use Compulsory Purchase powers to acquire

	individual empty homes. A consistent theme in the feedback the Scottish Empty Homes Partnership has received from councils has been the desire for more empty homes enforcement tools in Scotland. This year we have sought to support councils who are looking to use existing powers, namely Compulsory Purchase. However, the message we are receiving from councils continues to be that they don't think the existing tools are fit for purpose. They raise with us concerns about both the cost, timescales and risks of pursuing a Compulsory Purchase Order (CPO). "Time taken to carry out searches/advertise/ negotiate with owners if we can find them/prepare a statement of reason / liaise/satisfy with Scottish Gov etc. The process on average takes more than 2 years which can be delayed further if owner appeals the CPO or appeals the valuation and we have to go to a PLI or a Land Tribunal. The whole process in some cases have taken up to 5 years." Duncan Thomson, Group Manager – Private Sector, Housing & Regeneration Services, Glasgow Council. "High Street, a C listed building in the Leslie Conservation Area has been empty for at least 25 years. Council officers were very reluctant to take action but I eventually got Fife Council to agree to go for a CPO in 2006, having been asking since 1992. This request got lost with the Scottish Executive and then the Scottish Government for 6 years despite repeated complaints via an MSP. Even when a reporter was appointed it took over a year to actually have the hearing due to a series of illnesses suffered by the defendant. The CPO was finally granted in February 2015 but the property is still not actually for sale. It is in a very poor condition, basically only the walls and roof remaining. Nobody has been helped by the multiple delays in reaching this stage." – Cllr. Fiona Grant, Fife Council. We survey Scotland's empty homes practitioners each year in April and May. In this year's survey we asked councils if they had used enforcement as a method to bring empty homes back into use. Only one council reported having used CPO powers to bring a long term problem empty property back into use. This is despite the fact that a number of councils have highlighted to the Partnership outside the survey process that they have lists of 'no hope' empty homes where the property is causing issues in the community, the owners are non-engaging or non-contactable. They report that even for these cases councils are not prepared to pursue Compulsory Purchase due to the perceived risks around cost, timescales and the potential of ending up as owners of a property with no set end use. Example case stories from Empty Homes Officers: "A first floor flat in the centre of town which has been empty for 14

	years. The elderly resident of the ground floor flat struggles to cut the grass on the entire garden whereas she is only responsible for half of the rear garden. Lengths of guttering are hanging off the building which should be common repairs. When I last stopped to look at this flat, a builders van pulled up to ask if the property was on the market. There is strong demand for this type of property from either a developer or an owner occupier". "A cottage is adjacent to a large detached house. It has been empty for 18 years and is in serious disrepair. There would be significant demand for this property as it is close to the River". "A property is in the centre of a small village and has broken windows and is in a poor state of repair. It is causing problems to the neighbouring owners. The owner who lives in USA bought the property for development purposes and applied for planning consent to demolish the cottage and build 2 new properties on the site. The consent has now lapsed." "The property was a private let and as far as I can tell from the documentation it has been empty since 2008. We have lettered the owner constantly and went to the extent of having a letter hand delivered by an officer from another local authority. At the time of the delivery of the letter the owner spoke to the officer, she explained that her husband dealt with all the finances and he works away. She said that the property was left in a poor state by the previous tenant and they haven't done anything with it. I have sent the empty homes information but have still had no response. Building control have advised that they do not have any powers available to deal with this property." "We had an issue with a property that had been empty since 1999 and was in a serious state of disrepair. The council spent thousands of pounds repairing the property and stopping it from causing further damage to the two adjoining properties. Thousands of officers' hours were also used chasing the owner and trying to deal with the state of the property. The council were reluctant to use CPO as they had already spent a large amount of time and resource on the property, and has also had bad experiences using it previously, when the order had not been granted, despite all the effort put in." In this year's survey, for those who had not used CPO but who indicated an empty homes enforcement power was needed, we asked 'What has stopped you using a CPO?' Answers included: 'Lack of resources, too time consuming' 'Local authorities don't have the budget to CPO' 'Legal services don't seem to consider this a clear cut option'

	‘Cost and time constraints’ ‘Lack of funding and legal expertise’ ‘Lack of knowledge on how to implement this and internal reluctance to pursue this’ Through discussions with Empty Homes Officers more specific issues with using Compulsory Purchase have also been raised including - No clear guidance on what constitutes reasonable efforts to contact or engage with an owner before pursuing Compulsory Purchase. - The requirement to pay market price to the owner represents a direct cost to the council which may not be able to be recouped. 90.9% of this year’s survey responders indicated that a specific Scottish empty homes enforcement tool would be ‘very useful’ (63.6%) or ‘useful’ (27.3%). We also asked councils what type of enforcement tool they would find useful, and received the following ideas: • ‘Glasgow believe that the power of Enforced sale would be invaluable’ • ‘Enforced sale would be useful’ • ‘Like the idea of the Specific Scottish Empty Homes Enforcement Tool’ • ‘A compulsory sale order – may be useful for cases of ‘empty home hoarders’ • ‘Something that could be used as a stepping stone to CPO process, Anything that would assist the legal process when owner deceased and no identified beneficiary or someone dealing with estate.’ • ‘It is still too early for me to pinpoint this – however, I have already come across 4+ properties with large council tax arrears where owners are unresponsive.’ • ‘Simplified EDMO’ [Empty Dwelling Management Order – English Power] • ‘Maybe the Scottish Government making it clear that they fully endorse the use of CPOs to aid tackling the empty homes problems and maybe doing something to reduce the timescales for a CPO and therefore making it a more cost effect and user friendly tool’ • ‘Compulsory sale order’. In England, Empty Homes Officers have recourse to both Empty Dwelling Management Orders (to take over the lease of an empty home for up to 7 years), and Enforced Sale (under the Law and Property Act 1925). There are issues with both of these powers including long bureaucratic processes (Empty Dwelling Management Orders) and the requirement for there to be a debt against the

	property (Enforced Sale) that make them less than desirable for the Scottish context. However what they do offer, that Compulsory Purchase at the moment does not, are powers that councils are actually willing to pursue for single empty homes. The end goal of course is to not have to use the power. However having a power that the council feels confident it could follow through on if needed has been shown to make the other steps in the process above – especially those around negotiation and problem solving with owners – more effective. The Scottish Empty Homes Partnership have recommended the introduction of a 'Housing Re-use Power' (see Appendix) for councils which would allow them to either lease or force the sale of long term empty homes as a last resort and under strict conditions. This proposal was endorsed by the Land Reform Review Group in their final report. We would expect the use of such a power to be at the discretion of councils only after all other options in terms of advice, information and incentives have been offered. Not all councils would choose to use an enforcement power, but what we do know is that for those councils who see enforcement as a necessary part of their empty homes approach, the powers that exist are not as accessible or as effective as they would like. The Land Reform Review Group also made a recommendation for the creation of a Compulsory Sale Order which would enable councils to force vacant and derelict land on to the open market if it remains unused for 3 years. The Scottish Empty Homes Partnership is in favour of the adoption of a Compulsory Sale Order Power provided that any definition of vacant and derelict land also included vacant and derelict buildings. We believe such a power would achieve much of what we have been seeking through our proposal for a Housing Re-Use Power, namely a change of ownership where properties have got 'stuck' and owners are missing or not engaging. Change of ownership has time and time again proven the key to unlocking many an empty homes case and a power that councils can realistically use at low cost would be invaluable in tackling some of the worst problem empty homes. The key for the Partnership is that local councils have an enforcement tool that they feel is viable in terms of cost and effectiveness. While we will continue to advocate that enforcement is used as a last resort, we believe it is important that councils have an effective enforcement power as a final option for problem empty homes where incentives and negotiation fail.
36. Scottish Power Ltd	**Statutory Undertakers** You may be aware that Ofgem consulted recently on expanding the

	powers, available to electricity generation licence holders, under Standard Licence Conditions 14 and 15 of each generation licence. In response to this consultation, we made reference to the implicit support in these conditions and express support for the use of the statutory powers of compulsory acquisition by electricity generators. However we have reservations that, as we are not regarded as a public body, government and the public might be resistant to generators using these powers. We would therefore suggest that the definition, set out in paragraph 2.44 (DPCP), is expanded in any amended legislation to make it explicitly clear that companies which hold generation licences (Generation and renewables businesses [as well as gas transportation licences]) are classed as statutory undertakers. Ofgem have a critical role to play in regulating the electricity industry, and determining which licence holders have CPO powers, and accordingly, it is important that this is recognised in any legislative changes.
37. J Mitchell	We as a family have farmed in the vicinity of the Milltimber Brae for several generations. The family purchased the 200 acre holding as sitting tenants from the Culter Estate in 1984. Following work carried out by consultants for the AWPR in 2001/2002 a preferred route for the Bypass was announced in the Spring of 2005, which would not have affected our property. In December of that year, in response to lobbying against that route because of its perceived effect on the Camphill Community, a Rudolf Steiner School for children and young people with special needs, the Scottish Ministers announced an entirely different route further to the west, avoiding the Murtle Brae which had been safeguarded for the route of an Aberdeen Bypass for some 30 years in favour of a route affecting Milltimber Farm. The exact route selection for this was developed between December 2005 and May 2006 when the new route was announced. Little consultation was undertaken in respect of this route selection, which led to the Scottish Government having to relocate the Aberdeen International School at a reputed cost of in excess of £51 Million. They also had to buy out 12 houses blighted by the proposal, the total cost of which was in the region of £17.67 Million. As a consequence of the changing nature of agriculture, our farming system was diversifying from cattle and arable production towards livery. We raised with the AWPR team at various meetings in 2006 and 2007 issues regarding the design of the road in relation to the livery business which is located at Milltimber Farm, whereas the majority of the fields to the east were liable to be severed by the AWPR proposals.

	By February 2007 25% of the livery business had already been lost as a result of the proposed AWPR, Transport Scotland rejected proposals for an overbridge. The scheme involved the loss of some 47 acres out of 270. Transport Scotland considered that an overpass to link the main steading to the severed area was unnecessary and suggested that horses would walk to grazing on the other side of the B979 between the Milltimber Road and the AWPR via an underpass formed by the new Dee Bridge on the floodplain. Transport Scotland's agents, Graeme Kerr of the Scottish Agricultural College, considered that although the effect on our property was adverse, he went on to state that the business would still be viable (despite the loss of liveries). Mr Kerr's evidence before the Public Inquiry indicated high sensitivity. He identified the need to provide overbridges and underpasses to limit the effect of severance and loss of access. This evidence at 5.4.3 of his precognition was the proposals would involve an additional 310 m journey length predominantly adjacent to public roads and acknowledges that this additional journey length of its own would increase safety risk. In the light of such evidence we had to commission our own equine assessment from a specialist equine consultant with internationally recognised expertise to support our position and business. This was entirely at odds with the evidence provided by Transport Scotland raising considerable concerns about the impartiality of the EIA carried out by Transport Scotland upon which the route choice was predicated. Given the circumstances and Transport Scotland's refusal to consider relocating the business to the east of the proposed route, we had to spend approximately £1.4 Million in obtaining planning consent and building a new livery yard in an attempt to mitigate the haemorrhaging livery business. We are now faced with a major difference of opinion regarding the compensation payable which could proceed to the Lands Tribunal if these matters cannot be settled. **Private Water Supplies** We have also experienced significant issues with Design & Build by trying to ensure that our Private Water Supply would not be affected. Assurance was given that if any issues arose a mains connection would be provided but as a result of the contractual basis we have had water quality issues and no timeous responses from Transport Scotland and the CJV to resolve.

	Blighting Effect The mere promotion of a scheme has a blighting effect on development in the area. When the revised route was announced in 2006 house prices along the revised route plummeted. The effect is also illustrated by the fact that the 2012 Aberdeen City LDP did not allocate some of our land for development. One of the reasons given for the failure to allocate this was the potential reservation of the land in the area for the AWPR. It is interesting to note that as part of the same LDP review, a section of our property at Peterculter East (unaffected by the AWPR) was in fact re-zoned for housing.
38. MacRoberts LLP	Social, economic and political contexts are all very different now. There is a far greater sense of justice and injustice, fairness and unfairness, and a far higher expectation of the "right" to be heard and taken into account. The current CPO process is essentially adversarial. A great deal might be achieved by making it a more collaborative process, acknowledging at all stages that claimant's rights are being taken against their better wishes. Claimants should be entitled to and should receive more contextual information, assistance and advice than at present, to make the entire process less adversarial and less stressful. Has any analysis been carried out on the cost of the system in terms of managing objections, etc. taking account of claimants' and acquiring authorities' costs? It seems likely that applying cost to creating a system which provides contextual and timely assistance to claimants, coupled with a premium payment, would end up costing less overall. Too much onus on the claimant to establish and/or defend their claim, when it is they who are being inconvenienced. They should be compensated fairly, but never excessively: not ransom but also not just open market value. The whole process is complex, confusing, long-drawn-out and expensive. There is a significant lack of reasonable certainty about how the process will run, when and approximately how much compensation will be, so that it is hard for claimants to forward plan in a meaningful way. The stress that that creates should be mitigated by better expectation management, and help for claimants, especially those unable to fund their own professional advice. A means to prevent acquiring authorities from obtaining CPO confirmation but sitting on it for ages, e.g. until a more economically

	advantageous moment. Local authorities should have power to acquire to address areas of general dilapidation and lack of repair without having a requirement to have settled planning policy in place. Clarify ability to convert acquired land to other uses and to sell for other purposes.
39. Scottish Land and Estates	We welcome the opportunity to provide comment on this discussion paper as the subject affects our members. While we recognise that no one person ought to be able to stand in the way of a major beneficial infrastructure project, it is vital that the process is not weighted against the landowner in favour of the acquirer and that it is properly transparent.
41. Judges of the Court of Session	**Compensation and valuation: Chapters 10-17** While the courts are frequently called upon to adjudicate on questions relating to compensation and valuation, the task that they perform generally involves interpretation of the legislation together with the application of general principles of judicial review. The general issues of policy that underlie the drafting of the statutory provisions are matters on which those who have everyday contact with compulsory acquisition are better qualified.
44. Scottish Property Federation	We have no further comments. **General Comments** It has been the view of the SPF that CPOs are a vital part of the development and regeneration toolkit that until recently have been little utilised. In recent years there appears to be a greater willingness of Scottish local authorities to once again make use of CPO powers. We suspect that this will become an increasing requirement as public authorities take a greater lead in regeneration initiatives. In addition the continual requirement for infrastructure investment and the return of complicated mixed-use development projects in urban centres covering significant layers of land titles makes this a particularly important time to overhaul, clarify and modernise Scottish CPO legislation. In addition the introduction in Scotland of enhanced or additional policies of compulsory sale of land (Community Empowerment Bill and the land reform Bill respectively) suggests that a number of features of CPOs and, by extension, the non-statutory 'Crichel Down' rules require that we take the opportunity to improve our compulsory purpose powers and its associated processes of valuation and compensation in particular. The Scottish Property Federation will be pleased to continue to

	support this important SLC initiative.
46. Hendersons Chartered Surveyors	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 (CRM 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. 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. **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, e.g. (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 or seek to apply in full. 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.
Further responses, either made informally or at engagement events	Set out, where relevant, in the analysis below.
Analysis	
Explanation of question	This question was designed to find out whether consultees had concerns in relation to the CP system which were not addressed in the DP.
Summary of responses and analysis	There were 30 responses to this question, a number of which raised similar issues. These are summarised below. Numbers 1 to 5 relate to issues which were specifically not covered in the DP. 1. UTILITIES The DP (paragraph 2.66) confirmed that there are strong arguments for a review of this area of statute law, but reached the view that this could not be done within the scope of this project. JRR stated that this was an area badly needing attention, and an area where the question of "justification" looms large. CC suggested that utility way-leaves should be a separate topic as these raise a series of slightly different issues. LTS noted that consideration of wayleaves was not part of the process and questioned how the older CP Acts could be abolished since many of the newer wayleave Acts rely on references to the older CP Acts.

	CAAV stated that the importance of utilities in the world of CP needed to be considered as part of the process, and that omitting them would omit perhaps the major area of work, with issues for affected parties and the reputation of the process. SP stated that the definition of statutory undertakers contained in paragraph 2.44 of the DP, should be expanded to include companies which hold generation licences, and wanted this issue to be considered in any legislative changes. HCS stated that water/sewerage legislation needed to be updated to be consistent with good practice. 2. AIRSPACE The DP (paragraph 2.10) stated that investigation of the conveyancing implications of the CP of airspace lay well outwith the scope of this project. AJ stated that he did not understand this view as he was currently subject to a CPO involving airspace. He referred to the example of a 2014 CPO at the St James area in Edinburgh and quoted from SG correspondence released under an FoI request. AJ was concerned with the uncertainty relating to airspace, particularly as it affected CPOs. DLA stated that it was a mistake to exclude the conveyancing practicalities of airspace acquisition. They stated that the vast majority of CPOs were for road projects, where there was a recurring issue of how to deal with the acquisition of rights for bridges – was it a servitude or acquisition of airspace? They stated that if CPO law was being reformed, it would make sense to tackle the main practical issues being faced. They pointed out that the problem was partly the definition of "land" (paragraphs 2.46 – 2.48 of the DP) which only appeared to allow for the acquisition of rights in airspace, and not the acquisition of the airspace itself. The issue of airspace was raised at all the engagement events within solicitors' offices (DLA, S&W, Brodies, Burness Paull and CMS). The SLC has been urged to consider this matter further. Solicitors have stated that this issue has cost and timing implications for clients. 3. BLIGHT The DP (paragraph 2.9) stated that consideration of blight lay outwith the scope of this project. S&P stated that blight was a key issue identified in the Murning Review. There was a general acceptance that the promotion of, or the threat of, CP tended to act as a blighting effect on the marketability of property and associated value. The long procurement process and

	tendency to consult on options, however desirable, leads to uncertainty for those property owners along the corridor of any scheme. Such "blight" on alternative corridors exists until the actual route is finalised, and remains in respect of the chosen scheme until the vesting date. As the timescales involved in the CPO process were long, this tended to exacerbate the effect of blight. Their experience was that it was extremely difficult for property owners to dispose of their properties in the vicinity of any CPO scheme. They gave two examples:- • AWPR, where uncertainty remained from the date of the announcement of the alternative route in 2006 until the vesting date in 2013. • A96, where the "road show" has already "blighted" properties along the route options. This will continue until the scheme is delivered. They stated that any revised legislation should contain clear duties on AAs towards affected parties during the design, promotion and implementation of any CPO Scheme. They also stated that pre-scheme blight could also affect businesses, such as has been the case with the HS2 rail link in England. S&P pointed to the strict criteria to be met in order to achieve a valid blight notice under current legislation, and considered that the circumstances within which a blight notice could be served should be considerably widened. Blight notices were currently restricted to owner-occupiers and there was a rateable value limitation for non-residential properties. They pointed out that blight does not discriminate between different property types and values. They also considered that the requirement that reasonable efforts be adopted to dispose of the property on the open market prior to a blight notice being able to be served, should be removed. This was even more important as a result of the introduction in 2009 of the Home Report, which will refer to the threat of CP and will affect marketability and value. They also mentioned the cost of the Home Report to a residential property owner. The points made by S&P were also made, at some length, by SCPA, DVS and CAAV. JM stated that the mere promotion of a scheme had a blighting effect on development in the area. 4. INJURIOUS AFFECTION WHERE NO LAND IS TAKEN The DP (paragraph 2.9) stated that consideration of injurious affection claims where no land is taken, lay outwith the scope of this project.

	SCPA and DVS explained that injurious affection where land is not taken is dealt with by the McCarthy Rules (named after the English House of Lords case of *Metropolitan Board of Works v McCarthy*, and which provide for compensation for public works where no land is taken), but stated that these were neither well known nor understood. Stakeholders have advised that the interpretation of the statutes in this area has given rise to considerable complexity. The principles which seem to have been established by judicial authority are that the injury must:- • arise from the legitimate exercise of statutory powers, • be such that but for the statutory powers, it would have grounded an action at law, • be one affecting the value of the land, and • arise from the construction of the public works and not from their subsequent use. SCPA and DVS gave the example of the interference with access rights on land not owned by the affected party but where that land has been compulsorily acquired. They considered that whilst the implementation of these Rules rarely occurred, they should be incorporated within any new legislation, on the basis that a CPO should result in the CP of all property rights and interests, and all owners/tenants of such rights and interests are entitled to claim compensation for any injury caused as a direct consequence of the CPO and public works. DVS explained that the McCarthy Rules derived from section 6 of the 1845 Railways Act. They referred to *Wildtrees Hotel Ltd v Harrow London Borough Council* which contained a very lucid exposition of the case law and the inconsistencies in this area of the law. They gave an example to illustrate the inconsistencies. An occupier who runs a business of a hotel, pub or filling station, where the value of the premises always reflects the value of the business, effectively gets compensation which includes any business loss. However if the premises were used for a business such as a general store, general retail or industrial use, then compensation could be claimed only for the reduction in value of the premises, and any loss to the business is specifically excluded. DVS doubted that this was the original intention of the legislation, and stated that it would be better if all business losses were claimable, whatever the use. 5. CLAIMS UNDER PART 1 OF THE 1973 ACT The DP (paragraph 2.9) stated that consideration of claims under Part 1 of the 1973 Act, lay outwith the scope of this project. These are claims for compensation to reflect the diminution in value of

	property affected by public works where the property lies adjacent to or close by a public work, but no land has been acquired. The 1973 Act places limitations on such claims, on who can claim, and the amount of compensation payable. SCPA suggested that this right to claim compensation should be widened to cover all public works and all properties affected, but that loss should remain restricted to the diminution of value caused by one or more of the seven physical factors set out in the 1973 Act. They suggested that the AA should be obliged to announce a formal date of completion of the public work, but that the timescales for claiming compensation should remain as set out in the 1973 Act, and the six year limitation of applications to the LTS, which runs from the formal date of completion. They also suggested that an AA should retain its statutory obligation to reduce the effects of its public work by providing sound insulation and other mitigating works as circumstances dictate. Their views were echoed by DVS. CAAV stated that their members had reported that AAs were taking an increasingly defensive stance on Part 1 claims, notwithstanding that evidence existed of genuine permanent adverse effects. They stated that the problem was that the current tribunal system did not allow for a "quick fix" hearing for these types of claims in situations where the AA would not agree to a simplified procedure. The costly procedure to resolve disputes could discourage claimants from pursuing a legitimate claim. They stated that whilst LTS rules did allow for a pre-hearing costs award to cap fees for the applicant, this process itself could be costly and time consuming. CAAV stated that they had real concerns that homeowners with genuine claims, would not have access to justice unless there was an initial automatic referral to a simplified procedure in cases where points of law were not in dispute. S&P stated that Government had recognised that blight does not stop at the boundaries of a public work but had limited the amount of compensation to be paid in such circumstances. The amount to be paid was determined in accordance with seven physical factors set out in the 1973 Act, which do not include loss of view, privacy or amenity. S&P considered that compensation should be on the basis of full loss and that AAs should be under a duty to consider the effect of the scheme and be under a statutory obligation to reduce the effects of its public work by providing sound insulation and other mitigating works. 6. ADVANCE PAYMENTS Stakeholders expressed many and detailed concerns in relation to the current practices employed by AAs in dealing with advance payments.

	S&P considered that the system was "fatally flawed". They stated that AAs did not prepare in advance, nor did they have systems ready for dealing with advance payments. They pointed out that if AAs prepared in advance, they would be fully aware of the likely scale of compensation, but instead AAs adopted a cautious approach to the level of compensation, leaving claimants out of pocket. S&P and CAAV considered that there should be a prescribed form of applying for advance payment, that AAs should be under a duty to deal promptly with any advance payment request, and that AAs should be given a 21 day period to request further information. There should be appropriate sanctions for any failure. The experience of S&P and CAAV was that TS had failed to pay any claim for advance payment timeously. SCPA stated that the 90 day period for payment was regularly ignored by AAs and that current legislation provided no means of redress given that the statutory rate of interest was nil. SCPA considered that a penalty statutory rate of interest (8% over Bank of England Base Rate) and/or a penalty payment (5% of the whole advance payment) should address failure to comply with the 90 day period. IG stated that the current system of AAs avoiding advance payments and paying no interest was wholly unfair to those whose land was taken. SCPA and DVS noted that the assessment of likely compensation lay solely with the AA, that it could be very difficult to recover an overpayment to claimants, and thus AAs adopted a cautious approach. They also noted that current legislation permitted a series of applications for advance payments and that these were normally made following development of negotiations. S&P and CAAV also referred to this and suggested that this procedure should be altered so that the claimant only required to make one application which should be treated as a continuing one. 7. TAXATION S&P and CAAV stated that there were a number of aspects of the interaction of the CP regime with the taxation of property, which could cause hardship to claimants and which could be ameliorated by government intervention. They stated that the conversion of a property asset, which might qualify for valuable reliefs from capital taxes, into a sum of cash which would be fully taxable, could be especially problematic for the rural property sector. CAAV stated that while there is an alternative CGT roll-over relief regime for assessed gains made on CPO disposals (which may be nominal gains rather than real) this had at least two deficiencies in practice:-

	● the time limits are absolute without the HMRC discretion available for the main form of roll-over relief; ● it is understood that, while gains can be rolled over into buying a new building, they cannot be rolled over into building a new building on retained land. The limited availability of convenient land for purchase in the rural market makes both these points difficult. S&P expanded on their initial submission by advising on issues suffered by their clients, and likely to come before LTS. They understood that in accordance with Inland Revenue Note SP8/1979, agricultural disturbance claims will be assessed as a taxable receipt under Class 1 and 2 of Schedule D. Difficulties arise with capital taxes arising out of CP. The claimant is unable to control the timing of any disposal which, absent the scheme, he would be able to do as part of normal tax mitigation. Under the Taxation of Chargeable Gains Act 1992, CGT would seem to be payable in respect of any disposal consideration. Section 247 of the 1992 Act makes provision for roll-over relief. Such relief is available if some or all of the disposal proceeds are reinvested by the claimant in a replacement property within a four year period starting 12 months before and ending three years after the date of disposal. The time at which the disposal is treated as being made for tax purposes is the time at which compensation is agreed or otherwise determined in terms of section 246 of the 1992 Act "or if earlier (but after 20 April 1997) the time when the AA enter on the land in pursuance of their powers." This essentially means that unless the parties have agreed compensation, the date of vesting becomes the date at which the disposal is made, notwithstanding the fact that in the current climate it is highly unlikely that compensation can, or could be, agreed at that date. Effectively, therefore, a landowner has no funds with which to purchase alternative property to rollover any gain. A further anomaly occurs in respect of Section 17A of the 1963 Act which limits claims arising out of reinvestment of the property (stamp duty, agents fees etc.) to within "the period of one year beginning with the date of entry." The claimant effectively has to pay CGT on any compensation received. The English authority on this issue was *Bishopsgate Parking (No. 2) Ltd* which related to the CP of a car park. The owner had difficulty in finding a suitable replacement and was liable for CGT. The Tribunal decided that CGT was capable of being compensated. S&P stated that there is no Scottish authority on this issue but they were aware of a number of cases pending where this is a major issue. IG said that on the subject of taxation, whether Stamp Duty, VAT, Inheritance Tax, Income Tax or rates etc., the AA should be liable to

	pay these as a result of CPO purchases. She said that a prime example of this was their own case where they, as a family with an intergenerational farm business that has been disturbed in their own rights to use their land, should not be liable for tax costs that they would not have incurred but for the CPO process. DSS gave a detailed example from his own experience of losing the ability to claim various tax reliefs which would otherwise have been available as a result of the legislation on severance and compensation. 8. DESIGN AND BUILD (AND SIMILAR) CONTRACTS S&P explained the traditional approach to public and private works construction projects in Scotland. This involved the AA or landowner employing a designer or team of designers to design the scheme or project in detail. The AA would then undertake a competitive tendering process to find the best contractor on the basis of detailed drawings, method statements and timetables, with contractors bidding for the work in the knowledge that most of the risks had been identified during the design process. In that scenario, both design and construction is controlled by the AA; the AA having direct contracts with each of the design team and the contractor. They went on to state that most major projects are not now undertaken in the traditional format, but rather proceed by way of Design and Build contracts ("D&B"). In this scenario the AAs may undertake a minimum of design and very quickly move to competitive tender for a contractor. The contractor takes on the detailed design, and the construction. In some cases contractors now may also take on the funding and the future operation and maintenance of the project for a lengthy period of time. Through the D&B method the AA attempts to off-load as much risk as possible to the contractor. Risks such as adverse ground conditions, availability of manpower and the like are shifted to the contractors who are perceived to have the expertise in this area. DSS, S&P, CAAV, DJH, and JM all expressed concerns regarding the use of D&B contracts. The challenges which these contracts force upon landowners are summarised as :- 1. AA relinquishes control over design, thus leading to a drop in quality. The contractor will look for the cheapest possible short term solution, which will not always be best for the project or the surrounding landowners. 2. Large projects involve large sums of money. The contractor will have submitted as low a price as possible to procure the work and will look at every possible mechanism to generate extra money from the project so as to increase profit. This will force the contractor to cut

	corners and pick on easy targets to save money. 3. Once a contract is awarded, an AA is not in a position to easily alter the terms of that contract, thus sensible proposals for change put forward by landowners are unlikely to be considered. 4. AA passes full occupational rights to the contractor on the award of the contract, and with that will pass the obligation of dealing with neighbouring owners and / or occupiers and undertaking any mitigation works. Unless detailed specifications and method statements for mitigation works are inserted in the contract by the AA, the contractor will always go for the cheapest option which may not necessarily work in a rural setting. 5. CP legislation was drafted at a time when the traditional construction methods were employed, and the legislation is ill suited to the more modern construction and procurement methods. The issue of AAs not retaining responsibility for the scheme was raised by many agents and by landowners at the various engagement events held during the consultation. 9. PROFESSIONAL FEES AND COSTS Stakeholders expressed considerable unhappiness with the issue of professional fees. Historically fees were reimbursed on the basis of Ryde's Scale. However Ryde's Scale was pronounced archaic by the DCLG's predecessor in 2002 and DCLG advised that surveyors should be reimbursed in full in line with all other professional advisers. Notwithstanding this, and the decision in *Poole –v- South West Water* which upheld the principle of fees being paid on a time and expense basis, the SG have resisted calls for a similar approach. S&P, DSS, CAAV and HCS all reported difficulties dealing with recovery of fees. DSS stated that TS insist on reimbursing fees on the basis of Ryde's Scale plus 25%, while other AAs will offer Ryde's Scale plus 40% or, more recently Ryde's Scale plus 50%. HCS expressed concern that claimants are entitled to professional representation, but that the reality is that professional practitioners, for more than a generation, have been discouraged from accepting CP instructions as a result of fee practices by statutory bodies. 10. BACK-TO-BACK AGREEMENTS CC stated that, in modern practice, a significant number of CP projects involve a private interest, often as a driver for the entire endeavour. Although this was touched on only briefly in the DP, he suggested that this raised issues which were capable of having a very significant impact on the entire structure of compulsory purchase and the procedures which go with it. The "why" affects the "how".

	In a traditional CPO, a project is promoted which is developed and controlled by public interest (e.g. a road scheme). The scheme involves the taking of private property and there is no private interest behind it. The process itself and any decisions which require to be taken within it, can be taken by relying on the principle on which CPOs are meant to function i.e. that the public interest justifies a major interference with private property rights (that theme is reiterated throughout the DP. CC understood that back-to-back arrangements first emerged for purely technical reasons. He first encountered them when advising on issues arising out of a development of a city block in Glasgow. In the course of investigating the historic title it was discovered that a small triangle of land could not be traced to an owner. It was thought undesirable, and may even have been impossible, to transfer this enormous, costly new development to a new owner without being able to give a valid title to the whole area. In the circumstances, the project having received planning permission (and no doubt being perceived to be broadly in the public interest) a CPO was promoted over the whole site. The local authority then transferred the site to the developer, thus clearing the title impediment. This was done subject to an indemnity in respect of costs, from the developer. No compensation was payable because the developer was either the owner or had agreed terms for the acquisition of the remainder of the site and was content to indemnify the Council against any potential claim by the owner of the triangle [of land] which might emerge in the future. Viewed from that perspective, such arrangements have an evident utility and are unobjectionable. However, CC stated that what had emerged since was a different pattern in which the circumstances ranged across a spectrum. At one extreme, a public project or publicly-driven project which is said to be of evident public utility is promoted by a public authority in the public interest. The public authority lacks the funds to put the project into operation. It accordingly makes arrangement for the transfer of that project to a private party in due course. However, the rights and wrongs of the acquisition process and any contentious issues which arise during it, are entirely governed by the public interest agreements in favour of the project, in all its detail. At the other extreme of the spectrum will lie a project conceived by and primarily for the benefit of a private sector owner or developer, but nevertheless one which cannot be brought into reality without the acquisition of other private interests (who are by definition not prepared to sell). In that scenario there may be only a peripheral public interest in the scheme – even if it is generally in accordance with the planning regime or has planning permission. What is being authorised is the acquisition from one party, who wishes to make profit from his property, of that property so that another party may make the profit he in turn wishes to make from it. Critically, in that event the

	arguments and details of procedure and justification which may arise during any contentious process are, in reality, governed by the private developer and his requirements. CC's view was that the public authority is reduced to a mere cipher necessary to achieve the statutory power of CP. In that example, if an issue arises, for instance at enquiry, over why this or that should be done or why a particular detail is or is not included, the driver for its inclusion is not in reality the public interest at all but the private commercial interest of the developer. The public authority may even be prohibited by the agreement with the developer from becoming involved. CC stated that other schemes will stand somewhere in that spectrum, and that it seemed that the law, including procedural law, has not yet faced up to the way in which the law should proceed. He believed that an examination, from the point of view of principle, rather than governed by the facts of any particular case, was long overdue – and legally – a CPO process in which an AA, apparently the promoter, takes no decisions and is the master of nothing, does not fit the structures under which, on the face of it, such a process is intended to proceed. In these circumstances, CC's view was that an AA has in fact surrendered its role to another party, becoming little more than – at best – a post box. CC stated that he did not have the answer but that total transparency seemed the key so that any decision-maker could analyse the material to determine whether the public interest, whatever it was, justified the steps sought and could identify where the private interest was intervening. Similar concerns were expressed at engagement events at the offices of solicitors during the consultation. 11. STATUTORY UPLIFT TO MARKET VALUE S&P stated that in the great majority of schemes, land acquisition was a small element of the cost involved, while delays in acquiring land could be very costly to the project. Allowing an AA to take an overall view of the matter would offer it a useful degree of freedom in the interests of the public purse. Where an attractive offer is made to a landowner the acquisition process is likely to be quicker and less contentious than if compulsory powers were used. This is likely to have a beneficial impact on schemes, allowing them to proceed more quickly and offering consequential cost savings as a result. Spending a little more money at the start of the scheme might save significant sums overall, as the Chancellor of the Exchequer observed in January 2015 to the Royal Economic Society: "We should change our outdated compulsory purchase regime. Both

	the LSE Growth Commission and Chambers of Commerce have had the bright idea that, in some cases, if you pay people a little more you'd get planning a little quicker and the whole process could cost you less." S&P took this argument forward and considered that there was a case to be made for a statutory uplift to market value to be applied to cases of CP, returning the situation to that which existed before 1919, when it was standard practice to allow a 10 per cent uplift in the value of the land taken, in recognition of the fact that the seller is unwilling. This model continues to be upheld in some other jurisdictions, including on the Isle of Man where the Acquisition of Land Act 1984 states that the value of land is: …."the amount which the land if sold in the open market by a willing seller might be expected to realise, with an addition of 10 per cent on account of the acquisition being compulsory." In engagement events the concept of a statutory uplift was discussed and attracted widespread approval. Professor Norman Hutchison of Aberdeen University spoke to his research in this area and drew attention to the Indian system. 12. JUSTIFICATION JRR suggested setting down some measure of satisfaction or some objective against which to judge the adequacy of the system. He suggested that procedural arrangements might be judged against some notion of balance or fairness while compensation arrangements might be judged against the principle of equivalence. AJ said that it seemed that the fundamental issue of CP was that of the public interest over the individual interest of those affected. He was confused as to why the DP excluded justification for reason of focus on procedure, as justification is step one of the procedure. Without satisfaction of the initial test of justification, CP becomes a shopping trolley for those who seek to abuse the process. He stated that CP then became a form of legalised plunder, under the excuse of compensation. He gave a detailed summary of examples of CPOs where he has been involved. He highlighted issues where he considered the CP system to be inadequate, e.g. airspace, crane oversailing, blight, early engagement, ancient monuments and listed buildings and also raised issues relative to bad faith. SE considered that the DP lacked a robust review of empowerment and justification. DSS stated that as both a landowner, farmer and chartered surveyor, having gone through the CP process, he believed he was uniquely placed to comment on the current CPO provision. There should be a

	one system arrangement for the process incorporating the fundamental democratic rights to object; the process must recognise private property and human rights. The use of CPOs should be strictly controlled and any CPO process should be properly carried out with due regard to those affected by the scheme. An AA should not be able to abrogate its responsibility to private firms and there must be sanctions for non-compliance. There should be a flexible and sympathetic compensation regime, recognising the problems arising between claimants and AAs inherent in the existing process. A premium over and above market value for land acquired would go a very long way in breaking down the current antagonistic attitude towards schemes for those affected and would make the system smoother and easier. DSS set out at length in his submission details of the issues he encountered. JW said that the DP did not include reference to the seminal decision in *Bryan – v - United Kingdom* (whether an inspector is an independent and impartial tribunal), nor did it refer to *Stirling Plant (Hire and Sales) Limited – v – Central Regional Council* (confirmation by Secretary of State). He said that the proposed new law should operate for the most common examples of compulsory acquisition such as CPOs, and orders made under the Roads (Scotland) Act 1984 by the SMs. It should also operate for foreseeable proposed changes. These include changes following on from the May 2014 Land Reform Review Group report "The Land of Scotland and the Common Good" including the proposed extension of compulsory purchase rights and having regard to the proposed "Land and Property Information System." He also suggested that the SLC should also consider initiatives in other jurisdictions and approaches, for instance those whose land is compulsorily expropriated being given a share in the "marriage value" of the land assembled by compulsory expropriation. CAAV stated that powers of CP were a remarkable privilege granted by statute to enable an entity (in practice the state or a state-sanctioned corporation) to use the force of law to enforce the taking of private property, whether someone's home, business or other land. Enhancing and broadening the state's powers to take private property beyond the narrow areas where it can clearly be warranted was harmful to the principles of the liberal market economy that support growth and endeavour. Affected property, often peoples' homes or the places where they make their livelihood and their largest single purchase, required long term stability as does the investment market in property. Jeopardising that could intrude seriously on the affected people and more widely have adverse consequences for the economy in future. It was important on both these grounds that there be certainty in the process – powers should be defined and subject to time limits. Most affected parties were individuals and families for whom the procedures of CP from original concept to final

	implementation could take a significant part of a life. Therefore there was an onus on the body with that privilege to use it with care for those from whom it was taking their property. Ideally, much should be achieved by negotiation. Due process should always be followed. IG set out in her submission a detailed summary of her personal experience with the CPO system. She concluded that her family considered that the current legislation provided inadequate protection for landowners affected by such CP powers and welcomed reform. As the legislation stands, a landowner, "sells" his property for a scheme for an unknown sum, payable at some indeterminate date in the future with no interest payable on that sum until settlement. She wondered what property owner would accept such a situation in the real world. MacR said that the social, economic and political contexts were all very different now. There was a far greater sense of justice and injustice, fairness and unfairness, and a far higher expectation of the "right" to be heard and taken into account. The current CPO process was essentially adversarial. A great deal might be achieved by making it a more collaborative process, acknowledging at all stages that claimants' rights were being taken against their wishes. Claimants should be entitled to and should receive more contextual information, assistance and advice than at present, to make the entire process less adversarial and less stressful. MacR asked whether any analysis has been carried out on the cost of the system in terms of managing objections, etc. taking account of claimants' and AAs' costs? It seemed likely that applying cost to creating a system which would provide contextual and timely assistance to claimants, coupled with a premium payment, would end up costing less overall. They took the view that there was a significant lack of reasonable certainty about how the process would run, when and approximately how much compensation would be paid, so that it was hard for claimants to forward plan in a meaningful way. The stress which that creates should be mitigated by better expectation management, and help for claimants, especially those unable to fund their own professional advice. 13. GUIDANCE RTPI stated that the new legislation should be produced in tandem with guidance and good practice support to ensure that all users of CPO procedures were comfortable and confident with the new powers as they come into force. They also suggested that, while the detail of the new CP legislation was of great importance, they believed that some context or a preview to this would be useful, and was currently missing from the DP. It would be useful to set out why a CPO may be needed to make sure

	that all parties clearly understand the need for CPOs. It would also be important, as part of this, to set out the main reasons that people object to a CPO – on the merits of the proposal, as a bargaining position for compensation, or to make a point. These reasons, and perhaps others, have implications for how an objection to a CPO would be taken forward, and some guidance on this would be useful for all parties involved in the CPO process. They believed that there should be an opportunity to object, however consideration must be given to the process as a whole, not only the CPO procedure, including the allocation of a site within the Development Plan, and the Development Management process. LTS suggested that it may be appropriate for the new legislation to provide an express set of guiding principles within its own framework. That way the legislation could be given a purposive construction, and avoid some of the controversies which have beset the existing legislation. Reference was made to draft Guidance on CAADS which was prepared in 2011, but not finalised or issued. Several consultees, including RICSS and SCPA wished Guidance on CAADs to be finalised and issued, to assist AAs when faced with CAAD applications. 14. THE ENGLISH PERSPECTIVE SE stated that he believed Scotland's CPO problems lay in Scotland not tracking English CPO legislation. He referred to the 1997 Act, which could have followed the empowerment changes to the Town and Country Planning Act 1990 of England and Wales made in 2004. Those changes were specifically to make a whole swathe of general CPO power easier to apply. He suggested that in Scotland the course was set by the Community Empowerment (Scotland) Bill (now Act) and that empowering the community was dangerous when it should be local authorities alone which promote CPOs. NG stated that in England there was a power for AAs to requisition information at the start of the CPO process in order to establish the identity of owners, tenants and other benefited parties. They stated that this can be a useful power and there was no equivalent in Scotland. 15. HEARINGS SBC stated that in some recent planning hearings the Reporter had produced an agenda with a list of questions for each topic in advance of the hearing. While the list of questions did not limit the Reporter's ability to ask others, if required, it was highly useful in providing parties with advance notice of the main questions so they could provide focussed clear responses. They suggested that it would be useful to

	adopt this for CPO hearings. 16. HOUSING Shelter provided a detailed explanation of the activities of the Scottish Empty Homes Partnership (SEHP) and their work with councils to help bring private sector empty homes back into use. They explained their system of data collection, prioritising, advice and information, negotiation, incentives and ultimately enforcement or compulsory purchase. They reported that even where all other steps had failed and the property was causing detriment to the community they still found it difficult to use CP powers to acquire individual empty homes. They stated that they had sought to support councils who were looking to use CP powers, but that the feedback was that the existing tools were not fit for purpose. They mentioned examples from Glasgow City Council, and Fife Council which have taken in excess of five years. They reported that Councils are not prepared to pursue CP due to the concerns about cost, timescales and risk of pursuing a CPO, with the potential of ending up as owners of a property with no set end use. Shelter gave numerous examples of empty properties which had not been brought back into use, with the reasons given including a lack of funding and legal expertise, time constraints and no clear guidance on what constitutes reasonable efforts to contact or engage with an owner. Shelter argued for a specific empty homes enforcement tool and pointed to the system in England where empty homes officers had recourse to Empty Dwelling Management Orders and Enforced Sale under the Law of Property Act 1925. They acknowledged that the use of such powers was a last resort but argued that if an AA had such a power which it was confident it could follow through, this would be much more effective. 17. PERCEPTIONS OF UNFAIRNESS DSS stated that the procedure for confirmation of CPOs by the SMs had given rise to questions in his case. The Public Inquiry for the AWPR was presented with two alternative routes. The Reporter clearly recommended that the SMs should consider carefully the compensation payable in respect of the AWPR preferred route, as against the alternative. From evidence led at the LTS hearing, it appeared that this recommendation was not followed when the SMs confirmed the CPO. DSS stated that in his case the DV had stated that he would be independently investigating the possibility of “hope value” with the planning authorities, but failed to do so. At the LTS the DV gave evidence that there was no hope value whatsoever despite being aware that a considerable non-refundable deposit had been paid by Sainsbury’s as part of the missives for sale. This brought into

	question the impartiality of the VOA. DSS stated that his family had suffered a considerable degree of strain as a consequence of the CPO. He believed that his father's stroke was caused by the stress induced by the CPO and the public inquiry. The CPO process does not recognise the stress caused to affected parties by the forcible acquisition of property. In their experience this was compounded by the attitude of AAs and their agents in the process who resisted alternatives and mitigation measures and fought claims for compensation. S&P stated that increasingly the land take for CPO projects was not limited to what was immediately required for the project but involved land for landscaping and mitigation works. They gave the example of an SSE electricity substation where the extent of the substation was 11 acres but a further 32 acres were required for landscaping. S&P stated that SSE made no attempt to mitigate the land take and merely offered to the planning authority an extensive area as part of their planning application in order to obtain speedy consent. 18. CONVEYANCING ISSUES 18.1 SALMON FISHINGS/ACCESS OM raised an issue in relation to salmon fishings which were a separate land interest in Scotland and carry as a pertinent (associated right) a common law right of access. In her view this right of access was not a servitude but rather a form of dominium which could not exist independently and did not comprise a separate tenement in its own right. It resembled a servitude right in that there was no requirement for creation by deed, it was limited to certain acts of possession with no right or ownership, it was a real right enforceable against everyone and it must be exercised only in connection with the tenement to which it pertains and in the least burdensome manner. However it differed materially from a servitude in that it could not be lost by negative prescription. CP law did not make provision for its extinction. OM's view was that the right of access to salmon fishings was a special property right and constituted a right which would cease on the grant of a specific right of access but would revive on the extinction of such a specific right. She would prefer the situation to be clarified in legislation. 18.2 BURDENS GCC stated that it would be good to have certainty re the right to acquire by CPO the benefited proprietors' interests in burdens in property owned by the AA or the relevant third party in a back to back CPO. 18.3 COMMON/OPEN SPACE

	GCC stated that in relation to common/open spaces it would be useful to have a procedure for compulsorily purchasing these which was part of the normal procedure. 19. NATIONAL TRUST FOR SCOTLAND NTS strongly supported the continuation of their special parliamentary process and their ability to hold land inalienably. They welcomed the recognition of the importance of NTS ownership of land, and in particular inalienable land as a means of protecting it for the nation, and that it was not intended to consider this position further in the review. 20. SCOTTISH FEDERATION OF HOUSING ASSOCIATIONS SFHA explained that registered social landlords worked with local authorities to identify potential housing sites for development to meet needs identified in specific geographical locations or to address specialist needs. A SG subsidy was allocated to support land acquisition by housing associations for the development of affordable housing, mainly social rent. Many sites were in towns and cities and were also combined with a regeneration agenda, where new housing could revitalise a run down and depressed community while improving health and well-being. Access to land acquisition opportunities could prove very difficult in identified areas. While local authorities and other public bodies could provide access to land banks, this was sometimes at a cost which could make development difficult or was only useful where a consequential private sector acquisition proceeded as well. In addition there was often, particularly in rural areas, a need to target particular sites for development such as key sites to provide suitable accommodation for older people or people with disabilities. These key sites, whilst they might be appropriately zoned as exception sites for affordable housing use, might not be deliverable for that purpose without the appropriate use of CPO powers, which was often resisted.