

RESPONSE FORM

DISCUSSION PAPER ON COMPULSORY PURCHASE

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

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Summary of Questions and Proposals

PART 1: INTRODUCTORY AND GENERAL

Chapter 1 Introduction

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 The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.

(Paragraph 1.14)

Comments on Proposal 1

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.

We would emphasise that we have not responded to all questions as we feel that some are of a more technical nature which may be better answered by practitioners or professionals in this field.

Chapter 2 General issues

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

(Paragraph 2.56)

Comments on Proposal 2

Yes.

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

(Paragraph 2.70)

Comments on Proposal 3

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.

4. What comments do consultees have on the relationship between the compulsory acquisition of new rights or interests in or over land and general property law?

(Paragraph 2.70)

Comments on Proposal 4

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.

5. Would a general power to take temporary possession, as described in paragraphs 2.71 to 2.73, be useful for acquiring authorities, and, if so, what features should it have?

(Paragraph 2.73)

Comments on Proposal 5

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.

Chapter 3 Human rights

6. The right to compensation as a result of compulsory purchase in Scots law should be expressly provided for in the proposed new statute.

(Paragraph 3.51)

Comments on Proposal 6

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.

7. Do consultees agree with our view that the current statutory provisions applicable to compulsory purchase in Scotland are compatible with the Convention?

(Paragraph 3.87)

Comments on Proposal 7

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.

PART 2: OBTAINING AND IMPLEMENTING A CPO; THE MINING CODE

Chapter 5 Procedure for obtaining a CPO

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

(Paragraph 5.5)

Comments on Proposal 8

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).

9. Is there any reason why the procedures to be set out in the proposed new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B?

(Paragraph 5.18)

Comments on Proposal 9

None as far as we are concerned.

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

(Paragraph 5.18)

Comments on Proposal 10

Not that we are aware of, but we would question whether there is also scope to streamline any of this legislation at this time.

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

(Paragraph 5.20)

Comments on Proposal 11

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.

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

Paragraph 5.24)

Comments on Proposal 12

It appears satisfactory, although anecdotally we understand that agricultural tenants are some times not given formal statutory notice.

13. Should there be any further restrictions on the circumstances in which a statutory objector can insist upon a hearing or inquiry?

(Paragraph 5.25)

Comments on Proposal 13

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.

14. Should the proposed new statute provide that Scottish Ministers must refer cases to the DPEA within a specified time limit and, if so, within what time limit?

(Paragraph 5.26)

Comments on Proposal 14

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.

15. Should the DPEA have discretion over the process for determining objections to a CPO similar to that which they have in relation to planning matters?

(Paragraph 5.30)

Comments on Proposal 15

We see no reason why DPEA should not have discretion in this regard.

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

(Paragraph 5.32)

Comments on Proposal 16

We believe that a minimum timescale could be set out in primary legislation and this should be considered.

17. Should all CPOs made by local authorities and statutory undertakers require to be confirmed by Scottish Ministers and, if not, in what circumstances should acquiring authorities be able to confirm their own CPOs?

(Paragraph 5.41)

Comments on Proposal 17

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.

18. Are the current requirements for advertisement and notification of the making or confirming of a CPO satisfactory and, if not, what changes should be made, and why?

(Paragraph 5.42)

Comments on Proposal 18

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.

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

(Paragraph 5.46)

Comments on Proposal 19

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.

20. Should any conditions be attached to a revocation, so that the acquiring authority cannot initiate the same proposal within a certain period, or without specific consent of the Scottish Ministers?

(Paragraph 5.46)

Comments on Proposal 20

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.

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

(Paragraph 5.47)

Comments on Proposal 21

Yes, 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.

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

(Paragraph 5.50)

Comments on Proposal 22

Yes.

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

(Paragraph 5.50)

Comments on Proposal 23

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.

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

(Paragraph 5.59)

Comments on Proposal 24

Generally speaking the three year validity period is in our view reasonable.

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

(Paragraph 5.59)

Comments on Proposal 25

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.

26. Where the acquiring authority offer to replace a public right of way which will be affected by a proposed development, should the right to insist upon an inquiry be removed?

(Paragraph 5.64)

Comments on Proposal 26

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.

27. Where there is to be an inquiry into the loss of a public right of way, should any such inquiry be combined with any inquiry into the making of the related CPO?

(Paragraph 5.64)

Comments on Proposal 27

Yes, we believe that this would make sense.

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

(Paragraph 5.65)

Comments on Proposal 28

The reason for recent Public Inquiries should be looked at as background to make certain that expensive and time-consuming Inquiries are avoided where possible.

Chapter 6 Challenging a (confirmed) CPO

29. Should the proposed new statute make it clear that objections to a CPO, on the basis of allegations of bad faith on the part of those preparing the Order, are not competent under whatever provision will replace paragraph 15 of Schedule 1 to the 1947 Act?

(Paragraph 6.38)

Comments on Proposal 29

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.

30. Should the proposed new statute make it clear that applicants claiming that there has been bad faith in the preparation of a CPO have a right to claim damages from those allegedly responsible?

(Paragraph 6.38)

Comments on Proposal 30

Yes this should be the case. The availability of this right may help to focus minds and assist scrutiny.

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

(Paragraph 6.39)

Comments on Proposal 31

We have no comment to make.

32. Should any challenge to a CPO, on the ground that it is incompatible with the property owner's rights under the Convention, be required to be made during the six-week period for general challenges to a CPO?

(Paragraph 6.44)

Comments on Proposal 32

Agreed.

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

(Paragraph 6.45)

Comments on Proposal 33

There should be discretion where appropriate.

34. Where an applicant has been substantially prejudiced by a procedural failure, should the court have a discretion to grant some remedy less than the quashing of the CPO, either in whole or in part?

(Paragraph 6.48)

Comments on Proposal 34

Yes.

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

(Paragraph 6.51)

Comments on Proposal 35

Yes.

Chapter 7 Implementation of a CPO

36. Any restatement of the law relating to compulsory acquisition should include provision along the lines of sections 6 to 9 of the 1845 Act.

(Paragraph 7.9)

Comments on Proposal 36

This would seem reasonable.

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

(Paragraph 7.15)

Comments on Proposal 37

We support a single standard process which is clearly understood and transparent.

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

(Paragraph 7.19)

Comments on Proposal 38

Yes.

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

(Paragraph 7.19)

Comments on Proposal 39

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

(Paragraph 7.25)

Comments on Proposal 40

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

(Paragraph 7.29)

Comments on Proposal 41

42. When fixing interests in land, should any action taken or alterations made before service of a notice to treat, be considered differently from any action taken or alterations made after such service?

(Paragraph 7.29)

Comments on Proposal 42

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

(Paragraph 7.40)

Comments on Proposal 43

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

(Paragraph 7.51)

Comments on Proposal 44

45. Should there be any circumstances which would entitle an acquiring authority to withdraw a notice to treat after they have entered on to the land?

(Paragraph 7.51)

Comments on Proposal 45

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

(Paragraph 7.67)

Comments on Proposal 46

47. Alternatively, should it be competent for a landowner to serve a counter-notice within a set time limit following service of a notice of entry, whether or not the acquiring authority have entered on to the land?

(Paragraph 7.67)

Comments on Proposal 47

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

(Paragraph 7.73)

Comments on 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.

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

(Paragraph 7.78)

Comments on Proposal 49

We would draw your attention to the comments made above in respect of proposal 48.

50. Where a GVD applies to part only of a house, factory, park or garden, do the current provisions adequately safeguard the interests of the acquiring authority and the landowner and, if not, what alterations should be made?

(Paragraph 7.86)

Comments on Proposal 50

We have no comment to make.

51. Should a GVD be available in all circumstances?

(Paragraph 7.89)

Comments on Proposal 51

Yes, if a single system for effecting CPOs is implemented.

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

(Paragraph 7.89)

Comments on Proposal 52

Yes, as far as we aware.

53. Compensation should be assessed as at the date when the property vests in the acquiring authority, and interest should run on the compensation from that date.

(Paragraph 7.97)

Comments on Proposal 53

We 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.

54. Where the acquiring authority enter on to the land before it has vested in them, compensation should be assessed as at, and interest on compensation should run from, the date of entry.

(Paragraph 7.98)

Comments on Proposal 54

Yes.

55. In a situation falling within section 12(5) of the 1963 Act, the date upon which compensation should be assessed, and the date from which interest on the compensation should run, should be the date upon which reinstatement of the building on another site could reasonably be expected to begin.

(Paragraph 7.99)

Comments on Proposal 55

56. Should the proposed new statute confer upon the LTS a discretion to fix the valuation date at a date different from any of those mentioned above, where it appears to the LTS to be in the interests of justice?

(Paragraph 7.101)

Comments on Proposal 56

57. Where an acquiring authority are in genuine doubt as to whether or not they own a particular part of a parcel of land which they intend to acquire, where title is in the Register of Sasines, they should be able to:

- (a) use a GVD in relation to the whole of the land, and
- (b) register the GVD in the Land Register.

(Paragraph 7.106)

Comments on Proposal 57

Yes, we think is reasonable.

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

(Paragraph 7.114)

Comments on Proposal 58

Yes.

59. What, if any, alterations should be made to the time limits for the various steps involved in the implementation of a CPO?

(Paragraph 7.115)

Comments on Proposal 59

We have no specific comment to make other than the obvious statement that the process needs to be sufficiently flexible to accommodate absences through vacations and illness, but also timeous to keep the overall procedure moving along.

60. Would a new method of implementation of a CPO, along the lines described in paragraph 7.119, be preferable to continuing with the current two methods of implementation?

(Paragraph 7.120)

Comments on Proposal 60

Yes, a single method of implementation would be welcome.

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

(Paragraph 7.120)

Comments on Proposal 61

Chapter 8 Conveyancing procedures

62. Where there has been a confirmed CPO the land can be transferred to the acquiring authority by means of an ordinary disposition registered in the Land Register.

(Paragraph 8.39)

Comments on Proposal 62

Yes.

63. Do consultees agree that, if the GVD procedure is retained, the current rules on transfer of the land should continue, namely that:

(a) title to the land will vest in the acquiring authority at the end of the period specified in the GVD allowing the authority to take entry to the land, and

(b) registration in the Land Register will be required for the acquiring authority to obtain the real right of ownership?

(Paragraph 8.40)

Comments on Proposal 63

Yes.

64. The existing methods of transferring the land following a notice to treat should be replaced with a unitary method, to be known provisionally as a Compulsory Purchase Notice of Title. This would be executed by the acquiring authority.

(Paragraph 8.42)

Comments on Proposal 64

Yes.

65. Do consultees agree that, if the notice to treat and GVD procedures are replaced by a unitary procedure, there should be a single statutory method of transferring the land to the acquiring authority?

(Paragraph 8.43)

Comments on Proposal 65

Yes.

66. The acquiring authority should always obtain a valid title where they have used a method of transfer specified in the new legislation.

(Paragraph 8.45)

Comments on Proposal 66

Yes.

67. Should the Keeper be required to add a note on the Land Register stating that the title has been acquired by compulsory purchase?

(Paragraph 8.46)

Comments on Proposal 67

Yes for clarity and consistency this would be welcome.

68. The acquiring authority may serve a notice to treat on any tenant and extinguish the tenant's right under the lease in return for compensation.

(Paragraph 8.54)

Comments on Proposal 68

69. The acquiring authority may serve a notice to treat on any liferenter and bring the liferent to an end in return for compensation.

(Paragraph 8.57)

Comments on Proposal 69

70. It should be made clear that, on the acquiring authority becoming owner of the land, any subsisting securities would be extinguished.

(Paragraph 8.65)

Comments on Proposal 70

Yes.

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

(Paragraph 8.75)

Comments on Proposal 71

We are content for these to be retained.

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

(Paragraph 8.81)

Comments on Proposal 72

Chapter 9 The Mining Code

73. Should provision along the lines of the Code be included in the proposed new statute and, if so, should any additions or deletions be made?

(Paragraph 9.26)

Comments on Proposal 73

Yes, if a single procedure is to be established, this should be part of that.

PART 3: COMPENSATION

Chapter 11 Valuation of land to be acquired – basic position

74. The concept of “value to the seller” should continue to reflect any factors which might limit the price which the seller might expect to receive on a voluntary sale.

(Paragraph 11.30)

Comments on Proposal 74

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.

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

(Paragraph 11.34)

Comments on Proposal 75

Yes.

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

(Paragraph 11.42)

Comments on Proposal 76

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.

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

(Paragraph 11.53)

Comments on Proposal 77

We have no comment to make.

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

(Paragraph 11.55)

Comments on Proposal 78

Yes.

79. In cases of equivalent reinstatement, should there be an onus on the claimant to show that compensation assessed on the basis of market value (and disturbance, where appropriate) would be insufficient for the activity to be resumed on another site?

(Paragraph 11.58)

Comments on Proposal 79

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.

80. Should the LTS be entitled to impose conditions on the payment of equivalent reinstatement compensation in order to ensure that such compensation is properly used for the reinstatement in question?

(Paragraph 11.66)

Comments on Proposal 80

Yes.

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

81. How should the “scheme” be defined?

(Paragraph 12.78)

Comments on Proposal 81

We will leave this for others to provide detailed comment, suffice to say that the scheme should be defined by the relevant CPO.

82. Should an increase in the value of the land being acquired as a result of the scheme be taken into account for the purpose of assessing compensation?

(Paragraph 12.78)

Comments on Proposal 82

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”.

83. To what extent should an increase in the value of the land being acquired, as a result of the effect of the scheme on other land being acquired, be disregarded?

(Paragraph 12.78)

Comments on Proposal 83

There should be some form of test established or at the least a threshold.

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

(Paragraph 12.78)

Comments on Proposal 84

We will leave to others to comment on this proposal.

Chapter 13 Valuation of land to be acquired – establishing development value

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

(Paragraph 13.14)

Comments on Proposal 85

Yes, where the other land is retained by the landowner.

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

(Paragraph 13.19)

Comments on Proposal 86

Yes, we agree with this proposal and is only fair.

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

(Paragraph 13.22)

Comments on Proposal 87

88. Should there continue to be a statutory assumption that planning permission would have been granted for the acquiring authority's proposals if it were not for the compulsory purchase?

(Paragraph 13.30)

Comments on Proposal 88

Yes, this ought to be retained.

89. If so, should this continue to be limited (a) to planning permission which might reasonably be expected to be granted to the public and, (b) by the *Pointe Gourde* principle?

(Paragraph 13.30)

Comments on Proposal 89

90. The statutory assumption of planning permission for development in terms of paragraph 1 of Schedule 11 to the 1997 Act should be repealed.

(Paragraph 13.34)

Comments on Proposal 90

91. Should the statutory assumption of planning permission for development in terms of paragraph 2 of Schedule 11 to the 1997 Act be repealed?

(Paragraph 13.36)

Comments on Proposal 91

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

(Paragraph 13.40)

Comments on Proposal 92

93. The underlying “scheme” should be deemed to be cancelled, for the purposes of considering statutory planning assumptions, at the time when the CPO is first published.

(Paragraph 13.59)

Comments on Proposal 93

Yes.

94. The scope of the underlying “scheme” to be deemed to be cancelled for the purposes of considering statutory planning assumptions, should be the entire scheme and not simply the intention to acquire the relevant land.

(Paragraph 13.61)

Comments on Proposal 94

Yes.

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

(Paragraph 13.68)

Comments on Proposal 95

96. Should the provisions of Part V of the 1963 Act, relating to compensation where there is permission for additional development after the compulsory acquisition, be repealed and not re-enacted?

(Paragraph 13.76)

Comments on Proposal 96

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

(Paragraph 13.76)

Comments on Proposal 97

Chapter 14 Valuation of land to be acquired - CAADs

98. Should there be a time limit for applying for a CAAD following the making of the CPO and, if so, what should that limit be?

(Paragraph 14.6)

Comments on Proposal 98

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

(Paragraph 14.12)

Comments on Proposal 99

100. Provision along the lines of section 30(2) of the 1963 Act should be included in the proposed new statute and should apply to statutory planning assumptions as well as to CAADs.

(Paragraph 14.19)

Comments on Proposal 100

101. When an acquiring authority are considering a CAAD, the proposal to acquire the relevant land, and the underlying scheme, should be assumed to be cancelled at the time when the CPO is first published, with no assumption to be made about what may or may not have happened before that date.

(Paragraph 14.30)

Comments on Proposal 101

Yes.

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

(Paragraph 14.30)

Comments on Proposal 102

Yes, we agree with this proposal and support clarity.

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

(Paragraph 14.30)

Comments on Proposal 103

Yes.

104. Should the relevant date for determining a CAAD be linked to the date for cancellation of the scheme for the valuation of planning assumptions?

(Paragraph 14.31)

Comments on Proposal 104

No. We consider these to be distinct processes.

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

(Paragraph 14.33)

Comments on Proposal 105

Yes.

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

(Paragraph 14.36)

Comments on Proposal 106

One month is quite a strict timescale and could be lengthened.

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

(Paragraph 14.53)

Comments on Proposal 107

108. If so, should the inquiry procedure before a DPEA reporter be retained, with the reporter reporting to the LTS rather than to the Scottish Ministers?

(Paragraph 14.53)

Comments on Proposal 108

109. Should planning permission, which could reasonably have been expected to be granted as at the relevant valuation date, be assumed to have been granted?

(Paragraph 14.64)

Comments on Proposal 109

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

(Paragraph 14.64)

Comments on Proposal 110

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

(Paragraph 14.64)

Comments on Proposal 111

Chapter 15 Consequential loss – retained land

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

(Paragraph 15.18)

Comments on Proposal 112

113. The proposed new statute should provide that the assessment of compensation for severance or injurious affection should be carried out on a “before and after” basis.

(Paragraph 15.25)

Comments on Proposal 113

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

(Paragraph 15.37)

Comments on Proposal 114

Yes.

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

(Paragraph 15.44)

Comments on Proposal 115

We leave to others more experienced to comment on this proposal.

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

(Paragraph 15.49)

Comments on Proposal 116

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.

117. Is the current rule, that set-off for betterment applies to land which is “contiguous with or adjacent to the relevant land”, satisfactory?

(Paragraph 15.59)

Comments on Proposal 117

No.

118. The provisions which require any betterment to the retained land to be set off against any compensation paid to the landowner in respect of the acquired land should be repealed and not re-enacted.

(Paragraph 15.70)

Comments on Proposal 118

Chapter 16 Consequential loss - disturbance

119. The assessment of compensation for disturbance should be carried out separately from the assessment of the market value of the property.

(Paragraph 16.30)

Comments on Proposal 119

Yes.

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

(Paragraph 16.34)

Comments on Proposal 120

Yes.

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

(Paragraph 16.38)

Comments on Proposal 121

Yes.

122. The proposed new statute should make it clear that compensation for disturbance is payable from the date of publication of notice of the making of the CPO.

(Paragraph 16.44)

Comments on Proposal 122

123. The proposed new statute should make it clear that compensation is payable in respect of costs incurred in relation to a compulsory acquisition which does not ultimately proceed.

(Paragraph 16.45)

Comments on Proposal 123

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.

124. If compensation for disturbance is to be payable from before the confirmation of the CPO, should it include losses caused as a result of lost development potential?

(Paragraph 16.47)

Comments on Proposal 124

Yes.

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

(Paragraph 16.50)

Comments on Proposal 125

Yes.

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

(Paragraph 16.57)

Comments on Proposal 126

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.

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

(Paragraph 16.69)

Comments on Proposal 127

Yes.

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

(Paragraph 16.77)

Comments on Proposal 128

Yes.

129. Claimants should be under a duty to mitigate loss in terms of compensation for disturbance from the date of publication of notice of the making of the CPO.

(Paragraph 16.78)

Comments on Proposal 129

Yes.

130. It should be made clear that relocation compensation may be available even where this exceeds the total value of the business.

(Paragraph 16.88)

Comments on Proposal 130

Yes.

131. Should the rules regarding disturbance compensation for the displacement of a business be set out in the proposed new statute and, if so, what, if any, modifications should be made to them?

(Paragraph 16.92)

Comments on Proposal 131

Yes. Relocation can also mean a delay in final assessment of costs.

132. Should the valuation date for disturbance compensation be different from the valuation date in relation to the compulsorily acquired land, in particular where GVD procedure is used?

(Paragraph 16.99)

Comments on Proposal 132

133. Should it be made clear, in the proposed new statute, that a claim for disturbance compensation on the basis of relocation of a business will only be determined when sufficient time has elapsed following the relocation to enable the extent of the loss to be quantified?

(Paragraph 16.99)

Comments on Proposal 133

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

(Paragraph 16.101)

Comments on Proposal 134

Yes.

135. Should disturbance payments along the lines of those currently provided for by sections 34 and 35 of the 1973 Act be retained?

(Paragraph 16.104)

Comments on Proposal 135

Yes.

136. Should the LTS have jurisdiction in relation to any question arising with regard to disturbance payments, whether mandatory or discretionary?

(Paragraph 16.104)

Comments on Proposal 136

Yes.

Chapter 17 Non-financial loss

137. Should the minimum period of residence necessary in order to qualify for a mandatory home loss payment be increased and, if so, by how much?

(Paragraph 17.14)

Comments on Proposal 137

No.

138. Should the current system, of calculating home loss payments as a prescribed percentage of market value, be retained?

(Paragraph 17.21)

Comments on Proposal 138

Yes.

139. If so, should primary legislation provide for the periodic review of the relevant maxima and minima or for an automatic increase (or reduction) to reflect inflation?

(Paragraph 17.21)

Comments on Proposal 139

140. As an alternative, should a system, either of a flat rate payment, or of a payment individually assessed in each case, be introduced?

(Paragraph 17.21)

Comments on Proposal 140

141. Should the provisions relating to farm loss payments be amended so as to be more flexible and less onerous on the agricultural landowner?

(Paragraph 17.28)

Comments on Proposal 141

142. The proposed new statute should provide for two supplementary loss payments, one for home loss, and one for farm loss, which would, in each case, compensate for all aspects of non-financial loss arising from compulsory purchase.

(Paragraph 17.33)

Comments on Proposal 142

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**PART 4: RESOLUTION OF DISPUTES; THE CRICHEL DOWN RULES;
MISCELLANEOUS MATTERS**

Chapter 18 Process for determining compensation

143. Sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted.

(Paragraph 18.4)

Comments on Proposal 143

144. What evidence can consultees provide of shortcomings in the current LTS procedures for determining disputed compensation claims, and what changes should be made?

(Paragraph 18.17)

Comments on Proposal 144

145. Where land is compulsorily purchased which is subject to a tenancy of under one year, disputes about compensation relating to the tenancy should be referred to the LTS rather than the sheriff court.

(Paragraph 18.19)

Comments on Proposal 145

146. Should it be made clear, in the proposed new statute, that a six-year time limit to claim compensation runs from the date of vesting (or from the date when the claimant first knew, or could reasonably have been expected to have known, of the date of vesting)?

(Paragraph 18.22)

Comments on Proposal 146

147. Should it be made clear, in the proposed new statute, that the same time limit operates for any claim of disputed compensation, regardless of whether it follows a notice to treat or a GVD?

(Paragraph 18.22)

Comments on Proposal 147

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

(Paragraph 18.23)

Comments on Proposal 148

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

(Paragraph 18.23)

Comments on Proposal 149

150. Should the current rules on expenses be amended to allow the LTS a wider discretion to award claimants all of their reasonable expenses in some situations, even if they are ultimately awarded a smaller sum than had been offered?

(Paragraph 18.26)

Comments on Proposal 150

151. Should provision be introduced to allow the LTS to make an order at an early stage, to limit the expenses of a claimant in appropriate cases?

(Paragraph 18.27)

Comments on Proposal 151

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

(Paragraph 18.29)

Comments on Proposal 152

153. Are there circumstances in which an acquiring authority should be required to make an advance payment before taking possession?

(Paragraph 18.31)

Comments on Proposal 153

154. Should it be competent for the LTS to provide an enforceable valuation figure for an advance payment?

(Paragraph 18.33)

Comments on Proposal 154

155. At what rate should interest be paid on advance payments, and should the acquiring authority be liable for an increased rate if payment is delayed?

(Paragraph 18.34)

Comments on Proposal 155

156. It should be competent, where all the parties agree, for an advance payment to be made to the landowner where the land is subject to a security.

(Paragraph 18.36)

Comments on Proposal 156

157. Should the LTS have discretion to:

- (a) provide for interest from a date earlier than its award, and
- (b) increase the rate of interest where it finds that there has been unreasonable conduct by an acquiring authority?

(Paragraph 18.38)

Comments on Proposal 157

158. What are the advantages and disadvantages in resolving disputes in compulsory purchase cases by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

Comments on Proposal 158

159. Can consultees provide evidence of costs incurred in relation to resolving disputes by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

Comments on Proposal 159

Chapter 19 Cichel Down Rules

160. Should the Rules for giving former owners of compulsorily acquired land a right of pre-emption, where the land is no longer required for the purpose for which it was purchased, be placed on a statutory footing?

(Paragraph 19.5)

Comments on Proposal 160

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.

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

(Paragraph 19.9)

Comments on Proposal 161

Yes.

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

(Paragraph 19.11)

Comments on Proposal 162

No.

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

(Paragraph 19.12)

Comments on Proposal 163

164. Should the same time limit apply in relation to the obligation to offer back land, regardless of the type of land acquired, and how long should that time limit be?

(Paragraph 19.15)

Comments on Proposal 164

There should not be a time limit.

165. Should a time limit be introduced for land purchased between 1 January 1935 and 30 October 1992?

(Paragraph 19.15)

Comments on Proposal 165

No.

166. Should the seven exceptions to the obligation to offer back, currently provided for in the Rules, be retained and are there other exceptions which should be included?

(Paragraph 19.16)

Comments on Proposal 166

167. Should the special procedure in paragraph 23 of, and Annex 1 to, the Rules, relating to the obliteration of boundaries in agricultural land, be retained?

(Paragraph 19.17)

Comments on Proposal 167

168. Do time limits in the current Rules to carry out the process to offer back land operate satisfactorily?

(Paragraph 19.21)

Comments on Proposal 168

The current rules are inadequate as noted in the UK Government's own document of 2000.

169. Should clawback provisions in terms of the development value of surplus land be time limited and, if so, to what extent?

(Paragraph 19.24)

Comments on Proposal 169

170. The LTS should have a general jurisdiction to resolve disputes which arise in relation to the disposal of surplus land.

(Paragraph 19.26)

Comments on Proposal 170

Chapter 20 Miscellaneous issues

171. Should section 89 of the 1845 Act be repealed and not re-enacted?

(Paragraph 20.4)

Comments on Proposal 171

Yes.

172. The law on the taking of enforcement action should be amended so as to make it clear that a third party under a back-to-back agreement is entitled to enforce possession by virtue of the CPO.

(Paragraph 20.5)

Comments on Proposal 172

Yes.

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

(Paragraph 20.10)

Comments on Proposal 173

We will leave to others to make comment on this proposal.

174. Where a short tenancy is compulsorily acquired, should account be taken, for the purposes of assessing compensation, of the likelihood that it will be continued or renewed?

(Paragraph 20.18)

Comments on Proposal 174

Yes.

175. Provision along the lines of sections 99 to 106 of the 1845 Act should be included in the proposed new statute.

(Paragraph 20.23)

Comments on Proposal 175

176. Should the proposed new statute provide that any tax liability which the landowner incurs as a result of the compulsory acquisition may be recoverable under the head of disturbance?

(Paragraph 20.27)

Comments on Proposal 176

Yes. This is particularly the case as the landowner is in a situation not of his or her making.

177. Are there any other aspects of the current compulsory purchase system, not mentioned in this Paper, to which consultees would wish to draw our attention?

(Paragraph 20.29)

Comments on Proposal 177

General Comments

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.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.