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 The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.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

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.

### 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**

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

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**

No comments

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**

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.

## 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**

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.

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**

A legal issue. No comment.

## 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**

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

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**

We see no reason why these procedures should not be used for compulsory acquisition.

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

(Paragraph 5.18)

**Comments on Proposal 10**

None so far as is known

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**

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

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

(Paragraph 5.24)

**Comments on Proposal 12**

The 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.

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 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.

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

(Paragraph 5.26)

**Comments on Proposal 14**

The 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.

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**

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.

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**

Yes

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 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.

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**

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.

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

(Paragraph 5.46)

**Comments on Proposal 19**

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.

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**

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.

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**

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

(Paragraph 5.50)

**Comments on Proposal 22**

Agreed

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**

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.

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

(Paragraph 5.59)

**Comments on Proposal 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)

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 should be no need for such a condition – the SG guidance is clear. However, it would do no harm to enshrine this in statute

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**

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.

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. It is suggested that such inquiries should indeed be combined.

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**

No comment

## 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**

It is suggested that the proposed new statute should make bad faith a legitimate ground for objection.

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 – but not through the CPO process

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

(Paragraph 6.39)

**Comments on Proposal 31**

Yes

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**

It is considered that any such challenge should be made within the six-week period.

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

(Paragraph 6.45)

**Comments on Proposal 33**

No. Certainty is important. It can also become pointless after possession is taken, demolition, site-works, site re-configuration and even construction has started.

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. It is considered that in such circumstances the Court should have discretion to grant an appropriate remedy.

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**

See response to Q24 – the "clock should be stopped" in these circumstances

## 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**

Agreed

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

(Paragraph 7.15)

**Comments on Proposal 37**

Yes

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**

Agreed

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

(Paragraph 7.19)

**Comments on Proposal 39**

Yes – it should be the same as the six year time limit for referral to LTS

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

(Paragraph 7.25)

**Comments on Proposal 40**

Yes. 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

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

(Paragraph 7.29)

**Comments on Proposal 41**

Yes although we believe that a single process would be preferable (CPNT for example).

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**

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

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**

See response to Q24

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

(Paragraph 7.51)

**Comments on Proposal 44**

Yes, if done so within the three year period mentioned above and any reasonable expenses incurred by the claimant should be reimbursed

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**

Only by mutual consent, and again subject to payment of claimants' reasonable expenses

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**

Yes

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**

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.

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

(Paragraph 7.73)

**Comments on Proposal 48**

2 months

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**

Yes

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

(Paragraph 7.86)

**Comments on Proposal 50**

The answer to this question is yes but under explanation that under the present legislation there are two different mechanisms (under two dif, 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.

51. Should a GVD be available in all circumstances?

(Paragraph 7.89)

**Comments on Proposal 51**

Yes – in practice most recent CPOs in Scotland have used GVD satisfactorily

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

(Paragraph 7.89)

**Comments on Proposal 52**

Yes

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**

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.

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 to both questions

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**

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.

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**

Yes

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

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**

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.

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**

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.

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**

See response to Q60

## 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**

Agreed

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**

Agreed

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

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**

Yes

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**

Yes

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**

Yes

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**

Yes

## 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 although it should be made clear that the code allow 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

# 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**

Yes, value to seller is the right approach. The compensation should take into account any restrictions affecting the land

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. 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 form the retained land should be reflected separately in the claim for injurious affection in line with current practice

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

(Paragraph 11.42)

**Comments on Proposal 76**

The 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

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**

Yes

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

(Paragraph 11.55)

**Comments on Proposal 78**

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.

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**

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.

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, 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.

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

81. How should the "scheme" be defined?

(Paragraph 12.78)

**Comments on Proposal 81**

The 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 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.

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**

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.

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**

As Q82 response

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**

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.

## 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**

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.

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**

Agreed

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**

It has to be the relevant date of valuation otherwise matters become confused and take us even further away from the real world.

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 – see Section 232 of the Localism Act 2011.

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**

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.

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**

Yes

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**

Yes

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**

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

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. However, again reference is made to the changes brought by the Localism Act 2011

which deal very sensibly with planning assumptions.

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**

Yes – see Section 232 of the Localism Act 2011.

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**

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.

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

(Paragraph 13.76)

**Comments on Proposal 97**

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

## 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**

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

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

(Paragraph 14.12)

**Comments on Proposal 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 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.

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**

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.

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

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**

See response to Q100 – should be the date of valuation

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**

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

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**

It is considered that the time limit should be extended to three months - similar to a planning permission refusal.

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

(Paragraph 14.53)

**Comments on Proposal 107**

The 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.

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**

See response to Q107

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**

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 S232 of Localism act however which has

brought in a similar change

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**

Yes, but only to the extent that the market would do so

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

(Paragraph 14.64)

**Comments on Proposal 111**

Yes

## 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**

Yes

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**

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.

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

(Paragraph 15.37)

**Comments on Proposal 114**

This proposal is supported on the basis that the date of severance is the vesting date.

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**

Yes – any loss of profitability to a business should continue to be assessed separately as a disturbance item

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**

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

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**

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.

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**

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.

## 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**

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.

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

(Paragraph 16.34)

**Comments on Proposal 120**

Agreed

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 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

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**

(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.

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**

Yes – subject to 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)

**Comments on Proposal 124**

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.

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 – 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.

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**

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

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**

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.

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

(Paragraph 16.77)

**Comments on Proposal 128**

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.

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**

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

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 – in accordance with the decision in Shun Fung so subject to a reasonableness test

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**

No – likely to either be too short and hence restrictive or too long if encompassing all existing case law. Current flexibility is preferable.

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**

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.

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**

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.

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

(Paragraph 16.101)

**Comments on Proposal 134**

Agreed

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**

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.

## 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 need to change this – it is considered unlikely anyone would purchase a property threatened by CPO simply in order to get a HLP

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 – 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/occupiers loss in England) has done nothing to speed up the settlement process

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**

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

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**

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

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**

These are rare in practice as only payable when entire property is taken so no need to amend

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**

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

## 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**

Agreed

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**

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.

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**

Agreed

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**

Yes

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

(Paragraph 18.22)

**Comments on Proposal 147**

Yes

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

(Paragraph 18.23)

**Comments on Proposal 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 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.

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

(Paragraph 18.23)

**Comments on Proposal 149**

Yes. It is considered that the Lands Tribunal for Scotland should be given such discretion in exceptional circumstances

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**

Yes

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**

This currently exists in the form of a Protective Expenses order and should only be available for a point of public interest

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

(Paragraph 18.29)

**Comments on Proposal 152**

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

Further, it is our view that, as far as the current legislation is concerned, the assessment of the likely compensation due in response to an application for an Advance Payment is wholly at the discretion of the acquiring authority: whilst the claimant or the claimant's agent can make a claim and submit representations, it is nevertheless wholly incumbent on the acquiring authority to decide upon the amount of likely compensation due. Further, whilst claw-back provisions are in place, it can prove extremely difficult to recover an overpayment of compensation and thus acquiring authorities tend to adopt a cautious approach to such an application in assessing the compensation due.

Nevertheless, the current legislation permits a series of applications for further Advance Payments and normally, such applications will be made following the development of negotiations

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**

No – no need for change, can be done on a discretionary basis currently if justified

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**

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

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**

Interest should be payable at the statutory rate and a penalty rate would appear to be a practical way of ensuring prompt payment

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

(Paragraph 18.36)

**Comments on Proposal 156**

Yes

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**

(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

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**

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 potential y save substantially in costs.

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**

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.

## Chapter 19 Crichel Down Rules

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

(Paragraph 19.5)

**Comments on Proposal 160**

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.

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

(Paragraph 19.9)

**Comments on Proposal 161**

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.

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**

Yes

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**

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.

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**

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.

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**

Yes - See response to Q164

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**

Yes

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**

Yes

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 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.

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**

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.

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**

Agreed

## 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**

It is considered that the section does not work satisfactorily.

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

(Paragraph 20.18)

**Comments on Proposal 174**

The 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 the3 same assumption as is 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.

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**

Yes

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**

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.

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**

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).

**General Comments**

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