RESPONSE DOCUMENT

PREPARED BY

SCOTTISH COMPULSORY PURCHASE ASSOCIATION

IN RESPONSE TO

SCOTTISH LAW COMMISSION DISCUSSION PAPER ON COMPULSORY PURCHASE

Introduction

This Response has been prepared by the Scottish Compulsory Purchase Association (SCPA) which was formed in 2012 in anticipation of this investigation. SCPA comprises a mix of professionals including QC's, Barristers, Lawyers, Planners and Chartered Surveyors drawn from both the public sector and private sector who are actively involved in the formulation and implementation of Compulsory Purchase Orders and the assessment and negotiation of compensation claims that flow as a consequence of compulsory purchase by a variety of acquiring authorities throughout Scotland. This Response has been compiled following a series of six events throughout the country which have been organised in conjunction with RICS Scotland. The events have attempted to encompass all aspects of the Discussion Paper and have principally covered the two main sections i.e. the Compulsory Purchase Process and the Assessment of Compensation.

The discussions and issues covered at the six events were extremely wide-ranging and, as was expected, consensus was not achieved on every issue. However, the undernoted broad themes did evolve:-

- Whilst Scotland is a highly developed country, there is a continued need for the replacement of existing infrastructure and the provision of new infrastructure together with the need for regeneration schemes to continue to improve the lives of its citizens: these tasks are principally undertaken by Scottish Government under various guises.
- The use of compulsory purchase powers is regarded as pivotal in the delivery of such necessary public works and thus there is a reluctant acceptance that Compulsory Purchase Orders are necessary.
- The use of Compulsory Purchase Orders should remain strictly controlled by legislation and all Compulsory Purchase Orders require to be fully justified and costed prior to formal promotion. Further, respect and recognition requires to be given to the existence of private property rights in this country and also the interaction with existing human rights legislation.
- The provision of the compensation arrangements in respect of the compulsory purchase of private property interests requires to be fair – to both the acquiring authority (on behalf of taxpayers) and claimants; however, a higher requirement than exists at present is needed

to recognise the fact that such acquisition is indeed compulsory in nature. This, in turn, would mean an increased compensation burden on acquiring authorities. However, it is considered that this is a price very well worth paying as anecdotal evidence from utility companies suggests that where more flexible compensation arrangements exist, there is considerably less resistance to schemes resulting in fewer objections and schemes proceeding and, overall, at no higher a cost. This creates a “win-win-win” scenario for acquiring authorities, claimants and society as a whole.

- In recent years, there has been a distinct change in approach to the delivery of many public works whereby an Acquiring Authority will utilise its compulsory purchase powers to undertake site assembly but then abrogates its responsibilities for the construction of the public work to a private sector company- who will be as much influenced by profit as by the proper delivery thereof. Thus, the use of public powers for potential private sector gain requires to be very carefully balanced and it is suggested that a general duty of care should be established and placed on acquiring authorities to claimants and that acquiring authorities fully recognise the interests of claimants.
- The existing compulsory purchase procedures and compensation arrangement systems are, at best, creaking at the seams and, at worst, no longer fit for purpose in a modern Scotland and thus (radical) overhaul is required.
- That overhaul requires the delivery of a one-system arrangement of compulsory purchase which is both much quicker, easier and smarter to utilise relative to the present system but still contains the fundamental democratic right of objection and recognition of property and human rights- that is an extremely difficult balancing act to get right; a CPO process similar to the General Vesting Declaration procedure should be created and the notice to treat procedure should be removed (it is rarely used in Scotland in any event). In addition, a much more flexible and sympathetic compensation assessment regime requires to be installed which will help to assist in the breaking down of the barriers that often arises between acquiring authorities and claimants.
- Over the past few years there has been a noticeable shift with regard to the actions taken by acquiring authorities prior to the promotion and resolution to create a Compulsory Purchase Order. This action is driven by the need for acquiring authorities to be in a position to be able to fully justify their decision-making process with regard to any public work it wishes to undertake relative to the potential utilisation of compulsory purchase powers and also due to the tendering and procurement procedure regularly adopted nowadays. The effect is that significant investigation work is often undertaken before a public work comes anywhere near to fruition and this can result in the need for substantial

relevant information being derived from (potentially-affected) landowners which has a cost implication. In addition, as stated above, the tendering and procurement process of public works has also significantly altered whereby the construction and long-term future repair/maintenance of many schemes are now, in effect, undertaken by the private sector. Thus, any new legislation needs to reflect the circumstances of both the current situation and, hopefully, anticipate how systems and processes may develop in future years.

- In light of all of the above, it is considered that the Scottish Law Commission's decision to undertake a root-and-branch investigation into compulsory purchase and compensation assessments is very much welcomed and the SCPA wishes to engage in this debate in a positive manner.

The Response

The Discussion Paper contains a large number of proposals (many of which reflect the philosophy as set out above) and questions (to which there are, in many cases, a wide range of acceptable answers). This document sets out the formal position of SCPA but is not necessarily reflective of all of its members in all of the responses. Thus, all members have been strongly and positively encouraged to respond on an individual basis.

We now turn to the detail of our responses:-

Proposal 1:

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

This proposal is whole-heartedly supported although it is recognised that it will prove a complex task to draft appropriate legislation which is clear and unambiguous in nature that can deal with all of the complexities discussed below. Further, it is considered that there should be a single CPO system along the lines of (a) the promotion of a draft CPO, (b) objection process (c) Hearing or Inquiry process (d) confirmation/modification/rejection of a draft CPO (e) General Vesting Declaration/vesting date and possibly (f) a date for the formal completion of the public work.

Question 2:

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

It is considered that in compulsory purchase, an acquiring authority should be required to acquire all property interests in, under and over "land and buildings" which incorporate all pertinents and rights that are proposed to be compulsorily acquired. Thus, the current definition in the 2010 Act is perhaps slightly restrictive and the definition of "land" requires to be widened accordingly.

Question 3:

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

It is considered that it should be permissible for an acquiring authority to create new rights or interests in or over land that has been compulsorily acquired by that authority but such creation requires to be proportionate in nature and should involve the least intrusive method.

Question 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?

It is not considered that there is any conflict between CPO law and general property law.

Question 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?

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.

Proposal 6:

The right to compensation as a result of compulsory purchase in Scots Law should be expressed and provided for in the proposed new statute.

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.

Question 7:

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

It is agreed that the current statutory provisions are compatible with the Convention and it is a fundamental principle that within Scotland each citizen's human rights continue to be recognised and respected. However, it would appear that provided an acquiring authority can show good justification for the compulsory purchase of private property interests and that the public work is suitably demonstrated to be in the public interest for the benefit of a local community or wider society, then such appropriation is appropriate.

Proposal 8:

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

This proposal is supported on the basis that all entities in Scotland that possess CPO powers act in a standard and consistent fashion. See also our response to Proposal 1 above. In addition, it is considered that there should be a standard compensation claim form issued by all entities having CPO powers, at the latest, at the time of the issue of the General Vesting Declaration; that form should require the claimant to provide the acquiring authority with details regarding the claimant, agent(s) involved, the interest to be acquired, any loans/burdens/mortgages affecting the subjects, the amount of compensation sought, bank account details etc and thus would mean that the acquiring authority would have sufficient information to undertake an initial appraisal of the likely compensation payable: this process would aid the speed of processing an initial application for an Advance Payment of Compensation.

Question 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?

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

Question 10:

Is there any relevant legislation missing from that list?

None of which that we are aware.

Question 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?

This is an issue referred to in our Introduction above. It has been the experience of many members of SCPA that, in order to identify the options available and to ensure justification of compulsory purchase, a number of acquiring authorities in Scotland now undertake extensive and significant initial "survey and investigation" works in connection with a public work. These investigations go beyond the survey process and in many cases will involve a quite extensive and invasive inspection of the relevant lands to determine, amongst other things, the subsoil conditions, any contaminative/hazardous materials that may be present, the topography of the land and such process may involve damage to the land. In addition, extensive and detailed questionnaires tend to be utilised in connection with these investigation works which require to be completed by the landowner often in conjunction with his/her agent. Whilst it is accepted that physical entry to the relevant lands will be necessary, it is suggested that a minimum of seven clear days notice is required to be given.

In principle, the SCPA supports the actions of an acquiring authority to undertake these investigations but, equally, the extent of these investigations does mean that landowners may incur quite considerable time, cost and expense and thus all reasonable costs and expenses require to be recovered from the acquiring authority at the time of being incurred whether or not any of the surveyed land is later acquired. The power to enter land by a potential acquiring authority in such circumstances requires to carry (financial) responsibilities.

Question 12:

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

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.

Question 13:

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

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.

Question 14:

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

The issue of incorporating a specified time limit has been discussed for some time now and it is recognised that there are both advantages and disadvantages thereto. The main disadvantage of not having a specified time period is that in many cases matters are left to drag on for some considerable time – thus leading to the justification that the speed of the CPO process is glacial in nature. Nevertheless, it is recognised that some objections will raise complex challenges to acquiring authorities and that sufficient time needs to be given to the matter. However, an acquiring authority should realise from a fairly early stage in the compulsory purchase process the

likely resistance that will be met from landowners – principally from initial meetings and discussions and thus acquiring authorities require to react appropriately thereto. Further, on the basis that there is more than sufficient examples of the extremely slow pace of compulsory purchase then the insertion of specified time periods is, on balance, to be welcomed. Thus, it is considered that a specified time limit should be incorporated within the proposed new statute and within such time limit the Scottish Ministers must refer cases to the DPEA; this should be not greater than six months following the final date for the lodging of objections to the draft CPO.

Question 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?

It is considered that the DPEA should not have discretion over the process for determining objections to a CPO. As is stated in the Discussion Paper, compulsory purchase requires a much more vigorous balancing of the public interest set against private interests and that any objector affected should have the fundamental democratic right to be heard – either in writing or orally- and to be able to cross-examine relevant officials. Whilst it is recognised that such a view may extend the time period of compulsory purchase, it is considered that this is a price worth paying to ensure the protection of fundamental democratic rights. In this case, the tail should not wag the dog. However, it is a moot point as to whether or not the ultimate decision should continue to rest with The Scottish Ministers based upon the Reporter's Report and Recommendations- as in many cases, the acquiring authority will be, in essence, the Scottish Ministers who should not be seen to be prosecutor, jury and judge.

Proposal 16:

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

This proposal is supported.

Question 17:

Should all CPOs made by all 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?

It is considered that no acquiring authority should be able to confirm its own CPO. In any democratic system, there requires to be both checks and balances as well as transparency in the decision-making process whereby (negative or positive) prejudice is removed. Thus, the SPCA is strongly of the view that all Compulsory Purchase Orders require to be confirmed by an independent and arm's length organisation. This, of course, raises the question as to whether The Scottish Ministers are best placed to take such decisions as in some cases there can be a perception that they are supporting "their" schemes – the decision-making process in the case of M74 extension is a case in point whereby the Reporter's Recommendation was to reject the public work and associated CPO for a major transportation scheme promoted by Transport Scotland but, ultimately, The Scottish Ministers rejected the recommendation and the scheme proceeded. Nevertheless, democratically-elected representatives are best placed to take the ultimate public policy decisions.

Question 18:

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

It is considered that generally speaking the current requirements for advertisement and notification of the making or confirming of a CPO are satisfactory but nevertheless consideration requires to be given to the modes of communication that are now available via advances in technology.

Proposal 19:

An acquiring authority should be able to revoke a CPO.

This proposal is supported on the basis that the revocation occurs after the CPO has at least been confirmed. Further, it is considered that if this happens then a minimum period of five years requires to elapse prior to any similar CPO being re-instigated.

Question 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.

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.

Proposal 21:

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

This proposal is supported. However, the phrase “out-of-pocket expenses” implies that such expenses are of a modest nature. This may not necessarily be the case as one or more of the objectors (statutory or non-statutory) may have incurred significant expense with regard to objecting to the draft CPO which could include, amongst other things, the outlay on professional fees as well as time and expenses incurred with regard to the actual compulsory purchase process and consequent loss of profits as well as loss of control with regard to disposal as well as loss of control over any tax planning. Thus, it is suggested that in the rare situation where a CPO is revoked all affected parties would have the statutory right to claim compensation for all expenses and costs incurred as a direct consequence of the compulsory purchase process.

Proposal 22:

An acquiring authority should be required to register CPOs and relocations of CPOs.

This proposal is supported.

Question 23:

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

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.

Question 24:

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

Arguably, the three-year validity period is too long and this should be reduced to two years. In some cases, the acquiring authority will wish to utilise its confirmed compulsory purchase powers as soon as practically possible but equally there are other situations where the acquiring authority delays (for legitimate reason) the formal acquisition process; in either event, it is the acquiring authority who is in control That delay can further exacerbate the situation as there may have been a considerable amount of time taken up with the draft CPO/objection process and the claimants to a CPO remain powerless to force acquisition and thus remain “in limbo”. Accordingly, there perhaps should be an option whereby where there is a confirmed CPO all the affected claimants to the CPO can formally request the acquiring authority to compulsory purchase their interest and on receipt of such a request the acquiring authority is obliged to acquire the interest and to enter into negotiations under the Compensation Code; further, the date of the making of such a request is the “vesting date” for entry/assessing the compensation due. This option then gives the claimants some control regarding disposal.

However, the main problem that arises with the existing three-year validity period is that there is a six-week period between the date of the confirmation of the CPO within which a legal challenge to the CPO process can be made – initially to the Outer House of the Court of Session with a potential right of appeal to the Inner House and a further potential right of appeal to the Supreme Court. That legal challenge process can take up a considerable amount of time and at present runs in parallel with the three- year validity period – further adding to a sense of "limbo" for many claimants. The example of the Aberdeen Western Peripheral Route is germane as the relevant CPO was confirmed by The Scottish Ministers in mid-March 2010 and a timeous legal challenge thereto was raised to the Outer House with subsequent appeals to the Inner House and the Supreme Court. The Supreme Court's decision was announced in October 2012 (in the acquiring authority's favour) which only left the acquiring authority some four months within which to exercise its General Vesting Declaration. Indeed, it is understood that the appeals process was "fast-tracked" in order for the ultimate decision to be taken prior to the expiry of the three-year validity period. Thus, in the situation where a legal challenge is lodged then the two-year validity period should not commence until either the Supreme Court has issued its decision or the appeal has been formally settled or abandoned at some earlier stage.

Question 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?

It is considered that there is no need for a precondition as there is a sufficient validity period after confirmation and, in any event, as stated under Proposal 19 an acquiring authority would have the power to revoke a CPO – provided, of course, that reasonable compensation is paid (see comments under Proposal 21).

Question 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.

It is considered that any interference with any existing public/private property right requires an inquiry to be an option in the process.

Question 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?

It is suggested that such inquiries should indeed be combined.

Question 28:

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

By its very nature, a CPO is a complex legal process which involves the compulsory appropriation of private property rights. Thus, a balance has to be struck between the need for speed in the acquisition system but set against the protection of the private and human rights of the affected parties thereto.

Question 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.

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

Question 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.

It is suggested that the proposed new statute should make it so clear and the right would apply equally to statutory as well as non-statutory objectors.

Question 31:

Do Paragraphs 15 and 16 of Schedule 1 to the 1947 Act operate satisfactorily?

These Paragraphs appear to work satisfactorily.

Question 32:

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

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

Question 33:

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

It is envisaged that it would be rare where a late challenge would be permitted on the basis that the acquiring authority has undertaken due diligence in determining all statutory objectors. However, this may not be possible in all cases or an objector is "missed" or a statutory objector only becomes aware of the CPO at some later stage eg on receipt of the General Vesting Declaration. Thus, a late challenge could be regarded as fair and competent but there should be a heavy onus on the challenger to show why such a late challenge is valid .

Question 34:

Where an applicant has been subsequently prejudiced by a procedure or failure, should the Court have a discretion to grant some remedy less than the quashing of the CPO either in whole or part.

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

Question 35:

Should the time period of validity of a confirmed CPO be expressly extended, pending the resolution of the Court challenge to the CPO.

See the response to Question 24.

Proposal 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.

This proposal is supported.

Question 37:

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

As will be discussed later on in this Response Paper, it is the view of SPCA that there should be a single standardised compulsory purchase system and that being exercised along the lines of the

General Vesting Declaration process. Thus, notice to treat as an acquisition process would be removed. Nevertheless, it is considered that all affected rights and interests require to be compulsorily acquired and thus any new statute should list them.

Proposal 38:

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

This proposal is supported relative to a General Vesting Declaration process.

Question 39:

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

As stated under Question 37, it is the view of SPCA that notice to treat should be removed but on the basis of a General Vesting Declaration process, it is considered that there should be no time limit- on the basis that if a private property interest has been legitimately compulsorily acquired then there is a fundament entitlement to claim compensation. It is appreciated that this proposal could cause accounting problems for acquiring authorities who would need to provide in their accounts for such potential provision. Please also refer to our responses later in this paper on the General Vesting Declaration process, especially Question 148.

Question 40:

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

It is considered that notice to treat should be removed but please refer to our response to Proposal 8.

Question 41:

Does Paragraph 7 of Schedule 2 to the 1947 Act operate satisfactorily in practice?

It is the experience of many members of SPCA that the notice to treat system has a number of major flaws (most of which have already been exposed to the Courts over the years) and as a consequence the notice to treat procedure has rarely been used in Scotland for some time now. Further, it is considered that in order to streamline and simplify the compulsory purchase system there should be a single standardised compulsory purchase process.

Question 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?

As it is considered that notice to treat should be removed, please refer to our responses to this issue under the responses for the General Vesting Declaration process.

Question 43:

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

As stated above, it is considered that notice to treat should be removed.

Question 44:

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

As with our responses above, we consider that the notice to treat process should be removed.

Question 45:

Should there be any circumstances which would entitle an acquiring authority to withdraw a notice to treat after the event or on to the land.

See our previous comments with regard to notice to treat which should be removed

Question 46:

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

See our previous comments with regard to notice to treat which should be removed.

Question 47:

Alternatively, should it be competent for a land owner 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 onto a land?

The answer to this question is yes but under explanation that under the present legislation there are two different mechanisms (under two different Acts of Parliament) which deal with Material Detriment/Counter-Notices/Notice of Objection to Severance. Whilst the thrust of these Notices is the same i.e. to request (not to be able to force) an acquiring authority to compulsorily purchase not just the part of the land/property required for the public work but the whole property, the mechanisms and, indeed the types of property involved, vary considerably. Further, the ability of a landowner to serve a successful Notice is dependent on the type of property – in essence agricultural property and/or residential or industrial property. It is considered that the current legislation is flawed inasmuch as Material Detriment can have a detrimental effect on all different types of property and thus any new statute should be on the basis that Material Detriment can be adopted in respect of any type of property. Further, it is considered that, dependent upon the circumstances, all landowners in part-only acquisitions should have right to request the acquiring authority to compulsorily purchase either all or a designated part of the retained land on the basis of material detriment- whilst case law on the definition of material detriment exists it would be helpful for some guidelines to be produced, although each case would require to be decided on its own merits/circumstances. In assessing material detriment, consideration requires to be given to not just the extent of the land-take but also the overall effect of the public work on the retained land. However, the difficulty arises that in many disputed cases, the decision on material detriment is taken prior to the public work commencing, never mind having been completed and "the dust having settled".

Further, at present the service of the appropriate Notice requires to be undertaken within a very short timescale after the General Vesting Declaration has been issued by the acquiring authority – although in most circumstances it would be hoped that the landowner would already be aware of the opportunity of serving such a Notice and the timescales for so doing. Thus, in light of the suggestion that Material Detriment should cover all different property types then it is further suggested that there is a three-month period following the issue of the General Vesting Declaration within which a "Material Detriment Notice" can be served on the acquiring authority.

Whilst the concept of Material Detriment exists, it is not particularly well understood although there have been a number of Lands Tribunal cases and decisions in respect of this matter: indeed, the case law is continuing to develop (Morrison v Aberdeen City Council 2014). Further, it is recognised by SLC that much of the compulsory purchase /compensation legislation is out-of-date relative to modern times and thus does not recognise the development of different types of properties over the course of the last one hundred years. This equally has led to difficulties with regard to the proper interpretation of land that does fall within the Material Detriment provisions within the existing legislation (see Emslie v Transport Scotland 2013) which primarily dealt with the proper definition and interpretation of agricultural land within the meaning of the 1973 Act.

Question 48:

For how long should a notice of entry be valid?

See our previous comments regarding notice to treat which should be removed.

Question 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.

It is considered that for completeness an acquiring authority should serve notice of intention to make a GVD on all interests that have been identified within the CPO.

Question 50:

Where a GVD applies to part only of a house, factory, park or garden do the current provisions adequately safe guard the interest of the acquiring authority and the land owner and, if not, what alterations should be made.

See our response to Questions 46 and Questions 47.

Question 51:

Should a GVD be available in all circumstances?

It is suggested that there be a single compulsory purchase system which would reflect the current procedure of a General Vesting Declaration and thus it is considered that such a procedure should be available in all circumstances.

Question 52:

Are the time limits for implementing a GVD satisfactory?

It is considered that the time limits for implementing a GVD are satisfactory.

Proposal 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.

This proposal is supported with there being a sufficiently high rate of interest established and a minimum rate of interest- which should always be positive.

At present, the statutory rate of interest is linked to the Bank of England Base Rate and is set at 0.5% below Base Rate. Since March 2009 when an "emergency" base rate of 0.5% was introduced by the Bank of England it can be appreciated that the statutory rate of interest since that time has been nil. Whilst the statutory rate of interest should continue to be linked to Bank of England Base Rate, it is suggested that the linkage should be within an appropriate range above Base Rate. Further, statutory interest is calculated on a simple interest basis and it is suggested that the basis should be that of compound interest.

Proposal 54:

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

In light of the comments above, it is considered that there should be a single compulsory purchase system by way of the General Vesting Declaration procedure. Thus, compulsory acquisition would take place on a specific date. However, this does not preclude the possibility of the acquiring authority agreeing to compulsorily acquire property in advance of the scheme/CPO and in that circumstance it would be up to the respective parties to agree a specific date of entry as well as ensuring that the assessment of compensation is under the Compensation Code and that statutory interest applies from and after the agreed date of entry. In addition, a date requires to be established in the situation where temporary entry is taken for initial investigation works prior to any formal scheme being in place

Proposal 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.

This proposal is supported.

Rule 5 claims are rare but, where they exist, re-instatement work can happen either before or after the vesting date dependent upon circumstances (usually dictated by the ability of the claimant to secure an alternative site and all appropriate consents and warrants). It is normal practice for the acquiring authority to create a bank "float" from which the claimant can draw down the relevant monies to pay the contractor who usually requires to be paid monthly on a staged payment basis. The relevant monies to be paid can be scrutinised/checked by the acquiring authority. In addition, the acquiring authority should take steps to ensure that any compensation monies paid to the claimant are only used to pay the contractor.

Question 56:

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

It is considered that the LTS should have discretion on the basis that there would be a single compulsory purchase system involving a specific vesting date but see the response to Question 55 above..

Proposal 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***

This proposal is supported as it will be pivotal for any acquiring authority to ensure that it has properly compulsorily acquired all relevant lands and interests prior to any public works being undertaken thereon.

Proposal 58:

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

This proposal is supported.

Question 59:

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

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.

Question 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?

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.

Question 61:

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

See response for Question 60.

Proposal 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.

This proposal is supported.

Question 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.***

It is agreed that the current rules on transfer of the land should continue as set out above.

Proposal 64:

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

This proposal is supported on the basis that the issue of the General Vesting Declaration is in effect a deemed notice to treat.

Question 65:

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

This is agreed.

Proposal 66:

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

This proposal is supported.

Question 67:

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

It is considered that the Keeper should so add a note.

Proposal 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.

It is considered that there should be a single compulsory purchase system whereby all interests that require to be compulsory acquired are so acquired by way of a General Vesting Declaration with a specific vesting date; as a consequence of such compulsory acquisition, there would then be the opportunity for all affected parties to claim compensation.

Proposal 69:

The acquiring authority may serve a notice to treat on any life renter and bring the life rent to an end in return for compensation.

This proposal is supported and is consistent with previous responses with regard to the General Vesting Declaration procedure that all interests require to be compulsorily acquired and that a right to claim compensation arises in all cases.

Proposal 70:

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

This proposal is supported. The Registers should be updated to record the discharge.

Question 71:

Do the 1997 Act Section 194 and the 2003 Act Section 106 and 107 require reform or consolidation?

It is considered that both Sections should be retained.

Proposal 72:

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

This proposal is supported; please also refer to the responses earlier with regard to the creation of new rights.

Question 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?

It is considered that there should be a single, unifying system covering all compulsory purchase situations.

Proposal 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.

It is considered that the basis for assessing compensation for the loss of heritable property should be derived from Market Value as defined by RICS (RICS Valuation – Professional Standards January 2014, as amended January 2015). Accordingly, the adoption of such a basis would thus, in the first instance at least, reflect the price that would be paid in the open market as at the date of valuation i.e. the date of vesting as between a willing seller and a willing purchaser; equally, that valuation would reflect all the advantages of such a property as well as its disadvantages. It is considered that this element of compensation forms the back-bone of many compensation claims and its relationship to the practicalities of market conditions should be incorporated and there should be a lack of artificiality. Further, such a valuation/assessment of compensation will require, of course, to be undertaken "the no-scheme world" – as further discussed in this Response Paper. An outline definition is set out below:-

"The compensation to be paid for a heritable interest in a property that is compulsorily acquired is its market value at the relevant date of valuation and is the estimated amount which the interest should exchange for on the valuation date as between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties have each acted knowledgeably, prudently and without distress or compulsion; further, the compensation should reflect the highest and/or best use of the interest that maximises its productivity and that is possible, permissible and financially feasible; lastly, the compensation should have regard to a

special purchaser and/or synergistic value. In assessing such market value, no regard should be taken of any advantageous or disadvantageous effects that underlie the scheme of acquisition"

Question 75:

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

The answer to this question is yes and, in practice, there are two main methods by which the Rule 2 element of compensation in a part-only compulsory acquisition is assessed. Firstly, on a "before" and "after" basis whereby the "before" value is the unblighted open market value of the whole subjects as at the date of vesting: the "after" value is the open market value of the subjects reflecting both the part acquired as well as the diminished value of the retained land. The alternative approach is to specifically value on an open market value basis the land acquired and then add on the diminished value of the retained land which is the favoured approach adopted by the Lands Tribunal. It is considered that as a variety of approaches may be legitimate dependent upon the circumstances of the acquisition, any new legislation should not be proscriptive in nature thus allowing flexibility in assessing the compensation due.

An example of the former approach would be in respect of a dwelling-house where part of the garden ground was compulsorily acquired and in this situation the principle of assessing the compensation is relatively straightforward ie. "before" and "after" valuations are undertaken (what these values are of course will be subject to negotiation). An example of the latter approach would be the part-acquisition of a large area of land where the land acquired was used for different purposes and/or had potential for development for different uses.

Question 76:

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

The purchase of property is not without risk and purchasers thus require to take appropriate professional advice prior to any purchase; they also need to recognise that values may fall or rise. In addition, it is recognised that in many cases in order to assist such a purchase a mortgage will be sought from a lender. Equally, it is considered that it is the lender's responsibility to undertake diligence both with regard to the property under which security will be taken as well as the appropriate financial background checks on the potential borrower. In addition, it also has to be recognised that the property market will fluctuate (as has been clearly evidenced over the course of the last ten years) and property owners require to accept this reality. However it requires to be appreciated that, in normal circumstances, the property owner will have control over whether or not he/she wishes to sell at any particular point in the market cycle and would not willingly sell in the knowledge that negative equity will occur- the mortgage lender may also have a voice in this matter. Nevertheless, the Rule 2 element of compensation should not take account of the issue of negative equity. However, as later discussed in this Paper, it is considered that in addition to receiving the "no scheme-world" open market value of the heritable interest (and disturbance) there should be (a) a premium payable as well (b) an occupier's loss payment to take account of the fact that the acquisition is compulsory in nature. These additional payments should as a by-product help to alleviate the issue of negative equity. In addition, reference is made to the draft DCLG paper in England which also deals with this issue.

Proposal 77:

Provision on the lines of Rules 2, 4 and 5 should be included in the proposed new statute.

This proposal is supported.

Question 78:

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

It is considered that such a test should be retained.

Question 79:

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

In principle, in compensation claims the onus is on the claimant to prove loss and secondly the extent of that loss. In many cases of equivalent reinstatement, it is quite clear that Rule 5 should apply but there will also be a number of grey areas and in such circumstances the onus requires to rest with the claimant to demonstrate that Rule 5 is more appropriate than Rule 2 although it is recognised that it can be very difficult to determine a market value where no market is perceived to exist.

Question 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?

It is considered that the LTS should be so entitled. Please refer to the responses to earlier questions on this topic.

Question 81:

How should the "scheme" be defined?

The scheme should be defined as the relevant Compulsory Purchase Order which has been instigated by an acquiring authority in connection with the provision of a public work which is the statutory responsibility of that acquiring authority: if that Compulsory Purchase Order is one of several Compulsory Purchase Orders being implemented to undertake the assembly of land then all such related Compulsory Purchase Orders should be considered as forming the scheme.

Question 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?

As stated previously within this Response Paper, it is considered that open market value/market value is the appropriate basis for assessing heritable compensation. However, open market value/market value requires to be assessed in the hypothetical "no-scheme world"- whereby the underlying scheme of acquisition i.e. the public work is disregarded for valuation/assessment of compensation purposes. In the majority of cases, it is likely that the underlying scheme of acquisition will have blighted marketability and value over a period of time and thus it is considered, in equity, that such blighting effects should be ignored in assessing the heritable compensation. Thus, it also follows that in cases where an underlying scheme of acquisition enhances value eg a regeneration scheme or the acquisition (and only the acquisition) creates a specific enhanced special value of the land then that enhancement should also be disregarded. It is appreciated that the legislation should be as clear and unambiguous as possible but it has to be recognised that each case has to be decided on its own merits set against the above-stated principles.

Question 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?

See our response to Question 82 above.

Question 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?

As stated above, it is much more common for CPOs (and even the mere threat of compulsory purchase) to generate blight on property values and such blight can arise prior to the promotion of the draft CPO- the promotion only tends to confirm the market's perception and gives rise to reality. More unusually, public work can enhance value. Thus, disregard of the scheme is necessary in either scenario and, on balance, such disregard should kick in at the date of the promotion of the draft CPO.

Question 85:

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

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.

Proposal 86:

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

This proposal is supported but only such permission achieved after 1963.

Question 87:

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

On the basis of previous responses within this Response Paper, i.e. there should be a single compulsory purchase system involving a General Vesting Declaration then it is considered that the relevant date for determining existing planning permission would be the vesting date or if a positive CAAD had been achieved earlier, then that earlier date (see also Question 99).

Question 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?

It is considered that such a statutory assumption should be retained.

Question 89:

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

In the assessment of compensation these limitations should apply but without prejudice to any CAAD that may be sought and achieved

Proposal 90:

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

This proposal is supported. Again, reference should be made to the Localism Act 2011.

Question 91:

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

It is considered that this statutory assumption should be repealed.

Question 92:

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

In light of some of our responses above, it is considered that the relevant date is the vesting date on the basis that a single compulsory purchase system is introduced incorporating a General Vesting Declaration or the making of a CAAD, as highlighted in Question 99.

Proposal 93:

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

This proposal is supported.

Proposal 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.

This proposal is supported.

Proposal 95:

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

This proposal is supported.

Question 96:

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

It is considered that, on balance, the provisions should be retained although it should be pointed out that it is very rare for this scenario to occur.

Question 97:

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

The 10-year period should be retained.

Question 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?

It is considered that an application for a CAAD should be able to be made any time after the draft CPO has been formally promoted and all statutory and non-statutory objectors have been informed of this decision- this, in essence, is the acquiring authority giving the "green light" to its scheme and its intention to (compulsorily) acquire all relevant property interests in order to have complete control over the relevant landholding in order to undertake the public work. It is recognised that even after a draft Compulsory Purchase Order has been promoted there may be a considerable time lapse until it is confirmed and a vesting date occurs. Equally, the process for a CAAD to be determined can also be time consuming as in the first instance careful consideration requires to be given to any such application by the Local Planning Authority and that there is a right of appeal to that decision that lies both with the acquiring authority and the landowner. Nevertheless, it is considered that there should be no time limit on making an application for a CAAD. The best justification for no time limit would be the case where, for whatever reason, the claimant only claimed compensation at the last minute ie just before the expiry of the 6-year time bar to the Lands Tribunal and it was only recognised at that time that the land acquired did have potential development value in the absence of the scheme and that a CAAD was necessary.

Question 99:

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

It is considered that the heritable compensation should be assessed as at the date of vesting and thus all relevant matters relating thereto should also coincide with that date. At present, the effective date of a CAAD is the date of the promotion of the draft Compulsory Purchase Order which, as stated above, may be some time before the vesting date which can lead to considerable problems of being able to relate planning, market demand and value to two different dates . Thus,

it is proposed that the effective date of a CAAD is the date of the final determination of a CAAD if applied for and issued prior to vesting or, if vesting has occurred then, then it is effective as at the vesting date.

CAADs have over the last few years attained much greater importance but it requires to be borne in mind their principal usage is to assist in the assessment of compensation/valuation process. Thus, it is considered that a CAAD should contain as much relevant information as possible to provide clarity to both the acquiring authority and the landowner in assessing compensation. It can be appreciated that in the vast majority of cases where planning permission is granted then such consent will be subject to a series of conditions and, in many cases, a Section 75 Agreement may form part of the consent. Accordingly, a CAAD should be regarded as akin to an application for planning permission in principle and thus should contain all relevant and detailed information to guide the parties to the correct level of compensation due. However, it should be made clear that the information required under the Town and Country Planning (Scotland) Act 1997 for submission for such an application and the cost of all relevant information/assumptions which the Local Planning Authority may require may be recovered as part of any claim for compensation.

Further, at present the legislation restricts a CAAD to the land acquired and does not extend to retained land in the circumstance where there is a part-only land take. The situation is relatively straightforward where the whole property has been compulsorily acquired but difficulties do arise with regard to part-only acquisitions whereby part or all of the land acquired may be subject to a CAAD but no planning development guidance can be given with regard to the retained land, especially that land lying immediately adjacent to the acquired land; accordingly, the line of acquisition acts as a potential artificial planning boundary Thus, it is suggested that a CAAD can be utilised in connection with not just the land acquired (or to be acquired) but also in respect of all retained land or a designated part thereof.

It has also to be borne in mind that acquiring authorities will only be granted utilisation of their compulsory purchase powers for the land required for the specific public work – no more and no less. Thus, arbitrary demarcation lines are determined relative to the public work and not with regard to planning considerations. Further, in order to reduce the compensation burden on the taxpayer, acquiring authorities nowadays are much more adept in ensuring that the land take is

kept to a minimum and, in many cases, where possible, will purposefully design schemes to reduce the amount of part land-take acquisitions. Nevertheless, the fact remains that the majority of compulsory acquisitions in Scotland comprise part only acquisitions and the CAAD system requires to more accurately reflect this situation; in addition, the amount of compensation will be strongly influenced by planning/development considerations and thus the CAAD system requires to be as precise as possible.

Please also refer to our response to Question 107.

Proposal 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.

This proposal is not supported for the reasons outlined above.

Proposal 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, and no assumption should be made about what may or may not have happened before that date.

This proposal is supported.

Proposal 102:

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

This proposal is supported.

Proposal 103:

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

This proposal is supported.

Question 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?

We do not think it should be so linked for the reasons given above.

Question 105:

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

It is considered that such a right should be retained although the default position should be that the matter would be dealt with by written submissions: agreement between the parties as to the way by which an appeal should be handled is required.

Proposal 106:

Should there be any change to the current (one month) time limit for appealing against the CAAD?

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

Question 107:

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

It has to be recognised that in some compulsory purchase cases, the acquiring authority is in effect The Scottish Ministers. The refusal or acceptance of a positive CAAD will have in many cases a significant effect on the amount of compensation due and it is considered that in order to remove any perception of bias it may be preferable for the appeal to be heard by the Lands Tribunal for Scotland rather than DPEA. Further, it should also be recognised that in the initial application for a CAAD, which is to the relevant Local Planning Authority, who may also be the acquiring authority and thus again to ensure no perception of bias it may be preferable for the initial CAAD application to be submitted to DPEA for the issue of a CAAD and, as stated above, an appeal to the Lands

Tribunal for Scotland with that decision being final. In other circumstances, the appeal should remain with DPEA with a report and recommendations being submitted to The Scottish Ministers for their approval/modification/rejection.

With regard to the present system, it is considered that the acquiring authority's right to object to a positive CADD runs contrary to the planning system- as there are no third party rights of appeal against the grant of planning permission. Thus, it is considered that only the claimant should have the right to lodge a CAAD (it has been very rare and unusual for an acquiring authority to do so) but with the acquiring authority having the right to make representations thereto: further, the claimant retains the right to appeal against either a negative or positive CADD. There is however, the alternate view that the status quo should prevail ie either the claimant or the acquiring authority can seek a CAAD and the appeal process can be used by either party thereafter.

Question 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?

As stated above, the compulsory purchase system and the assessment of compensation should be undertaken in a transparent manner without any perception of negative and positive bias. Our views with regard to the CAAD appeal process is as stated under Question 107 above demonstrate this ethos. Equally, it is considered that the option to deal with a CAAD appeal should be either by way of written representations or an inquiry

Question 109:

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

It is considered that such planning permission which could reasonably have been expected to have been granted at the relevant valuation date should be assumed to have been granted. Reference is again made to the Localism Act 2011.

Question 110:

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

It is considered that in such circumstances there is still a need for a CAAD process to determine what, if any, planning permission could have reasonably expected to have been granted at the relevant valuation date rather than just relying on "hope value" which in turn is subject to subjectivity by professional property valuers. In this type of situation, in order to ensure that an accurate compensation assessment is made as much certainty with regard to the development potential/planning permission requires to be incorporated in such an assessment.

Question 111:

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

It is considered that the same criteria should indeed be applied in relation to all relevant planning assumptions.

Proposal 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.

This proposal is supported

Proposal 113:

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

As stated in response to Question 75, it is considered that there are (at least) two recognised approaches to the assessment of Severance and Injurious Affection and flexibility of approach should not be restricted by any new legislation.

Proposal 114:

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

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

Proposal 115:

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

This proposal is supported albeit it may be in some circumstances the decrease in the market value of the retained land may be wholly or partly assessed relative to a potential loss of profits and thus retention of flexibility of approach is required. Reference is made to the response to Question 113 and it will also be necessary to ensure that double-counting does not occur.

Proposal 116:

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

It is considered that any proposed new statute should incorporate an appropriate definition of Accommodation Works ie physical works undertaken on either retained land where there is a part-only compulsory acquisition or on privately-owned land where no land has been acquired that ameliorate the effects of the public work and to also give a legislative responsibility to an acquiring authority to undertake such works, if it so wishes, but in discussion and negotiation with the affected land owners. Equally, there should be a duty of care on acquiring authorities to ensure that any such works that are undertaken are completed properly and in accordance with previously-agreed specifications. Occasions have arisen where inferior works (or no works at all) have been provided and the acquiring authority takes no remedial action but suggests that the claimant take the matter up with the contractor- even though there is no contractual relationship between the claimant and the contractor.

Question 117:

Is the current rule, set –off for betterment applies to land which is "contiguous with or adjacent to the relevant land", satisfactory?

It is considered that the current situation with regard to set-off for betterment is confused, open to misinterpretation, extremely difficult to apply on a consistent basis and, in many cases, iniquitous and thus, on balance, should not be incorporated in any new proposed statute. As stated within this Response Paper, the compulsory purchase of private property rights can impose a severe imposition or restriction on landowners: whilst the statutory right to exercise compulsory powers to acquire such land interests is needed (provided proper justification is shown) there requires nevertheless to be a counter-balance with regard to the assessment of compensation. It is considered that any rule that allows for the set-off for betterment for compensation does not reflect that proper balance and, as pointed out in the Discussion Paper, creates an opportunity for confusion, time delay and inconsistent amounts of compensation. Nevertheless, it is recognised that retention of the status quo of the ability to set-off betterment in the compensation assessment will be favoured by acquiring authorities.

Proposal 118:

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

See the response to Question 117 above.

Proposal 119:

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

This proposal is supported inasmuch as the disturbance assessment is consistent between the Rule 2 and Rule 6 elements, creates equivalence and follows the long-established principle determined in Horn v Sunderland (1941).

Proposal 120:

There should be an express statutory provision for disturbance compensation.

This proposal is supported and, as set out in this response paper, disturbance compensation needs to be widened in nature- particularly with regard to the informal pre-scheme situation.

Question 121:

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

Whilst it is recognised that it may be challenging to draft an explicit set of words in any new legislation, it is nevertheless recommended that the principle of causation should be set out in any proposed new statute.

Proposal 122:

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

It is considered that whilst this proposal is an extension of the current legislation, it does not go far enough. Recent practice of many acquiring authorities (and it is considered that this practice will be adopted by others and in the future widened in scope) has been to undertake very intensive and invasive investigations with regard to the options available in respect of a public work – the ongoing investigations with regard to the dualling of the A9 is a case in point. Whilst the state (under many guises) may have taken a decision in principle with regard to a public work, it is then the responsibility of the relevant officials to determine the precise nature and detail of the public work and the tendering/procurement route. In order to ensure that proper justification is made with regard to any associated Compulsory Purchase Order it is common nowadays for detailed and extensive investigations to be undertaken. These investigations in many cases involve direct contact with potentially-affected landowners and may incorporate ground investigation works, completion of questionnaires etc. As a consequence, even at an early pre-scheme stage, a landowner may well incur cost and expense in being involved in the project – whether in agreement or disagreement of the concept of the public work Thus, it is suggested that any new statute requires to recognise this situation as these costs and expenses are incurred as a direct consequence of compulsory purchase or the threat of compulsory purchase and thus should form a legitimate claim for disturbance whether or not any of the land is ultimately compulsorily

acquired. It should be borne in mind that in many instances the acquiring authority will have engaged relevant professional consultants to undertake these initial investigation/option-forming commissions and will be already be incurring expense as a result. Thus, it is considered that there is a three-stage process within which (reasonable) disturbance costs may be incurred and should be able of being recouped ie firstly, at the pre-scheme stage as outlined above, secondly between the issue of the draft CPO and its vesting and thirdly after vesting. Nevertheless, it is accepted that costs incurred in objecting to a CPO, including PLI costs, do not fall to be recovered and are borne by the claimant.

Proposal 123:

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

In light of our comments in response to Proposal 122, this proposal is supported.

Question 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.

It is considered that in many cases even the mere threat of compulsory acquisition creates a negative perception of property and that blight begins to occur: in addition, it can and does influence the thinking and policies of Local Planning Authorities Thus, whilst the onus of proof would rest with the landowner subject to a reasonable test, it is suggested that any such losses caused as a result of lost development potential should form a legitimate heading of (disturbance) compensation.

Question 125:

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

It is considered that payment for disturbance should not necessarily be restricted to the occupier of the property and indeed the Planning Compensation Act 1990 permits property investors to

recover all reasonable costs if an alternative or replacement property investment is purchased within a given timescale. Thus, it is considered that this principle has already been established and thus it is fair to suggest that investment owners, who are by definition not occupiers, should be entitled to claim for all reasonable costs and expenses incurred as a direct consequence of the compulsory purchase or indeed a threat of compulsory purchase of their interest.

Question 126:

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

It is considered that there is insufficient evidence/experience to form a judgement on this issue. Nevertheless, corporate structure is undertaken for a variety of good reasons including reduction of exposure to tax and ensuring that directors' and shareholders' interests are properly protected. Thus, claims for compensation should not necessarily be restricted, or indeed disallowed, only due to the fact that there has been a prudent corporate structure put in place. Equally, the cost of unwinding such structuring prior to any compulsory purchase may not be time and cost effective.

Question 127:

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

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.

Question 128:

Should a claimant's personal circumstances be taken into account when considering the assessment of disturbance compensation.

It is recognised that to ensure an accurate definition of "personal circumstances" will prove highly challenging to the drafting of any new legislation. Nevertheless, it is considered that in principle a

more liberal and flexible view with regard to the assessment of disturbance compensation requires to be adopted and thus the utilisation of “personal circumstances” should not be disallowed. Nevertheless, the concept of equivalence should be upheld and double-counting requires to be avoided.

Proposal 129:

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

This proposal is supported on the basis that there is a general obligation to mitigate loss. Reference is made to previous responses to this issue in this paper.

Proposal 130:

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

This proposal is supported.

Question 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, modification should be made to them.

It is considered that it would be of assistance for such rules to be set out in any proposed new statute. These rules, by definition, would have to be fairly general in nature but that the “default position” would be that disturbance compensation for the displacement of a business would be on the basis of relocation and unless a good argument is presented that the basis should be that of total extinguishment. Further, Section 43 of the Land Compensation (Scotland) Act 1973 gives statutory authority to those business owners aged over 60 to claim business disturbance on the basis of total extinguishment: it is considered that this right should be protected and that 60 remains the appropriate age..

Question 132:

Should the valuation date for disturbance compensation be different from the valuation date in relation to the compulsory acquired land – in particular where the GVD procedure is used?

It is considered that the valuation date for disturbance compensation should be the vesting date on the basis that there is a single compulsory purchase system involving a General Vesting Declaration procedure. However, this valuation date should not preclude claimants being able to claim reasonable disturbance compensation that may have been incurred some considerable time prior to vesting ie anytime after any approach has been made by an acquiring authority. Reference is made to previous responses to this issue in the paper, particularly to the "three-stages".

Question 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?

It is suggested that it should be made so clear. It is the experience of members of the SCPA that the time-frame can sometimes be measured in years before the full extent of business loss is crystallised and thus can be properly and accurately quantified. This, in turn, potentially runs into the time-scale difficulty for making a timeous application to the Lands Tribunal and could cause problems for claimants of following this approach relative to the existing method.

Proposal 134:

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

This proposal is supported.

Question 135:

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

It is considered that such disturbance payments should be retained.

Question 136:

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

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.

Question 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.

It appears not to be significantly disputed that there should be an additional payment made to the occupier of a residential property that has been compulsorily acquired (equally, we consider that there is as strong, or indeed stronger, argument that an additional payment in respect of occupiers of business/commercial/agricultural properties should also be made). Accordingly, the issue at stake in this Question is how that additional payment should be determined for residential properties: at the very least, it should be straightforward to understand and calculate. One method would be in respect of the premium that should be added to the Rule 2 element of the compensation and this response is further developed in respect of our responses to Questions 138, 139 and 140 below. Arguably, the minimum period of residence of one year is too short a period and there could be a sliding scale related to the amount of Home Loss Payment due ie the

longer the occupant has been in occupation, the higher the payment: on balance, it is considered that there should be a minimum period of residence for occupiers and that it should be three years prior to the vesting date and accordingly an owner-occupier would receive a Home Loss Payment based on a mix of the value of the property acquired and length of occupation. A tenant in each case would receive the minimum amount provided, of course, he/she had been in occupation for at least three years prior to vesting.

Question 138:

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

Whilst it could be argued (with justification) that the current Home Loss Payment in Scotland is miserly and iniquitous in comparison to England/Wales, it does nevertheless work efficiently in practice. Thus, it is suggested that if a Home Loss Payment system is to continue, then a percentage linked to market value should be retained although that percentage would fluctuate dependent upon length of occupation.

Question 139:

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

It is considered that there should be no maximum or, if there was to be a maximum, then it should be set at a high level. There should be a minimum payment (say £3,000) and, thus, any new legislation should ensure that the maximum/minimum payment is subject to regular review every three years.

Question 140:

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

In response to the above three questions on Home Loss payments, it is considered that the system should be easy to understand and efficient to operate. Further, it is suggested that the approach

continues to be based on a percentage of the market value of the acquired property but with interaction/greater regard to the length of residence prior to acquisition- as this was an important criteria behind why Home Loss Payments were introduced in the first instance. Thus, consideration should be given to the Home Loss Payment being more related to length of occupation prior to acquisition but with there being a minimum three year qualifying period of continuous occupation prior to acquisition.

Further, it is considered that, in addition to a Home Loss Payment for residential properties (and indeed other loss payments for other types of properties- see below), greater recognition needs to be made of the fact that the acquisition of the property interest is compulsory in nature and that there should be a premium added to the Rule 2 element- as was the case prior to 1919- and any new legislation should incorporate such a premium.

Question 141:

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

The calculation of the Farm Loss Payment is significantly different to that of a Home Loss Payment although the underlying philosophy of both Payments is primarily the same i.e. to reflect the upset of losing one's home/farm. However, it is rare for such a Payment to be made as it is rare for a whole farm to be compulsorily purchased. However, a Payment should also be made to the occupier where part-only of a farm is compulsorily acquired.

It is considered that a consistent approach to Home Loss Payments and Farm Loss Payments should be adopted and thus the calculation of a Farm Loss Payment should be applied where the whole or part of the farm is compulsorily acquired (by whatever method) and should be undertaken by way of a similar approach to our response to Questions 137-140 above. The Payment would be to the occupier under the same three year occupational qualifying period; there would be a minimum payment (say £3,000) which would be reviewed every three years (ideally at the same time as Home Loss Payments) and the Payment would be based on a percentage of the market value of the interest of the property acquired. Equally, there would be a maximum payment but, as with Home Loss payments above, it should be set at a fairly high level.

Proposal 142:

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

It is considered that the new statute should in fact go further and include a loss payment to the occupier for any type of property acquired. Business Loss Payments have existed in England and Wales for over ten years now and a similar Payment should be introduced in Scotland to cover occupiers of all types of property not covered under residential and farms above.

As above, there should be a minimum qualifying period (say three years), a minimum payment (say £3,000) subject to a three year review and the Payment should represent a percentage of the market value of the interest in the property acquired. Equally, there should be a maximum payment but, as above, it should be set at a fairly high level.

It is re-iterated at this point that in addition to the above-described supplementary payments there should be a premium added to the Rule 2 element to reflect the fact that the acquisition is indeed of a compulsory nature. See previous responses to this issue.

Proposal 143:

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

This proposal is supported.

Question 144:

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

The shortcomings include:-

- The length of time involved; six months and considerably more are common.
- The potential costs involved; in many cases the fear of losing the case and also potentially being responsible for the other party's costs is a significant factor in the decision-making process of a claimant who will be against an acquiring authority who is perceived to have "bottomless pockets" and may use this to its advantage.
- As the LTS acts as a quasi-court then there is usually a necessity to employ high-level professional legal advice which would incorporate at least a commercial lawyer if not also junior or senior QC. The appointment of such professionals adds to the costs.
- Appearance at a Hearing can be a very intimidating experience- for both professionals and non-professionals alike.

Notwithstanding the above, it is considered that the Lands Tribunal may still be the appropriate forum to settle disputes but all other forms of dispute resolution should be available ie arbitration, adjudication and mediation as it is in the interest of all parties to have disputes settled in a time and cost efficient manner.

The experience of SCPA members is that the parties often seek extensions of agreed timescales once in the court process. This further exacerbates matters, particularly for the claimant and (since mid-2009) with no interest accruing, there is little incentive for the acquiring authority to have the claim resolved timeously. It is submitted that there should be set timetables for progressing claims agreed at a procedural hearing held within one month of the claim being submitted and that hearings must take place no later than six months after the claim has been submitted. Just cause would require to be shown for any extensions of time which are sought. The Lands Tribunal should encourage greater utilisation of written representations.

Proposal 145:

Where land is compulsory purchased which is subject to a tenancy of under one year, disputes of about compensation relating to the tenancy should be referred to the LTS rather than the Sherriff Court.

This proposal is supported.

Question 146:

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

It is considered that it should be made clear that the six year time limit (if indeed that is the appropriate limit) commences on the date of vesting for both the lodging of a claim and any reference to the Lands Tribunal in the case where the compensation is disputed. In addition, cross-reference is made to the utilisation of a formal declared date of completion which can be used in connection with Part 1 claims.

Question 147:

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

In response to a number of questions above, our position is that there should be a single compulsory purchase system incorporating a General Vesting Declaration and a vesting date and thus a notice to treat procedure should not be involved. Thus, our answer to Question 146 above is pertinent.

Question 148:

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

It is considered that there should be consistency with regard to time limits, if not, then confusion may arise. In the vast majority of cases (but not necessarily in each and every case), claimants

will be aware that their interest in property has been compulsorily acquired and that there is a right to claim compensation- as the acquiring authority should be under a statutory obligation to make this quite clear to all claimants. Equally, it is not unreasonable that there should be a time limit within which that claim should be lodged. Accordingly, the time limit should coincide with the six year time limit from the date of vesting to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation.

However, there may be rare occasions where, for whatever reason, a claimant may not be aware that his/her property interest has been compulsorily acquired until some time after vesting but this should not fundamentally preclude the right to claim compensation; also, the six year time rule for an application to the Lands Tribunal should only commence from the date that the claimant was aware that his/her interest had been compulsorily acquired. Nevertheless, it would be incumbent on the claimant to fully demonstrate and justify why a late claim is being made.

Question 149:

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

It is considered that the Lands Tribunal for Scotland should be given such discretion in exceptional circumstances- see the response to Question 148 above..

Question 150:

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

It is considered that the Lands Tribunal for Scotland should be given wider discretion with regard to the award of reasonable expenses and that each case requires to be decided on its own merits.

Question 151:

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

It is considered that such provision ie protective expenses orders should be introduced. One of the main criteria in deciding as to whether or not an application to the Lands Tribunal for Scotland should be lodged is the issue of costs but all such applications will require to be carefully scrutinised.

Proposal 152:

There should be a prescribed form to claim an Advance Payment.

On balance, this proposal is not supported. The main reason for an Advance Payment is one of speed to reduce any element of financial hardship on the claimant. Whilst it is accepted that acquiring authorities require sufficient detail of the claimant and the claimant's claim, this information should all be incorporated within the compensation claim form which many acquiring authorities in Scotland have developed over the years; indeed, it is suggested that there should be a standard Scotland-wide compensation claim form. Thus, the formal compensation claim form requires to be completed and submitted up front (even though the compensation amount claimed on the form may not be stated other than "to be negotiated under the Compensation Code") and all that would be required thereafter is an Advance Payment application letter.

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, experience has indicated that it can prove extremely difficult to recover an overpayment of compensation and thus acquiring authorities tend to adopt a very cautious approach to such an application in assessing the compensation due- and arguably this is a prudent approach. 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.

In addition, it has been the experience of members that the three month period within which an Advance Payment application requires to be assessed, processed and paid is regularly not adhered to by acquiring authorities and the current legislation provides no obvious enforcement for payment by the claimant. Such a (common) situation defeats the main reason for an Advance Payment being requested and the current position whereby the rate of statutory interest is nil

further exacerbates the problem. It is considered that three months is a not an unreasonable period of time for an acquiring authority to make the Advance Payment- especially if a fully completed compensation claim form has already been submitted. Failure to do so should be penalised either by way of having a penal statutory rate of interest (say 8% over Bank of England base rate) and/or a penalty payment, say 5% of the Advance Payment amount.

Question 153:

Are there circumstances in which an acquiring authority should be required to make an Advance Payment before taking possession?

It is considered that on the basis that there would be a single compulsory purchase system involving a General Vesting Declaration procedure then there is no reason to incorporate within any new statute a requirement on an acquiring authority to make an Advance Payment prior to vesting.

However, as set out in the response to Response 122 (initial/early land investigative works) where there may be compensation due at that stage in the process, then the opportunity to apply for an Advance Payment may/would arise, particularly if there is a dispute as to the amount of compensation due at that time.

Question 154:

Should it be competent for the LTS to provide an enforceable valuation figure for an Advance Payment?

It is fair to state that in many instances the three month period within which an application for an Advance Payment requires to be assessed made and paid is not followed and equally there is very limited redress in such circumstances. Nevertheless, it has to be recognised that the payment of compensation at any stage involves taxpayers' money and there requires to be a proper and fit audit system in place before any such monies are paid. Equally, as stated in our response to Proposal 152 above it is considered that discretion with regard to the extent of the amount of any Advance Payment rests solely with the acquiring authority and that it has to be fully satisfied prior

to any monies being paid. Accordingly, it is considered that the involvement of the Lands Tribunal for Scotland would not significantly assist in this particular issue – rather, acquiring authorities should have a higher degree of statutory requirement to undertake the assessment of an advance payment more timeously and, if not, then "stick" methods require to be employed

Question 155:

What rate should interest be paid on Advance Payments, and should the acquiring authority be liable for increased rate if payment is delayed?

It is considered that the statutory interest to be paid on Advance Payment should be say 4% above Bank of England Base Rate and "stick" methods require to be employed if the Payment is made late, as discussed above, Further, at present the interest calculation is undertaken by way of a simple interest method and it is suggested that an annual compound interest method should be adopted.

Proposal 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.

It is our experience that the practical implementation of Section 48 (6) of the 1973 Act is inconsistently applied by acquiring authorities in Scotland – some rigorously enforce the requirements of the Section whilst others appear to be ignorant or ignore the requirement. In addition, it requires to be recognised that in many compulsory acquisitions of lands there will be a heritable security or mortgage or similar held over the property.

Notwithstanding the above, it is considered that on the basis that an interest in property has been acquired and if an application for an Advance Payment is made, then there should be no reason why an acquiring authority should not make an Advance Payment – that payment may be made wholly to the claimant if there is no mortgage etc held over the property or partly to the claimant/heritable security holder or wholly to the heritable security holder where a mortgage etc is in place The provisions of the above section should not be used by acquiring authorities to make no payment at all following an Advance payment application.

Further, from a practical point of view it is considered prudent that any landowner affected by a Compulsory Purchase Order which is subject to a heritable security, mortgage etc. should formally contact the lender in order to forewarn the lender of the impending situation and that appropriate discussions take place. It is considered that it would be in the mutual interests of both the landowner and the lender for an Advance Payment to be made.

Question 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 there has been unreasonable conduct by the acquiring authority?

(a) It is considered that the issue of statutory interest is best dealt with via statute and that interest accrues from the date of vesting or from the date of entry if agreed earlier or from the date that compensation should have been in respect of the investigative works costs- see the responses to Response 122 and Question 153.

(b) Determining unreasonable conduct by an acquiring authority may prove to be difficult and expensive and, as above, statute should deal with this matter.

Question 158:

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

Each individual case should be decided on its own merits, but, as set out in our response to Question 144 above, it is considered that all forms of dispute resolution require to be made available.

Question 159:

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

References to the Lands Tribunal vary in complexity but it is not unreasonable to suggest that as a minimum, each party can incur £25,000 on professional fees; further, a norm may be closer to £50,000 and there will be cases where the costs are considerably higher. Costs by way of the various forms of ADR would , as a general rule, be 50% of the above.

Question 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?

It is considered that the Crichel Down Rules are put on a statutory footing – whether the land was acquired by a central government department, local authority or other body having compulsory purchase powers. The Rules should be applied consistently. It should be recognised that the compulsory purchase of private property rights does impose a significant imposition and thus if the relevant lands are no longer required for a public work and have been formally declared surplus, then such a right of pre-emption should exist in all circumstances. Further, it is considered that the acquiring authority should not gain financially from any buy-back at the expense of the previous owner. The price to be paid on the buy-back should be on the same basis as the compensation

assessment (it is accepted that values will alter in any intervening period) and where a “ransom strip” situation has developed the acquiring authority should not be able to argue that the price to be paid reflects that ransom. In the first instance, both the acquiring authority and the previous landowner should obtain valuations of the land and the price to be paid then be subject to negotiation; in the event that a suitable price cannot be agreed then the matter should be referred to the Lands Tribunal to decide.

Whilst the above is a majority view, the alternative view is that the Critchel Down Rules as existing should be maintained.

Question 161:

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

It is our view that the Rules should apply to all land acquired by any means of compulsion.

Question 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?

It is considered that, generally speaking, there should be no limitation with regard to cases where land has been compulsory acquired although “material change” requires to be accurately defined. Whilst a right of pre-emption would exist, it would be up to the previous landowner to decide whether or not he/she/it would wish to exercise such option.

Question 163:

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

It is considered that the current provisions are satisfactory.

Question 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?

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.

Question 165:

Should a time limit be introduced for land purchase between 1st January 1935 and 30th October 1992?

See our response to Question 164 above.

Question 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.

It is considered that most of the seven exceptions (but perhaps not nos. 3 and 4) to the obligation to offer back should be retained on the basis that the land has been formally declared surplus by the acquiring authority.

Question 167:

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

It is considered that this procedure could be retained.

Question 168:

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

It is considered that the existing time limits do pose administrative implications particularly with regard to identifying and contacting previous landowners. Thus, the proposal that the overall time limit be extended to (at least) 8 months is not unreasonable.

Question 169:

Should claw-back provisions in terms of the development value of surplus land be time limited and, if so, to what extent?

It is the general view that the acquiring authority should not gain financially and that the previous owner should be able to reap any windfall profit if in the intervening time if the land now has development potential/value and thus there should be no claw-back provision or time limit. However, there is a counter-argument that where there has been (significant) public expenditure resulting in betterment then claw-back provisions are pertinent.

Proposal 170:

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

This proposal is supported.

Question 171:

Should Section 89 of the 1845 Act be repealed and not re-enacted.

It is considered that this section should be repealed and not re-enacted.

Proposal 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.

This proposal is supported.

Question 173:

Does Section 114 of the 1845 Act work satisfactorily?

It is considered that the section does not work satisfactorily.

Question 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?

It is considered that the likelihood of a continuation/renewal of a short tenancy should be taken into account in assessing the compensation. It is recognised and accepted that each case would have to be decided on its own merits and particular circumstances. Indeed, a short-term tenancy may have only been entered into due to the knowledge of a threat of compulsory purchase that, in its absence, a longer-term lease would have been established. Further, it should be appreciated that there are significant differences as between residential lettings (Short Assured Tenancies) and commercial lettings.

Proposal 175:

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

This proposal is supported.

Question 176:

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

It is considered that any such liability should be recoverable under "disturbance" compensation. The fact that the acquisition is of a compulsory nature means, by definition, that the future planning of the ownership and occupation of property is outwith the control of the proprietor. Thus, in the "no scheme world" a proprietor can take whatever prudent action is necessary in order to avoid or reduce any liability for tax on a disposal etc: that flexibility is lost by way of compulsory purchase. Thus, as a counter-balance it is considered that the recovery of any exposure to tax is a fair adjustment.

Question 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?

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. It is perhaps not unreasonable that the default position of acquiring authorities on receipt of a Blight Notice is to reject that Notice on the basis that at least one criteria has not been met – and thus the Notice fails. The effect of not being able to dispose of one's principal asset or alternatively being left in limbo for a considerable time prior to compulsory acquisition is manifestly unjust. Accordingly, it is considered that the circumstances within which a Blight Notice can be served should be considerably widened. In addition, the limitation that it is restricted to owner-occupiers and that there is a Rateable Value limitation for non-residential properties should also be improved as blight does not discriminate between different property types and values. In addition, it is also suggested that the requirement that reasonable efforts be adopted to dispose of the property on the open market prior to a Blight Notice being able to be served should also be removed. This especially so nowadays with regard to residential properties in Scotland as a consequence of the introduction in 2009 of the Home Report. Whilst such a Report tends to focus on the state of repair/condition of the property relevant factors, such as the threat of compulsory purchase, will also be taken into account and will undoubtedly affect marketability and value. It is common practice for potential purchasers of the property to view the Home Report online prior to undertaking any physical viewing of the property and the mere mention of even the threat of compulsory purchase tends to have the effect that the market quickly loses interest in the property. It should also be recognised that there is a cost to be borne by the residential property owner in instructing a Home Report.

2. McCarthy Rules

These Rules, which primarily deal with injury to property rights which have not been compulsorily acquired but are affected by a public work, are not well known or understood. An example would be the interference of access rights on land not owned by the affected party but that land has been compulsorily acquired. It is considered that whilst the implementation of these Rules rarely occurs, they should be incorporated within any new legislation- on the basis that a CPO should result in the compulsory purchase of all property rights and interests and that all owners/tenants of such rights

and interests are entitled to claim compensation for any injury caused as a direct consequence of the CPO and public work.

3. Part 1 Claims, 1973 Act

These are claims for compensation to reflect the diminution in value of property affected by a public work where the property lies adjacent to or close by a public work but no land has been acquired. The 1973 Act places a number of severe limitations on such claims- both in terms of what types of public works are incorporated principally roads and airports, who can claim and the amount of compensation payable. Government has, on the one hand, recognised that blight does not stop at the boundaries of a public work but, on the other, has limited the amount of compensation to be paid in such circumstances; that amount is determined relative to the seven physical factors as stated in the 1973 Act and thus loss of view, privacy, amenity etc are not compensatable.

It is suggested that this right to claim compensation is widened to cover all public works and all properties affected but that loss remains restricted to the diminution in value caused by one or more of the seven physical factors as stated in the 1973 Act. Further, it is not unreasonable for this type of claim to be lodged after the public work has been completed and "the dust has settled" and thus the time-scales for claiming compensation as set out in the Act are sensible: as stated in some of the responses above, it is suggested that there is an obligation on acquiring authorities to announce a formal date(s) of completion of the public work and the six year limitation to apply to the Lands Tribunal in the case of disputed compensation runs from that date. Lastly, it is also suggested that an acquiring authority retains its statutory obligation to reduce the effects of its public work by providing sound insulation and other mitigating works as circumstances dictate.

This completes our Response Paper. We trust that the Scottish Law Commission finds this document to be of assistance in its deliberations in respect of CPO and compensation issues and it is confirmed that it should not hesitate to contact us if it wishes clarification or amplification on any of the matters referred to above.

Scottish Compulsory Purchase Association

May 2015.