The Law Commission

(LAW COM No 291)

TOWARDS A COMPULSORY PURCHASE CODE: (2) PROCEDURE

FINAL REPORT

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Presented to the Parliament of the United Kingdom by the Secretary of State for Constitutional Affairs and Lord Chancellor by Command of Her Majesty
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The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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EXECUTIVE SUMMARY

Reforming the law of compulsory purchase

The current law of compulsory purchase of land is difficult to locate, complicated to decipher and elusive to apply. The case for its reform is overwhelming and has been recognised by Government. In July 2000, the Compulsory Purchase Policy Review Advisory Group, which had been established by the DETR, reported that the law was "an unwieldy and lumbering creature". One of its recommendations was that the Law Commission should be asked to review the law relating to compulsory purchase and to make proposals for its simplification, consolidation and codification. This led to a formal reference by the Lord Chancellor to the Law Commission in July 2001.

The work of the Law Commission has dealt in turn with Compensation and with Procedure. Following a Consultative Report (CP No 165), a Final Report on Compensation (Law Com No 286) was published in December 2003, making recommendations for reform and putting forward a Compensation Code as an indicative framework for legislation. The Appellate Committee of the House of Lords has subsequently supported the case for legislative reform along the lines of the Law Commission's recommendations in *Waters v Welsh Development Agency* [2004] 1 WLR 1304. A Consultative Report on Procedure (CP No 169) was published in 2002, and this Final Report now deals with the issues we had identified and makes recommendations for the reform of this area of the law. It forms the culmination of the Law Commission's project on compulsory purchase law.

The central problem we seek to address is the inadequacy of the principal statute, the Compulsory Purchase Act 1965. Many of its parts are out-dated, some are obsolete, and the statutory language throughout is archaic and obscure.

Authorisation of compulsory purchase

A compulsory purchase order comprises two distinct stages. It is initiated by an "acquiring authority" (which may be a local authority, a government department or some other body in the public or private sector), following which there is a process of confirmation. During the process, owners, occupiers and other persons affected are entitled to object or make representations, and there may be a public inquiry. The decision whether or not to confirm the order is for the "confirming authority" (usually a Secretary of State). We recommend that the two-stage authorisation process should be retained, but that it should be rationalised such that there is a unitary procedure applicable whether the order is being made by a government department or by some other body.

Prior to making a compulsory purchase order, an acquiring authority may wish to enter the land for surveying purposes. We consider that the statutory powers to survey are neither clearly prescribed nor applicable to a wide enough range of bodies. We recommend that all acquiring authorities should (subject to appropriate judicial controls) be entitled to enter upon land for necessary

surveys provided that they are considering a distinct project of real substance for which entry is genuinely required.

Compulsory purchase orders are subject to challenge by a statutory review procedure under Part IV of the Acquisition of Land Act 1981 and by (non-statutory) judicial review. These jurisdictions are in need of rationalisation. We recommend that challenges to confirmation (or refusal of confirmation) should be made exclusively by the process of statutory review but that challenges to earlier stages should be by way of judicial review. We further recommend that the court should be empowered to quash the decision to confirm as an alternative to quashing the compulsory purchase order, and on so doing to give appropriate directions to the relevant authority.

Implementation of compulsory purchase

Implementation of a compulsory purchase order may be by "notice to treat" or by "general vesting declaration". These alternative means are to be retained. We do however recommend that the implementation procedure contained in Schedule 3 to the Compulsory Purchase Act 1965, which we believe is now obsolete, should be repealed without replacement. We consider that the statutory provisions dealing with the persons entitled to receive notice to treat are in need of modernisation, and we make recommendations accordingly.

Once notice to treat is served, implementation will continue with service of notice of entry. We recommend that the provisions for service of such notice should include deployment of site notices, and that the statutory penalties for unauthorised entry should be abolished, on the basis that claimants can bring civil actions for compensation. We recommend that the enforcement provisions should be modernised so that warrants are addressed to High Court enforcement officers rather than sheriffs, that responsibility for the costs of enforcement should be clarified, and that the levying of distress in the compulsory purchase process should be abolished.

The general vesting declaration is of much more recent statutory vintage, and presents fewer difficulties. We do however consider that there are three useful reforms which should be made concerning the effect of a vesting declaration on existing rights, the length of time available to an authority to proceed by vesting declaration, and the operation of vesting declarations on the divided land procedure. These are each dealt with in the relevant parts of the Report.

The local land charges register performs an important function in providing a means for those purchasing, or otherwise dealing with, land to discover whether there are any current compulsory purchase proposals. Currently registrable as local land charges are preliminary notice of a general vesting declaration, the right to claim compensation for injurious affection where no land is taken, and the liability to make an advance compensation payment. We recommend extending the registrable events to include the making of a compulsory purchase order and the service of notice to treat in respect of any land.

Time

Under current law, the powers conferred by a compulsory purchase order are only exercisable for a period of three years from the date the order becomes operative. We recommend clarification of what is required in order to "exercise" powers: that is, service of notice to treat, or execution of a general vesting declaration (according to the implementation procedure chosen.) We also recommend reduction of the period in which powers should be exercised in order to minimise unnecessary delays in land acquisition. We consider the time limit within which notice to treat (once served) should be acted upon, and similarly recommend a reduction in the time available from the current period of three years. We recommend stricter controls on notice of entry, requiring authorities to enter within a prescribed period from the date of service.

It is necessary that compensation claims for compulsory purchase are brought expeditiously to the Lands Tribunal. We recommend standardisation of these limitation provisions as they apply to notices to treat and to vesting declarations such that the claimant should be required to claim compensation within a certain period running from the date when they knew or ought reasonably to have known of the taking of possession of the land or its vesting in the acquiring authority. Under the current Limitation Act (of 1980) this period would be six years: in the event of the Law Commission's recommendations on Limitation of Actions (contained in its Report Law Com No 270) being implemented, it would be three years (subject to a "long-stop" period of ten years). We also make recommendations for the periods during which compensation (once agreed or determined) may be recovered, and during which a claimant may apply for compensation paid into court by an authority to be paid out.

Transfer of title

The final stage in the implementation of compulsory purchase involves the transfer of title to the acquiring authority. The enforcement of the obligation on the landowner to complete the "statutory contract" may be by order of specific performance. We recommend the retention of this method of enforcement. At the same time, we recommend that the concept of the vendor's lien (exercisable pending full payment of compensation by the acquiring authority) should be abolished in this context, and that the prescription of specific forms of conveyance for compulsory acquisitions should also cease.

As an alternative means of enforcement, the authority may invoke the "deed poll" procedure vesting title in itself and entitling it to immediate possession of the subject land. The statutory provisions concerning this procedure are archaic and unduly complex. We recommend that the procedure should be re-stated in a modern statutory form, in so doing making the process as simple and effective as possible. The detailed provisions concerning the defraying of conveyancing costs should be replaced by a simple provision that the acquiring authority should pay all reasonable costs in connection with completion, such costs to be assessed in case of dispute by the costs judge of the High Court. The theme of simplification is furthered by recommendations rationalising the procedures for dealing with persons with "limited powers" and absent or "non-

compliant" owners, adopting a simplified procedure for dealing with payments into and out of court, and repealing the current complex provisions. We also recommend that an acquiring authority should be able retrospectively to rectify accidental omissions (where in the course of the procedure interests have been missed).

Service of notices

The procedures of compulsory purchase are of course heavily reliant on efficient provisions regulating the service of notices on landowners and other persons affected. We review the law of service, and recommend rationalisation of the various applicable statutory provisions.

Divided land

Where part of an owner's land is subject to compulsory purchase, the owner may in certain circumstances compel the acquiring authority to take the whole. This is a complex area of the law, being contained in several statutory sources, which are nevertheless insufficiently comprehensive. We recommend the adoption of a single unified procedure dealing with divided land applicable irrespective of the method of implementation chosen by the acquiring authority.

Interference with rights

During the acquisition process, the authority must deal with various rights and interests over the land being acquired: private rights (such as easements or covenants benefiting neighbouring properties), minor tenancies (not themselves the subject of compulsory purchase), mortgages and rentcharges secured over the subject land, and public rights of way exercisable over it.

We recommend the rationalisation of the law concerning private rights, in particular providing that there will be a presumption that such rights are "overridden", subject to the authority electing to extinguish them by serving notice. We recommend amendment of the procedure dealing with minor tenancies (and long tenancies which are about to expire) insofar as implementation by notice to treat (but not by general vesting declaration) is concerned. We review the procedures for dealing with mortgages and rentcharges and public rights of way, but make no substantive recommendations for reform.

Abortive orders

Finally, we consider the extent to which acquiring authorities may abandon or withdraw a compulsory purchase order (before or after service of notice to treat). Government has already accepted that those affected by an order being aborted should be entitled to compensation for consequential losses incurred, and we consider how this policy can best be carried through. We make recommendations as to how (and when) compulsory purchase proposals should be capable of withdrawal, how those affected should be notified of their rights to claim, and what exclusions from the liability to compensate there should be.

THE LAW COMMISSION

Report on a reference to the Law Commission under section 3(1)(e) of the Law Commissions Act 1965

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FINAL REPORT

To the Right Honourable the Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor

PART 1
INTRODUCTION

1.1 Compulsory purchase is of vital social and economic importance. If large-scale capital projects improving local and national infrastructures are to be implemented, if inner cities are to be regenerated, if land is to be logically and efficiently assembled for the advancement of public purposes, the role of compulsory purchase is absolutely crucial. Exciting and innovative though development may be, it exacts a heavy toll on owners and occupiers whose land is taken, and a fair balance must always be maintained between the public and the private interests at stake. Any civilised society according due respect to its members' rights must ensure that those whose lands are expropriated are fully compensated for the loss they have sustained and at the same time provide processes for the implementation of compulsory acquisition which are both expeditious and transparent.

1.2 It is striking, therefore, to anyone who has encountered the current operation of the law of compulsory purchase in England and Wales, how difficult to locate, complicated to decipher, and elusive to apply it is. The principles are to be found in a multiplicity of Acts of Parliament which date back to 1845 and which have never been subjected to the rigour of consolidation, still less of codification. There are also major questions which are not answered by those statutes and which require resort to, and reasoning from, the plethora of case law that has inevitably developed. As a result, those unfortunate enough to be caught in the process of compulsory acquisition will find no solace in a clear statement of legal principle indicating the mutual rights, obligations, privileges and duties of the acquirer and the acquired, for none exists. The compromise of disputes over the issue, and questions over the extent, of the acquisition and the compensation payable to the dispossessed, is, to put it mildly, not assisted by this sorry state.

Government and the Law Commission

1.3 Government has accepted the case for reform. In July 2000, the Compulsory Purchase Policy Review Advisory Group ("CPPRAG"), established by the Department of the Environment, Transport and the Regions ("DETR"), published its Final Report which recommended simplification and codification of the "complex and convoluted" legislative basis of the "unwieldy and lumbering creature" that is compulsory purchase law. CPPRAG recommended reference to

the Law Commission in order to prepare the necessary legislation to consolidate, codify and simplify the law.

1.4 Following publication by the Commission of a Scoping Paper, the Lord Chancellor formally referred compulsory purchase law to the Law Commission in July 2001 at the instigation of the Minister for Housing and Planning in the Department for Transport, Local Government and the Regions ("DTLR"). The terms of reference were:

> To review the law (legislation, case law and common law rules) relating to compulsory purchase of land and compensation, with particular regard to
>
> (i) The implementation of compulsory purchase orders;
>
> (ii) The principles for the assessment of compensation on the acquisition of land;
>
> (iii) Compensation where compulsory purchase orders are not proceeded with;
>
> (iv) Compensation for injurious affection;
>
> and to make proposals for simplifying, consolidating and codifying the law.
>
> As part of the Review, the Law Commission will give priority to consideration of the rules relating to the disregard of changes in value caused by the scheme of acquisition.

1.5 Government (DTLR) formally responded to CPPRAG in December 2001 in a "Policy Statement", *Compulsory Purchase and Compensation: delivering a fundamental change*. This accepted that "the most basic step" in the process of modernisation would be to "consolidate, codify and simplify the legislation as soon as the opportunity arises", and Government undertook to work with the Law Commission to achieve this objective. In the foreword to the Policy Statement, Lord Falconer of Thoroton, the then Minister for Housing, Planning and Regeneration, stated:

> The current arrangements for acquiring land do not function effectively, and all too often are a barrier to progress and a nightmare for the owner of the land. There is an urgent need for change. We have spent a long time reviewing and consulting on the best ways of achieving that. Now is the time for action. There is a need for clearer powers, which are much simpler to use; a speedier process; and better compensation arrangements.

1.6 The Law Commission published two Consultative Reports in the course of 2002. In July, it published a Consultative Report on Compensation, dealing with items (ii) and (iv) in the terms of reference. In December, it published a Consultative Report on Procedure, not only dealing with items (i) and (iii), but also, with the

specific agreement of the Office of the Deputy Prime Minister ("ODPM"),[1] dealing with the making and authorisation of compulsory purchase orders.

1.7 In July 2002, Government (ODPM) published a Policy Response Document setting out in the light of consultation on the Policy Statement its proposals for a simpler, fairer and quicker system, and indicating the following procedural reforms it was minded to introduce by legislation:

(1) Confirmation of unopposed orders by acquiring authorities;

(2) Consideration of objections by means of written representations where that is agreed by objectors;

(3) The definition of dates from which various compensation entitlements arise (in particular, making clear that determination and valuation of assets should ordinarily occur at date of entry or date of vesting);

(4) Affording all persons with interests in or rights over the subject land (including tenants) the right to be treated as statutory objectors and to be heard at an inquiry;

(5) Reduction of the overall time limit for completing the compulsory purchase process following confirmation, by reducing to 18 months the period for service of notice to treat (or making a vesting declaration), and reducing to 18 months the period of effectiveness of such notice;

(6) Increasing the effectiveness of the notice of entry, once served, to a maximum period of three months;

(7) Provision of compensation for actual losses where a compulsory purchase scheme does not proceed (an issue being considered by the Law Commission);

(8) Encouragement of easier access to the Lands Tribunal, including looking at the possibility of repealing section 4 of the Land Compensation Act 1961 (which presently restricts awards of costs);

(9) Provision for confirmation of orders in stages so that difficulties relating to part of a site should not delay progress on the remainder; and

(10) Giving all authorities powers to acquire land compulsorily for mitigation works where such works are being prejudiced by delay in agreeing acquisition.[2]

1.8 Several of these reforms have already been effected by Part 8 of the Planning and Compulsory Purchase Act 2004:[3]

[1] The government department which, in succession to DETR and DTLR, currently has responsibility for planning and compulsory purchase.

[2] See Consultative Report on Compulsory Purchase Procedure: Law Com CP No 169, para 1.11

(1) Unopposed orders may now be confirmed by the acquiring authority if certain conditions are met;[4]

(2) A "written representations procedure" may be invoked, if the objector consents, in certain circumstances;[5]

(3) Orders are to be publicised by site notices;[6]

(4) The range of persons who qualify as statutory objectors is widened;[7]

(5) Legislation now states the "relevant valuation date" for the purposes of valuation in accordance with rule (2) in section 5 of the Land Compensation Act 1961;[8] and

(6) Compulsory purchase orders may now be confirmed in stages if certain conditions are met.[9]

Final Report on Compensation

1.9 In December 2003, the Law Commission published its Final Report on Compensation.[10] Although (as had been agreed with Government) this Report contained no draft Bill, it set out its recommendations in the form of a Compensation Code, as an indicative framework for future legislation. This was consistent with the aims of the project; namely to review, in a collaborative venture with ODPM, the law of compensation for compulsory purchase, to sort out the existing law, and to make recommendations for the general content and shape of a future code and for repeals of existing legislation.

1.10 The Compensation Report was warmly received. The Lands Tribunal, itself responsible for the determination of disputes as to compensation payable for

[3] The 2004 Act obtained Royal Assent on 13 May 2004. Part 8 came into force on 31 October 2004.

[4] Planning and Compulsory Purchase Act 2004, s 102(2), inserting section 14A into the Acquisition of Land Act 1981.

[5] Planning and Compulsory Purchase Act 2004, s 100(6), inserting sections 13A and 13B into the Acquisition of Land Act 1981.

[6] Planning and Compulsory Purchase Act 2004, s 100(4), amending Acquisition of Land Act 1981, s 11 and Planning and Compulsory Purchase Act 2004, s 100(7), substituting Acquisition of Land Act 1981, s 15.

[7] Planning and Compulsory Purchase Act 2004, s 100(5), amending the Acquisition of Land Act 1981, s 12 and Planning and Compulsory Purchase Act 2004, s 100(6), replacing the Acquisition of Land Act 1981, s 13.

[8] Planning and Compulsory Purchase Act 2004, s 103(2), inserting section 5A into the Land Compensation Act 1961. This is the date by reference to which the value of the land being acquired is to be assessed for the purpose of determining the amount of compensation payable: in essence, it is the date on which possession is taken.

[9] Planning and Compulsory Purchase Act 2004, s 100(6), inserting section 13C into the Acquisition of Land Act 1981.

[10] Towards a Compulsory Purchase Code - (1) Compensation: Final Report (2003) Law Com No 286; Cmnd 6071.

compulsory purchase, and uniquely positioned to comment on the operation of the current law, welcomed the report, through its President George Bartlett QC, as:

> … an outstanding analysis of the law of compensation and the difficulties that it currently presents to claimants and acquiring authorities. The proposed Compensation Code would, we believe, substantially remove the major difficulties. It is readily understood and should be capable of straightforward application in the great range of claims that arise where land is compulsorily acquired.[11]

1.11 On 29 April 2004, the House of Lords delivered its decision in the case of *Waters v Welsh Development Agency*[12], which involved consideration of some of the principal issues dealt with in the Compensation Report, notably the rules relating to the disregard of changes in value caused by the scheme of acquisition. Their Lordships were strongly critical of the existing law, and highly supportive of the case for legislative reform. In the words of Lord Brown of Eaton-under-Heywood:

> It is to be hoped that your Lordships' opinions on this appeal coupled with the Law Commission's exemplary report may pave the way for further legislation.[13]

1.12 Lord Nicholls of Birkenhead, with the agreement of the majority of the House, specifically approved the statement of Lord Justice Carnwath in the court below to the following effect:

> The right to compensation for compulsory acquisition is a basic property right. It is unfortunate that ascertaining the rules by which compensation is to be assessed can involve such a tortuous journey through obscure statutes and apparently conflicting case law as has been necessary in this case. There can be few stronger candidates on the statute book for urgent reform or simple repeal than section 6 of and Schedule 1 to the Land Compensation Act 1961.[14]

Scope and extent of this Report

1.13 In our view, the case for reform of compulsory purchase procedure is as strong as that for reform of the principles for assessment of compensation. The direction of reform may, however, be subtly different. The twin problems affecting the law of compensation are (i) a number of specific major issues, such as project disregard, which require extensive treatment, and (ii) the current presentation of the law in a disparate array of sources, which requires radical overhaul and restatement by way of codification. In the context of procedure, the main problem

[11] Lands Tribunal in Law Commission press release 13 December 2003 concerning publication of Towards a Compulsory Purchase Code - (1) Compensation: Final Report (2003) Law Com No 286; Cm 6071.

[12] [2004] 1 WLR 1304.

[13] *Ibid*, para 164.

[14] *Ibid*, para 3 citing *Waters v Welsh Development Agency* [2002] 4 All ER 384, para 116, *per* Carnwath LJ (CA). See further *Ocean Leisure Ltd v Westminster City Council* (2004) 43 EG 144, paras 34-39, *per* Carnwath LJ.

is an unevenness of quality in the relevant statutory materials. The legislation governing implementation by general vesting declaration is relatively modern, being consolidated in the Compulsory Purchase (Vesting Declarations) Act 1981, and does not require major surgery. The statute governing implementation by notice to treat (the Compulsory Purchase Act) on the other hand, although itself dating from 1965, contains rules which are largely derived from the first half of the 19th century. Much of the language is archaic and obscure, and many parts are out-dated or even obsolete.

1.14 The review is not entirely comprehensive, as there are certain aspects of compulsory purchase procedure that have been omitted from its scope.[15] Most notably, we have not addressed the application of the Lands Clauses Consolidation Act 1845. As we explained in the Consultative Report, there are pragmatic reasons for leaving the 1845 Act alone, and while we would prefer to see its repeal in the medium, we have accepted for the purposes of this project the view of ODPM that wholesale repeal of the Act could give rise to significant and unforeseeable complications.

1.15 Much of the Compulsory Purchase Act 1965 was based on the 1845 Act, some sections being lifted wholesale from one to the other with little modification. This was consistent with the main objective of the 1965 Act, namely to consolidate the Lands Clauses Acts[16] as applied by the Acquisition of Land (Authorisation Procedure) Act 1946. It was recognised in 1965 that the Lands Clauses Acts would remain on the statute book, albeit constituting a code "of which little use will be made."[17] There were three reasons which caused concern that repeal of the 1845 Act would lead to errors of inadvertent omission, and unwitting alteration, of the existing law:[18]

(1) The 1845 Act was partly adoptive and partly not. So far as it was adoptive, it had been adopted with innumerable variations of modification by a long series of Acts both public general and local. Moreover, the 1845 Act was automatically incorporated (and not simply applied) unless it was specifically excluded in the special Act;[19]

(2) Many of the 1845 Act's provisions had been overtaken, without being repealed, by the property legislation of 1925; and

(3) At some of the most important points the 1845 Act proceeded by inference rather than by specific enactment. Thus, instead of conferring a

[15] See Law Com CP No 169, paras 1.20-1.33.

[16] For the purposes of this Report "The Lands Clauses Acts" means, unless the contrary intention appears, the Lands Clauses Consolidation Act 1845, the Lands Clauses Consolidation Acts Amendment Act 1860 and any Acts for the time being in force amending the same: see the Interpretation Act 1978, s 5, Sched 1.

[17] Notes on Clauses in the Compulsory Purchase Bill (1964).

[18] These are set out as in Law Com CP No 169, para 1.29.

[19] Special Act is defined in Lands Clauses Consolidation Act 1845, s 2 as an Act "which authorises the taking of lands for the undertaking".

right to compensation, it assumed the existence of such right and concentrated on the method of assessing the amount (which meant that case law had filled the gaps and would need to be codified - a task outside the then scope of consolidation).

1.16 We set out on this project with a view to recommending the final repeal of the 1845 Act. As we proceeded further, however, we realised that the obstacles identified in 1965 still existed and that repeal continued to carry the risks outlined above. It was not in any event a priority task:

> Since the 1845 Act has very limited application, cases will rarely arise where the courts will need to intervene. Moreover, those private or local Acts which have incorporated the 1845 mechanisms for particular works or projects will almost certainly have been time-limited in their operation.[20]

1.17 In consequence, this Report does not contain any recommendations for the reform or the repeal of the Lands Clauses Consolidation Act 1845.

1.18 Nor have we considered the costs rule contained in section 4 of the Land Compensation Act 1961. Government has accepted that this is one of the obstacles "currently deterring claimants from making full use of the Tribunal's expedited procedures",[21] and the Lands Tribunal has argued the case for the conferment of full discretion as to awards of costs. It is not, however, part of our current reference, and we understand that it is being pursued separately by Government.

1.19 In addition, there are certain specific areas of compulsory purchase law which are the subject of separate governmental review:

(1) Those categories of land for which special rules apply relating to authorisation and implementation;[22]

(2) The minerals code contained in section 3 of and Schedule 2 to the Acquisition of Land Act 1981;[23]

(3) The Transport and Works Act 1992.[24]

1.20 Our terms of reference do not expressly include consideration of the authorisation of compulsory purchase. We have, however, found it necessary, and have obtained the consent of ODPM, to deal with certain aspects of the authorisation process.

[20] Law Com CP No 169, para 1.30.

[21] Policy Response Document (ODPM, July 2002), para 12(ix).

[22] Land of statutory undertakers; local authority-owned land; National Trust land; common, open space and allotment land; listed buildings and land within conservation areas; burial grounds; and ecclesiastical property.

[23] This code re-enacts parts of the Railways Clauses Consolidation Act 1845.

1.21 There are two concerns about the authorisation process which were frequently expressed in the course of our consultation and which we should record, but in relation to which we do not make formal recommendations. First, delay in the process is often being attributed to the time taken by the confirming authority in confirming compulsory purchase orders submitted to it. This concern led some consultees to propose that there should be statutory time limits applicable to the confirmation stage. We doubt that this would be practicable in view of the vast differences in the scope, complexity and sensitivity of orders being submitted, but we hope that confirming authorities will heed this concern and review their working practices to ensure that the confirmation process is conducted as expeditiously as possible. Secondly, we were informed by two consultees (the Country Land and Business Association and the Central Association of Agricultural Valuers) that a number of acquiring authorities, in their experience, fail to produce adequate statements of reasons in support of the compulsory purchase order being made. We doubt that this is a matter for primary legislation (matters of form, such as the prescribed form of compulsory purchase orders themselves, are normally dealt with by secondary legislation) but we would draw attention to the need for acquiring authorities to make the process as open as possible,[25] by following the ODPM guidance,[26] and by ensuring that the description of purpose in the order is given in "precise terms"[27] in accordance with the 2004 Regulations.

Structure of this Report

1.22 In this Final Report we review the procedure applicable to compulsory purchase. In explaining our recommendations, we adopt a chronological approach to the process of compulsory acquisition. We therefore begin with the process of authorisation, examining how compulsory orders are first made, and, following consideration of objections, are (or are not) confirmed. We then consider the implementation of orders, including the means whereby title in the subject land is transferred to the acquiring authority. We review the current procedure for divided land, and the effect of compulsory purchase orders on those with rights over the land being acquired. Finally, we examine the legal implications, including liability to compensate, where compulsory purchase orders are not proceeded with by the relevant authority.

1.23 Most Parts of this Report are divided into numbered sections, each comprising a relatively discrete element of the procedure, leading in most cases to recommendations for reform. We first set out the existing law, then outline the deficiencies we have identified in the course of the project and the provisional

[24] Not only is government currently reviewing the procedures of the 1992 Act, its impact goes beyond the law of compulsory purchase.

[25] The non-statutory "statement of reasons" will ordinarily act as the basis for the acquiring authority's "statement of case" which is required to be served where an inquiry is to be held into remaining objections: see Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990, r 7.

[26] Circular 06/2004, para 35 and App R (replacing ODPM Circular 02/2003).

[27] See Compulsory Purchase of Land (Prescribed Forms)(Ministers) Regulations 2004 (SI 2004 No 2595), reg 3(a)(i), Schedule, Form 1, para 1 and note (f) on "purpose".

proposals made in the Consultative Report on Procedure to deal with them. We then explain the views expressed to us during the consultation process, discuss those views against the background of the proposal and any further relevant matters, and finally formulate those recommendations we consider to be necessary and appropriate.

1.24 As we stated in our Consultative Report on Procedure, "We remain strongly of the view that the ultimate aim should be the consolidation of the existing statutes, as amended, into a single Procedural Code."[28] The necessary precursor to the implementation of such an objective is the identification of those provisions which require repeal, and those which require restatement, and that is the main task we have set ourselves in formulating our recommendations for reform at this stage. Unlike the Final Report on Compensation, we do not present those recommendations on reform of procedure as a Code, although in bringing them together as we do at the end of this Report we have attempted to set them out in such a way as to be readily comprehensible and easily accessible.

1.25 We have found this approach essential in order to ensure that we treat the intricacies of the process with the necessary detail. We realise, however, that it is important that we do not lose sight of the bigger picture, and it may be useful at this stage to set out an overview of the process, with reference to the current law and the major respects in which our recommendations will advance its reform.

Overview

Authorisation

1.26 The process of compulsory acquisition is commenced by an order being made and publicised by the acquiring authority. The acquiring authority then decides whether to submit the compulsory purchase order for confirmation by the confirming authority, following which objections or representations may be made to the confirming authority by those opposing the acquiring authority's plans. If objections remain unresolved, the Secretary of State (as confirming authority) will usually hold an inquiry or effect their resolution by a written representations procedure.

1.27 In **Part 2**, we review the processes of making and confirmation, and recommend that a single procedure, and consistent terminology, be adopted whether or not the acquiring authority is a government department. We consider the statutory powers of acquiring authorities to enter and survey land prior to making a compulsory purchase order, and recommend expansion of such powers subject to necessary measures to protect land owners. We review the procedure for publicising the making of a compulsory purchase order and note the amendment to the existing law effected by the Planning and Compulsory Purchase Act 2004. We consider the circumstances in which those affected by a compulsory purchase order may challenge the order before the High Court, either by the statutory review procedure contained in Part IV of the Acquisition of Land Act

[28] Law Com CP No 169, para 1.17.

1981 or by judicial review, and we make recommendations for the rationalisation of these means of challenge.

Implementation

1.28 Once the compulsory purchase order has been confirmed, the acquiring authority has two means of implementation available: the "notice to treat" procedure or the "general vesting declaration" procedure. The main features of the two procedures are as follows:

(1) Notice to treat involves service of a statutory notice on each landowner affected inviting them to make a compensation claim and requesting them to negotiate ("treat") with the authority as to the appropriate amount payable. Entry is effected by service of a notice of entry, which may be served at the same time as, or subsequently to, the notice to treat. The authority may then enter and take possession of the subject land not earlier than 14 days after giving notice of entry.

(2) Execution of a general vesting declaration offers the acquiring authority a quicker, more direct route to acquisition of title. It is a one-stage process which vests title in the acquiring authority without the need for a formal conveyance or investigation of title.

1.29 Government has already determined that these two alternative processes of implementation of a compulsory purchase order should be retained. In **Part 3** we review both processes. We recommend the abolition of the apparently obsolete procedure for implementation contained in Schedule 3 to the Compulsory Purchase Act 1965. We then consider the notice to treat machinery with particular reference to problems of service, and to the consequences of non-compliance, either on the part of the acquiring authority ("unauthorised entry") or the owner of the subject land ("refusal of entry"), and make recommendations for reform of the relevant legislation. We recommend the removal of distress as a means of enforcing payment.

1.30 We review in outline the general vesting declaration procedure. We do not consider that the procedure itself, being relatively modern, presents many difficulties. Those recommendations for reform which we do make relate to time limits, and to specific applications of the procedure to "divided land" and to "existing rights" in the subject land. These are dealt with in detail in later Parts of the Report. Finally, we make recommendations for the registration of certain steps in the process of compulsory purchase as local land charges in order to give notice to potential purchasers of the subject land.

Time

1.31 It is important that the process of compulsory purchase is capable of expeditious operation. This has two specific aspects. First, the implementation process must operate within time constraints, so that landowners do not have the prospect of compulsory purchase hanging over them for an unacceptably long period of time. Secondly, claims for compensation must be referred to the Lands Tribunal within a defined period of the acquisition so that they do not become "statute-barred".

1.32 We consider these two main issues relating to time in **Part 4**. First, we examine the operation of time limits during the process of implementation, in particular how long an acquiring authority has to exercise its powers following confirmation, and how long notices to treat, and notices of entry, remain valid following service. We recommend a reduction in the time available to implement an order once confirmed, and to act upon a notice to treat once served. We also recommend that there should be a limited time within which an authority may act upon a notice of entry.

1.33 Secondly, we review the operation of the law of limitation as it applies to the reference of claims for compensation for compulsory purchase to the Lands Tribunal. We recommend that there should be standardisation of the limitation provisions as they apply to implementation by notice to treat and by vesting declaration and that the claimant should be required to claim within six years of the date they knew, or ought to have known, of the taking of possession of the subject land or its vesting in the acquiring authority. This period would be reduced to three years (with a "long-stop" period of ten years) in the event of implementation by Government of the recommendations made by the Law Commission in its Report on Limitation of Actions.[29] We also make recommendations concerning the time within which a claimant should be required to bring an action to recover compensation following agreement with the authority, determination by the Lands Tribunal, or payment into court.

Transfer of Title

1.34 The process of implementation of a compulsory acquisition is concluded by the transfer of title from the landowner to the acquiring authority. For the most part, completion of the transfer is governed by the ordinary law relating to the sale and purchase of land. It has been considered necessary, however, to make special provision in previous legislation for the enforcement of the landowner's obligation to complete the acquisition over and above the remedy of specific performance: the "deed poll procedure" which vests title in the acquiring authority where the landowner has failed to convey, or to make good title. Acquiring authorities may also be faced with owners who cannot be traced, who suffer from incapacity, or who are unable or unwilling to deal with the authority. In each of these cases, special procedures have been developed whereby the authority pays into court the sum of compensation prior to execution of a deed poll.

1.35 In **Part 5** we review the enforcement by the acquiring authority of the obligation to transfer title on the part of the owner of the subject land. We make recommendations for the simplification of the "deed poll procedure". We consider, and reject, the case for statutory recognition of a vendor's lien arising on the entry into possession of the subject land pending payment of compensation. We recommend, in the interests of flexibility and simplification, the repeal of those provisions requiring prescribed forms of conveyance on completion of the compulsory purchase and setting out in elaborate detail the costs payable by the acquiring authority.

[29] Limitation of Actions (2001) Law Com No 270.

1.36 We then consider how the current legislation deals with the problems outlined above: where owners of the subject land have limited powers to deal with it; where owners cannot be traced or are unwilling to deal (or are prevented from dealing) with the acquiring authority; and where, subsequent to entry upon the subject land, it is discovered that certain interests have been overlooked. We make recommendations for the reform of the procedures applicable in each of these cases. We then consider the statutory machinery relating to payment into court as it applies to these procedures for transfer of title.

Service of Notices

1.37 The procedures of compulsory purchase are heavily reliant on efficient provisions concerning service of notices on landowners and other interested parties.

1.38 In **Part 6** we review the current law relating to the physical means of serving statutory notices and recommend rationalisation.

Divided land

1.39 Where part of an owner's land is subject to compulsory purchase, that owner may in certain circumstances compel the acquiring authority to take the whole. The current law is complex, being dependant on both the subject matter of the acquisition (in particular whether the land includes buildings and whether it is agricultural) and the method of acquisition (notice to treat or general vesting declaration) employed by the acquiring authority.

1.40 In **Part 7** we review this statutory regime. We recommend the adoption of a single unified procedure for divided land applicable whether implementation of the compulsory purchase order is by notice to treat or by general vesting declaration.

Interference with rights

1.41 During the course of the process of compulsory acquisition, the acquiring authority will have to deal not only with the land being acquired but also with interests over that land, such as easements and covenants benefiting neighbouring land (referred to in this Report as "private rights"), minor tenancies not themselves being compulsorily acquired, mortgages and rentcharges, and even public rights of way. There are currently distinct statutory procedures for dealing with each of these kinds of interest.

1.42 In **Part 8** we review the effect of a compulsory purchase order on private rights. We recommend that, in the absence of the acquiring authority electing to extinguish such rights, it should be presumed that they are overridden to the extent necessary to allow works to be carried out pursuant to the compulsory purchase order. We recommend a procedure for cases of extinguishment enabling those affected to object prior to confirmation of the order.

1.43 We also consider the effect of a compulsory purchase order on those holding minor tenancies, and we recommend reform so to achieve consistency between the notice to treat and general vesting declaration procedures. We briefly review the effect of compulsory purchase on mortgages and rentcharges, and on public rights of way. We do not recommend reform other than restatement of the law in more modern language.

Abortive orders

1.44 A compulsory purchase order will not necessarily result in the compulsory acquisition of the subject land. The acquiring authority may decide that it no longer wishes to pursue its initial objectives, or to carry them out in the way it had envisaged, or circumstances may change such as to make the original project no longer realistic or desirable. There is currently no specific right to compensation for those suffering loss as a result of the abandonment or withdrawal of compulsory purchase proposals prior to service of notice to treat, although there may be some limited redress by invocation of the statutory provisions concerning blight. There is also no transparent procedure for the notification of withdrawal or abandonment of compulsory purchase orders to those affected. Government has accepted the case for reform in these two respects.

1.45 In **Part 9** we review the effect of a compulsory acquisition being aborted, whether by express withdrawal by the acquiring authority or otherwise. We consider the case for a procedure whereby those affected are given proper notification of the progress of the acquisition, and for the payment of proper compensation for loss or expense incurred as a result. We make recommendations concerning liability to compensate, including circumstances in which such liability should be excluded. We also make recommendations concerning withdrawal of notice to treat.

Acknowledgements

1.46 We have been greatly assisted in the completion of this project by the responses submitted to the Consultative Report. In Appendix C we list all those who have responded. We are also grateful for the continuing support and assistance of Lord Justice Carnwath, who as Chairman of the Law Commission from 1999 until 2002 instigated and then led the compulsory purchase project. We have also been greatly assisted in completing this Report, and finalising our recommendations, by two consultants with considerable practical experience of the machinery of compulsory purchase, Alan Cook of Nabarro Nathanson and Richard Owen of Drivers Jonas.

PART 2
AUTHORISATION OF COMPULSORY PURCHASE

INTRODUCTION

2.1 Compulsory purchase orders are made under statutory powers contained in a large number of general Acts that give effect to the functions of public authorities and utilities. The body making the order is the "acquiring authority". The order must be in prescribed form, detailing the subject land (by reference to a map) and stating the purpose for which the land is being acquired. Publicity for the order must be provided by notice, both in local newspapers and on site, and individually served on owners, occupiers and those otherwise affected. Those served, or entitled to be served, may object or make representations within the time period specified by the notice.[1] A public inquiry or hearing must be held by an inspector at which relevant objections by statutory objectors are heard, but is otherwise discretionary. Public inquiries and hearings have recently been supplemented by a written representations procedure, available where objectors consent. Once the objections and representations have been considered, together with any report of the inspector, the order may be confirmed by the "confirming authority", ordinarily the relevant Secretary of State, with or without modifications. Notice of confirmation must then be published and served. There is a statutory right to challenge the compulsory purchase order within six weeks of publication of the notice of confirmation. Once that period has elapsed the order is immune from challenge.

2.2 The law relating to authorisation of the majority of compulsory purchase orders is to be found in the Acquisition of Land Act 1981. In this Part we review the authorisation process from the making of the order, through the objection stages to its confirmation, and finally we consider the means available to challenge the order. We also consider the powers of acquiring authorities to secure entry to the subject land in order to carry out a proper survey. It is not, however, part of our terms of reference to review the powers pursuant to which acquiring authorities make compulsory purchase orders.[2]

(1) ORDERS

2.3 Two separate statutory procedures exist for the authorisation of orders. Where the order is being made by a non-ministerial body (such as a local authority), the procedure to be followed is that set out in Part II of the Acquisition of Land Act

[1] Objections by "qualifying persons" (see Acquisition of Land Act 1981, s 12 as now amended by the Planning and Compulsory Purchase Act 2004, s 100(5)) are sent to the confirming authority: see the Compulsory Purchase of Land (Prescribed Forms)(Ministers) Regulations 2004 (SI 2004 No 2595), reg 3(c) and Schedule, Form 7 note (k) relating to the form of newspaper and site notice concerning a made order about to be submitted for confirmation.

[2] Law Com CP No 169, para 2.5.

1981. Where the order is being made (or, to give the accurate terminology, is being "prepared in draft") by a government department, the procedure is that set out in Schedule 1 to the same Act. We have undertaken the task of reviewing whether the distinction in procedures serves any practical purpose.

Existing law

2.4 Authorisation of a compulsory purchase is conferred by a "compulsory purchase order",[3] referred to by practitioners as a "CPO". In our Consultative Report on Procedure[4] we drew attention to the differences between the two possible forms of order.

2.5 Orders made by acquiring authorities which are not part of central government (variously referred to in the Acquisition of Land Act 1981 as "an authority other than a Minister"[5] and "local and other authorities"[6]) are first "made" by the authority and then submitted to be "confirmed" by the "confirming authority".[7] Confirmation may be "with or without modifications".[8] The power to refuse confirmation (for example because an objection is upheld or because of procedural irregularity) is not spelt out in the legislation, although it is implicit.

2.6 By contrast, where the acquiring authority is a minister (acting through his or her department), orders are first "prepared in draft" and then are "made" by the minister.[9] The making of the order may be "with or without modifications".[10] The minister is also free to decide not to make the order at all.

2.7 Section 102 of the Planning and Compulsory Purchase Act 2004 amends the Acquisition of Land Act 1981 by inserting a new section 14A which makes provision for confirmation of a compulsory purchase order by the acquiring authority itself. This procedure is only available where "the notice requirements" have been complied with,[11] no objection has been made in relation to the

[3] Acquisition of Land Act 1981, s 2(1). The form of order is prescribed in the Compulsory Purchase of Land (Prescribed Forms)(Ministers) Regulations 2004, Schedule, Forms 1-6.

[4] Law Com CP No 169, para 4.3.

[5] Acquisition of Land Act 1981, s 2(2).

[6] See heading to the Acquisition of Land Act 1981, Part II. In the relevant Inquiries Procedure Rules (SI 1990 No 512) these authorities are referred to as "Non-Ministerial Acquiring Authorities".

[7] Acquisition of Land Act 1981, s 2(2). The procedure is laid down in Pt II ss 10-15 and s 26 (date of operation).

[8] Acquisition of Land Act 1981, ss 13(1), (2) (as now substituted by the Planning and Compulsory Purchase Act 2004, s 100(6)).

[9] Acquisition of Land Act 1981, s 2(3). The procedure is laid down in Schedule1 to the Act.

[10] Acquisition of Land Act 1981, Schedule 1, para 4.

[11] These are the requirements to publish, affix and serve notices in connection with the compulsory purchase order: Acquisition of Land Act 1981, s 13(5), amended by the Planning and Compulsory Purchase Act 2004, s 100(6).

proposed confirmation[12] and the order is capable of being confirmed without modification.[13]

2.8 The impact of section 14A is comparatively limited:

(1) The two-stage authorisation process is retained;

(2) The power to determine confirmation is delegated on a case-by-case basis to the acquiring authority by the confirming authority only where the conditions precedent have been met;

(3) The power only operates in respect of orders made by non-ministerial bodies (and not by ministers);

(4) It applies only where there is no live objection to an order; and

(5) Confirmation is in respect of a whole order. It does not operate in relation to part only of an order, and it does not permit modifications.

Deficiencies

2.9 In the Consultative Report on Procedure, we stated our view that little purpose seemed to be served by having two distinct procedures both for authorisation and for inquiries, and that it would be tidier and simpler for the same procedure to be applied to both. We acknowledged that there is one major difference between the procedures; Schedule 1 to the Acquisition of Land Act 1981 includes provision, in highways acquisitions, for joint consideration of objections by the Secretaries of State having responsibility for highways and for planning matters. While accepting that this was not a priority issue, we emphasised the desirability of a rationalisation of the terminology of confirmation procedures, subject to the retention of a special provision for highway acquisitions.[14] We did not make any provisional proposal as such in relation to this subject.

Consultation

2.10 Consultees who responded to our suggestion agreed that the current distinction was unnecessary. Their comments followed two strands of argument.

2.11 First, some simply considered the terminology used in the procedures and intimated which they considered was preferable. Some favoured use of “draft” followed by “made”; others seemed to favour the non-ministerial “made” and “confirmed”. Government did not express a view on this issue. We believe that it would be valuable to adopt consistent terminology, and we recommend the usage of “making” and “confirmation” for the two stages of the process, as we consider that this usage would be easier for those not acquainted with the technical detail

[12] Or all objections have been withdrawn.

[13] Acquisition of Land Act 1981, s 14A(3). The procedure does not apply in relation to orders in respect of certain land: s 14A(2).

[14] Law Com CP No 169, para 4.4.

of compulsory purchase law to understand. Once an order has been "made", there is an order in existence. Once an order has been "confirmed", then the authority can take steps to implement it.

2.12 Secondly, two respondents contended that, in order to ensure compliance with the Human Rights Act 1998, it would be preferable if a minister were not both promoting and confirming authority in relation to the same project. A minister, it was said, could not be sufficiently independent and impartial when it comes to confirming orders initiated by his or her own department. This concern raises an important matter of substance.

2.13 The relevance of Article 6 of the European Convention on Human Rights ("ECHR") to the role of the minister in planning applications has already been extensively considered by the House of Lords in *R (Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions*.[15] In the words of Lord Slynn of Hadley:

> It has long been established that if the Secretary of State misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside. Even if he fails to follow necessary procedural steps - failing to give notice of a hearing or to allow an opportunity for evidence to be called or cross-examined, or for representations to be made or to take any step which fairness and natural justice requires - the court may interfere. The legality of the decision and the procedural steps must be subject to sufficient judicial control. [16]

2.14 Compliance with Article 6 does not, however, require that disputes concerning civil rights are submitted, at every stage, to a tribunal satisfying the requirements of independence and impartiality. The entire process of decision making, including the guarantees offered by any court or tribunal before which challenge may be made, must be assessed. If the maker of the initial decision does not itself satisfy the terms of Article 6, but "full jurisdiction" is nevertheless conferred on the court or tribunal to which appeal or review is submitted, the process will be compliant.

2.15 The key question is therefore whether the process by which an administrative decision may be challenged, in this case judicial review, is sufficiently broad as to confer full jurisdiction. Full jurisdiction "does not mean full decision-making power. It means full jurisdiction to deal with the case as the nature of the decision requires."[17] The requirements of full jurisdiction are to be assessed having "regard to matters such as the subject matter of the decision appealed against,

[15] [2003] 2 AC 295 (HL).

[16] [2003] 2 AC 295, para 50.

[17] [2003] 2 AC 295, para 87, *per* Lord Hoffmann.

the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."[18]

2.16 We consider that judicial review confers full jurisdiction over the administrative decisions made by both acquiring authorities and confirming authorities in the process of compulsory purchase. [19] As long as the procedural aspects of the decision-making process are capable of judicial review, we believe that the procedure complies with Article 6 and provides for an effective remedy for the purposes of Article 13 of the ECHR, and that it therefore complies with the Human Rights Act 1998.

2.17 Our view of *Alconbury* is consistent with the approach taken by the English courts in the recent decisions in *Begum,*[20] *McLellan*[21] and *Adlard*[22] in which *Alconbury* was applied, and by the ECtHR in *Bryan v UK,*[23] *Holding and Barnes v UK*[24] and *Kingsley v UK*.[25]

Recommendations for reform

2.18 We are therefore of the view that the separate "ministerial" and "non-ministerial" procedures leading to the authorisation of compulsory purchase orders should be amalgamated. The resulting unitary procedure should continue to be in two stages. The order should first be "made" (by the acquiring authority), and should then be "confirmed" (by the confirming authority). Special provision would continue to be necessary to deal with highway acquisitions.

[18] *Bryan v UK* (1996) 21 EHRR 342, para 45 (ECtHR).

[19] It is also noteworthy that in *Alconbury* (paras 53-55) Lord Slynn refers to the availability of judicial review on grounds of error of fact. This is consistent with the ambit of judicial review under common law rules and the court's duty under the Human Rights Act 1998, s 6 to act in a manner compatible with Convention rights. Therefore, in cases of judicial review, the court has a statutory obligation to conduct its review to a standard that will secure compliance with Article 6.

[20] *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 (HL) affirming *Runa Begum v Tower Hamlets LBC* [2002] 1 WLR 2491 (CA). The issue before the House of Lords was whether the homelessness scheme under Part VII of the Housing Act 1996, which provides for an appeal against decisions of local housing authorities on a point of law only, was compatible with Article 6.

[21] *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129. The case concerned introductory tenancies and review proceedings under the Housing Act 1996, s 129 and considered whether the remedy of judicial review was compliant with Article 6.

[22] *R (on the application of Adlard) v Secretary of State for Transport, Local Government and the Regions* [2002] 1 WLR 2515. This decision concerned the power of the Secretary of State to "call-in" planning decisions, and the adequacy of judicial review for the purposes of Article 6. See also J Finlay and S Bird, "*Alconbury* a year on: Article 6 challenges face stiff uphill struggle after Court of Appeal in *Begum* and *Adlard* adopt a schematic approach" [2002] JPL 1045; and, generally, P Craig, "The Human Rights Act, Article 6 and Procedural Rights" [2003] PL 753.

[23] (1995) 21 EHRR 342.

[24] Application No. 2352/02, 12 March 2002 (Unreported).

[25] (2000) 33 EHRR 13; (2002) 35 EHRR 177.

Recommendation (1) – Ministerial, and Non-ministerial body, orders

(1) The separate procedures for the authorisation of compulsory purchase orders, contained in section 2 of and Schedule 1 to the Acquisition of Land Act 1981, relating to orders made by Ministers and orders made by other bodies, should be amalgamated.

(2) The new unitary procedure should encompass two stages:

(a) "making" by the acquiring authority, and

(b) "confirmation" by the confirming authority (which will include delegated confirmation).

(3) The new unitary procedure should make special provision, in highway acquisitions, for joint consideration by the Ministers responsible for highways and for planning respectively.

(2) SURVEYS

2.19 Before making a compulsory purchase order an acquiring authority will ordinarily need to enter on the subject land for the purpose of inspection, assessment, measuring and site surveying. In its supporting statement of reasons (which accompanies notice of making) an authority should describe the land and "its location, topographical features and present use" and identify "any special considerations affecting the order site" such as the presence of ancient monuments, listed buildings or consecrated land.[26] In order to prepare such a statement, it is obvious that some form of survey must first be conducted.

Existing law

2.20 Entry for surveying purposes will often be achieved by agreement following negotiation with the landowner affected. In the absence of agreement, however, the authority may resort to compulsion derived from various sources:

(1) Section 11(3) of the Compulsory Purchase Act 1965 confers power of entry (on not less than three nor more than 14 days' notice) for the purpose of "surveying and taking levels" of the subject land, and "probing or boring to ascertain the nature of the soil and of setting out the line of the works". This power may be exercised by any acquiring authority, but it cannot, rather curiously, operate until confirmation of the compulsory purchase order, because until then the authority is not "authorised by the compulsory purchase order to purchase the land".[27] Compensation is

[26] See ODPM Circular 06/2004, App R.

[27] Compulsory Purchase Act 1965, s 11(3) speaks of the "acquiring authority" having power, but "acquiring authority" is given a narrow definition in section 1(3) of that Act. Authorisation to purchase flows only on publication of the notice of confirmation under Acquisition of Land Act 1981, s 15. The Acquisition of Land Act 1981 seems to extend the definition of "acquiring authority" in that Act to any body "who may be authorised to purchase the land compulsorily": see *ibid*, s 7(1).

payable to the landowner or any occupier for "any damage thereby occasioned".

(2) Local authorities have additional powers. By section 15 of the Local Government (Miscellaneous Provisions) Act 1976, a person authorised by such an authority may enter both on the subject land and on "any other land" in order to survey (from the ground or from the air) in connection with a "proposal by the authority to acquire compulsorily" either an interest in, or a right over, the subject land.[28] This power, which may be exercised before a compulsory purchase order is made, enables the authority:

(a) "to search and bore on and in the land for the purpose of ascertaining the nature of the subsoil or whether minerals are present in the subsoil" (as part of the power to survey);

(b) "to place and leave, on or in the land, apparatus for use in connection with the survey", and to remove that apparatus (as part of the power to enter).[29]

The authority may take on to the land such number of persons and such equipment as are necessary for the survey.[30] In certain circumstances 14 days' notice must be given.[31] If the land is unoccupied or the owner is absent, the authorised person must ensure that he leaves it "as effectively secured against trespassers as he found it."[32] Compensation is payable for any damage suffered in exercise of the power.[33] If an authorised person wrongfully discloses any trade secret relating to land that he has entered, he commits an offence.[34] Obstruction of an acquiring authority exercising its right of entry under the 1976 Act may comprise a summary offence.[35]

(3) Additional specific powers to survey (similar to those in the 1976 Act) are contained in section 289(1) of the Highways Act 1980, section 324(6) of the Town and Country Planning Act 1990, and section 88(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990. Where

[28] Local Government (Miscellaneous Provisions) Act 1976, s 15.

[29] *Ibid*, s 15(2).

[30] *Ibid*, s 15(3)(b).

[31] Where the land is occupied, or before leaving or removing apparatus, or (where the land is held by statutory undertakers) in order to search or bore on the land: *Ibid*, s 15(3)(c), (e), (f).

[32] *Ibid*, s 15(3)(d).

[33] *Ibid*, s 15(5).

[34] *Ibid*, s 15(8).

[35] *Ibid*, s 15(7).

these statutory powers are available to a local authority, the powers in the 1976 Act cease to apply.[36]

2.21 The powers in the 1976 Act are more extensive than those in the 1965 Act in the following respects. Under the 1976 Act (but not under the 1965 Act) the authority may:

(1) enter land for surveying purposes prior to an order being made and confirmed;

(2) take apparatus (such as measuring or recording equipment) on to land;

(3) conduct an aerial survey in the airspace above land; and

(4) enforce the right of entry by utilising obstruction powers.

Deficiencies

2.22 In our Consultative Report on Procedure we drew attention to the fact that acquiring authorities' powers under section 11 of the 1965 Act are fairly limited, and that they could be usefully widened by extending to all authorities the powers contained in section 15 of the 1976 Act.[37] We made no specific provisional proposal to this effect as we felt that it might be thought that the power to enter in connection with what is no more than a "proposal" to purchase compulsorily should be confined to clearly defined public authorities.

Consultation

2.23 In our consultation question[38] we asked whether it would be right to leave unchanged the narrow effect of section 11(3) of the Compulsory Purchase Act 1965 Act (as it applies to all acquiring authorities post-confirmation), and to leave in place any wider powers under the Local Government (Miscellaneous Provisions) Act 1976 or other statutes.

2.24 The consultation responses reflected three widely different views. Some supported our provisional proposal to retain the existing law. Some felt that the powers in the 1965 Act do not go far enough. Others felt that the 1976 Act powers go too far and do not incorporate sufficient safeguards for affected landowners. It was however generally recognised that powers to survey are of importance. The Welsh Development Agency, for example, indicated to us that power to survey is essential if an acquiring authority is to compile a full financial appraisal for a prospective CPO project and to measure the possible problems of relocation. That appraisal enables an authority to evaluate, at an early stage, the benefits of phased acquisition and to narrow down its options.

[36] *Ibid*, s 15(9).

[37] Law Com CP No 169, paras 3.25-3.28.

[38] Law Com CP No 169, para 3.28, Consultation issue (B).

No change

2.25 Several consultees endorsed our provisional proposal that the effect of section 11(3) of the 1965 Act (as extended by the 1976 Act for local authorities alone) should remain unchanged.

2.26 The Law Society considered that it would be inappropriate to extend the powers of acquiring authorities which are not public bodies. The NFU argued similarly against extending power to privatised utility companies, for two reasons. First, they fear that those bodies may use the power for speculative surveys for proposals which have no real prospect of implementation by CPO and secondly, they are not aware that absence of the power is causing demonstrable harm.

Need to restrict power

2.27 The Country Land and Business Association ("CLA") were concerned that, because the existing powers to enter on privately-owned land for surveying purposes are already wide, any extension of these powers cannot be to the benefit of a landowner. In this context they cite the range of powers contained in planning and highways legislation which are designed to facilitate a local authority acting in its regulatory capacity (for example, in determining a planning application or requiring discontinuance of a non-conforming use).[39] The CLA argued for the placing of some constraint on powers of entry, the use of which should be exceptional rather than the norm. They proposed that, before entry is effected, an acquiring authority should be required either to obtain a court order, or to give at least 28 days' notice of its intention to enter. In either event, compensation for any disturbance caused by entry on to the land should also be payable.[40]

Need to widen power

2.28 Both LT Property (involved in the London Cross-rail project) and British Waterways favoured extension of the 1976 Act powers to a wider range of bodies with CPO powers. Presently, survey work depends on the goodwill and co-operation of affected landowners, but the downside of this is that it takes time to negotiate agreement. LT Property argued that it is important to speed up the process of scheme design, to ensure by early survey that need for disruptive design change is eliminated – or at least minimised – and to facilitate more swift delivery of the government's transportation objectives. The Royal Institute of Chartered Surveyors ("RICS") and City of London Law Society took a similar approach. They argued for the extension of powers to both public and private sector acquirers, and asserted that site survey early in the acquisition process benefits all affected parties. However, they were concerned that wider powers should be offset by legislative safeguards designed to avert the potential for

[39] Town and Country Planning Act 1990, ss 324, 325; Planning (Listed Buildings and Conservation Areas) Act 1990, ss 88, 88A, 88B; Highways Act 1980, s 289.

[40] Local Government (Miscellaneous Provisions) Act 1976, ss 15(5), 15(6) provide a compensation remedy for physical damage suffered. Compulsory Purchase Act 1965, s 11(3) provides a similar remedy. Disputed compensation is determined by the Lands Tribunal.

abuse of power. Presently section 15 of the 1976 Act speaks of "a proposal" by the authority to acquire compulsorily an interest which should (it is argued) be more strictly defined so as to prevent authorities surveying land on a speculative basis only.

Recommendations for reform

2.29 We believe, having carefully considered the responses of consultees, that section 11(3) of the Compulsory Purchase Act 1965 is unduly narrow in its scope, in particular in denying the acquiring authority power to survey the land until the order has been confirmed. Indeed we find it quite illogical that the kind of appraisal that is required to decide whether an acquisition should be phased, or whether design issues need revisiting, or whether there are other financial or practical implications (such as how a business essential to the wider economy of an area is to be relocated), must await the post-confirmation implementation stage. In order to prepare its supporting statement of reasons, an acquiring authority must describe topographical features on the subject land and its use, and must provide to the confirming authority details of "any special considerations affecting the order site", together with proposals for re-housing of residents or relocation of businesses.[41] To do this job properly an authority may well have first to go on site.

2.30 We therefore recommend that the powers contained in section 15 of the 1976 Act should be extended to all authorities, public or private, who require to make compulsory purchase orders. Those bodies will be bound to compensate for any physical damage caused by the entry and surveying operations, and will be bound by the obligation (underpinned by penalty) not to disclose, without proper cause, confidential information relating to commercial activities. In this context, it is important to emphasise the requirement contained in section 15(1) that there be a "proposal by the authority to acquire compulsorily" the subject land. This indicates, in our view, that while it may not be necessary for a resolution to have been passed by the acquiring authority, it must have a distinct project of real substance genuinely requiring the survey of the land in question. The authority cannot act on a mere whim. We consider that it may be of assistance for future legislation building upon section 15(1) to clarify the threshold for entry for surveying purposes in this particular regard.

2.31 We acknowledge the concerns expressed about the potential for abuse of a widened power of entry for surveying purposes. At the same time, we consider that it is important that both public and private sector bodies should have such wider powers. We believe that a balance can be achieved by conferring such powers on all acquiring authorities but at the same time enabling landowners to apply to the county court for an order restraining entry on the basis that the necessary criteria are not satisfied. The court should have a broad jurisdiction to make orders not only restraining unlawful action by the authority but also (where the unlawfulness relates to the manner of entry) requiring the authority to comply with such conditions as it thinks fit.

[41] See ODPM Circular 06/2004, Apps R and U.

Recommendation (2) – Entry for surveying purposes

(1) An acquiring authority should be entitled to enter upon land in order to carry out necessary surveys prior to the compulsory purchase order being made provided that it is considering a distinct project of real substance genuinely requiring such entry upon the land.

(2) Section 15 of the Local Government (Miscellaneous Provisions) Act 1976 should be extended to apply to all authorities which have compulsory purchase powers.

(3) The county court should have jurisdiction to control the unlawful exercise by acquiring authorities of their powers of entry for surveying purposes by restraining entry or by making entry subject to such conditions as it specifies.

(4) Section 11(3) of the Compulsory Purchase Act 1965 should be repealed and replaced by a modern provision based on, or incorporated within, section 15 of the Local Government (Miscellaneous Provisions) Act 1976.

(3) OBJECTIONS

2.32 Part II of the Acquisition of Land Act 1981, together with delegated legislation, prescribes the procedure to be followed by a local authority (and many other non-ministerial acquiring authorities) once the compulsory purchase order has been made. Schedule 1 to the same Act regulates the procedure applicable where the acquiring authority is a minister of a government department. In brief, certain persons must be notified of the making of the order and publicity (in the form of notices in local newspapers) given so that objections can be made prior to confirmation of the order.

Existing law

2.33 The Acquisition of Land Act 1981 provides that, with one exception, all owners, lessees and occupiers are entitled to notice stating the effect of the order, stating that it is about to be submitted for confirmation, and specifying the time within which,[42] and the manner in which, objections may be made.[43] The single statutory exclusion from the requirement of notice were "tenants for a month or any period less than a month" thereby denying such persons who had a direct occupational interest in the land a right to object to their enjoyment of the property being disrupted.[44] In the Consultative Report on Procedure we noted with approval that the Government was proposing to extend the right to notice of the making of the order to all those with any form of interest or right to occupy.[45]

[42] Not less than 21 days from the service of the notice.

[43] Acquisition of Land Act 1981, s 12.

[44] Policy Statement (DTLR, Dec 2001), App, para 2.12, quoted in Law Com No 169, para 4.7.

[45] Law Com CP No 169, para 4.7.

Deficiencies and provisional proposals

2.34 Although the term is not used in any primary legislation, the person entitled to notice (and to object) is traditionally referred to as a "statutory objector". A definition is to be found in the Inquiries Procedure Rules.[46] We provisionally proposed in the Consultative Report on Procedure that this term should be adopted, and applied, in primary legislation.[47]

Consultation

2.35 A number of consultees supported our proposal that the term "statutory objector" should be defined in primary legislation. Consultees also indicated their concern that the expression should not be limited to those entitled to receive notice; it should embrace any person who has some form of interest in the land being acquired. The Welsh Development Agency suggested that the interest should be defined as one held before the first notice date[48] (so as to prevent the late acquisition of interests in order to obtain statutory objector status).

Legislative reform

2.36 Section 100 of the Planning and Compulsory Purchase Act 2004 has now amended Part II of the Acquisition of Land Act 1981. Section 12 of the 1981 Act, listing the persons on whom notice of the making of the order must be served, no longer excludes tenants for a month or any period less than a month. It requires that service be effected on every "qualifying person" in relation to land comprised in the order. A person is a "qualifying person" if he is "an owner, lessee, tenant (whatever the tenancy period) or occupier of the land" or if he falls within section 12(2A). A person falls within section 12(2A) if he is a person to whom the acquiring authority would be required to give notice to treat[49] or if he is a person the authority thinks is likely to be entitled to make a claim for compensation for injurious affection[50] in the event of the order being confirmed and the purchase taking place.[51]

2.37 This new provision extends the range of persons entitled to be notified of the making of the compulsory purchase order, and we welcome its enactment. We believe that it deals incidentally with the problem raised by the Welsh Development Agency. The use of the present tense indicates that notices must

[46] "Any objector to whom the Secretary of State is obliged by virtue of [Acquisition of Land Act 1981,] s 13(2) to afford an opportunity to be heard": Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990, r 2 (SI 1990 No 512). These rules will require up-dating as a result of the Planning and Compulsory Purchase Act 2004. In practice, it is a matter for the discretion of the inspector as to which persons they are prepared to hear at an inquiry.

[47] Law Com CP No 169, para 4.8, Proposal 2.

[48] The date of the first notice of making of the order, whether that is by newspaper publication or (now) by affixing the notice to the land (under the Planning and Compulsory Purchase Act 2004, s 100(4), amending the Acquisition of Land Act 1981, s 11).

[49] If proceeding under the Compulsory Purchase Act 1965, s 5(1).

[50] That is, a claim under the Compulsory Purchase Act 1965, s 10.

[51] So far as the person is known to the acquiring authority after making diligent enquiry.

be served on those persons who are currently, that is at the date of service, holding an interest in or occupying the subject land.

2.38 We are a little disappointed that the new provision does not address the confusion inherent in the use of the "statutory objector" terminology in the secondary legislation.[52] It would be useful, in our view, to effect rationalisation should the opportunity arise. We do believe, however, that on the major points of substance an important enhancement of the rights of those affected by compulsory purchase has been effected and we see no immediate need to make any further substantive recommendations in this area.

(4) LEGAL CHALLENGE

2.39 Part IV of the Acquisition of Land Act 1981 sets out a procedure for statutory review whereby compulsory purchase orders can be challenged in the High Court. We reviewed this procedure in our Consultative Report on Procedure.[53] While we did not propose any fundamental changes, we did address certain points of substance and made provisional proposals accordingly.

Existing Law

2.40 Statutory review under Part IV of the Acquisition of Land Act 1981 is a self-contained process. Application may be made to the High Court by "any person aggrieved" by a compulsory purchase order who desires to question its validity or the validity of any of its provisions. Challenge may be made on the following grounds:[54]

(1) that the authorisation is "not empowered to be granted"[55] (a challenge based on *vires*);

(2) that "any relevant requirement" has not been complied with[56] (a procedural challenge[57]).

[52] The Compulsory Purchase of Land (Written Representations Procedure)(Ministers) Regulations 2004 (SI 2004 No 2594) now introduce the term "remaining objector", meaning a person who has a "remaining objection" under Acquisition of Land Act 1981, s 13A.

[53] Law Com CP No 169, paras 4.16-4.24. The statutory appeal procedure is not available where an order is confirmed by Act of Parliament under the Statutory Orders (Special Procedure) Act 1945, s 6: Acquisition of Land Act 1981, s 27.

[54] Acquisition of Land Act 1981, s 23(1)-(3).

[55] That is under the Acquisition of Land Act 1981 itself or under any enactment mentioned in section 1(1) thereof. Section 1(1) refers to a compulsory purchase to which the 1981 Act applies by virtue of any other enactment (whenever passed or made) and a compulsory purchase under an enactment specified in section 1(2). In turn, section 1(2) refers to the Metropolitan Police Act 1886, s 2; the Military Lands Act 1892, s 1(3); the Small Holdings and Allotments Acts 1908, ss 25(1), 39(1) and 1926, s 4; the Development and Road Improvement Funds Act 1909, ss 5(1), 7(1); and the Education Act 1996, s 530(1).

[56] "Relevant requirement" is defined as any requirement of the Acquisition of Land Act 1981, or of any regulation made under section 7(2) of that Act, or any requirement of the Tribunals and Inquiries Act 1992 (or rules made thereunder): Acquisition of Land Act 1981, s 23(3).

2.41 Application must be made promptly. By section 23(4) of the 1981 Act, application must be made to the High Court within six weeks from the date on which notice of the confirmation of the order is first published.[58] On an application to the High Court, the court may:

(1) by interim order, suspend the operation of the compulsory purchase order (or any provision within it) "either generally or in so far as it affects any property of the applicant", pending final determination of the proceedings;

(2) by final order, quash the compulsory purchase order (or any provision within it) "either generally or in so far as it affects any property of the applicant", if satisfied that the authorisation is not *intra vires*, or that the applicant's interests have been "substantially prejudiced" by the failure to comply with "any relevant requirement".[59]

2.42 Where an order is neither suspended nor quashed, it becomes operative on the date when statutory notice of confirmation is first published.[60]

2.43 Section 25 of the 1981 Act provides that:

> Subject to the preceding provisions of this Part of this Act, a compulsory purchase order, or a certificate under Part III of, or Schedule 3 to, this Act, shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever.

2.44 This "ouster" provision applies to compulsory purchase orders "made" by non-ministerial bodies (such as local authorities), to compulsory purchase orders "prepared in draft" by government departments, and to certificates under Part III of (and Schedule 3 to) the 1981 Act. Its effect is to prevent challenge (save by the

[57] A procedural challenge can also be made to a certificate under Part III of, or Schedule 3 to, the Acquisition of Land Act 1981. (Where certain kinds of land with special protection are to be the subject of compulsory purchase, confirmation of a CPO will either be denied (eg land owned by a statutory undertaker: s 16) or made subject to special parliamentary procedure (eg common land: s 19), unless the appropriate minister has issued a Part III certificate to the effect that the acquisition will not cause serious detriment or that its effects have been mitigated. Similarly, under s 28 and Schedule 3 the compulsory purchase of rights over special kinds of land vested in certain statutory bodies by the creation of new rights may only proceed after ministerial certification).

[58] Section 23(4) provides for a time limit of six weeks from the date of first publication of notice of the confirmation *or making of* the order. The italicised words refer to orders by ministerial bodies only. In the case of an order to which the Statutory Orders (Special Procedure) Act 1945 applies, the time limit is six weeks from the date on which the order becomes operative. In the case of a certificate, it is six weeks from the date on which notice of the giving of the certificate is first published.

[59] Acquisition of Land Act 1981, s 24. The function vested in the court is restricted: it is one of supervision of a particular administrative process, not one of broad review or appeal. See for example the analogous Northern Ireland decision in *Cowan v Department of Enterprise, Trade and Investment* [2000] NILR 122, 133 *per* Girvan J.

[60] Acquisition of Land Act 1981, s 26. This does not apply to orders to which the Statutory Orders (Special Procedure) Act 1945 applies.

Part IV procedure) to the validity of an order from the date the order is "made" or "prepared in draft".[61] Section 25 is not, however, engaged until a compulsory purchase order is in existence, and challenge by judicial review is therefore tenable up to the moment when the order is made (that is, sealed by the acquiring authority).[62]

2.45 Once the compulsory purchase order has been made by the acquiring authority, section 25 will operate to prevent challenge by judicial review save in highly unusual circumstances.[63] This ouster will continue to apply up to and after confirmation.[64] There is no requirement in the Part IV procedure akin to that pertinent to judicial review that the court give permission to apply, and accordingly there is no mechanism for the judicial filtering out of weak or unmeritorious cases.[65]

Deficiencies

2.46 In our Consultative Report on Procedure, we drew attention to several deficiencies in the current procedure.

2.47 First, we considered the test for standing.[66] We felt that although the "sufficient interest" test had become standard for judicial review,[67] the wider "person

[61] In *Swick Securities Ltd v Chelsea Borough Council*, (Unreported) May 1 1964 (CA) (Court of Appeal Transcript 1964, No 134), the Court of Appeal, construing the predecessor to section 25, accepted the concession of counsel that "confirmed" referred to compulsory purchase by non-ministerial bodies, "made" referred to compulsory purchase by government departments, and "given" referred to certificates under Part III of, or Schedule 3 to, the 1981 Act. This construction was adopted in *R v Camden LBC, ex parte Comyn Ching & Co (London) Ltd* (1984) 47 P & CR 417, 424, *per* Woolf J.

[62] *R v Camden LBC, ex parte Comyn Ching & Co (London) Ltd* (1984) 47 P & CR 417. This decision concerned an application for judicial review of a local authority's resolution to make a compulsory purchase order. Woolf J held that section 25 did not deprive the court of jurisdiction to hear and determine the application. He accepted, however, (at 425) that it was a matter for the discretion of the court whether to hear such an application, and was of the view that "in the majority of cases, notwithstanding my interpretation of section 25, it would be wrong for the court to hear an application of this nature. In the normal situation it would be preferable for the court to defer any application to the court until after the matter has gone before the Secretary of State." See also *Simpsons Motor Sales (London) Ltd v Hendon Corporation* [1964] AC 1088, 1127, *per* Lord Evershed.

[63] Judicial review has been successfully invoked to challenge the decision of a local inquiry inspector to exclude the evidence (of harassment and threats by the landlord) on which the acquiring authority's attempt to seek confirmation of a compulsory purchase order was substantially based: *R v Secretary of State, ex parte Kensington & Chelsea RBC* (1987) 19 HLR 191.

[64] For a similar approach in the context of challenging orders modifying the definitive map of public rights of way (pursuant to Wildlife and Countryside Act 1981, Sched 15, para 12) see *R v Cornwall County Council, ex parte Huntington* [1994] 1 All ER 694, 700, where the Court of Appeal held that the High Court could only intervene by way of judicial review when the relevant formal processes of making and confirmation of the modification order had been completed.

[65] Government has it in mind to rectify this omission across the statutory appeal canvas: see Consultation Paper *Statutory Appeals and Statutory Review: Proposals for Rationalising Procedures* (Department for Constitutional Affairs, February 2004).

[66] Law Com CP No 169, paras 4.18-4.20.

aggrieved" test should be retained at present for statutory appeals relating to CPOs. That would reflect the existing statutory appeal arrangements under planning and housing provisions. While a single test would be helpful in the context of judicial review and statutory appeals, it was not appropriate to reform the law incrementally. A global approach to reform across statutory appeals in general was called for.

2.48 Secondly, we considered the subject matter of the legal challenge under Part IV of the 1981 Act.[68] The appeal procedure is directed towards the question of the "validity" of a compulsory purchase order, or any provision contained in it.[69] It therefore applies not only to challenging confirmation of an order, but also to questioning those earlier stages of the compulsory purchase process from making to confirmation. It does not apply, however, to challenging refusals to confirm either in part or in whole.[70] While judicial review becomes available once the statutory procedure is unavailable, the demarcation between the two remedies is far from clear. In general, the jurisdictional boundaries between the statutory appeal process, statutory immunity from challenge and the availability of judicial review are insufficiently defined.

2.49 Thirdly, section 24(2) of the Acquisition of Land Act 1981 is unduly restrictive.[71] Where the court is satisfied that the grounds of review are made out, it may simply "quash the compulsory purchase order or any provision contained therein... either generally or in so far as it affects any property of the applicant." If an order is quashed and the acquiring authority still desires to proceed, it has then to go back to the beginning and "re-make" the whole order. We felt that this was "unnecessarily draconian".[72] The remedy as presently framed fails to allow a court to distinguish successive stages in the making and confirmation process. More particularly, it fails to give the court power to strike down a later decision (for example, the confirmation, which may be procedurally flawed) and at the same time to preserve earlier stages in the process (such as passing the resolution and sealing the order).

Provisional proposals

2.50 In our Consultative Report we set out two proposals:[73]

(1) The statutory procedure for challenging the validity of a compulsory purchase order (and the statutory immunity from challenge in other proceedings) should apply to the decision of the confirming authority to

[67] Supreme Court Act 1981, s 31(3).

[68] Law Com CP No 169, paras 4.21-4.22.

[69] Acquisition of Land Act 1981, s 23(1).

[70] *Islington LBC v Secretary of State for the Environment* (1982) 43 P &CR 300.

[71] Law Com CP No 169, para 4.24.

[72] *Ibid*.

[73] *Ibid*, para 4.24, Proposal 3.

confirm, or to refuse to confirm, the order, and not to earlier stages of the process (which would be subject to judicial review).

(2) The court should have power under the Part IV procedure simply to quash the decision of the confirming authority (to confirm or to refuse to confirm) or to make such order as is appropriate.

Consultation

Judicial review and the statutory procedure

2.51 A substantial majority of those who responded to the proposal to rationalise the respective functions of the Part IV procedure and judicial review gave it their support. The Law Society considered that it was sensible to confine the statutory procedure to the decision to confirm and to allow challenge to earlier stages of the process by judicial review. There was general satisfaction with the requirement that the statutory procedure be invoked within six weeks of the confirmation decision.

2.52 Judicial review was seen as performing an important role. Indeed, one consultee (the Country Land and Business Association) believed that judicial review should be the universal remedy, although they made no substantive complaint about the way the statutory appeal route operates. A small number of consultees (including ODPM) felt that the statutory procedure was the preferable route for challenge of both making the order and the granting of confirmation. They felt however that refusal of confirmation was better suited to challenge by judicial review, as in the event of the application succeeding the order (having been "made") would survive, enabling the issue of confirmation to be remitted to the minister for re-consideration, possibly after further inquiry or hearing.

Relief under the statutory procedure

2.53 The majority of consultees who replied on this issue supported the proposal. They favoured giving the court power to keep the underlying project alive and thereby to prevent it being stifled by a partial challenge. It was felt that this might also provide scope for saving public expenditure. Similarly, the conferment on the court of a supplemental power to make "such other order as is appropriate" would provide more flexibility on a case-by-case basis.

2.54 However reservations were expressed by certain consultees. The Planning and Environment Bar Association thought that although partial quashing might have the benefit of saving public money, in practice it could be difficult to identify and separate the part of a CPO which is erroneous in law (or the property to which that part relates) from the remaining valid part or parts. ODPM felt that to quash only the ministerial confirmation would have the effect of leaving the order itself "in limbo". They considered that unnecessary complications could thereby be caused. In particular, it would be unclear what the next step should be. It may be that the inquiry should be re-opened.

2.55 The RICS suggested that, as with planning applications, an acquiring authority should be given power to "twin-track" compulsory purchase orders, so that if the original order is refused by the Secretary of State there would still be an opportunity to submit a second for approval.[74] It would be advantageous to vest power in the Secretary of State to re-consider a refused application within a fixed period. At present, the minister becomes *functus officio* (that is to say, he or she loses the right to intervene) on refusal.

2.56 The Department for Constitutional Affairs were concerned that the proposal was seeking to provide the court with power to substitute its own decision for that of the minister, thereby greatly extending the remit of judicial intervention and limiting the primacy of the executive in administrative affairs. The Department felt that any extension of power here should be limited to that contained in section 31(5) of the Supreme Court Act 1981 whereby the court may remit a decision to the appropriate decision-making body for reconsideration "in accordance with the findings of the court". As we shall explain below, we did not intend the court to have as wide a power as envisaged by the Department, and in our recommendation for reform we gratefully adopt the analogy of section 31.[75]

Standing

2.57 Our conclusion relating to the issue of standing (that it would be neither practicable nor advisable to implement change from the "person aggrieved" test on a piecemeal basis) met with some resistance. Lord Justice Brooke felt that standardisation in this field was justified, as well as being consistent with the Law Commission's previous recommendations in its 1994 Report,[76] and that statutory intervention to start that process is preferable to development of legal principle by judicial decision. Both the CLA and the RICS expressed concern that the present test appears too narrow. For example, a neighbour, who may be adversely affected by potential loss of amenity, would be precluded from a right to challenge. Clarification would be timely, it was said, and the statutory appeal test should be brought into line with that for judicial review.

2.58 The point was made compellingly by Lord Justice Brooke that the High Court may not be the appropriate forum for statutory appeals, which may be better suited to a specialist tribunal (with power to remedy procedural mishaps), with appeal lying on important points of principle and practice to the Court of Appeal.

2.59 The Government is presently involved in considering reform of the tribunals system in England and Wales. That work involves a review of arrangements for

[74] Since the RICS submitted their response to the Consultative Report, it has ceased to be possible to "twin-track" planning applications: see Planning and Compulsory Purchase Act 2004, s 43.

[75] Supreme Court Act 1981, s 31(5) provides: "If, on an application for judicial review seeking [a quashing order], the High Court quashes the decision to which the application relates, the High Court may remit the matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court." See also Civil Procedure Rules, r 54.19.

[76] Administrative Law: Judicial Review and Statutory Appeals (1994) Law Com No 226.

handling appeals from tribunals within the proposed unified Tribunals Service. Following the Leggatt Report,[77] the Law Commission undertook work in connection with land, property and housing tribunals with a view to finding ways to remove jurisdictional overlaps and scope for 'forum shopping'. Our Report was published in September 2003.[78] We recommended that the existing Lands Tribunal should be retained, with some extensions to its jurisdiction. A reformed Lands Tribunal (under our proposals) would be analogous to the High Court in having both original jurisdiction for first instance cases and an appellate jurisdiction (from a new Property and Valuation Tribunal). In that report we did not consider the possibility of transferring statutory review jurisdiction relating to ministerial decisions across from the High Court to the Lands Tribunal.[79]

2.60 The issue of extending the Lands Tribunal's jurisdiction to deal with CPO confirmation decisions falls outside our terms of reference for the present project. Our only recommendation relating to the Lands Tribunal was limited to the issue of concurrent determination of claims (common law or statutory) arising from damage to land or to use of land.[80] It is not appropriate for us to make any further recommendation at this juncture.

Recommendations for reform

Extent of ouster provision

2.61 In our 1994 Report on Administrative Law: Judicial Review and Statutory Appeals,[81] we indicated that, although statutory review (such as the Part IV procedure) and judicial review are conceptually distinct, there can be circumstances where the appropriate route of challenge is less than clear. We did not, ten years ago, recommend the enactment of a single co-ordinated provision covering all applications to quash, but we did recommend "that future statutory provisions are drafted so as to indicate clearly the extent of the exclusivity [of review] thereby conferred."[82] We also recommended a model clause for statutory review[83] which provided for the quashing of an "act or decision either generally or in so far as it affects the applicant."

2.62 We believe that, in time and through appropriate administration of justice legislation, the statutory review process should embody the flexibility that is

[77] Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users - One System, One Service (August 2001).

[78] Land, Valuation and Housing Tribunals: the Future (2003) Law Com No 281.

[79] The jurisdictions of the reformed Lands Tribunal are dealt with in Land, Valuation and Housing Tribunals: the Future (2003) Law Com No 281, paras 4.38-4.49.

[80] See our Final Report Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286, paras 10.10, 10.11 and proposed Rule 20.

[81] Administrative Law: Judicial Review and Statutory Appeals (1994) Law Com No 226, Pt XII.

[82] *Ibid*, para 12.13.

[83] *Ibid*, App E (with explanatory notes).

inherent in judicial review. Judicial review allows for different tests of standing;[84] it provides for the filtering out of inappropriate or unmeritorious applications; and it puts in place mechanisms for discovery and for interim relief. A number of these elements are currently missing from statutory review.[85]

2.63 For the present, however, we take the view that any reform of the statutory review procedure should be focussed on the special circumstances of compulsory purchase. We said in our Administrative Law Report that the great diversity of statutory provisions creating the right to appeal or to apply to the High Court was "one factor which made it difficult to treat statutory appeals as a single coherent subject for which to propose general reforms."[86] That remains the position today. As we have explained, a substantial majority of consultees supported our provisional proposal to the effect that the making of a compulsory purchase order should be subject to challenge by judicial review, and that the confirmation stage should be subject to the statutory review procedure. We accordingly make a recommendation to this effect.

Extent of remedy

2.64 In the light of our consultation we believe that our proposal on power to quash should be refined. We consider that two changes to the existing law would be useful:

(1) That the court should have the power to quash the decision of the confirming authority as an alternative to quashing the compulsory purchase order from its very inception;

(2) That the court should have the power to remit a decision to the appropriate authority to reconsider, in accordance with the findings of the court.

2.65 We accept that, in the context of statutory review, the role of the court is (and should remain) supervisory. The purpose of review is to afford a vehicle for correcting illegality or significant procedural irregularity causing invalidity. It is not designed to afford the courts an opportunity to second-guess an administrative decision. That power is only granted where Parliament specifically provides a right to appeal to a tribunal on the facts as well as the law.

[84] When judicial review engages a potential human rights violation (Human Rights Act 1998, s 7(3)), the wider "sufficient interest" standing narrows to that of "victim".

[85] The Department for Constitutional Affairs presently has in train a review of statutory appeals and reviews, with a view to rationalising the underpinning procedures (see below).

[86] Administrative Law: Judicial Review and Statutory Appeals (1994) Law Com No 226, para 12.1. In our Consultation Paper on the subject (Administrative Law: Judicial Review and Statutory Appeals (1993) Law Com No 126), we stated that "It is often said that the statutory provisions which regulate the manner in which administrative and adjudicatory decisions are taken are necessarily very specific to the context for which they were designed, and this is a factor which must be borne in mind in considering the extent to which simplification and harmonisation is possible" (Part B, para 16.1).

2.66 Within these boundaries we envisage that the court should have power to quash a defective decision, to stipulate the tests or procedures to be applied by the decision-making body and, where appropriate, to direct whether or not a previous inquiry or hearing should be reopened. We consider that the court should have some flexibility in this regard. In deciding whether to quash the compulsory purchase order itself, or whether merely to quash the decision to confirm, it would be exercising a discretion and would be expected to take account of all the circumstances.

Standing

2.67 Although in our 1994 Report we reported that there was support from consultees at that time for the use of a single term to describe eligible standing, to replace the concept of "person aggrieved", the Commission made no recommendation for reform.[87] We were concerned that, unless an expression could be found which was entirely appropriate, there was a risk that the test of standing might be widened beyond that which was originally envisaged by the legislature.

2.68 For this reason, and in order to meet the need to promote consistency of approach across the statutory provisions relating to review, we are not minded to make a recommendation in the context of compulsory purchase alone. We are conscious, moreover, that at the time of preparing this Report, the Department for Constitutional Affairs has in train a separate review on Statutory Appeals and Statutory Review: Proposals for Rationalising Procedures.[88] We believe that the fruits of that work should be available before further consideration is given to change.

Recommendation (3) – Legal challenge

(1) Any challenge to the validity of a decision to confirm (or to refuse to confirm) a compulsory purchase order should be made pursuant to the statutory review procedure contained in Part IV of the Acquisition of Land Act 1981, and no such challenge shall be made by way of judicial review.

(2) Any challenge to earlier stages of the compulsory purchase process (such as making the compulsory purchase order) should be by way of judicial review.

[87] Our reasoning is set out in Administrative Law: Judicial Review and Statutory Appeals (1994) Law Com No 226, paras 12.17, 12.18. We recommended the use of "person adversely affected" for judicial review, but felt that would be too narrow for statutory review.

[88] DCA Consultation Paper (February 2004). This paper builds on Administrative Law: Judicial Review and Statutory Appeals (1994) Law Com No 226, Lord Woolf's Report on *Access to Justice* (1996) and Sir Jeffrey Bowman's Report on *Review of the Crown Office List* (March 2000).

(3) Under the statutory review procedure, the High Court should be entitled in the exercise of its discretion to quash the determination of the confirming authority to confirm the compulsory purchase order as an alternative to quashing the whole order. Where the High Court makes such an order that a determination be quashed, it should be entitled to remit that determination to the appropriate authority with a direction that the authority re-consider its determination in accordance with the findings of the court.

PART 3
IMPLEMENTATION OF COMPULSORY PURCHASE

INTRODUCTION

3.1 Following confirmation of the compulsory purchase order, there are two alternative means by which the order may be implemented so as to pass title from the landowner to the acquiring authority: by notice to treat and by vesting declaration.[1]

The notice to treat procedure

3.2 The notice to treat procedure involves service of a statutory notice on each affected landowner to initiate the process of agreeing or determining compensation. Title does not pass to the authority until compensation has been settled, but the authority may take possession in the meantime by serving notice of entry. The land is valued at the date of entry (or the date of determination of compensation if earlier) and interest runs from that date.

3.3 The purpose of service of notice to treat is threefold:

(a) to inform interested persons that the acquiring authority intends to proceed to exercise its powers of compulsory purchase for the subject land;

(b) to obtain particulars of the recipients' interests in the land and of the compensation to be claimed; and

(c) to tell the relevant parties that the authority is willing to negotiate on the compensation "to be made for the damage which may be sustained by reason of the execution of the works."[2]

3.4 The notice to treat route encompasses two separate steps. The purpose of notice of entry as the second step (served after, or at the same time as, notice to treat) is:

(a) to give notice to the owner, lessee and occupier of subject land that the authority will be entering that land;

(b) to validate such entry at the end of the prescribed period, notwithstanding non-payment of compensation at that juncture; and

(c) to act as a preliminary step to enforcing entry by warrant if entry is then denied.[3]

[1] The following explanation is taken from Law Com CP No 169, para 2.11.

[2] Compulsory Purchase Act 1965, s 5(2)(c).

The vesting declaration procedure

3.5 The more recent vesting declaration procedure enables the authority, after confirmation, to make a declaration, vesting in itself title and authorisation to enter after expiry of a defined period (not less than 28 days) from the service of a notice on those affected. Title passes on the date so fixed, whether or not compensation has been settled.

3.6 The purpose of a vesting declaration is to short-circuit the lengthier process of notice to treat followed by notice of entry. Execution of a general vesting declaration is (after preliminary notice) a single-step process which vests title to subject land automatically in the acquiring authority without need for formal conveyance or investigation of title. The acquired interests convert into compensation rights, and right of entry is immediate against all interest holders except those with minor tenancies. We are given to understand that today the procedure is used extensively by acquiring authorities. It has the added advantage that it effects transfer of title where identifying ownership of land would otherwise be problematic.[4]

3.7 In this Part we review these two processes of implementation. We do so in the light of the acceptance by Government that both notice to treat and vesting declaration should be retained as alternatives. The DTLR Policy Statement explained this decision:

> There have also been suggestions that it is unnecessary to retain both the notice to treat and the general vesting declaration procedures. The latter replaces both the notice to treat (which is deemed to have been served) and the conveyance with one procedure… It is therefore useful to acquiring authorities where it has not been possible to identify the owners of all the affected land. It also offers a greater degree of certainty for those affected, including fixing the date of vesting as the date to which the valuation of their property will relate. However, its disadvantages include the fact that the power to withdraw the notice to treat no longer applies once the declaration has been executed… We therefore see sense in retaining the flexibility afforded by keeping both the notice to treat and general vesting declaration procedures.[5]

3.8 We commence our review of implementation by dealing with what technically remains a third possible route: the rather obscure statutory procedure for obtaining right of entry contained in Schedule 3 to the Compulsory Purchase Act 1965. We then deal with the notice to treat procedure, including how entry upon the subject land is secured by notice of entry, and the consequences of non-compliance, where the entry by the acquiring authority has not been authorised or where the entry has been refused by owners or occupiers of the subject land.

[3] Law Com CP No 169, para 2.11(1).

[4] Law Com CP No 169, para 2.11(2).

[5] Policy Statement, App, para 2.28. The Department proposes to issue a circular to authorities containing "advice about when each [procedure] may provide the best course of action": para 3.11.

We consider the law of distress as an enforcement mechanism. We then review in outline the vesting declaration procedure as an alternative to notice to treat. Finally, we consider the desirability of registering steps in the compulsory purchase process in the register of local land charges.

(1) PROCEDURE UNDER COMPULSORY PURCHASE ACT 1965, SCHEDULE 3

The existing law

3.9 The procedure contained in Schedule 3 to the Compulsory Purchase Act 1965 (given effect by section 11(2) of the same Act) has changed little since 1845. It follows quite closely that which appeared in sections 85 to 87 of the Lands Clauses Consolidation Act of that year. It involves the authority paying into court as "security" a sum of money reflecting the amount of compensation being claimed or a sum determined as equal to the value of the interest being acquired by an "able practical surveyor" who has been appointed in writing by two justices of the peace. Simultaneously, the authority must tender a bond to the landowner for the sum in question, underwritten by two sureties. When compensation under the bond has been paid in full, the court will release the secured moneys to the acquiring authority.

Deficiencies

3.10 This procedure has the following defects:

(1) It is cumbersome and expensive, involving appointment of a surveyor, procuring of a bond and application to the High Court;

(2) It is cast in archaic and ambiguous terms (it is not clear from the wording whether service of notice to treat is a prerequisite to its invocation);[6] and

(3) It appears to offer no benefit not already provided for under the two more modern procedures.

Provisional proposals

3.11 In our Consultative Report on Procedure we indicated our provisional view that while retention of the two parallel procedures of notice to treat and vesting declaration was merited, section 11(2) and the procedure under Schedule 3 to the Compulsory Purchase Act 1965 was obsolete and should be repealed.[7]

Consultation

3.12 In our consultation process we asked whether consultees agreed that these provisions should be repealed.

[6] See differing views in *Tiverton, etc Rly v Loosemore* (1884) 9 App Cas 480, 501 and in *GWR v Swindon Rly* (1884) 9 App Cas 787, 805 and 810 (under the corresponding provision in Lands Clauses Consolidation Act 1845, s 85).

[7] See Law Com CP No 169, paras 5.4, 5.5.

3.13 Of the 15 consultees who responded to us on this topic, all but one agreed with our provisional proposal. Both the Law Society and the RICS told us that the procedure is no longer needed; the RICS specifically said that the procedure is obsolete and is never used in practice today. The only dissenting voice was ODPM. The Department indicated that it was not persuaded on the evidence then available that Schedule 3 is obsolete, or that the reason why the provision had been preserved in the 1965 Act has now been rendered otiose.

Recommendation for reform

3.14 In the light of our consultation we believe that Schedule 3 no longer provides a useful procedure for securing entry to land. We have been unable to discern any reason for the retention of Schedule 3. On that basis, we recommend repeal of the relevant provisions.

Recommendation (4) – Procedures for implementation

(1) Implementation of a compulsory purchase order, once it has been confirmed by the confirming authority, should be effected only by notice to treat or by vesting declaration.

(2) The implementation procedure contained in section 11(2) of, and Schedule 3 to, the Compulsory Purchase Act 1965 should be repealed without replacement.

(2) NOTICE TO TREAT

The existing law

3.15 Implementation by notice to treat is now governed by section 5 of the Compulsory Purchase Act 1965.[8] Much of the language in the original provision derives from section 18 of the Lands Clauses Consolidation Act 1845, and is in need of modernisation.

3.16 There are four main legal requirements:[9]

(1) The compulsory purchase order must have become "operative";[10]

(2) The acquiring authority must "require to purchase" the land specified in the notice for the authorised (and not a collateral) purpose, and it may include only part of that encompassed in the order as confirmed;

(3) Notice must be given to "all the persons interested in, or having power to sell and convey or release, the land, so far as known to the acquiring authority after making diligent inquiry"; and

[8] As amended by the Planning and Compensation Act 1991, s 67.

[9] See Law Com CP No 169, para 5.17.

[10] An order will become operative on the date when notice of confirmation is first published ("the operative date"), subject to the power of the court to suspend operation pending resolution of a legal challenge: Acquisition of Land Act 1981, ss 24(1), 26(1).

(4) Notice must give particulars of the land, demand particulars of the recipient's "estate and interest" and state that the authority is willing to treat both for purchase of the land and for compensation payable for "the damage which may be sustained by reason of the execution of the works."[11]

3.17 Although section 5 requires notice to treat to be served on all persons with interests in the land, it has been held that such service is not necessary in relation to those holding "short tenancies" as defined by section 20 of the 1965 Act.[12] We consider the problems caused by such tenancies in Part 8.[13]

3.18 We deal with time limits in detail below.[14] The Compulsory Purchase Act 1965 provides that an authority's power of compulsory purchase "shall not be exercised after the expiration of three years from the date on which the compulsory purchase order becomes operative."[15] Service of notice to treat is sufficient "exercise" of the powers for this purpose.[16] Once notice to treat has been served it is valid for a further three years, unless one of several specified events has occurred.[17]

Deficiencies

3.19 In our Consultative Report on Procedure we set out the main deficiencies of this procedure:[18]

(1) Section 5(1) provides for the service of notice on "all the persons interested in, or having power to sell and convey or release, the land", but fails to define within the statute which interests qualify for service. In particular, there is no reference within section 5 to the exclusion of certain "short tenancies" from the requirement to serve notice to treat.

(2) Section 5(2)(c) provides for the authority to express willingness to treat both for the purchase of the subject land and "as to the compensation to

[11] Compulsory Purchase Act 1965, s 5(2)(c). This, as we pointed out, is a very incomplete description of the different heads of compensation available under the present code. For the various heads see our Final Report Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286, paras 2.9-2.21 and proposed Rule 2 (Basis of compensation).

[12] *Newham LBC v Benjamin* [1968] 1 WLR 694.

[13] See Part 8(2) on minor tenancies.

[14] Part 4(1). We also deal with ODPM's proposals for change which are, as yet, unimplemented.

[15] Compulsory Purchase Act 1965, s 4.

[16] *Grice v Dudley Corporation* [1958] Ch 329.

[17] Compulsory Purchase Act 1965, s 5(2A). The events are agreement or payment of compensation, or referral of compensation to the Lands Tribunal for determination; execution of a general vesting declaration; or the authority taking possession of the subject land. The three-year period may also be extended by agreement between the parties: Compulsory Purchase Act 1965, s 5(2B), and see generally para 4.7 below.

[18] Law Com CP No 169, paras 5.19-5.21.

be made for the damage which may be sustained by reason of the execution of the works." Reference to "execution" is too narrow because it fails to embrace compensation for use of the works. In general, the provision contains an incomplete description of the various heads of compensation payable.[19]

(3) There is no prescribed form of notice to treat. This may lead to inconsistency of approach and the inadequate provision of necessary supporting information to affected parties.

(4) The language used in section 5 of the Compulsory Purchase Act 1965 is in need of modernisation.

Provisional proposals

3.20 In our Consultative Report on Procedure we made two provisional proposals to address these deficiencies:[20]

(1) There should be a prescribed form of notice to treat to ensure consistency of practice (to be accompanied by standard notes to recipients explaining their rights).

(2) The reference to compensation in section 5(2)(c) of the 1965 Act should be broadened to substitute reference to compensation to be paid in respect of the taking of the interest in accordance with the Compensation Code.[21]

3.21 We also invited the views of consultees on whether the definition of "interests" qualifying for service of notice to treat creates any practical problems.[22]

Consultation

3.22 All of those who responded to our provisional proposals supported them. The Highways Agency pointed out that the prescribed forms may need to embrace several versions so as to cater for the different types of interest being acquired (for example, where land is subject to a mortgage). We accept that this may be necessary. We envisage that new primary legislation would simply confer a regulation-making power, leaving the drafting of the forms to the appropriate Government department.

[19] Under the existing law those heads are: market value, severance and/or injurious affection, disturbance, equivalent reinstatement. Under our recommendations, the basis of compensation becomes: market value, injury to retained land (off-setting any betterment), consequential loss and equivalent reinstatement: see further Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286, para 2.21 (and proposed Rule 2) and Parts III and IV where the heads are described.

[20] Law Com CP No 169, para 5.22, Proposal 6.

[21] See now Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286, Part XII Rule 2 (basis of compensation).

[22] Law Com CP No 169, para 5.20.

3.23 More difficult, and complicated, is the definition of the categories of interest-holder who will be entitled to service of notice to treat. While a number of respondents believed that the present definition (augmented by the case law) was adequate, a majority of those who responded on this issue expressed concern.

3.24 The need for a clear definition of persons entitled to service was strongly pressed, as was the desirability that the same definition should apply whether the acquisition was being implemented by notice to treat or by vesting declaration. It was felt that it was unsatisfactory to have to rely on case law to achieve a comprehensive list of those entitled.

3.25 In our consultation we also asked whether an authority should have discretion to serve notice to treat on owners of interests or occupiers outside the defined categories. Almost unanimously those who responded on this issue endorsed this approach. It was thought that no authority should seek to appropriate without prior notice to those persons affected, and that to do so would be likely to contravene the Human Rights Act 1998.[23] As we explain in Part 8, notice to treat must be served on those holding "short tenancies" if the acquiring authority decides to exercise its rights under compulsory purchase rather than allowing the tenancy to expire by effluxion of time or terminating the tenancy by notice to quit.[24]

3.26 The Planning and Environment Bar Association went a step further, putting the case for mandatory service on all identified interest-holders, together with all persons entitled to compensation even though they may not have an interest in the land.[25] This would incidentally render the vesting of a discretion in acquiring authorities otiose. We believe, however, that it would be undesirable to require authorities to acquire interests for which they have no need. It would remove the flexibility currently enjoyed by acquiring authorities, and would risk a disproportionate increase in the compensation payable out of public funds for compulsory purchase. On the other hand, we do believe that those who have interests in land which may be affected by a compulsory purchase order should be informed of the acquiring authority's intentions so that they can act accordingly.

3.27 One consultee proposed that the extent to which notice may be served on agents should be clarified. We are of the view that clarification is not necessary. Service is governed by relatively modern legislation that provides a self-contained code.[26]

[23] See ECHR, Articles 6 and 8, and Article 1 of the First Protocol.

[24] See paras 8.44-8.46 below.

[25] For example, those entitled to disturbance payments under the Land Compensation Act 1973, s 37.

[26] See Compulsory Purchase Act 1965, s 30 (as substituted by the Acquisition of Land Act 1981, s 34(1), Sched 4) and the Acquisition of Land Act 1981, s 6 (as amended by the Planning and Compensation Act 1991, s 70, Sched 15, para 8 and by the Planning and Compulsory Purchase Act 2004, s 100(2)).

Although these provisions do not allow for service on agents,[27] they do permit service by leaving a copy of the notice "on or near" the subject land. The same formula is used in the recent amendment to the provisions concerning service of notices of making and of confirmation.[28] This, in our view, is adequate: it avoids the need to spend time and resources in identifying those authorised to act as agents and in investigating the extent of any agent's authority. Service at the site should be sufficient as a long-stop measure.

Recommendations for reform

3.28 We recommend that there should be a prescribed form, or prescribed forms, of notice to treat. Legislation should confer power on the relevant government department to make regulations prescribing the forms in question.

3.29 We accept that it would be highly advantageous to provide a clear statutory definition of those interests entitled to service. We also accept that the same definition should be applied whether implementation is by notice to treat or by vesting declaration.

3.30 It is important to emphasise the function of notice to treat. It is to inform those who have interests in, or who occupy, the land subject to compulsory purchase, of the authority's intentions to proceed to acquisition, and to invite them to negotiate for compensation for the loss of their rights in the land. If the authority does not intend to acquire a particular interest in the land there is no requirement to serve notice to treat.

3.31 Consistency between the notice to treat and vesting declaration procedures has been, by and large, achieved as a result of section 7(1)(ii) of the Compulsory Purchase (Vesting Declarations) Act 1981 which, on execution of a vesting declaration, deems service of "constructive notice to treat" on every person who could have actually been served with notice to treat under section 5 of the Compulsory Purchase Act 1965. Exception is, however, made for persons "entitled to a minor tenancy or a long tenancy which is about to expire." This exception is not on all fours with the exception for those holding short tenancies contained in section 20 of the 1965 Act. It is self-evidently desirable that these exceptions are made compatible. Section 5 of the 1965 Act should, therefore, exclude expiring tenancies from the requirement to serve notice to treat, and section 20 of the same Act should be amended to cater for such tenancies, providing compensation entitlement for the lost value of any unexpired term. We make recommendations to this effect in Part 8 below.[29]

3.32 The other important distinction between the two statutes concerns the requirement to serve occupiers of the subject land. Where the authority proceeds by vesting declaration, every occupier of the land (save where there subsists a

[27] See *Fagan v Knowsley MBC* (1985) 50 P&CR 363, CA (brother as agent); *R (Staley-Brookes) v Newark & Sherwood DC* [2002] EWHC 1583 (Admin) (fax to solicitors).

[28] Planning and Compulsory Purchase Act 2004, s 100.

[29] See Part 8(2).

minor or expiring tenancy[30]) and every potential claimant who has supplied their details to the authority[31] is entitled to be served with notice of execution. By contrast, occupiers are not required to be served with notice to treat under the 1965 Act. We believe that this inconsistency should be rectified so that (subject to the exclusion relating to short or expiring tenancies) occupiers are entitled to be served whichever implementation procedure is adopted.[32]

3.33 Mortgagees are entitled to be served with notice to treat.[33] In the event of a failure to serve, they are not bound by any determination of compensation nor are they obliged, pending the mortgage being paid off, to accept any loss to their security.[34] It would be beneficial to encapsulate this principle in primary legislation.

3.34 Although the case was made to us in the process of consultation that special provision should be made for agricultural tenancies held from year to year, we do not consider that they should be treated differently from other minor tenancies.

3.35 It is essential that all those who are likely to have a viable claim for compensation should be aware of the authority's actions, and be invited to negotiate with the authority for the amicable compromise of their claims. At the same time, it is important that the authority is subject to an obligation that is realistic and achievable. The persons on the list should be readily ascertainable to the authority by serving a requisition for information on those whom it knows have an interest in the subject land, by carrying out a search at the Land Registry (or, where still relevant, the Land Charges Registry), or by visiting the site itself.

3.36 In our view, and subject to exceptions detailed in paragraph 3.37 below, the persons required to be served with notice to treat should comprise:

(1) Owners of a freehold interest in the land;

(2) Owners of a leasehold interest in the land;

(3) Mortgagees, legal and equitable;

(4) Those entitled to the benefit of an enforceable contract to create a freehold or a leasehold interest in the land, including those with the benefit of an option to purchase or of a right of pre-emption; and

(5) All persons in lawful occupation of the land.

[30] We discuss minor and expiring tenancies in more detail in Part 8(2) below.

[31] Under the Compulsory Purchase (Vesting Declarations) Act 1981, s 3.

[32] We understand that current practice of most acquiring authorities is to serve occupiers known to them.

[33] See further, for procedures for dealing with mortgages and rentcharges, Part 8(3) below.

[34] See *Cooke v LCC* [1911] 1 Ch 604.

This list corresponds to those who we believe are required to be served under the current law.

3.37 It should not, however, be necessary for the authority to serve notice to treat on those holding "minor tenancies" or those with the benefit of an incorporeal hereditament (typically an easement or profit à prendre) or those entitled to enforce a restrictive covenant. These are special cases. The authority may in the exercise of its discretion decide to acquire these interests and invoke the notice to treat procedure to this end, but it is not obliged to do so, and there are other courses of action open to it.[35] Nonetheless, we do believe, in order to promote transparency, that acquiring authorities should provide information as to their intentions to holders of such interests.

Recommendation (5) – Notice to treat

(1) An acquiring authority should be required to serve notice to treat in prescribed form on any owner of a freehold or leasehold interest in the land, any mortgagee (whether legal or equitable), any person entitled to the benefit of a contract to create a freehold or leasehold interest, and any lawful occupier of the subject land.

(2) It should not, however, be required to serve notice to treat on those holding "minor tenancies", those with the benefit of an easement or profit à prendre over the subject land, or those entitled to enforce a restrictive covenant over the subject land.

(3) An acquiring authority should be entitled, in the exercise of its discretion, to serve notice to treat in prescribed form on any person (other than those set out in (1) above) who owns an interest in, or occupies, the subject land.

(4) In section 5(2)(c) of the Compulsory Purchase Act 1965, there should be substituted reference to compensation being paid for loss incurred in accordance with the four compensation heads (as exist currently or as proposed).

(5) In section 20 of the Compulsory Purchase Act 1965, the right to compensation (and allied procedure) afforded to a minor tenant should be extended to any person holding a long tenancy which is about to expire (as defined in section 2(2) of the Compulsory Purchase (Vesting Declarations) Act 1981).

(3) NOTICE OF ENTRY

The existing law

3.38 By section 11(1) of the Compulsory Purchase Act 1965:

[35] These are explained in Part 8 below.

> If the acquiring authority have served notice to treat in respect of any of the land and have served on the owner, lessee and occupier of that land not less than fourteen days notice, the acquiring authority may enter on and take possession of that land, or of such part of that land as is specified in the notice.

3.39 The acquiring authority is therefore entitled to serve notice of entry in respect of either the whole or part of the subject land, and then to take possession of the whole or "of such part of that land as is specified in the notice". This means that it may serve different notices for different parts of the land at different times, or serve notice for the whole and in either case may take possession in stages. If it serves notice in respect of the whole, but opts to take possession in stages, once it has entered upon the first plot of land it is deemed (for the purpose of assessing compensation) to have taken possession of the whole.[36]

3.40 In order to prevent the premature expiry of the CPO, the authority must serve notice to treat within three years of its becoming operative,[37] and then (following service of notice of entry) must enter on and take possession of the subject land within three years of service of notice to treat.[38] This latter time limit may be extended by agreement between the parties.[39] No provision is currently made for expiry of a notice of entry once served.

3.41 Service of notice of entry does not commit the authority to taking possession at the end of the period specified in the notice, nor does it result in a notional taking of possession at that time.[40] What constitutes actual entry will be a question of fact.

Deficiencies

3.42 We highlighted in our Consultative Report on Procedure the not infrequent practice of delaying entry beyond the date specified in the notice (sometimes for a significant period) and, in passing, we questioned whether that practice actually complies with the wording of section 11(1) of the Compulsory Purchase Act 1965, which seems to envisage the specifying of the period with some precision. There is, however, no prescribed form, or form of words, for notice of entry. The legislation is also silent as to the power of an acquiring authority to withdraw notice of entry once served.

[36] See *Chilton v Telford Development Corpn* [1987] 1 WLR 872 (CA) (where the salient provisions in the New Towns Act 1981, Sched 6, para 4 mirrored those which it replaced in the Compulsory Purchase Act 1965, s 11(1)). Purchas LJ said, at 879, "I adopt the construction which is favourable to the owner and the occupier of the land, because these sections, although incidentally dealing with calculation of compensation and interest, were primarily enacted for the protection of such a person."

[37] See Part 4(1), below, on time limits for validity: Compulsory Purchase Act 1965, s 4; Acquisition of Land Act 1981, s 26.

[38] Compulsory Purchase Act 1965, s 5(2A)(c), unless compensation has been agreed or paid or referred to the Lands Tribunal, or a vesting declaration has been executed, within that second period.

[39] Compulsory Purchase Act 1965, s 5(2B).

[40] *Burson v Wantage RDC* (1974) 27 P&CR 556 (LT).

3.43 Failure to specify a date when (or a finite period within which) possession will be taken may give rise to serious uncertainty and disruption for occupiers. In turn, this can lead to the payment of compensation from public funds for avoidable losses. If a landowner does not know precisely when they must vacate (particularly as no further notice need be served once the original has expired, so after a period of delay they might be expelled without warning and with no right of appeal) that may very well comprise a breach of their rights under the Human Rights Act 1998.[41]

3.44 The Government has already signalled its concern that the time limits set out in the present legislation are too generous to acquiring authorities and, in the interests of speed and fairness, should be abridged.[42]

Provisional proposals

3.45 In our Consultative Report on Procedure we made no proposal for substantive reform of the arrangements relating to notice of entry, other than indicating that the obsolete procedure contained in Schedule 3 to the Compulsory Purchase Act 1965 should be repealed. We have now made a formal recommendation to this effect.[43] We noted the Government's proposals for adjusting the time limits, replacing the minimum period of 14 days with a maximum of three months.[44]

Consultation

3.46 We asked consultees whether, in their view, other practical problems flowed from operation of the rules for notice of entry and if so how they should be remedied.[45]

Taking of entry

3.47 The consensus was that the legislative controls on entry on land and the taking of possession should be more rigorous. The taking of possession by the acquiring authority entitles the affected owner to statutory interest[46] and to make application for an advance payment.[47] Yet service of notice of entry does not provide adequate information as to precisely when possession will actually be

[41] Interference with right of due process (Article 6), right to privacy (Article 8), and right to peaceful enjoyment of possessions (First Protocol, Article 1).

[42] See Policy Response Document (ODPM, July 2002), para 12(iii), and Part 4(1), paras 4.10-4.13 on time limits below.

[43] Para 3.14 above; Recommendation 4(2).

[44] We adopted the Government's time limit proposals elsewhere in our Report: see Law Com CP No 169 paras 5.14, 5.15 and Proposal 5. Government is minded to increase certainty in the process for affected parties by increasing the period from notice of entry to taking possession from the current minimum of fourteen days to a fixed period of two months, with an absolute requirement that if the authority has not taken possession within one month of the expiry date, the notice will cease to have effect (and will not be capable of re-service): see Policy Response Document (ODPM, July 2002), para 12(iii).

[45] Law Com CP No 169, para 5.28, Consultation issue (l).

[46] Compulsory Purchase Act 1965, s 11(1), Land Compensation Act 1961, s 32.

[47] Land Compensation Act 1973, s 52, as amended by Planning and Compulsory Purchase Act 2004, s 104.

taken. A longer period of notice would be preferable, together with effective sanctions for failure to take possession at the expiry of the period. There would also be advantages in flexibility, allowing parties to agree extensions of time between themselves.

3.48 One respondent suggested that an obligation could be imposed on the authority to take possession within a defined period of the notice of entry becoming operative.[48] It was also suggested, for transparency, that service of notice of entry should be registrable on the local land charges register.[49] Some respondents felt that in general a "telescoping" of the CPO implementation timetable would contribute to a more orderly handling of entry, and would help to remove the uncertainties which can flow from delay.

Passing of title

3.49 Presently title only passes when compensation has been paid to the owner (or into court) and a formal transfer of title (or deed poll) has been executed.[50] It was contended by English Partnerships that this may cause practical problems, especially where compulsory purchase of particular land is an integral part of a public/private joint venture with a commercial developer. In such a situation the acquiring body may need to demonstrate good title for financing purposes. It was therefore proposed that provision should be made for the automatic vesting of title when an authority takes possession under the notice to treat route.

3.50 This approach, it was argued, would not cause hardship to landowners because:

(1) The recipient of the notice would remain entitled to compensation;

(2) The recipient of the notice would not be expelled any earlier from their property than they would under the current rules;

(3) Notice to treat could still be withdrawn within the statutory time-frame;[51]

(4) The flexibility of the notice to treat procedure would be preserved.

Notification of entry

3.51 The Country Land and Business Association expressed concern that acquiring authorities sometimes fail to serve notice of entry on all the correct parties. Under section 11(1) of the 1965 Act it is mandatory to serve "the owner, lessee and

[48] In Law Com CP No 169 at Proposal 5(4) (time limits) we suggested that notice of entry would become effective two months after service and then remain valid for a further month during which possession could be taken (failing which, it would expire for good).

[49] We consider this issue in Part 3(8) below. Our conclusion is that it is not currently necessary to register notice of entry.

[50] We discuss the obligation to complete purchase in Part 5(2) below.

[51] Six weeks: see Land Compensation Act 1961, s 31(1). This would have to be made subject to the proviso, though, that possession could not already have been taken (reversing *R v Northumbrian Water Ltd, ex p Able UK Ltd* (1996) 72 P&CR 95: see Part 9, para 9.22 below).

occupier" of the subject land. Omitting one of these parties can give rise to confusion, distress and injustice. It was therefore suggested that the acquiring authority should be required to certify to the confirming authority proper compliance with this requirement.

3.52 The Planning and Environment Bar Association were concerned that the purpose (and authority) for entry were sometimes unclear. In the context of highway schemes, for example, where land is only temporarily required for landscaping or ground modelling, land is included in a CPO as a precautionary measure. It is not always clear whether entry in such circumstances purports to be effected under notice of entry or by some form of temporary licence (which may not be documented). In the view of the Planning and Environmental Bar Association, the acquiring authority should be required to certify in writing that entry has been effected (and on what date), whether that entry was in whole or in part, and whether entry was effected under notice of entry or under some other form of instrument or agreement (detailing the latter).

Recommendations for reform

Taking of entry

3.53 Government has already indicated its desire to see a measure of reform relating to the notice of entry procedure. As we indicate above, Government is minded to replace the current minimum period of 14 days with a fixed period of two months, allowing one further month thereafter for taking possession. If this were to be given legislative force, we believe that it would meet satisfactorily the concerns expressed to us about lack of certainty.

Passing of title

3.54 There would be serious practical difficulties should title be deemed to pass with possession where the authority has proceeded by notice to treat. Unlike general vesting declarations, where possession follows transfer of title in the whole, possession by notice of entry can be taken piecemeal. In our view, it would not be practicable to devise an arrangement where either title passes in stages or where it is deemed to pass as a whole on service of the first notice of entry.

3.55 We are of the view that if early passing of title is needed in a given situation, an acquiring authority would be better advised to invoke the vesting declaration procedure. This has the benefit of ensuring that title passes automatically on the vesting date without need for execution of any form of conveyance or transfer.[52] It is open to an authority to make separate vesting declarations in relation to separate plots of land and thereby to proceed incrementally with the transfer of title. Payment of compensation (and interest) runs from formal vesting rather than the date of taking possession.[53]

[52] Compulsory Purchase (Vesting Declarations) Act 1981, s 8.

[53] *Ibid,* s 10.

Notification of entry

3.56 We believe that certification of proper service will achieve little. A confirming authority has no right to intervene in the implementation stage: indeed it is *functus officio* once confirmation has been given or refused. The mischief complained of relates to the adequacy of notice to all persons who are liable to be affected. That could be overcome by extending the site notice arrangements that now apply to notices of making and of confirmation.[54] We consider further in Part 6 below the provisions concerning service of notices in general, but here specifically recommend reform in this respect.

3.57 We think that the Planning and Environment Bar Association's point can more properly be addressed by the standard notes supporting the prescribed form of notice to treat which we have recommended above.[55] Section 11(4) of the 1965 Act already makes it clear that entry (prior to payment of compensation) is prohibited except by way of notice of entry or "with the consent of the owners and occupiers". If that proviso is drawn to the attention of owners and occupiers at the notice to treat stage, they will be on notice to ask the authority – in the absence of notice of entry – for proof of a licence permitting entry. If that is not forthcoming, and entry is effected, the interest holder may have recourse to the courts for trespass.

Recommendation (6) – Notice of entry

Section 11(1) of the Compulsory Purchase Act 1965 should be amended so that notice of entry (in addition to service on every owner, lessee and occupier of subject land or part of that land) shall also be affixed to a conspicuous object or objects on or near the land and the display maintained, so far as is reasonably practicable, for its period of validity.

(4) UNAUTHORISED ENTRY

3.58 The Compulsory Purchase Act 1965 penalises acquiring authorities which enter and take possession without obtaining the requisite prior authority. In our Consultative Report on Procedure we provisionally proposed the repeal of the relevant provision.

Existing law

3.59 By section 11(4) of the Compulsory Purchase Act 1965:

> Except as provided by the foregoing provisions of this section, the acquiring authority shall not, except with the consent of the owners and occupiers, enter on any of the land subject to compulsory purchase until the compensation payable for the respective interests in that land has been agreed or awarded, and has been paid to the

[54] Acquisition of Land Act 1981, s 11(3), as substituted by Planning and Compulsory Purchase Act 2004, s 100(4); Acquisition of Land Act 1981, s15(1), (2), as substituted by Planning and Compulsory Purchase Act 2004, s 100(7).

[55] Para 3.28, Recommendation 5(1) above.

persons having those interests or has been paid into court in accordance with this Act.

3.60 Section 12 of the Compulsory Purchase Act 1965 provides that where an acquiring authority, or one of its contractors, "wilfully"[56] enters on and takes possession of any of the subject land in contravention of section 11(4) the authority "shall forfeit to the person in possession of that land the sum of £10 in addition to the amount of any damage done to the land by entering and taking possession".[57] A daily penalty of £25 lies where an authority remains in unlawful possession after a sum has been adjudged to be forfeited under section 12. If the authority has paid compensation (to the owner or into court) "in good faith and without collusion" in the reasonable belief that the person receiving the money (or for whose benefit it was paid) was entitled to it, then no penalty shall lie.[58]

Deficiencies and provisional proposal

3.61 In our Consultative Report we indicated our view that the penalty contained in section 12 of the Compulsory Purchase Act 1965 appears to serve no useful purpose in modern circumstances.[59] We considered that the amount of the "forfeit" was derisory and that, where damage is suffered, there seems no reason why a claim should not be brought in the ordinary way, by civil action. We therefore provisionally proposed its repeal without replacement.

Consultation and recommendation for reform

3.62 In the main, respondents agreed that section 12 should be repealed. Only the CLA and CAAV favoured retaining a form of penalty or forfeit, presumably as an incentive to authorities to carry out sufficient checks and enquiries.[60] In general, however, it was felt that claims for damages in trespass provided a more effective and more substantial remedy in the event of default by the acquiring authority. We agree with this, and confirm our provisional proposal.

Recommendation (7) - Unauthorised entry

Section 12 of the Compulsory Purchase Act 1965 should be repealed without replacement.

(5) REFUSAL OF ENTRY

3.63 In the event of force being necessary to effect entry, the authority should issue a warrant to the sheriff who is then authorised to use such force as is requisite to enable possession to be taken. Provision is made for the costs of enforcement to

[56] That is with a lack of honest belief that the conditions precedent have been fulfilled: *Steele v Midland Railway* (1869) 21 LT 387.

[57] That sum, plus the amount of any damage, is recoverable "summarily as a civil debt" in the magistrates' court (with appeal against forfeiture to the Crown Court).

[58] Compulsory Purchase Act 1965, s 12(6).

[59] See Law Com CP No 169, para 7.22.

[60] They suggested that the figure should be uprated to £1,000.

be deducted from the compensation payable, or to be levied by distress. We consider here the enforcement procedures available to acquiring authorities where they are refused entry upon the subject land.

Existing law

3.64 By section 13(1) of the Compulsory Purchase Act 1965:

> If the acquiring authority are under this Act authorised to enter on and take possession of any land, and the owner or occupier of any of that land, or any other person, refuses to give up possession of it, or hinders the acquiring authority from entering on or taking possession of it, the acquiring authority may issue their warrant to the sheriff to deliver possession of it to the person appointed in the warrant to receive it.

3.65 No application to court for a warrant of possession is therefore required. On receipt of the warrant by the sheriff, he or she "shall deliver possession of any such land accordingly".[61] Provision is made for the deduction of the costs of the warrant from the compensation payable to the claimant.[62] If the costs exceed the compensation, the authority may levy distress.[63]

3.66 We noted in the Consultative Report on Procedure the review then being conducted by Government into civil enforcement procedures generally.[64] The result of that review has been the enactment of certain provisions contained in the Courts Act 2003 changing the procedure for enforcement of High Court writs and replacing sheriffs with High Court "enforcement officers" for those purposes.[65]

3.67 Section 13 of the Compulsory Purchase Act 1965 is not, however, replaced or amended by the Courts Act 2003. Warrants issued by acquiring authorities must therefore, for the time being, be addressed to sheriffs and not to enforcement officers.

Deficiencies

3.68 In our Consultative Report on Procedure we considered that the enforcement machinery contained in section 13 was still regarded as useful, and we propounded the view that it satisfied the requirements of the Human Rights Act 1998.[66] Our concern about the enforcement procedure was the apparent lack of

[61] Compulsory Purchase Act 1965, s 13(2).

[62] Compulsory Purchase Act 1965, s 13(3).

[63] Compulsory Purchase Act 1965, s 13(4).

[64] Law Com CP No 169, para 7.29. The Government's proposals were set out in their Green Paper "Towards effective enforcement" (LCD, July 2001); and then in the Responses to Consultation document (April 2002).

[65] Courts Act 2003, s 99, Sched 7. The provisions came into force on 15 March 2004.

[66] Law Com CP No 169, para 7.28, referring to *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

control over the costs incurred by the sheriff and ultimately recoverable (at least in theory) from the owner of the subject land.[67]

3.69 The question now arises, following enactment of the Courts Act 2003, whether section 13 of the Compulsory Purchase Act 1965 should be amended so as to achieve conformity with the new legislative regime: in particular whether the employment of sheriffs to enforce entry upon land subject to compulsory purchase should be replaced by that of High Court enforcement officers.

Provisional proposals

3.70 In our Consultative Report on Procedure we provisionally proposed that the acquiring authority should bear the sheriff's costs, and have the right to deduct them from any compensation payable, but that this should be subject to review by the Lands Tribunal of the reasonableness of the costs being claimed.[68]

3.71 We provisionally proposed retention of the section 13 procedure whereby the acquiring authority may issue a sheriff's warrant.[69] However, it has since become clear that the procedure needs modernisation in order to bring it into line with the mechanism for enforcement of other warrants.

Consultation

3.72 First, we asked consultees whether they agreed that the warrant-based enforcement procedure should be re-stated in modern form.[70] All consultees who responded on this issue agreed that such a procedure should be retained.

3.73 The Department for Constitutional Affairs strongly supported the need for a modern re-statement of the enforcement procedure, following the model of the Courts Act 2003 and its attendant secondary legislation. They stressed the real practical difficulties consequential upon concurrent powers being vested in sheriffs and enforcement officers. For example, money claims against land (*fi fa* orders) are now to be enforced by the High Court enforcement officers, whereas compulsory purchase orders would continue to be enforced by sheriffs on the initiative of the acquiring authority. ODPM also suggested that the impact of the Courts Act 2003 should be considered on the statutory enforcement powers.

3.74 Secondly, we asked consultees whether the enforcement procedure gave rise to any practical problems. The Highways Agency stated that they were not aware of any specific practical problems although they considered that the process could be time-consuming if possession is required urgently. They did raise some concerns about the process in the light of our provisional proposal that possession should be taken within one month of the date specified in the notice of entry, and suggested that further consideration be given to this issue.

[67] Law Com CP No 169, para 7.28.

[68] Law Com CP No 169, para 7.28, Proposal 13(2), (3).

[69] Law Com CP No 169, para 7.28, Proposal 13(1).

[70] Law Com CP No 169, Consultation issue (V)(1).

3.75 RICS noted the practical problems that may arise regarding the timing of taking possession of the interests of investors (landlords) and occupiers (tenants). They suggested that the legal position of each should be clarified in the legislation. They also noted practical problems that can arise when only a part of the land is being taken into possession, with more to be taken at a later date. They stated that when such a situation exists two sets of the appropriate notices should be issued, one for each section of the land, rather than attempting to deal with both under one notice or procedure.

3.76 Thirdly, we asked consultees whether they agreed that the sheriff's costs should be borne in the first instance by the acquiring authority.

3.77 All consultees who expressed a view on this issue agreed with this provisional proposal. The Highways Agency stated that their current practice is to bear the sheriff's costs in the first instance and then deduct them from the claimant's compensation. The City of London Law Society agreed on the basis that such costs (which can be considerable) are made expressly deductible from compensation and recoverable as an ordinary civil debt in the event of the costs exceeding the compensation payable. DCA made the same point as to enforcement of the costs payable in the event of the compensation being insufficient to cover the costs in full. The Estates and Wayleaves Forum, emphasising that the enforcement procedure is being invoked primarily as a result of the landowner's intransigence, requested that statute clarify that the ultimate liability to pay the sheriff's costs lies with the landowner.

3.78 Some concern was expressed about the appropriate machinery for the assessment of costs. While it was generally agreed that the landowner should only be liable to pay such costs as are reasonable, several consultees felt that the Lands Tribunal is not the appropriate forum to assess reasonableness. Both CLA and the Central Association of Agricultural Valuers ("CAAV") argued that the courts' "taxation regime" would be a better method of establishing the reasonableness of the amount. The Welsh Development Agency agreed with the view that it should be the courts that deal with costs. DCA, however, agreed with us that assessment of costs should be a matter for the Lands Tribunal, rather than the courts.

3.79 The Bar Council also supported the proposal that the Lands Tribunal should determine the question of reasonableness. They wished to emphasise, however, that the function of the Tribunal in this respect should not be restricted to "review" on *Wednesbury* principles, setting aside only those costs which no reasonable authority would have incurred or which were otherwise incurred unlawfully. The Tribunal should simply be empowered to decide, on request by the claimant or by the authority, what costs should have been incurred, and to order payment of that amount, provided it does not exceed the sum actually incurred.

Recommendations for reform

3.80 Although the primary question in our consultation concerned the issue of costs, we now recommend that section 13 of the 1965 Act be amended to achieve

compatibility with the Courts Act 2003.[71] Not only will this promote procedural consistency, it should also have a positive impact in reducing the costs incurred in relation to enforcement. We understand that both DCA and ODPM support this reform.

3.81 It is clear in our view that the costs of enforcement (whether they be the costs of the sheriff, as under the current process, or the costs of enforcement officers, as recommended) should be borne initially by the acquiring authority, subject to recoupment from the landowner against whom enforcement has been necessary. The landowner should only be liable to meet such costs as are reasonable in the circumstances.

3.82 Despite the concerns expressed in the consultation process, we have formed the view that determination of the reasonableness of the costs should be within the jurisdiction of the Lands Tribunal. We consider that the Lands Tribunal, given its expertise in determining issues of compensation and other issues in relation to compulsory acquisition, is the most cost-effective, speedy and proportionate forum for the resolution of such disputes. It should be possible for the Lands Tribunal expeditiously to develop transparent procedure and practice for the determination of such costs.

Recommendation (8) – Refusal of Entry

(1) While the procedure enabling the acquiring authority to issue a warrant for possession (under section 13 of the Compulsory Purchase Act 1965) should be retained, the warrant should be issued to High Court enforcement officers rather than to the sheriff.

(2) The costs of the warrant should be borne initially by the acquiring authority subject to recoupment from the person refusing entry. The acquiring authority should be entitled to deduct such costs from any compensation payable to that person. Where costs exceed the level of compensation payable, they should be recoverable as a civil debt.

(3) The Lands Tribunal should have jurisdiction to decide whether the sum claimed by the acquiring authority as costs of enforcement is reasonable in all the circumstances of the case.

(6) DISTRESS

Introduction

3.83 The Compulsory Purchase Act 1965 contains a single specific provision dealing with distress as a means of enforcement of payment by parties involved in the compulsory purchase process. We have provisionally proposed its repeal, and we now confirm that as a final recommendation.

[71] We also recommend below, in Recommendation 9, that Compulsory Purchase Act 1965, s 13(4),(5) should be repealed.

Existing law

3.84 By section 29(1) of the Compulsory Purchase Act 1965:

> No distress levied under this Act shall be deemed unlawful, nor shall the person making the distress be deemed a trespasser on account of any defect or want of form in the warrant of distress or other proceedings relating to the distress; and the person making the distress shall not be deemed a trespasser ab initio on account of any irregularity afterwards committed by him so, however, that any person aggrieved by any defect or irregularity may recover full satisfaction for the special damage in civil proceedings.

3.85 The corresponding provisions under sections 138 and 141 of the Lands Clauses Consolidation Act 1845 were repealed by section 1 of, and Schedule 1 Part XIV to, the Statute Law (Repeals) Act 1993.

Deficiencies and provisional proposal

3.86 In our Consultative Report we stated that we saw no reason for this special provision for levying distress in the modern law, and we provisionally proposed its repeal on the ground that it served no useful purpose.[72]

Consultation

3.87 A substantial majority of consultees supported our provisional proposal. Few gave reasons, but the Highways Agency indicated that there was already adequate provision for the award of special damages in civil proceedings. CLA and CAAV both agreed that there was no justification for levying distress in this situation or any useful purpose to it.

3.88 DCA replied more substantively on the effects of the new enforcement procedures now contained in the Courts Act 2003, explaining that if the enforcement costs are borne by the acquiring authority, who will then recover them either through deductions from compensation payable or through the courts, there is no need for special provision enabling the High Court enforcement officer to levy distress. In that respect at least, section 29 would no longer serve any useful purpose.

3.89 There were two expressions of concern. The Law Society, while admitting that distress was not in general use, contended that it could be helpful in cases where little or no compensation is payable but enforcement costs are high. Richard Rattle gave some support for this, citing experience of circumstances where the costs of using a sheriff exceeded compensation payable and where section 29 had been a useful "lever" to assist in the recovery of the excess.

Recommendations for reform

3.90 On balance, we consider that the case for repeal of section 29(1) of the 1965 Act[73] is strong, and we recommend accordingly. We also believe that, in the light

[72] Law Com CP No 169, para 7.31, Proposal 14, Consultation issue (W).

of our recommendation above[74] that the costs of issuing a possession warrant should in future be recoverable as a civil debt (and not by levying distress), section 13(4),(5) of the 1965 Act should also be repealed, and we so recommend.

Recommendation (9) – Distress

(1) Section 13(4) and (5) of the Compulsory Purchase Act 1965 should be repealed without replacement.

(2) Section 29 of the Compulsory Purchase Act 1965 should be repealed without replacement.

(7) VESTING DECLARATION PROCEDURE

3.91 The vesting declaration is a relatively recent innovation, having been introduced by the Land Commission Act 1967, and presents few practical difficulties. In our Consultative Report on Procedure we expounded the view that there was no reason to amend the main features of the vesting declaration procedure. Indeed, the procedure would form an adequate basis for a future consolidation.[75] There are, however, three respects in which improvement can be made. First, some clarification of the effect of a vesting declaration on existing rights is desirable. Secondly, it is difficult to identify what step in the vesting declaration procedure amounts to the "exercise" of compulsory purchase powers under section 4 of the Compulsory Purchase Act 1965 (an important point for the definition of time limits). Thirdly, some adjustment of the divided land procedure as it applies to vesting declarations would be beneficial.

3.92 In the course of this Report, we make recommendations for the reform of the vesting declaration procedure in its application to these discrete areas. These recommendations are to be found in other Parts of the Report where the particular issues are discussed in their proper place. We include an explanation of the vesting declaration procedure here, as it forms an essential component in understanding the current processes for implementing compulsory acquisition, but at this stage we do no more than sketch the difficulties we have identified.

Existing law

3.93 The Compulsory Purchase (Vesting Declarations) Act 1981 applies the same implementation procedure irrespective of the status of the acquiring authority (that is, whether or not the authority is a ministerial body).[76]

[73] Section 29(2) of the 1965 Act, the only other subsection, has already been repealed by the Statute Law (Repeals) Act 1974.

[74] See Recommendation 8(2) above.

[75] Law Com CP No 169, paras 5.47-5.51.

[76] Compulsory Purchase (Vesting Declarations) Act 1981, s 1.

Declaration procedure

3.94 Before a general vesting declaration may take effect, three steps must be taken. First, the authority must give "preliminary notice" of its intent to make a general vesting declaration, by including particulars in either the statutory notice of confirmation of the order,[77] or a subsequent notice (published and served in the same manner as the notice of confirmation).[78] The preliminary notice must be given before service of any notice to treat in respect of the land which is to be the subject of a declaration.[79] The notice will invite potential claimants of compensation to provide their details.

3.95 Secondly, the general vesting declaration must be executed in prescribed form.[80] The declaration:

(1) must not be executed before the CPO comes into operation;[81]

(2) must not be executed before the end of the period of two months from first publication of the preliminary notice (or any longer period specified in the notice), unless "every occupier of the land specified in the declaration" gives written consent to earlier execution;[82]

(3) vests the subject land in the acquiring authority on the expiry of the period to be specified in the declaration (which period must be not less than 28 days following service of notice of execution of the declaration).[83] The "vesting date" is the first day following expiry of the specified period.[84]

3.96 Thirdly, notice of execution of the vesting declaration (in prescribed form) must be served on "every occupier of any of the land" (except land in which there subsists

[77] Published or served under the Acquisition of Land Act 1981, s 15 (as now substituted by the Planning and Compulsory Purchase Act 2004, s 100(7)): see Compulsory Purchase (Vesting Declarations) Act 1981, s 3(5).

[78] Compulsory Purchase (Vesting Declarations) Act 1981, s 3. The preliminary notice must include the prescribed particulars: *ibid,* s3(1), (3), and see the Compulsory Purchase of Land (Vesting Declarations) Regulations 1990 (the "1990 Regulations"), reg 3(b) and Sched, Form 2 Pt 1 (statement of effect of the Compulsory Purchase (Vesting Declarations) Act 1981, Parts II and III).

[79] Compulsory Purchase (Vesting Declarations) Act 1981*,* s 3(2).

[80] Compulsory Purchase (Vesting Declarations) Act 1981*,* s 4(1), and see the 1990 Regulations, reg 3(a) and Sched, Form 1 (form of general vesting declaration).

[81] Compulsory Purchase (Vesting Declarations) Act 1981*,* s 5(2). See para 3.16(1) above.

[82] Compulsory Purchase (Vesting Declarations) Act 1981, s 5(1).

[83] Compulsory Purchase (Vesting Declarations) Act 1981, s 8. Notice of execution is served under the Compulsory Purchase (Vesting Declarations) Act 1981, s 6.

[84] Compulsory Purchase (Vesting Declarations) Act 1981, ss 2(1), 4(3).

a minor or expiring tenancy)[85] specified in the declaration, and on every person who has supplied information in response to the preliminary notice.[86]

Effect of declaration

3.97 On the vesting date, the provisions of the Land Compensation Act 1961 and the Compulsory Purchase Act 1965 are deemed to apply as if (on the date of execution) notice to treat had been served on every person on whom such notice could have been served, except those persons who have already been served with actual (rather than constructive) notice to treat or who are entitled only to a minor or expiring tenancy.[87]

3.98 Title to the specified land "and all interests therein", and the right to take possession, are deemed to vest in the acquiring authority from the vesting date as if the authority was empowered to, and did, execute a deed poll under the Compulsory Purchase Act 1965.[88]

3.99 If there subsists in land, specified in a vesting declaration, a "minor tenancy or a long tenancy which is about to expire",[89] possession may only be taken after (i) serving notice to treat in respect of the tenancy; (ii) serving notice of entry (specifying a minimum of 14 days) on "every occupier of any of the land in which the tenancy subsists"; and (iii) awaiting expiry of the specified period.[90]

3.100 The Compulsory Purchase (Vesting Declarations) Act 1981 makes special provision for the vesting of divided land.[91]

Deficiencies

3.101 In our Consultative Report on Procedure we highlighted three possible deficiencies in the way in which the Compulsory Purchase (Vesting Declarations) Act 1981 works.

3.102 We noted the difficulties of its relationship with section 4 of the Compulsory Purchase Act 1965. In particular, it is doubtful what amounts to the "exercise" of

[85] We discuss minor and expiring tenancies in Part 8(2) below.

[86] Compulsory Purchase (Vesting Declarations) Act 1981, s 6 and see 1990 Regulations, reg 3(c) and Sched, Form 3 (notice specifying land and stating effect of vesting declaration).

[87] Compulsory Purchase (Vesting Declarations) Act 1981, s 7(1). It shall be assumed that the acquiring authority required to take the whole of the land specified in the declaration, and that it had knowledge of all the parties referred to in Compulsory Purchase Act 1965, s 5: *ibid.,* s 7(2).

[88] Compulsory Purchase (Vesting Declarations) Act 1981, s 8(1),(2). Deed polls are executable under the Compulsory Purchase Act 1965, s 9 and Sched 2, in accordance with s 28.

[89] "Minor tenancy" is defined in the Compulsory Purchase (Vesting Declarations) Act 1981, s 2(1), and "long tenancy which is about to expire" is defined in s 2(1),(2). See Part 8(2) below.

[90] Compulsory Purchase (Vesting Declarations) Act 1981, s 9.

[91] Compulsory Purchase (Vesting Declarations) Act 1981, s 12, Sched 1. We discuss these provisions in Part 7 below.

compulsory purchase powers in the context of the vesting declaration procedure.[92] This is an important question as powers have to be exercised within three years of the first notice date in order to keep a compulsory purchase order alive. We deal with this issue at Part 4(1) below and recommend that the defining moment should be the date of execution of the vesting declaration.[93]

3.103 We drew attention to the differences between the notice to treat and vesting declaration procedures where acquisition of divided land was concerned, and provisionally proposed the adoption of a unified process.[94] We discuss this at Part 7 below and recommend that there should be a single unified procedure applicable in such cases. [95]

3.104 We observed that it was not clear whether easements and other rights (such as restrictive covenants) are automatically extinguished or are merely overridden when the vesting declaration procedure is invoked.[96] This is a complicated issue. Under the notice to treat procedure easements and other rights affecting the subject land are not automatically extinguished, but may be overridden when necessary on payment of compensation. We discuss this more fully at Part 8(1) below and recommend that, whether rights are interfered with by notice to treat or by vesting declaration, the effect should be the same.[97] Rights should be presumed overridden unless, and until, the acquiring authority elects to extinguish. [98]

Consultation

3.105 We invited views of consultees on two issues: whether the vesting declaration procedure operates satisfactorily in practice and whether our original analysis of the operation of the procedure was correct in relation to easements and other rights over subject land.

Problems with the procedure

3.106 A number of respondents told us that they had not encountered any major problems with the vesting declaration procedure in practice. Interestingly, one respondent (the Highways Agency, which has significant experience of compulsory acquisition for road schemes) told us that they do not use the procedure because of its inflexibility. By reason of its "blanket" effect it may lead to unnecessary acquisition of title to temporary licence and dedication plots, and subsequently to the need to dispose of unwanted tranches of land.

[92] Law Com CP No 169, paras 5.9-5.11.

[93] See para 4.35, Recommendation 11(4).

[94] Law Com CP No 169, paras 6.34, 6.49.

[95] See para 7.28, Recommendation 21(1).

[96] Law Com CP No 169, para 5.50.

[97] See para 8.30 below. Recommendation 22 is designed to be a unified procedure.

[98] See para 8.35, Recommendation 22(1).

3.107 A number of practical problems were raised by the respondents, which fall under two heads; delay and compensation.

DELAY

3.108 The Law Society suggested that the divided land procedure (incorporating "notice of objection to severance") can have the effect of delaying the operation of the entire vesting declaration, and not simply the land that is the subject of the objection notice. RICS were concerned that difficulties can arise where there is delay between the authority taking possession and occupiers physically vacating and particularly concerning the question of where responsibility for effecting fire damage insurance cover lies.

COMPENSATION

3.109 Although the vesting declaration route ensures swift and clean transfer of title to an acquiring authority (so that the authority can then deal with it as its own), there is no accelerated means of identifying compensation claimants. The absence of the option to pay into court may lead the acquiring authority unnecessarily to incur liability for interest from the deemed date of possession until payment to the correct claimant.

Interference with rights

3.110 Respondents accepted that the vesting declaration procedure is less than clear on this issue. All who responded on the point agreed that statutory clarification is warranted. We deal with these concerns in Part 8 below.

Recommendations for reform

3.111 We believe three reforms should be made:

(1) It should be made clear that execution of a vesting declaration (rather than service of a preliminary notice) is required to keep a compulsory purchase order alive within the three years' time limit for exercise of powers;[99]

(2) The procedure applicable to divided land should be amalgamated;[100] and

(3) New legislation should clarify the effect of vesting on existing rights in the subject land (under section 8 of the Compulsory Purchase (Vesting Declarations) Act 1981).[101]

[99] Compulsory Purchase Act 1965, s 4. See our discussion below on time limits for validity in Part 4(1) and, more particularly on vesting declarations, paras 4.6, 4.16 and 4.35 and Recommendation 11(3).

[100] See below at para 7.28 and Recommendation 21 relating to a unified procedure for divided land.

[101] See below at paras 8.8, 8.30 and Recommendation 22 relating to interference with existing private rights.

As we have already explained, our specific recommendations on these issues can be found elsewhere in this Report.

(8) LOCAL LAND CHARGE REGISTRATION

3.112 A potential purchaser, or any other person dealing with land (such as a mortgagee), has a justifiable interest in discovering whether the land in question is threatened by proposals for its compulsory acquisition. In our Consultative Report on Procedure we discussed the desirability of making certain steps in the process of compulsory purchase registrable on the register of local land charges. We consider here the reception accorded to our provisional proposals on this issue, and make recommendations accordingly.

Existing law

3.113 Registers of local land charges are maintained by "registering authorities".[102] Responsibility for applying to register falls on the "originating authority", in most cases the authority by whom the charge is brought into existence or by whom it is enforceable.[103] Where a registered charge is varied, or ceases to have effect, the register must be amended accordingly.[104]

3.114 Certain stages in the process of compulsory purchase are registrable:

(1) Preliminary notice of a general vesting declaration;[105]

(2) The right to claim compensation for injurious affection where no land is taken;[106] and

(3) The liability to make an advance payment of compensation.[107]

3.115 In addition, certain categories of CPO are required to be registered.[108] There is, however, no statutory requirement to register the making or confirmation of a CPO, or any subsequent steps in the procedure other than those listed above.

3.116 Registration is generally deemed to constitute actual notice to all persons and for all purposes connected with the land affected, as from the date of registration. It does not follow that a failure to register affects the enforceability of the matter in question. Persons who, having carried out a personal or official search of the

[102] Local Land Charges Act 1975, s 3.

[103] Local Land Charges Act 1975, s 5.

[104] Local Land Charges Rules 1977, r 8.

[105] Compulsory Purchase (Vesting Declarations) Act 1981, s 3(4). Execution of the vesting declaration is not, however, registrable.

[106] Land Compensation Act 1973, s 8(4), (4A).

[107] Land Compensation Act 1973, s 52(8), (8A).

[108] See the Opencast Coal Act 1958, s 11; the New Towns Act 1981, s 12.

register, purchase land affected by an unregistered local land charge, may, however, claim compensation for consequential loss.[109]

3.117 We explained in the Consultative Report on Procedure that acquiring authorities often, as a matter of good practice, informally note the making of a CPO, and the service of notice to treat and notice of entry, on the register. DLTR's Procedure Manual reads:

> The making of the order should be registered as a local land charge, although this is not a statutory requirement. Registration should ensure that the existence of the compulsory purchase order is revealed to those making enquiries.[110]

Deficiencies

3.118 In response to CPPRAG[111], Government indicated that they thought this state of affairs inadequate and that, in the interests of improved openness, mandatory registration should apply to the "making, withdrawal, confirmation/decision to refuse to confirm or cancellation of an order."[112] In our Consultative Report on Procedure we endorsed that view.[113]

Provisional proposals

3.119 We considered that the key stages requiring registration in order to protect the potential purchaser were the making of the CPO and the commencement of its implementation, whether by service of notice to treat or by service of the preliminary notice of a vesting declaration.[114] We therefore provisionally proposed that the making of the order and the service of notice of treat should become registrable as local land charges and that the service of the preliminary notice of a vesting declaration should remain so registrable.[115]

3.120 We did not consider it necessary to make express provision for withdrawal or lapse of orders or notices, as the rules already deal with cancellation or variation of the local land charges register.[116] Nor did we consider that any information other than the bare fact of the order being made, or the notice being served, should be the subject of registration.[117] The function of registration is to alert the

[109] Local Land Charges Act 1975, s 10(1). Compensation is payable by the registering authority, but may be recoverable from the originating authority.

[110] DTLR Compulsory Purchase Procedure Manual (TSO, November 2001) Part V, Section B (Drafting and Making the Order), para 57.

[111] See "Fundamental review of the laws and procedures relating to compulsory purchase and compensation" (DETR, July 2000).

[112] See DTLR Policy Statement, para 3.9 and App, para 2.23.

[113] Law Com CP No 169, para 7.52.

[114] Law Com CP No 169, paras 7.52-7.54.

[115] Law Com CP No 169, Proposal 17.

[116] Law Com CP No 169, para 7.52.

[117] Law Com CP No 169, para 7.53.

potential purchaser. Once that is done, he or she can pursue whatever enquiries are necessary to obtain the information required.

Consultation

3.121 A significant majority of consultees agreed with our view that the scope of local land charges registration should include additional stages in the process of compulsory purchase. The main reservation was how a balance could be achieved in practice between injecting greater certainty and not causing excessive delay (by making the steps dependant upon registration, or by making the process too cumbersome and costly). It was suggested that expansion of the local land charges regime should not be countenanced if it would have a deleterious effect on the operation of title registration (and more particularly electronic registration under the Land Registration Act 2002).

3.122 We have had fruitful discussions with HM Land Registry on this topic. They have helpfully indicated to us their view that the local land charges register is the appropriate machinery to achieve our objective of publicising the processes of compulsory purchase to any potential purchasers. In their view no advantage would be gained by requiring registration on the land register under the Land Registration Act 2002.

3.123 First, the Local Land Charges Rules place a continuing obligation on the relevant registrar to keep the register up-to-date. Secondly, the Land Registration Act 2002 provides that certain interests including local land charges will continue to bind the land and be protected, even though they are not reflected in the land register.[118] Thirdly, if a notice had specifically to be entered on the land register, the authority would have to identify, and then apply against, all the separate titles affected (and possibly pay additional fees). Fourthly, some form of protection would be necessary for those cases where title to the subject land is not registered.

3.124 We are grateful for, and we accept, this advice. We have framed our recommendation to encompass the consequences of non-registration as a local land charge. We have also confirmed our earlier proposal that informal notes might be used so that interested persons may discover the current status of orders on search of the register.

Recommendation (10) – Local land charge registration

(1) The following should become registrable as local land charges for the purposes of the Local Land Charges Act 1975:

(a) making of the compulsory purchase order; and

(b) service of notice to treat in respect of any land under section 5 of the Compulsory Purchase Act 1965.

[118] Land Registration Act 2002, ss 11, 12, 29, 30 and Scheds 1 and 3.

(2) Amendment of the register, to reflect withdrawal or lapse of the compulsory purchase order or of notices being varied or ceasing to have effect, should be governed by the Local Land Charges Rules.

(3) Failure to register as a local land charge should not invalidate the order or notice, but any person adversely affected by such failure should be entitled to claim compensation for consequential loss suffered in accordance with section 10 of the Local Land Charges Act 1975.

(4) To achieve consistency of approach, ODPM should provide authorities with guidance on the desirability of attaching informal notes to the register on the current status of an order and its state of implementation.

PART 4
TIME

4.1 In this Part, we consider two issues relating to time. First, we examine the time limits encountered during the implementation of a compulsory purchase order. We then consider the operation of limitation in relation to claims for compensation following compulsory acquisition.

(1) TIME LIMITS FOR VALIDITY

4.2 Much of this territory has already been explored by Government, although its proposals for reform of the relevant law have not yet been translated into legislation. In our Consultative Report on Procedure, we expressed our opinion that the Government's proposals were in need of some refinement.[1]

4.3 The key time limits relate to the following stages in the process following confirmation:

(1) The time within which the compulsory purchase powers must be "exercised" (by invocation of either notice to treat or vesting declaration procedure);

(2) The time during which a notice to treat remains valid following service;

(3) The time during which a notice of entry remains valid following service.

Existing Law

Time for "exercise" of powers

4.4 A compulsory purchase order[2] becomes operative "on the date on which notice of the confirmation or making of the order is first published" in accordance with the legislation.[3] Notice of confirmation has to be published in one or more local newspapers "[a]s soon as may be after the order has been confirmed".[4]

4.5 Section 4 of the Compulsory Purchase Act 1965 provides that the "powers of the acquiring authority for the compulsory purchase of the land shall not be exercised after the expiration of three years from the date on which the compulsory purchase order becomes operative." If the acquiring authority is proceeding by notice to treat, it must therefore serve notice to treat within three years of the date of publication of confirmation of the CPO ("the operative date").[5]

1 Law Com CP No 169, Part V(2).

2 Other than an order to which the Statutory Orders (Special Procedure) Act 1945 applies.

3 Acquisition of Land Act 1981, s 26(1).

4 *Ibid,* s 15.

5 *Grice v Dudley Corporation* [1958] Ch 329.

4.6 If the acquiring authority is proceeding by general vesting declaration, there is some doubt as to what it must do to satisfy section 4. In *Westminster City Council v Quereshi*,[6] Aldous J held that it was sufficient for the authority to serve a preliminary notice within the three-year period. In *Co-operative Insurance Society v Hastings Borough Council*,[7] however, Vinelott J held that execution of the vesting declaration itself was necessary in order to keep the CPO alive. In view of this uncertainty, it is a counsel of prudence, endorsed by a Departmental circular, that the authority should execute its vesting declaration within three years of the operative date.[8] Once a general vesting declaration has been executed no further time limits apply, subject to two minor exceptions:

(1) Notices of execution must be served in prescribed form "[a]s soon as may be" after execution;[9]

(2) The right to enter and take possession of land subject to minor and expiring long tenancies may only be exercised after service of notice to treat in respect of the tenancy and after service on every occupier of notice of entry for a period "not being less than 14 days" from the date of such service.[10]

Time following notice to treat

4.7 Under section 5(2A) and 5(2B) of the Compulsory Purchase Act 1965, notice to treat ceases to have effect at the end of three years beginning with the date of its service, unless one of the following has happened:

(1) Compensation has been agreed between the parties or has been awarded, or has been paid to the claimant (or into court);

(2) A general vesting declaration has been executed;

(3) The authority has taken possession of the land specified in the notice to treat;

(4) The question of compensation has been referred to the Lands Tribunal; or

(5) The parties have agreed to extend the period of validity of the notice to treat (assuming that (1) to (4) above have not occurred).

Time following notice of entry

4.8 Service of notice of entry is governed by section 11 of the Compulsory Purchase Act 1965. Section 11(1) provides that an acquiring authority is entitled to enter on

[6] (1990) 60 P & CR 380.

[7] (1993) 91 LGR 608.

[8] ODPM Circular 06/2004, para 63.

[9] Compulsory Purchase (Vesting Declarations) Act 1981, s 6.

[10] *Ibid,* s 9.

and take possession of the whole or part of any land which has been the subject of notice to treat if it has served "not less than fourteen days notice" on "the owner, lessee and occupier" of that land. As we indicated in our Consultative Report on Procedure,[11] this appears to leave the authority free (within the bounds of reasonableness) to take possession at any time after service of the notice of entry, without any further notice to the persons affected. In other words, the notice of entry remains valid indefinitely.

Deficiencies

4.9 The existing law has the following deficiencies:

(1) Section 4 of the Compulsory Purchase Act 1965 does not indicate clearly how compulsory purchase powers are to be "exercised", and in particular that the time limit relates both to service of notice to treat and to execution of a general vesting declaration;

(2) The inconsistency of the decisions in the *Quereshi* and the *Co-operative Insurance Society* cases is unsatisfactory and should be resolved by statute;

(3) The current open-ended nature of notice of entry should be rectified in order to produce greater certainty for landowners and to reduce any opportunity for abuse; and

(4) The current provisions enable acquiring authorities to take six years from confirmation of the CPO to the taking of possession. This seems too long, and may provide a tacit endorsement of excessive delay in the completion of projects with risk of hardship to those whose land is being acquired or whose interests are being otherwise affected.

Government reform proposals

4.10 In response to a recommendation by CPPRAG[12], Government consulted on the conferment on affected owners and occupiers of the right to serve a "reverse notice to treat" requiring the acquiring authority to implement the order.[13] It was, however, realised on consultation that such a reform, while enabling affected owners to seize the initiative, would have a potentially deleterious effect on the ability of authorities to carry out effective forward planning, and the proposal was accordingly dropped.

4.11 Instead, Government preferred to reduce the current time limits in an attempt to expedite the compulsory purchase process. Its most recent proposals, published in July 2002, are to:

[11] Law Com CP No 169, para 5.8. The right to serve the reverse notice to treat would arise once one year had elapsed after the confirmation of the CPO.

[12] "Fundamental review of the laws and procedures relating to compulsory purchase and compensation" Final Report (DETR, July 2000).

[13] Policy Statement (DTLR, December 2001), paras 3.10, 3.11 and App, paras 2.25-2.27.

> …reduce the overall period within which an acquiring authority has to complete the compulsory purchase process following confirmation from six years to three years, with a maximum of eighteen months between confirmation and serving the notice to treat (or a general vesting declaration) and then a maximum of a further eighteen months during which the notice to treat remains effective. Recognising the practicalities of organising, say, a major regeneration scheme, we feel that this reduction in time represents a fair balance between the interests of acquiring authorities and of those whose property is to be acquired.[14]

4.12 In its earlier proposals, DTLR had suggested that the period from notice to treat to taking possession "should be reduced to a norm of one year", with the proviso that it could be extended to three years by the minister at confirmation stage or generally by agreement of the parties.[15] The proposals were silent, however, as to the period for validity of notice of entry once served.

4.13 Government clarified its position in July 2002:

> We also envisage increasing the degree of certainty for those whose property is affected by increasing the period between the authority serving notice of entry and taking possession from fourteen days to two months, with an absolute requirement that, if the authority has not then taken possession within one month of the expiry of the two-month period specified in the notice of entry, that notice will immediately cease to have effect and the authority will not be able to serve a further notice of entry.[16]

Provisional proposals

4.14 In our Consultative Report on Procedure we suggested that ODPM's proposals could be further refined as follows.

Validity of CPO

4.15 We proposed that a CPO should cease to have effect at the end of 18 months from the "operative date" rather than from the date of confirmation.[17] This would allow for any legal challenge which might first be made to the order.[18]

Vesting declaration

4.16 We proposed that legislation should indicate clearly that a CPO was implemented (and that powers were therefore being "exercised", thereby engaging section 4 of the Compulsory Purchase Act 1965) by service of notice to treat or by execution

[14] Policy Response Document (ODPM, July 2002), para 12(iii).

[15] This followed CPPRAG's recommendations in its Final Report, para 61(i).

[16] Policy Response Document, para 12(iii).

[17] Law Com CP No 169, para 5.15, Proposal 5(1).

[18] The "operative date" is the present trigger in the Compulsory Purchase Act 1965, s 4.

of a vesting declaration.[19] This would resolve the current conflict of authority and overturn the decision in *Westminster City Council v Quereshi*.[20]

Notice to treat

4.17 We proposed the adoption of the Government's approach that a notice to treat should cease to have effect at the end of 18 months from the date of its service, save where compensation has been agreed or awarded or has been paid or paid into court, a vesting declaration has been executed, notice of entry has been served or the question of compensation has been referred to the Lands Tribunal.[21]

Notice of entry

4.18 We proposed the imposition of a time limit on notice of entry: that it should take effect two months from the date of its service (an automatic fixed period) and be valid for one month, during which period the acquiring authority must take possession. If possession is not taken during that period, the notice of entry would cease to have effect, and the authority would be precluded from serving further notice.[22]

Time extension

4.19 We proposed that all these time limits should be capable of extension by agreement between the parties, or on application to the confirming authority.[23] In cases of particular complexity, an acquiring authority may genuinely need more time.

Consultation

4.20 In our Consultative Report on Procedure we asked consultees whether they agreed with our provisional proposals and, in particular, the issues on which we had suggested that some further clarification of the Government's proposals would be valuable.[24] We were conscious that, in adopting the general framework envisaged by Government for compressing time limits, we were moving into an area of public policy that could prove contentious. Understandably there was a mixed response.

Validity of CPO

4.21 Around half of those responding on this issue agreed with the proposal that the current three–year time limit contained in section 4 of the 1965 Act should be

[19] Law Com CP No 169, Proposal 5(2).

[20] (1990) 60 P & CR 380.

[21] Law Com CP No 169, Proposal 5(3). The exceptions replicate those currently contained in Compulsory Purchase Act 1965, s 5(2A): see para 3.18 and n 17, and para 4.7 above.

[22] Law Com CP No 169, Proposal 5(4).

[23] Law Com CP No 169, Proposal 5(5).

[24] Law Com CP No 169, para 5.15, Consultation issue (G).

reduced to eighteen months, subject, however, to the important proviso that this period could be extended by agreement where circumstances dictated. One respondent emphasised that the right to seek extension should be the same for both authority and for the landowner. Another respondent indicated that the "operative date" for a CPO should be six weeks after confirmation of the order, rather than on publication of notice of confirmation[25] (which notice has to be published "[a]fter the order has been confirmed"[26]).

4.22 The main expressions of dissent came from bodies which have acquiring authority status. The thrust of their concern was that, although clarity is important, a truncated time limit would not allow sufficient flexibility to authorities involved in complex land assembly projects. The Highways Agency, for example, told us that because the national road programme is constantly evolving, particular schemes could be delayed subsequent to confirmation of the CPO through insufficient funding, changes in Government policy, or even change of Government. Without reasonable time limits for implementation, some schemes would simply expire, necessitating re-making of the order once the particular problem causing delay is resolved. That would result in further delay to the particular scheme and the burdening of the taxpayer with avoidable costs.

4.23 The same point was made by other authorities who explained that the complexity of funding arrangements and of design issues for major projects could put schemes in jeopardy. Large-scale redevelopment or infrastructure projects would become increasingly difficult to deliver. London Transport Property, in particular, told us that schemes such as Crossrail could become unworkable. They cited the Jubilee Line extension and the East End Line extension projects where, because of the thousands of separate properties involved in the construction of major tunnelling, service of notice to treat had taken many months to accomplish. In the former scheme, completion of the project took over six years following service of notices to treat. In practice the placing of works contracts for a linear scheme (and the execution of those contracts) is handled in phases. Signing of contracts in order to implement development can only occur once confirmation of the order has been achieved.

4.24 The City of London Law Society suggested that, in the light of the complex funding and site assembly concerns, the minimum period for serving notice to treat (or for executing a vesting declaration) should be two years, subject to the ability to extend by agreement or on application to the minister. The Welsh Development Agency advised the same time limit.

[25] As presently provided for in the Acquisition of Land Act 1981, s 26(1).

[26] Acquisition of Land Act 1981, s 15 as amended by the Planning and Compulsory Purchase Act 2004, s 100(7). The new section 15 lays down no time limit for publication, although, in respect of the new site notice, the confirming authority must maintain it in place for six weeks from "the date when the order becomes operative." Before the section was amended by the 2004 Act it provided for newspaper publication "[a]s soon as may be after the order has been confirmed".

Notice to treat

4.25 Respondents' views on this issue in the main mirrored the concerns expressed above. Those who agreed with our proposal reinforced their point that it is essential that there be provision for extension of time limits by agreement, and that the authority and the landowner have parity of right. Likewise, those who disagreed did so for the reasons already explained. The City of London Law Society suggested that the period should be two years (again with power to extend). On the other hand, the NFU suggested that the period of 18 months was too long, and that it should be reduced to 15 months (with notice of entry then having a three–month life).

Notice of entry

4.26 Those who responded in favour of our proposal repeated their concern that there should be provision for extension by agreement. The Highways Agency had reservations, however, about the practicality of effecting entry within the one–month period, particularly where a sheriff's warrant is required in order to facilitate the process.[27] They suggested that an exception be framed to our proposal to the effect that, where entry is refused necessitating application for a warrant, there be deemed compliance with the one–month time limit where application has been made for a warrant within that month (even if execution falls outside the period). The Welsh Development Agency argued for considerably greater latitude,[28] subject to the claimant being able to require possession by service of a seven–day counter–notice.

4.27 LT Property suggested two amendments to our proposal in order to surmount, in particular, the special engineering problems which attach to tunnelling projects:

(1) In tunnelling schemes there should be a minimum period for serving notice of entry (as now), which they suggest be one month, but there should be no maximum period for its validity;[29]

(2) In other projects there should again be no maximum period, but it should be open to a claimant to serve counter-notice on the authority (two months after receipt of notice of entry), requiring possession to be taken in 28 days.

Time extension

4.28 There was virtual consensus on the suggestion that time limits should be capable of extension. Respondents, particularly those representing acquiring bodies, were anxious that flexibility should be built into the process to allow for complex cases. Westminster City Council indicated that if the notice of entry provisions are made immutable (with fixed minimum and maximum periods), local authorities would

[27] Compulsory Purchase Act 1965, s 13. We deal with this procedure under Part 3(5) above and Recommendation 8 (refusal of entry).

[28] Notice of entry having validity for up to three years.

[29] LT Property argued that, in their view, claimants are unlikely to be prejudiced by delay in taking possession of subsoil.

have significant difficulty in entering into undertakings with owners not to implement confirmed CPOs.[30] RICS drew attention to the fact that our proposal relating to time extensions omits a requirement to justify the seeking of extension with reasons. They felt that should be rectified.

4.29 The major voice of dissent to our proposal was ODPM who suggested that, if time extensions were to be sought from the confirming authority (rather than by agreement), a statutory procedure would be required for representations to be made to, and considered by, the minister. That would be cumbersome and would lead to delays in the process.

Recommendations for reform

4.30 Ultimately the issue of whether, and if so how, CPO procedures are to be expedited is a matter of policy for Government. Insofar as new time limits are to be introduced to achieve such an objective, it is particularly difficult for the Law Commission to justify, and hence to make, precise recommendations as to the appropriate length they should attract. In formulating our recommendations we have not therefore sought to quantify precisely the appropriate time limits. We do, however, believe that reform of time limits is necessary in the following respects.

4.31 First, there is clearly a strong case for reducing the time during which an acquiring authority may implement a CPO from the three–year limit which is currently applicable. A majority of our respondents would favour a reduction of the limit to two years or less.

4.32 Secondly, we believe that there is also a strong case for reducing the time during which a notice to treat may be acted upon by an acquiring authority. Similarly, a majority of our respondents would favour a reduction of the limit to two years or less.

4.33 Thirdly, we consider that it is essential to introduce time limits to control the operation of notice of entry. In particular, a notice of entry should not remain valid irrespective of the interval of time elapsing since its service on owners and occupiers of the land. We therefore believe that a notice of entry should specify a date on which it takes effect (being a reasonable time after service) and also a date by which entry must be made and possession taken, failing which the authority will be unable to act upon the notice.

4.34 We believe that some flexibility should be introduced into the system and that it should be possible for the acquiring authority and the landowner to agree between themselves an extension of the time for acting upon a notice to treat or a notice of entry (as the case may be). We are not convinced, however, that those parties should be entitled to agree an extension of the time for implementation of the compulsory purchase order, as that order will have been confirmed by the confirming authority on the basis that the acquiring authority is expected to proceed expeditiously with the acquisition.

[30] We discuss the issue of undertakings in the context of abortive orders in Part 9 below.

4.35 Finally, it would be extremely valuable to resolve those difficulties that have arisen in the interpretation of section 4 of the Compulsory Purchase Act 1965. It should be made clear that in determining whether an acquiring authority has implemented a CPO within the prescribed period, the question is whether the authority has either served notice to treat or executed a general vesting declaration.

Recommendation (11) – Time limits

(1) The powers exercisable pursuant to the compulsory purchase order should only be exercisable for a prescribed period (being less than the current period of three years) from the date on which the order becomes operative.

(2) On the expiration of the prescribed period the compulsory purchase order should cease to have effect. Section 4 of the Compulsory Purchase Act 1965 should be amended accordingly.

(3) An acquiring authority should be treated as having exercised powers by service of notice to treat or by execution of a general vesting declaration but not otherwise.

(4) A notice to treat should cease to have effect on the expiration of a prescribed period (being less than the current period of three years) from the date on which the notice to treat is served, save and insofar as it relates to land in respect of which:

- **(a) compensation has been agreed or awarded or has been paid or paid into court;**
- **(b) a general vesting declaration has been executed;**
- **(c) the acquiring authority has served notice of entry; or**
- **(d) reference has been made to the Lands Tribunal for determination of the compensation payable.**

(5) A notice of entry should not take effect until the expiry of a prescribed period from the date on which it is served, and it should cease to have effect on the expiration of a prescribed period from the date of service, save and insofar as it relates to land in respect of which entry has been made and possession taken. Where notice of entry has expired without entry being made, it should not be permitted to serve any further notice in respect of the land to which the expired notice relates.

(6) The time limits referred to in (4) and (5) above should be capable of extension by agreement between the acquiring authority and those persons owning land or interests in land.

(2) LIMITATION PERIODS FOR COMPENSATION CLAIMS

4.36 Recent case law has emphasised the importance of making compensation claims to the Lands Tribunal within the statutory time limits. Failure to do so may result in the claim becoming statute-barred. In our Consultative Report on Procedure we considered the case for rationalising the law of limitation as it applies to the

payment of compensation for compulsory purchase and made provisional proposals for reform.[31] These proposals sought to take account not only of the existing law of limitation, primarily contained in the Limitation Act 1980, but also of the recommendations made by the Law Commission, and accepted in principle by Government, for reform of the law of limitation in our 2001 Report on Limitation of Actions.[32]

Existing Law

4.37 The Limitation Act 1980 does not deal specifically with claims for compensation on compulsory purchase. By section 9 of that Act, however:

> An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

4.38 In *Hillingdon Borough Council v ARC Ltd*,[33] the Court of Appeal held that, applying section 9 of the Limitation Act 1980, references of compulsory purchase compensation claims must be made to the Lands Tribunal within six years of accrual of the cause of action. Where the acquiring authority was proceeding by notice to treat, the cause of action accrued on the date of entry upon the subject land.[34] The same time limit applies in relation to claims for injurious affection.[35]

4.39 The Compulsory Purchase (Vesting Declarations) Act 1981 specifically imposes a time limit for reference of a compensation claim to the Lands Tribunal where the acquiring authority is proceeding by general vesting declaration: in this case six years from the date on which the claimant (or his or her predecessor) "first knew, or could reasonably be expected to have known" of the vesting of title in the authority.[36] Once that period has expired, the authority is wholly relieved of any obligation to pay compensation.[37]

4.40 By section 20(1)(b) of the Limitation Act 1980, no action shall be brought to recover proceeds of the sale of land after the expiration of twelve years from the date on which the right to receive the money accrued. As a result of the operation of the "statutory contract" arising on the agreement or determination of compensation, it is thought that the claimant has twelve years from such agreement or determination to bring proceedings to recover the sum in question.

[31] Law Com CP No 169, paras 7.2-7.17.

[32] Limitation of Actions (2001) Law Com No 270.

[33] [1999] Ch 139.

[34] The right to recover interest on the compensation sum does not accrue until the amount on which the interest is payable is awarded or agreed: *Halstead v Manchester City Council* [1998] 1 All ER 33 (CA).

[35] See, for a recent example where the claimant unsuccessfully argued that the acquiring authority was estopped from relying on section 9 of the Limitation Act 1980, *Bridgestart Properties Ltd v London Underground Ltd* [2004] EWCA Civ 793.

[36] Compulsory Purchase (Vesting Declarations) Act 1981, s 10(3).

[37] *Royal Bank of Scotland plc v Clydebank District Council* [1992] SLT 356, explained in *Hillingdon Borough Council v ARC Ltd* [1999] Ch 139, para 36, *per* Potter LJ.

4.41 Where the acquiring authority has invoked the deed poll procedure,[38] and has paid compensation moneys into court, it appears that potential claimants have 12 years in which to exercise their rights to take the money out. Section 29 of the Local Government (Miscellaneous Provisions) Act 1976 (applicable only to local authorities) provides that, once 12 years have elapsed since the date of payment into court, the acquiring authority may apply for unclaimed compensation to be paid out to them. The court does, however, have a discretion, exercisable after the 12 year period, to order payment of such sum as it considers just to persons who would previously have been entitled.[39]

Law Commission Report on Limitation of Actions (2001)

4.42 The Law Commission's 2001 Report on Limitation of Actions was published with a draft Bill annexed in June of that year.[40] No specific recommendations were made on the law of limitations as it applies to compensation for compulsory purchase.

4.43 The 2001 Report recommended replacing the present statutory time limits with a "core regime", based on a "primary limitation period" of three years, running from the date when the claimant knows (or ought reasonably to know) of the facts giving rise to the claim. This core regime was however to be subject to a "long-stop limitation period" of ten years from the accrual of the cause of action.[41]

4.44 Pursuant to the recommendations, claims arising from a statute (such as those for compensation for compulsory purchase) would be subject to the "core regime", with a primary limitation period of three years.[42] Claims to recover the proceeds of sale of land would not be subject to the "primary" period, but would be subject to the "long-stop" period, which would run from the date on which the vendor became entitled to recover the proceeds.[43]

4.45 At the date of publication of the 2001 Report, the compulsory purchase project was in its infancy, no more than a preliminary "scoping" study having been published. It did not therefore seem appropriate to make recommendations in relation to compulsory purchase and limitation in advance of completion.[44] However, in the light of comments made by consultees we did agree "with some hesitation" that claims under the Compulsory Purchase (Vesting Declarations) Act 1981 should be excluded from the core regime. We also recommended that

[38] Where, for example, an owner is untraceable: see Parts 5(1) (deed poll procedure) and 5(5) (untraced owners) below.

[39] Local Government (Miscellaneous Provisions) Act 1976, s 29(2).

[40] Limitation of Actions (2001) Law Com No 270.

[41] Law Com No 270, para 1.12.

[42] Law Com No 270, paras 4.201, 4.202. The three-year limitation period would apply, without more, for referral of claims to the Lands Tribunal.

[43] Law Com No 270, para 4.151.

[44] Law Com No 270, para 4.285, n 333.

claims under section 32 of the Land Compensation Act 1973 should be brought within that regime.[45]

4.46 On 16 July 2002 it was announced that Government accepted in principle the Law Commission's recommendations relating to limitation of actions, and that it would "give further consideration to some aspects of the report, with a view to introducing legislation when an opportunity arises."[46] At the date of writing this Report no such legislation has been introduced.

Deficiencies

4.47 In our Consultative Report on Procedure we highlighted the anomaly, brought to our attention by consultation responses on the Limitation of Actions project, that there is a specific statutory time limit for compensation claims under the vesting declarations procedure, but no such specific time limit where the authority is proceeding by way of notice to treat.[47] Although in *Hillingdon Borough Council v ARC Ltd*[48] the Court of Appeal held that, following notice to treat and entry, a compensation claim under section 11 of the Compulsory Purchase Act 1965 is subject to a six-year limitation period,[49] the position remains unsatisfactory. Under the vesting declaration procedure, the six-year period for reference to the Lands Tribunal runs from the date of knowledge, or presumed knowledge, of vesting. By contrast, under the notice to treat route, the six years runs from the date of entry upon the subject land irrespective of the state of the claimant's knowledge.

Provisional proposals

4.48 We provisionally proposed in our Consultative Report on Procedure that the limitation periods relating to compensation under the present law should be rationalised. Our proposals were framed in the alternative, first on the basis of no change to the existing general law, and secondly on the basis of an amended law of limitations implementing our recommendations in the 2001 Report.

4.49 The provisional proposals were to the following effect:

(1) For reference of compensation claims to the Lands Tribunal:

(a) under the existing law, a period of six years running from the date when the claimant knew, or ought reasonably to have known, of

[45] Law Com No 270, para 4.287. The reference in this paragraph to section 34 is erroneous: see Law Com CP No 169, para 7.10, n 14. Section 32 of the 1973 Act sets out the mechanics for making a claim for a statutory "home loss payment" where an individual has been displaced from their dwelling. By section 32(7A), for the purposes of the Limitation Act 1980, a person's right of action to recover a home loss payment is deemed to accrue on the date of displacement. Section 32 does not, however, stipulate a limitation period.

[46] "Government accepts law commission proposals on time limits" 16 July 2002, press release Lord Chancellor's Department 217-02 (http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=27098&NewsAreaID=2).

[47] Law Com CP No 169, para 7.13.

[48] [1999] Ch 139.

[49] Under Limitation Act 1980, s 9.

the taking of possession of the subject land or of its vesting in the acquiring authority as the case may be;

(b) under the amended law, in accordance with the "core regime", a period of three years from the date when the claimant knew or ought reasonably to have known of the taking of possession or vesting, with a "long-stop" period of ten years.

(2) For actions to recover compensation following determination by the Lands Tribunal, or agreement:

(a) under the existing law, a period of twelve years;

(b) under the amended law, a period of ten years;

in either case from the date of the determination or agreement.

(3) For payment out of court to a claimant of sums paid into court:

(a) under the existing law, a period of twelve years;

(b) under the amended law, a period of ten years;

in either case from the date of payment into court, but subject to the proviso that the court may order payment to a claimant where it is satisfied there are good reasons for an application not having been made within that period, or in other exceptional circumstances. [50]

Consultation

4.50 In our Consultative Report on Procedure we asked consultees whether there should be time limits for reference of compensation disputes to the Lands Tribunal and whether the time limits should be the same under both the notice to treat and the vesting declaration procedures.[51]

4.51 A significant majority of respondents agreed that there should be time limits for reference of claims to the Lands Tribunal so that they could not run indefinitely and that any such time limits should be standardised. Concern was expressed by the NFU that claimants should be made aware of the time limits applicable; they suggested that acquiring authorities should be under an obligation to give such information to potential claimants and to remind claimants before the limit expires. We consider that this is an important point. We believe that the authority should be obliged to provide such information, perhaps in notes of guidance accompanying the notice to treat or the vesting declaration notification. We are not convinced, however, that it is desirable to require authorities to remind claimants at any later stage, although this may be good practice.

[50] Law Com CP No 169, para 7.17, Proposal 12.

[51] Law Com CP No 169, para 7.17, Consultation issue (T)(1), (2).

4.52 ODPM suggested to us that, if there were to be a limitation period or periods, there should be provision for such period or periods to be extended by agreement. This approach would be preferable to the artificiality of requiring the commencement of proceedings within a time limit in circumstances where such proceedings would then be inevitably adjourned.

4.53 Although neither the Limitation Act 1980 nor the Compulsory Purchase (Vesting Declarations) Act 1981 makes express provision for mutual extension of limitation periods without the sanction of the court, we are aware that the courts have read into the legislation a power to extend limits by agreement, so long as the extension is for a reasonable period only.[52] In *Chester-le-Street DC v Co-operative Wholesale Society*[53] it was held that the time limit was procedural rather than jurisdictional, and thus was capable of being waived explicitly or by behaviour.

4.54 In its original Policy Statement, DTLR indicated that it saw some merit in the automatic reference of compensation disputes to the Lands Tribunal on expiry of a prescribed period of time.[54] Following consultation, however, ODPM formed the view that it would be unwise to proceed with such a reform because of difficulty in formulating the appropriate trigger for automatic reference, and because acquiring authorities might be tempted to put undue pressure on claimants to settle quickly for less than their proper entitlement.[55] We agree with this view.

4.55 We have always envisaged that the proposed rationalisation relating to referrals to the Lands Tribunal should apply both to the existing law and to any amended law based upon our 2001 recommendations. The Highways Agency expressed doubt about the "core regime", on the basis that if claimants were subject to the "primary limitation period" (three years) rather than the "long-stop" period (ten years), they would not have sufficient time to quantify all their losses adequately. Monitoring and assessing adverse effects of works on trade may take several years beyond the construction phase. Otherwise, respondents supported the policy we advanced.

4.56 An additional issue was raised concerning the interrelationship of statutory limitation and the deed poll procedure contained in section 9 of the Compulsory Purchase Act 1965. It was contended that section 9 does not make appropriate provision to ensure finality where a landowner fails to co-operate in making title or conveying.

[52] The limitation period applies only to reference for determination. Even where it expires, there is nothing to prevent the parties settling the claim by agreement or from enforcing an agreement by reference to arbitration under Lands Tribunal Act 1949, s 1(5): see *BP Oil UK Ltd v Kent CC* [2003] RVR 276 (CA), rather than determination under s 1(3).

[53] [1998] EGCS 76 (CA). See also *Bridgestart Properties v London Underground* [2004] EWCA Civ 793; [2004] All ER(D) 267 (Jun) (CA) where the reference was held statute-barred.

[54] Policy Statement (DTLR, December 2001), App, para 2.34. Such a reform would require amendment of the Land Compensation Act 1961, s 4. That falls outside our terms of reference: see para 1.18 above.

[55] Policy Response Document (ODPM, July 2002), para 17(ii).

4.57 Section 9 operates only where the authority is able to tender the "compensation agreed or awarded to be paid" leading to payment into court.[56] If no claim has been made by the landowner, and the matter is not referred by the acquiring authority to the Lands Tribunal for determination within the limitation period,[57] the matter then becomes statute-barred. Even though the authority has taken possession, there is no machinery available for completion of the purchase. Vesting defective title in an authority may obviously lead to practical problems at a later stage.[58]

4.58 We do not believe that the solution is to interfere with the current limitation provisions. We consider that the appropriate reform is by imposing an obligation on the acquiring authority to refer the matter to the Lands Tribunal within the limitation period. This can best be effected by amendment of section 9 of the 1965 Act. We deal with this issue separately in our discussion of the deed poll procedure in Part 5(1) below.[59]

Recommendations for reform

4.59 We confirm our provisional proposals and recommend accordingly that there should be standardisation of the limitation provisions as they apply to the dual implementation procedures of notice to treat and vesting declaration. Whichever implementation procedure is adopted, we recommend that the claimant should be required to claim compensation within a prescribed period of the date on which they knew (or ought to have known) of the entry upon, and taking possession of, the subject land,[60] or of the vesting of title in the acquiring authority.[61] The period for bringing a claim should be six years under the current limitation regime. In the event of implementation of the recommendations in the 2001 Report the period should be three years, with a "long-stop" of ten years. Once a claim has been brought, time then stops running and adjudication on the quantum of the claim (including computation of future losses) can occur outside the limitation period.

4.60 We further recommend that once compensation has been agreed or determined, the claimant should be required to recover the compensation payable within a prescribed period of the agreement or determination: 12 years under the current limitation regime, ten years under any amended law. Similar provisions should apply in relation to sums paid into court by the acquiring authority pursuant to the deed poll procedure.

[56] Compulsory Purchase Act 1965, s 9(1).

[57] Limitation Act 1980, s 9.

[58] For example, if the authority subsequently enters into leases with operating companies. It is also important that an authority does not retain indefinite contingent liabilities to pay compensation following closure of a project.

[59] Paragraph 5.28 and Recommendation 13(5).

[60] Where the authority is proceeding by notice to treat.

[61] Where the authority is proceeding by vesting declaration.

Recommendation (12) – Limitation periods

(1) Where the acquiring authority has proceeded by notice to treat or by vesting declaration and compensation has not been agreed, the issue should be referred to the Lands Tribunal for determination:

(a) (under the existing law) within six years of the date when the claimant knew, or ought reasonably to have known, of the taking of possession of the subject land or its vesting in the acquiring authority; or

(b) (under the amended law) within three years of the claimant's date of knowledge, in accordance with the "core regime", with a "long-stop" period of ten years.

(2) Following agreement, or determination by the Lands Tribunal, of the amount of compensation payable by the acquiring authority, that amount should be recoverable by the claimant within:

(a) twelve years (under the existing law), or

(b) ten years (under the amended law)

of the date of agreement or determination as the case may be.

(3) Following payment of compensation into court by an authority, the claimant should apply for payment out within:

(a) twelve years (under the existing law), or

(b) ten years (under the amended law)

from the date of the payment into court, subject to the proviso that the court may order payment to a claimant subsequently where it is satisfied that there are good reasons for an application not having been made previously, or that there are other exceptional circumstances.

(4) Section 9 of the Limitation Act 1980 should be amended accordingly.

PART 5
TRANSFER OF TITLE

5.1 The final stage in the implementation of a compulsory purchase order involves the transfer of title to the subject land to the acquiring authority. In this Part we review this process, considering the means of enforcement available to acquiring authorities by means of the "deed poll" procedure, the machinery for completion of the acquisition, and the liability for costs of completion. We also discuss the resolution of difficulties which may arise where the owners of the subject land are suffering from disability or incapacity, where they cannot be traced, or where the acquiring authority discover, subsequent to commencing implementation of the compulsory purchase order, that they have failed to purchase or to compensate all those entitled.

(1) DEED POLL PROCEDURE

5.2 Completion of a compulsory acquisition is governed by the ordinary law relating to sale of land. Once compensation has been agreed or determined, there comes into existence a relationship equivalent to vendor and purchaser under a contract for sale. This is sometimes referred to as a "statutory contract", enforceable if necessary through the courts by order of specific performance.[1]

5.3 There is, however, an additional remedy set out in section 9 of the Compulsory Purchase Act 1965 available to an acquiring authority where the landowner fails to convey or to make good title. This is execution of a "deed poll" vesting title in the authority and entitling them to immediate possession of the subject land.

Existing law

5.4 The deed poll procedure may be invoked by the acquiring authority where the owner of any of the land being compulsorily purchased, or of any interest in that land, does one of the following:

(1) Once compensation has been agreed or awarded, refuses to accept the compensation payment duly tendered;

(2) Neglects or fails to make out title to the land or interest to the satisfaction of the acquiring authority; or

(3) Refuses to convey or release the land as directed by the acquiring authority.[2]

5.5 The acquiring authority is thereupon entitled to pay into court the compensation payable in respect of the land or interest in question. The sum paid is placed to the credit of "the parties interested in the land".[3] The acquiring authority may then

[1] See *Capital Investments Ltd v Wednesfield UDC* [1965] Ch 774.

[2] Compulsory Purchase Act 1965, s 9(1).

[3] Whom the authority must describe: see Compulsory Purchase Act 1965, s 9(2).

execute a "deed poll" describing the subject land, declaring the circumstances of the payment and giving the names of the parties to whose credit the payment into court was made.[4] The effect of execution of the deed poll is that the "estate and interest" of the relevant owners vests "absolutely" in the acquiring authority and as against those persons entitles the authority to "immediate possession" of the subject land.[5]

5.6 The High Court may order distribution of moneys paid into court "according to the respective estates, titles or interests of the claimants", and make such other orders as it thinks fit. An order may be made on the application of any person claiming any of the money paid into court, or any interest in the whole or part of the affected land.[6]

5.7 Section 28 of the Compulsory Purchase Act 1965 makes provision for the mechanics of execution of deed polls.[7] The deed poll provisions in the 1965 Act are expressed to be subject to section 7 of the Law of Property Act 1925.[8]

5.8 Payments into court are governed by sections 25 and 26 of the 1965 Act. We deal with these provisions in more detail below, in Part 5(7). In our Consultative Report on Procedure we indicated our provisional view that the provisions should be replaced in simpler form in the context of deed polls.[9] The provisions in their present form (based substantially on those in the 1845 Act) are used far more rarely today because of the range of means for effecting entry (via notice of entry or vesting declaration) which are now available.

5.9 In summary, section 25 applies section 4 of the Administration of Justice Act 1965[10] in prescribing the method of payment. It makes specific provision for two matters in relation to compensation:

(1) Where the payment was "in respect of any lease, or any estate in land less than the whole fee simple, or of any reversion dependent on any

4 Compulsory Purchase Act 1965, s 9(3).

5 Compulsory Purchase Act 1965, s 9(4).

6 Compulsory Purchase Act 1965, s 9(5). For example, a mortgagee may apply for payment out of the amount secured by the mortgage: see *Re Marriage* (1861) 9 WR 843.

7 They are to be under seal and give rise to any stamp duty "which would have been payable upon a conveyance to the acquiring authority of the land described therein": Compulsory Purchase Act 1965, s 28(1),(2).

8 Under which section "any such power of disposing of a legal estate exercisable by a person who is not the estate owner is, when practicable, to be exercised in the name and on behalf of the estate owner".

9 Law Com CP No 169, para 5.37 and paras 7.32-7.40.

10 Although the words of Administration of Justice Act 1965, s 4 are retained in section 25 of the Compulsory Purchase Act 1965, section 4 itself has been repealed by s 75 of and Sched 9 to the Administration of Justice Act 1982 on the basis that there are no saving provisions (see Interpretation Act 1978, s 16). The Administration of Justice Act 1982, s 38 and Part VI, and the Court Funds Rules 1987, also govern payment of funds into court. In addition the Civil Procedure Rules ("CPR") Part 37 contains general rules for payments in and out of court under a court order.

such lease or estate", any person with an interest in the money may apply to the court for an order as to the laying out, investment, accumulation or payment so as to preserve "the same benefit as they might lawfully have had from the lease, estate or reversion or as near thereto as may be."[11] As we indicated in the Consultative Report on Procedure, this means that the court can fairly apportion between interested parties, for limited estates, sums paid into court and the income generated.[12]

(2) Any person who has only a possessory title (and no documentary proof of ownership) is entitled to apply for payment out of court of moneys if no other claim is made for them.[13] There is a presumption that such person is entitled to payment as owner unless and until "the contrary is shown to the satisfaction of the court".

5.10 Section 26 of the Compulsory Purchase Act 1965 deals with the liability of an acquiring authority for costs (for example, of the land purchase and of investment of compensation) where money has been paid into court. The court may make an appropriate order against the authority. The section is couched in complex terms.

Deficiencies

5.11 In our Consultative Report on Procedure we highlighted three areas which, in furthering a new statutory code, we believed merited attention.

5.12 First, we indicated that section 9 of the Compulsory Purchase Act 1965, closely derived as it is from the Lands Clauses Consolidation Act 1845,[14] is framed in an archaic manner.[15] The provisions are in need of modernisation and simplification within a new deed poll procedure.[16] Likewise, section 28 of the 1965 Act could usefully be modernised and incorporated within such a procedure.

5.13 Secondly, we doubted that the provisions in the 1965 Act relating to leases (or similar interests) and to those persons in possession as owners at the time of the

[11] Compulsory Purchase Act 1965, s 25(2).

[12] See Law Com CP No 169, para 7.34(1).

[13] Compulsory Purchase Act 1965, s 25(3), which speaks of "the persons respectively in possession of the land, as being the owners, or in receipt of the rents of the land, as being entitled to the rents at the time when the land was purchased". This sub-section follows closely Lands Clauses Consolidation Act 1845, s 79.

[14] Sections 76 and 77.

[15] Law Com CP No 169, paras 5.35, 5.36.

[16] In our consultative report we also drew attention to the linkage between the deed poll procedure in Part I of the Compulsory Purchase Act 1965 and the vesting declaration procedure as established by the Compulsory Purchase (Vesting Declarations) Act 1981, s 8(1) (discussed above in Part 3(7)).

purchase,[17] need to appear expressly in a modern code, so long as there is a general power for the court to make such orders as it thinks fit.[18]

5.14 Thirdly, we doubted that section 28(3) of the 1965 Act (which provides that the execution of a deed poll is subject to section 7(4) of the Law of Property Act 1925) any longer served a useful purpose.[19] The combined effect of these provisions appears to be that the acquiring authority is required to exercise its powers in the name of the estate owner where it is practicable to do so. We consulted specifically on this issue.

Provisional proposals

5.15 In our Consultative Report on Procedure we set out our provisional proposals for a new (and simplified) deed poll procedure.[20] Adoption of that procedure was made contingent, as under the existing law, upon the person entitled to compensation either refusing to accept that compensation, failing to make good title or refusing to convey the land.

5.16 In summary, we proposed that, once the compensation has been agreed or (in practice, more likely) determined, the acquiring authority may make payment into court, accompanied by a description of the subject land and of the persons entitled, so far as the latter are known to the authority. Having made that payment, which the court would hold to the credit of the owner, the authority would then be entitled to execute a deed poll (describing the land, the circumstances and persons credited with the compensation payment) vesting title in itself.[21] An eligible claimant would be entitled subsequently to apply to the court for an order that the payment into court be distributed, as well as any further appropriate ancillary orders the court may consider necessary. Incidental provisions would be incorporated in the new legislation dealing with matters such as sealing of deed polls, stamp duty and costs.

5.17 The effect of our proposals would be to repeal parts of sections 9[22], 25, 26[23] and 28[24] of the Compulsory Purchase Act 1965 and to replace those parts with simpler and more concise provisions, thereby addressing the three areas of deficiency identified above.

[17] Compulsory Purchase Act 1965, s 25(2),(3).

[18] Law Com CP No 169, para 5.35.

[19] Law Com CP No 169, para 5.36.

[20] Law Com CP No 169, para 5.37 and Proposal 7.

[21] All interests in respect of which compensation had been paid would vest absolutely in the acquiring authority, together with the right to take immediate possession in respect of them.

[22] But not section 9(5) of the 1965 Act which would be retained and amended: see para 5.27 and Recommendation 13(6) below, dealing with payments out of court and "incidental orders".

[23] Sections 25, 26 of the 1965 Act should be replaced in part: see Part 5(7) and Recommendation 19(1) (payments into and out of court) below.

[24] But not section 28(1),(2) of the 1965 Act which would be amended: see Recommendation 13(7) below.

Consultation

5.18 Those who responded to our proposals in connection with the deed poll procedure agreed with our view that it would be desirable to re-state the procedure in modern form, and that the detailed provisions relating to payment into court are no longer necessary, so long as the court is given a general power to make such orders as it thinks fit.[25] The Highways Agency, for example, informed us that they are making increasing use of this method of compulsory acquisition and would welcome the process being made as simple and as effective as possible. Others echoed the desire for simplicity.

5.19 Apart from one respondent who argued that perhaps a label more modern than "deed poll" would be appropriate, the only dissent to our provisional proposals came from the Law Reform Committee of the Bar Council. It suggested that leaving the ability to execute with the acquiring authority alone risked giving it too much power, and that some more effective form of check and balance is desirable. That might be effected by replacing the present system with one under which the court executes the conveyance or transfer.

5.20 We asked consultees whether they had any comment on the effect and continuing relevance of section 28(3), and in particular its reference to section 7(4) of the Law of Property Act 1925.[26] No consultee contested our proposal to repeal section 28(3). The Highways Agency told us that they have completed a number of deed polls, and that each had been exercised in the name of the Secretary of State as the acquiring owner, without problems arising.

5.21 Finally, we asked consultees to indicate the extent to which the deed poll procedure is used in practice and to share with us any practical problems of which they were aware.[27]

5.22 The principal concern related to limitation periods and the inability to utilise the deed poll procedure once the relevant limitation period has expired. Reference must be made to the Lands Tribunal within six years of the date of entry into possession.[28] The Highways Agency and RICS both asked what would happen if the limitation period expired before such reference was made. There is no obligation on the acquiring authority to make such a reference during the limitation period. Yet at the same time the authority is not entitled to execute a deed poll before compensation has been agreed or awarded.[29] The practical

[25] Law Com CP No 169, Consultation issues (K)(1),(2).

[26] Law Com CP No 169, Consultation issue (K)(3).

[27] Law Com CP No 169, Consultation issue (K)(4).

[28] The limitation period is governed by Limitation Act 1980, s 9 (as established by *Hillingdon LBC v ARC Ltd* [1999] Ch 139, CA). Limitation runs from date of entry: see *Bridgestart Properties v London Underground* [2004] EWCA Civ 793, CA. It was held in *Bridgestart Properties* that, although the parties were unaware of the time limit at the date of actual entry in 1994, by 1998 (when *Hillingdon* was decided by the Court of Appeal) the claimant should, as a "normal and sensible precaution"(*per* Keene LJ), have made a "protective reference" to the Lands Tribunal to prevent its cause of action later becoming statute-barred. See generally, on limitation for claims, Part 4(2) above.

[29] Compulsory Purchase Act 1965, s 9.

consequence is that even if an authority has taken possession, there may be no effective machinery for finalising the purchase, leaving the authority with defective title[30] (and the landowner without proper compensation).

5.23 This important omission should, in our view, be rectified. There are two possible solutions. Statute could enable an acquiring authority unilaterally to submit a valuation to the Lands Tribunal and make payment into court in that sum. Alternatively, an obligation may be imposed on the acquiring authority to refer any contested issue of compensation to the Lands Tribunal within the limitation period, or such extended period as the Tribunal may allow. We prefer the latter alternative.

5.24 Aside from this issue, consultees (such as the City of London Law Society) indicated to us that, although in their experience use of the deed poll procedure is currently not widespread, its future use may increase for two reasons. First, because the expeditious acquisition of paper title is necessary in order to facilitate the increasing number of concession-based schemes backed by compulsory purchase, where the concession company or other entity is granted a lease of the relevant asset, and that lease is then charged to funders. Secondly, public bodies are becoming anxious to use the procedure as a means of stopping the clock running on liability to pay statutory interest. The alternative to this, of course, would be greater use of the vesting declaration route in order to circumvent delay caused by reference to the Lands Tribunal.

Recommendations for reform

5.25 In the light of our consultation we are minded to confirm our provisional proposals. Our recommendations essentially replicate them, subject only to dealing with the limitation issue outlined above.[31]

5.26 The expression “deed poll” is straightforward and is understood by most people as representing a unilateral mechanism (for example, the procedure for change of surname). Not only do we believe that change is unnecessary, we are also conscious that any such change would require amendment of references in other legislation, notably the Compulsory Purchase (Vesting Declarations) Act 1981.

5.27 We are not persuaded that further controls on the procedure are necessary. At the moment a deed poll can only be executed where compensation is agreed or has been determined by the Lands Tribunal. In our view, acquiring authorities can be expected to execute deed polls unilaterally. The extent of the order (and of the land to be taken) will already have been determined by the Secretary of State in the confirmation process. If a claimant is aggrieved that an authority has taken more land by deed poll than is justified, their remedy lies either by way of judicial

[30] This can have serious consequences where an authority, as freeholder, has to enter into leases with operating companies, or to exchange land (under Acquisition of Land Act 1981, s 19), or to grant private rights of way over diverted access tracks.

[31] On payment into court see also our Recommendation 19 below.

review or through the review process contained in section 9(5) of the Compulsory Purchase Act 1965.[32]

5.28 We do believe that our earlier proposal needs to be supplemented by a further provision dealing with the limitation issue. We recommend that an acquiring authority should be obliged to make a reference to the Lands Tribunal within the limitation period where the amount of the compensation payment still has not been settled. That will be within six years from the date of accrual of the cause of action under the present limitation regime,[33] or such extended period as the Lands Tribunal may allow.

Recommendation (13) – Deed poll procedure

(1) If, after compensation in respect of any land or interest in land has been agreed or determined, the person entitled:

(a) refuses to accept the compensation; or

(b) fails to make out title to the satisfaction of the acquiring authority; or

(c) refuses to convey or release the land as directed by the acquiring authority,

the authority should be entitled to proceed by the "deed poll procedure" as described in this recommendation.

(2) The acquiring authority should be entitled to pay into the High Court the compensation payable in respect of the relevant land, or interest, accompanied by a description of the person or persons entitled (so far as known to the authority). The compensation so paid into court should be placed to the credit of those persons.

(3) On payment into court as above, the acquiring authority should be entitled to execute a deed poll describing the relevant land and the circumstances of the payment, and giving the names of the persons to whose credit the compensation is paid.

(4) On execution of the deed poll, all the interests in respect of which the compensation was so paid should vest absolutely in the acquiring authority, together with the right to immediate possession as respects those interests.

(5) The acquiring authority should be required to make a reference to the Lands Tribunal within the limitation period applicable for such

[32] It appears from the words in section 9(5) "and may make such order as the court thinks fit" that the court has a fairly broad discretion to direct an inquiry of its own and to make appropriate orders.

[33] Limitation Act 1980, s 9(1). See further Part 4(2), paras 4.37 et seq above.

references (or within such extended period as the Lands Tribunal may allow) for compensation to be assessed.

(6) On the application of any person claiming any part of the money paid into court, or any interest in any part of the land in respect of which it was paid into court, the High Court should be entitled to order its distribution according to the respective interests of the claimants, and to make such incidental orders as it thinks fit.

(7) The incidental provisions of section 28 of the Compulsory Purchase Act 1965 (sealing of deed polls, stamp duty, etc) should be incorporated, save for section 28(3) which should be repealed.

(8) The costs incurred in connection with a payment into court under this proposal should be borne by the authority, save as the court otherwise orders.

(2) OBLIGATION TO COMPLETE PURCHASE

5.29 Once notice to treat has been served, and compensation agreed or determined, the acquisition is ready to be finalised. Completion is governed by the ordinary law relating to the sale of land, and we consider here whether specific provision should be made in relation to compulsory purchase.

Existing law

5.30 Service of a notice to treat does not of itself create a binding contract of sale.[34] Once compensation has been agreed or determined, however, the relationship between land-owner and acquiring authority becomes equivalent to that of vendor and purchaser and what is known as a "statutory contract" comes into being. This contract is specifically enforceable by the parties, and is registrable as an estate contract.

5.31 In the nineteenth century it was well established that, where an acquiring authority had taken possession under compulsory powers, the landowner retained a lien on the land until the purchase money (and any compensation for injurious affection) had been paid. The court would enforce that lien by an order for sale, even though the works were constructed and in use.[35] Under current law,

[34] See *Capital Investments Ltd v Wednesfield UDC* [1965] Ch 774, 794, *per* Wilberforce J: "There is, by the mere service of a notice to treat, no consensus between the parties, because at this point the price has not been fixed. A notice to treat does nothing more than establish conditions in which a contract might come into existence, either a voluntary contract or a statutory contract. [The legal authorities] make it plain that a contract does not come into existence by the mere service of a notice to treat before the compensation has been determined."

[35] *Walker v Ware, Hadham and Buntingford Rly* (1865) 1 LR Eq 195, 199, *per* Sir J Romilly MR: "[T]he Act of Parliament does not deprive the plaintiff of his lien. It was not intended, that because power was given to railway companies to take possession of land upon paying into the bank the amount of the valuation of a surveyor and giving the bond required by the [1845] Act, the landowner should lose his ordinary right of lien when the

the landowner certainly has a right to enforce payment by an action for specific performance. What is less certain today is whether, pending payment of compensation, the vendor retains a lien on the subject land.[36] As we explained in our Consultative Report on Procedure:

> There seems little justification for such a lien, to secure what is a statutory right to payment of compensation by a public authority. On the other hand, where the acquiring authority is a commercial entity, such as a privatised utility company, the additional protection of a vendor's lien may continue to be important.[37]

5.32 Schedule 5 to the Compulsory Purchase Act 1965 contains a prescribed form of conveyance. It is not, however, mandatory; an acquiring authority is permitted to use any other form which it may think fit.[38]

Deficiencies and consultation

5.33 In our Consultation Report on Procedure, we indicated our provisional view that the present procedures were probably adequate. However, as part of our consultation we sought views on whether the law relating to vendor's lien requires statutory clarification of the circumstances and conditions for its operation.[39] We asked consultees whether there was any practical purpose to be served in retaining the prescribed forms of conveyance contained in Schedule 5 to the 1965 Act.[40] We also asked consultees whether they agreed that in general terms the law relating to completion of purchase following notice to treat operates satisfactorily.[41]

5.34 Considerable concern was expressed by consultees about the current operation of the notice to treat procedure. Indeed, some acquiring authorities have chosen to adopt the vesting declaration route as a matter of policy in order to circumvent the problems they have encountered. These problems can be summarised as follows:

amount payable by the company has been subsequently ascertained, and is found to exceed the deposited sum."

[36] Title will not have passed, notwithstanding the taking of possession, until there is formal transfer or execution of a deed poll. From the time of determination of compensation until transfer the landowner will retain a lien on any of the title deeds which he holds. If the landowner is no longer in possession, it appears that his unpaid vendor's lien is not registrable: see *London & Cheshire Insurance Co v Laplagrene Property Co* [1971] 1 Ch 499 (considering the Land Registration Act 1925, s70(1)(g) - now Land Registration Act 2002, Sched 1 para 2 and Sched 3 paras 2, 2 and 2A).

[37] Law Com CP No 169, para 5.32.

[38] Compulsory Purchase Act 1965, s 23(6). It seems the prescribed form is rarely used in modern practice: *Butterworths Compulsory Purchase and Compensation Service*, vol 1, para D1007.

[39] Law Com CP No 169, para 5.33, Consultation issue (J)(2).

[40] Law Com CP No 169, para 5.33, Consultation issue (J)(3).

[41] Law Com CP No 169, para 5.33, Consultation issue (J)(1).

(1) Unwilling and uncooperative vendors can cause significant delays in the process;

(2) Problems can arise as to title (for example, identifying the terms of an easement);

(3) Taking possession pursuant to notice of entry does not bring with it title to subject land, so where the authority is in a joint venture with a developer there can be difficulty demonstrating good title for a third party funding the project;

(4) Expiry of the limitation period can give rise to problems relating to quantification of compensation and transfer of title;

(5) Enforcement of the statutory contract is not realistic for many claimants because of the cost and delay attached to Lands Tribunal proceedings.[42]

5.35 One proposed solution was that there should be a mechanism whereby a claimant can compel the acquiring authority to enter (thereby fixing the valuation date[43]) and then achieve at least a preliminary determination of compensation.[44] This might provide comfort to mortgage lenders who are being asked to advance moneys for a replacement property.

5.36 Our reaction to this suggestion turns in part on Government's stance in its Policy Response Document.[45] In its previous Policy Statement,[46] ODPM had canvassed the possibility of making provision for a "reverse notice to treat", whereby a claimant could force the authority's hand, together with a reduction of the time limit for service of notice of entry.[47] Following consultation, however, Government rejected this approach because of the difficulties it might cause in the forward planning of acquiring authorities. It was felt that a fairer balance would be struck between the interests of authorities and of claimants (particularly where a major

[42] Barry Denyer-Green put to us the following examples: (1) Notice to treat is served in respect of a claimant's house and part of his garden, leading to service of a 1965 Act, s 8 counter-notice. Claimant finds an equivalent alternative property and puts in an offer. The authority makes a compensation offer which is far too low. The claimant must then refer the matter to the Lands Tribunal (entailing delay), and faces a double loss: expropriation of his present home and inability to secure his new home. (2) Blight notice is served by claimant (small business owner holding premises on lease); no objection is made and notice to treat is deemed to have been served. Claimant moves to alternative business premises. Authority refuses to make entry until premises required for the scheme. Claimant refers matter to the Tribunal, meanwhile remaining liable for rent on the subject premises, as well as the replacement premises, for which he may not receive compensation.

[43] Planning and Compulsory Purchase Act 2004, s 103 inserting a new s 5A into the Land Compensation Act 1961 (relevant valuation date).

[44] By analogy with Land Compensation Act 1973, s 52.

[45] ODPM, July 2002.

[46] DTLR, December 2001.

[47] DTLR Policy Statement, App, paras 2.25-2.30. The time limit would reduce from the norm of three years down to 12 months (with certain exceptions). This followed a recommendation by CPPRAG.

regeneration scheme is in train) if the two time limits[48] were simply shortened to 18 months.[49] Once notice of entry is served it would be valid only for three months and would not be renewable if these changes were to be implemented.[50]

5.37 This would inject more certainty into the process for claimants. The enhanced mechanism in the Land Compensation Act 1973[51] would allow for advance payment of compensation based on the estimate of the acquiring authority. In our view, no further reform would be necessary.

5.38 Consultees did not indicate very much practical experience of the vendor's lien in the context of compulsory acquisition. The Law Society, for example, felt that the concept was not well known and that it did not appear to serve any useful purpose. The Bar Council's view was that no lien should apply: full compensation payment should be made on completion and the ability to enforce a lien seemed problematic.

5.39 We accept the validity of these objections, and recommend that the vendor's lien be abolished by statute. On further consideration, we are also of the view that with the expansion of registered title, the retention of title deeds as a means of securing payment of compensation would be of utility in a diminishing number of cases. We do not therefore see any purpose in giving late statutory recognition to a device whose days are numbered.

5.40 Almost all those responding on the issue saw little value in retaining the prescribed forms of conveyance laid out in Schedule 5 to the Compulsory Purchase Act 1965. Only one response, from solicitors Bond Pearce, argued that prescribed forms might be useful to prevent delays occurring as a result of the negotiation of forms of transfer, particularly clauses relating to indemnity.

5.41 We believe that it is no longer necessary to prescribe forms of transfer in primary legislation. We therefore recommend repeal of Schedule 5. We do think, however, there may be value in ODPM or the various professional associations involved exploring the production of alternative precedents in order to achieve some consistency of approach, and to reduce unnecessary duplication of work.

Recommendation (14) – Completion of purchase

(1) Where notice to treat has been served and compensation has been agreed or determined, there should be deemed (as now) to be in place a contract of sale of the subject land between the claimant and the acquiring authority.

[48] Order operative until notice to treat; and notice to treat until possession.

[49] Policy Response Document (ODPM, July 2002), para 12(iii).

[50] The changes were not included in the Planning and Compulsory Purchase Act 2004.

[51] Land Compensation Act 1973, s52 as supplemented by the Planning and Compensation Act 1991, s 63(2) and the Planning and Compulsory Purchase Act 2004, s 104.

(2) The contract of sale should be enforceable by action by either party for specific performance.

(3) The concept of a vendor's lien, in the context of compulsory purchase, should be abolished by statute.

(4) Schedule 5 to the Compulsory Purchase Act 1965 (prescribed forms) should be repealed.

(3) COSTS OF COMPLETION

Introduction

5.42 The costs of completing the compulsory purchase are subject to very detailed provision in the Compulsory Purchase Act 1965.

Existing law

5.43 By section 23 of the Compulsory Purchase Act 1965:

> (1) The costs of all conveyances of the land subject to compulsory purchase shall be borne by the acquiring authority.
>
> (2) The costs shall include all charges and expenses, whether incurred on the part of the seller or on the part of the purchaser:
>
> > (a) of all conveyances and assurances of any of the land, and of any outstanding terms or interests in the land, and
> >
> > (b) of deducing, evidencing and verifying the title to the land, terms or interests, and
> >
> > (c) of making out and furnishing such abstracts and attested copies as the acquiring authority may require, and all other reasonable expenses incident to the investigation, deduction and verification of the title.
>
> (3) If the acquiring authority and the person entitled to any such costs do not agree as to the amount of the costs, the costs shall be taxed by a Master of the Supreme Court on an order of the court obtained by either of the parties.
>
> (4) The acquiring authority shall pay what the Master certifies to be due in respect of the costs to the person entitled and, in default, that amount may be recovered in the same way as any other costs payable under an order of the Supreme Court.
>
> (5) The expense of taxing the costs shall be borne by the acquiring authority unless on the taxation one-sixth of the amount of the costs is

disallowed, and in that case the costs of the taxation shall be borne by the party whose costs have been taxed; and the amount thereof shall be ascertained by the Master and deducted by him accordingly in his certificate of taxation.

(6) Conveyances of the land subject to compulsory purchase may be according to the forms in Schedule 5 to this Act, or as near thereto as the circumstances of the case will admit, or by deed in any other form which the acquiring authority may think fit.

All conveyances made according to the forms in the said Schedule, or as near thereto as the circumstances of the case may admit, shall be effectual to vest the land thereby conveyed in the acquiring authority and shall operate to bar and to destroy all estates, rights, titles, remainders, reversions, limitations, trusts and interests whatsoever of and in the land comprised in the conveyance which have been purchased or compensated for by the consideration mentioned in the conveyance.

Deficiencies

5.44 In our Consultative Report on Procedure we did not think that it was necessary for the procedure to be spelt out in such detail in legislation.[52] In principle we thought that the acquiring authority ought to be required to bear all the costs connected with the purchase. We considered that there could be a simple requirement for the authority to pay to those interested all reasonable costs in connection with the completion of the compulsory purchase (so far as not covered by other provisions governing compulsory purchase). It was our view that the task of assessing costs should remain with the High Court.[53]

Provisional proposals

5.45 We provisionally proposed that section 23 should be replaced by a provision that the acquiring authority should pay to those interested all reasonable costs (as assessed by the costs judge) incurred in connection with the completion of the compulsory purchase (so far as not covered by any other provisions).[54]

Consultation

5.46 We asked consultees whether they agreed with this provisional proposal, and, if they did not, what practical purpose they believed was served by section 23.[55]

5.47 All consultees who responded on this issue supported the provisional proposal. Solicitors Bond Pearce considered that this was a much-needed reform. The Highways Agency stated that they were not aware of having ever invoked section 23(5) and that they would be content that the provision should be repealed.

[52] Law Com CP No 169, para 7.42.

[53] Law Com CP No 169, para 7.43.

[54] Law Com CP No 169, Proposal 16.

[55] Law Com CP No 169, Consultation issue (Y)(a).

Richard Rattle suggested that if agreement were reached on costs, reference to a costs judge would not be necessary.

5.48 We also asked consultees whether the assessment of the costs of completion should be transferred from the courts to the Lands Tribunal.[56]

5.49 There was considerable diversity of opinion on this issue, a small majority arguing in favour of the jurisdiction to assess costs remaining with the courts. The Highways Agency, for instance, stated that some of these costs would relate to legal charges, which differ from land valuation traditionally carried out by the Lands Tribunal. These, in their view, should continue to be taxed by a Master of the Supreme Court. CLA agreed the courts were a better forum for this. The Bar Council made the same point, noting that in most cases a Chancery Master could assess the costs. If not they could be assessed by a costs judge perfectly well, rather than increase complications by transfer to the Lands Tribunal.

5.50 ODPM stated that they do not see why there is a need for jurisdiction in assessing costs to be transferred to the Lands Tribunal if the High Court already has the expertise. PEBA also emphasised this point. However, ODPM stated that they assumed that the Law Commission would consult with the relevant courts' policy administrators in DCA before proceeding further with this proposal. The remaining respondents disagreed without further comment.

5.51 The Welsh Development Agency were ambivalent. Athough they agreed that there needs to be a body to resolve the issue of reasonable solicitors' or surveyors' costs, they considered it immaterial whether that is the Lands Tribunal or a taxing body.

5.52 A significant minority were of the view that the Lands Tribunal would be a more appropriate body to determine costs. The NFU argued that the Lands Tribunal has the necessary expertise and experience. They stressed, however, that assumption of such a responsibility would need to be adequately resourced. Although Richard Rattle disagreed with the proposal to transfer jurisdiction, he conceded that if the issue were raised as part of a reference of a compensation case to the Lands Tribunal, it would seem reasonable to expect the Lands Tribunal to deal with it.

Recommendations for reform

5.53 We consider that the case for repeal of section 23 of the 1965 Act, on the grounds that it is excessively and unnecessarily detailed, is very strong, and we recommend accordingly.

5.54 A more difficult question concerns the taxation of the costs of completion, that is whether the question should be put before the courts (as at present) or before the Lands Tribunal. We are not aware that the present arrangement causes problems in practice, and we are conscious that expertise in the assessment of

[56] Law Com CP No 169, Consultation issue (Y)(b).

legal costs resides today with the specialist judiciary of the High Court. On that basis we recommend no change to the present procedure.

Recommendation (15) - Costs of Completion

(1) Section 23 of the Compulsory Purchase Act 1965 should be repealed and replaced by a provision that the acquiring authority should pay to those persons who have incurred them all reasonable costs in connection with the completion of the compulsory purchase (so far as not covered by any other provisions).

(2) The costs incurred should be assessed by the Costs judge. This duty of assessment should remain in the High Court and not be transferred to the jurisdiction of the Lands Tribunal.

(4) PERSONS WITH LIMITED POWERS

5.55 Schedule 1 to the Compulsory Purchase Act 1965, titled "Persons without power to sell their interests", contains rules making provision for transfer of title where the authority is dealing with an individual or body suffering from legal disability or incapacity. As we pointed out in our Consultative Report on Procedure, these rules appear virtually obsolete. They derive from provisions in the Lands Clauses Consolidation Act 1845,[57] much of Schedule 1 replicating the language of earlier legislation. The rules have been described variously as "of limited and rare application"[58] and "of little practical interest [because in] most, if not all, cases... power to sell and convey exists elsewhere."[59] In our Consultative Report on Procedure, we provisionally suggested repeal of Schedule 1 to the 1965 Act without replacement.[60]

Existing law

5.56 Schedule 1 to the Compulsory Purchase Act 1965 provides that it shall be lawful "for all persons who are seised or possessed of or entitled to any of the land subject to compulsory purchase, or any estate or interest in any of that land, to sell and convey or release it to the acquiring authority, and to enter into all necessary agreements for the purpose."[61] These powers may be exercised on behalf of the interest-holder himself and his "successors", and on behalf of any person entitled "in reversion, remainder or expectancy after him, or in defeasance

[57] Principally sections 7-9 and sections 71-75. Those sections were themselves amended by the Compulsory Purchase Act 1965, Sched 8, because many of the legal disabilities applying in 1845 had since been removed, rendering the provisions of limited application.

[58] *Encyclopedia of Compulsory Purchase and Compensation* (Sweet & Maxwell), para B-0443.

[59] Halsbury's Statutes (4th edn, 2000 reissue) vol 9, p 244.

[60] CP No 169, para 5.46.

[61] Compulsory Purchase Act 1965, Sched 1, para 2(1).

of his estate", so long as the interest-holder is not a lessee for a term of years or for any lesser interest.[62]

5.57 The powers are specifically exercisable by the following classes of person:

(1) Corporations;

(2) Tenants in tail or for life;

(3) Trustees for charitable and other purposes;

(4) Persons entitled to receive rents and profits of any of the subject land.[63]

5.58 Where compensation is payable for land to be purchased from a person "under any disability or incapacity" (in a legal sense), who is subject to the Schedule 1 procedure, or for severance or injurious affection to such land (being "permanent damage"),[64] the valuation shall be determined by two surveyors nominated by the parties.[65] Compensation in the determined amount must then be paid into court by the authority and will only be paid out in one of four circumstances. Broadly, those circumstances are:

(1) For discharge of any debt or incumbrance affecting the land;

(2) For purchase of substitute land to be held for like trusts and purposes;

(3) Where buildings were taken or damaged, for removal or replacement or rebuilding;

(4) For payment to any person who becomes "absolutely entitled" to the compensation.[66]

5.59 Once payment has been made into court, the acquiring authority is entitled to require the landowner to convey the land or interest to it. If that fails to happen, or

[62] Compulsory Purchase Act 1965, Sched 1, para 2(3).

[63] Compulsory Purchase Act 1965, Sched 1, para 2(2). See also provisions relating to trustees for a beneficiary under a disability, rights of common and powers to release: Sched 1, paras 2(4), 3.

[64] For injury to retained land, see Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286, Part III, paras 3.13-3.35 and proposed Rule 4.

[65] If the two surveyors cannot agree on the valuation, a third surveyor nominated by two Justices of the Peace may make the valuation: Compulsory Purchase Act 1965, Sched 1, para 4. We recommend (in Recommendation 16) that the surveyor-appointment mechanism should be replaced (thereby removing references in the legislation to JPs). This means that section 1(5) of the 1965 Act can also be repealed.

[66] Compulsory Purchase Act 1965, Sched 1, para 6.

if good title is not made out, the authority is then authorised to execute a deed poll vesting title absolutely in the authority.[67]

Deficiencies

5.60 In our Consultative Report on Procedure we indicated two deficiencies:

(1) Schedule 1 to the 1965 Act, in its present form, is unnecessarily complex;

(2) The provisions do not appear to have been used in recent years and they are not likely to be required in the future.

To this may be added a third deficiency: the Schedule's terminology is archaic, deriving from the Lands Clauses Consolidation Act 1845, and contains ancillary provisions with monetary values which have long outlived their usefulness.[68]

Provisional proposals

5.61 We did not make a formal proposal on this issue, other than to indicate that our provisional view was that Schedule 1 to the 1965 Act could be repealed without replacement.

5.62 We did not conceive that there was a present or foreseeable future need for Schedule 1 or an equivalent replacement. If an equivalent were needed, we suggested it might be based on the much simpler Australian model contained in section 116 of the Lands Acquisition Act 1989 (Commonwealth), which has two main limbs:

(1) Where an acquiring authority wishes to acquire an interest in land by agreement or compulsorily, but the owner lacks "capacity or power" to execute a transfer, or to handle compensation, then

(2) The court may approve the owner disposing of the land to the authority (on such terms as are appropriate), so long as the compensation is paid to a court-appointed trustee or applied in such manner as the court directs.[69]

5.63 On balance, however, we were of the view that a replacement provision is not necessary, and that Schedule 1 to the 1965 Act could simply be repealed.

Consultation

5.64 Most of those consultees who responded on this issue supported the repeal of Schedule 1. The Highways Agency, for example, told us that they had no recollection of ever having used the powers contained in the schedule.

[67] Compulsory Purchase Act 1965, Sched 1, para 10. The deed poll must recite a description of the land; the acquisition by the authority; the vendors' names; the amount of compensation paid into court; and the default.

[68] Compulsory Purchase Act 1965, Sched 1, paras 7-9.

[69] The full text is set out in Law Com CP No 169, para 5.45.

5.65 Two respondents expressed disagreement. One (the Bar Council) indicated that it is possible that certain charities may be prevented from disposing of endowment land without some form of scheme endorsed by the court or by the Charity Commission. It may be necessary to retain some statutory mechanism for this purpose, possibly on the basis of the Australian model. A second respondent **(**Richard Rattle) made a similar point: that, if circumstances involving legal disability were to arise and it was not appropriate to use a vesting declaration, an acquiring authority would require statutory machinery to effect transfer of title.

Recommendations for reform

5.66 On re-consideration we now accept that simple repeal of Schedule 1 to the 1965 Act has the potential, albeit remote, to cause problems in the future. We are mindful that the Australian Law Reform Commission, in its report pre-dating the 1989 Commonwealth Act, recommended replacement of a similar provision (also derived from the 1845 Act) with one in simpler and more comprehensive form. Such a provision should be designed to protect persons under legal disability,[70] notwithstanding the fact that it will only be on "rare occasions when there is such a person".[71]

5.67 We therefore recommend that Schedule 1 to the 1965 Act be repealed but that it be replaced by a simpler, more comprehensive, provision. That provision should confer power on:

(1) the person in whom the legal interest in the subject land is vested, notwithstanding any contrary legal provision, to dispose of the land to the acquiring authority;

(2) the Lands Tribunal, to approve the terms of the disposal (as to form, the amount of compensation payable and the method of payment).

Recommendation (16) – Persons with limited powers

(1) Where the owner of any interest in the subject land has limited power to deal with that land (including disposal), the acquiring authority should be entitled to proceed by the "limited powers procedure" as described in this recommendation.

[70] For example, by putting in place a mechanism to ensure that the amount of compensation payable is reasonable.

[71] *Lands Acquisition and Compensation* (ALRC Report No 14, 1980), para 340.

(2) The authority may apply to the Lands Tribunal for:

(a) appointment of a surveyor (selected from the surveyor members of the Tribunal) to undertake a valuation which will determine the amount of compensation to be paid in respect of the interest. When the application has been made, both the authority and the owner may submit to the Lands Tribunal (and its appointed surveyor) their own assessments of the appropriate amount payable, which submissions will be for the sole purpose of informing the valuation process;

(b) an order empowering the owner to dispose of the interest to the authority on such terms and conditions as the Lands Tribunal considers appropriate (including as to the manner of payment of the compensation).

(3) Schedule 1 to the Compulsory Purchase Act 1965 should be repealed.

(5) UNTRACED OWNERS

5.68 The notice to treat procedure depends on the owner of land or interests being compulsorily acquired being not only identifiable but also available to negotiate the compensation payable for the loss sustained. The Compulsory Purchase Act 1965 contains rules addressing the difficulty of "absent and untraced owners" and lays down a machinery whereby in such circumstances land may be vested in the acquiring authority following "valuation" by a surveyor appointed by the Lands Tribunal (rather than determination of compensation as such), payment into court of the sum concerned, and execution of a deed poll. In our Consultative Report on Procedure we considered the operation of this procedure and made provisional proposals for reform.[72] We reported that about a dozen surveyor appointments are made each year by the Lands Tribunal, often relating to small (and not particularly valuable) parcels of land which may have been forgotten by their owners.[73]

Existing law

5.69 Schedule 2 to the Compulsory Purchase Act 1965 is a short, self-contained code, applied by section 5(3) of that Act. Where the owner is a person who either "is prevented from treating with [the acquiring authority] on account of absence from the United Kingdom", or "cannot be found after diligent inquiry has been made", and compensation is payable for the subject land for "any permanent injury to any such land",[74] the compensation payable shall be assessed by the valuation of a

[72] Law Com CP No 169, para 5.38-5.41, Proposal 8.

[73] Occasionally a parcel may attract greater value because, notwithstanding its size, it unlocks development potential. See Law Com CP No 169, para 5.39 and nn 93, 94.

[74] This presumably means injury to retained land: see Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286, paras 3.13-3.35 (and proposed Rule 4) for discussion of this head of compensation.

surveyor selected from the members of the Lands Tribunal.[75] Once made, the valuation report is to be preserved by the authority for production in the event of any demand to do so by the landowner or by other persons interested in the land.[76] The authority must bear the costs of valuation.[77]

5.70 When compensation has been assessed, the acquiring authority "may" then pay that sum into court for the credit of the interested parties, who must be described "so far as the acquiring authority is in a position to do so".[78] Payment into court, while discretionary, is a condition precedent to further action. Once the compensation has been paid into court, the authority is entitled to execute a deed poll describing the land to which the payment relates, and declaring the circumstances under which, and the names of the parties to whose credit, payment into court was made.[79] The effect of execution of the deed poll is that "all the estate and interest in the land of the parties for whose use and in respect whereof the compensation was paid into court shall vest absolutely in the acquiring authority, and as against those persons the acquiring authority shall be entitled to immediate possession of the land."[80]

5.71 Power is conferred on the High Court to order distribution of the sum paid into court "according to the respective estates, titles or interests of the claimants", on application being made to it by any person claiming any part of the money or the land or any interest in the land.[81] If a claimant is dissatisfied with the surveyor's valuation they may, before applying to court, require the authority to submit to the Lands Tribunal the question whether the compensation paid into court was sufficient, or whether any, and if so what, further sum ought to be paid over or paid into court.[82]

[75] The selection is made by the President of the Tribunal, on application by the authority, in accordance with the Lands Tribunal Act 1949, s 3: see Compulsory Purchase Act 1965, Sched 2, para 1. The provision in the 1965 Act derives from the Lands Clauses Consolidation Act 1845, ss 58-62 wherein (in its original form) two justices would have to nominate an "able practical surveyor".

[76] Compulsory Purchase Act 1965, Sched 2, para 1(3).

[77] Compulsory Purchase Act 1965, Sched 2, para 1(4).

[78] Compulsory Purchase Act 1965, Sched 2, para 2(1).

[79] Compulsory Purchase Act 1965, Sched 2, para 2(2).

[80] Compulsory Purchase Act 1965, Sched 2, para 2(3).

[81] Compulsory Purchase Act 1965, Sched 2, para 3. If, before distribution, the money has been dealt with under Administration of Justice Act 1965, s 6, the court may also order distribution of the appropriate dividends. Section 6 has been repealed by Administration of Justice Act 1982, s 75, Sched 9. The distribution of money is now governed by Part VI of the Administration of Justice Act 1982 and the Court Funds Rules 1987.

[82] The Lands Tribunal has therefore power to award a further sum which must be paid over, or paid into court, within 14 days of the Lands Tribunal's award: Compulsory Purchase Act 1965, Sched 2, para 4(1), (2). Where the sum is increased, the costs of the claimant's application fall to be paid by the acquiring authority; otherwise, costs are in the discretion of the Lands Tribunal: Compulsory Purchase Act 1965, Sched 2, para 4(3).

5.72 The Schedule 2 procedure does not apply where the acquiring authority is invoking the vesting declaration procedure as in such circumstances it is able to proceed regardless of any outstanding interests.

Deficiencies

5.73 In our Consultative Report on Procedure we outlined the following deficiencies in the procedure for dealing with "absent or untraced owners":

(1) The qualifying criteria appear unduly narrow. In our view, the procedure should be available whenever the authority is unable to deal directly with the person entitled, not only where they cannot be traced or are out of the jurisdiction but also where they are unable (for example, through illness) or unwilling to deal with them;[83]

(2) The procedure allows only for challenge of the surveyor's valuation by the claimant. There should be some means whereby an acquiring authority may challenge valuations which it considers to be too high;[84]

(3) In general, Schedule 2 to the Compulsory Purchase Act 1965 is cast in archaic language, and its form is in need of improvement.[85]

Provisional proposals

5.74 In our Consultative Report on Procedure we therefore took the view that Schedule 2 to the 1965 Act should be restated in modern terms and that it should be widened to include persons who are unwilling or unable to deal with the acquiring authority for whatever reason.

5.75 The Lands Tribunal had raised with us the question whether acquiring authorities should be allowed to challenge the surveyor's valuation. It seemed to us, however, that the problem could be dealt with by appropriate amendments to the Lands Tribunal rules, enabling the authority to present its views on quantum prior to the valuation being fixed. As we did not consider any substantive change to the law was necessary, we did not make any provisional proposal in this regard.

Consultation

5.76 Many consultees agreed that there is a need to modernise the Schedule 2 procedure. British Waterways, for example, told us that identification of interests can be a common source of delay in the compulsory acquisition process and that measures to expedite the process and to introduce greater certainty would be welcomed by acquiring authorities.

5.77 Others went further. The City of London Law Society argued, in the context of acquisitions where land value is relatively nominal (such as sub-soil acquisitions),

[83] Law Com CP No 169, para 5.41.

[84] Law Com CP No 169, para 5.40.

[85] Law Com CP No 169, para 5.41.

that an independent valuation, without any reference to the Lands Tribunal, should be made binding on the parties. *De minimis* matters would incur disproportionate cost if they had to be referred to the Lands Tribunal for determination. The RICS, on the other hand, argued for the determination of compensation by the Lands Tribunal.

5.78 The Welsh Development Agency felt that valuation issues should be capable of being re-opened by authorities as well as by claimants, partly because the current position undermines the purpose of an independent valuation, and partly because it might encourage claimants to be unresponsive until a late stage in the process (thus causing cost and delay).

5.79 Concern was expressed in relation to limitation periods. London Underground Ltd indicated that an acquisition (and the project it is designed to facilitate) could be frustrated if the owner of the subject land makes no claim, as the limitation period then expires and the acquiring authority is left with no method whereby it can vest title in itself. It seems to us that this problem can best be dealt with by reform of Schedule 2 to the Compulsory Purchase Act 1965.[86] If the qualifying criteria were broadened, as outlined in our recommendation below[87], the authority would be able to exercise its powers under Schedule 2 where owners fail to respond to impending acquisitions, and lessen the risk of the law of limitation operating so as to frustrate the project being implemented.

5.80 All but one of the consultees who responded on the issue of qualifying criteria agreed that the Schedule 2 procedure should be available in a broader range of circumstances. The dissenting view came from the Country Landowners Association who contended that extension of the procedure would create potential for abuse. The CLA argued that acquiring authorities should be obliged to attempt to negotiate compensation with recipients of CPOs who have no real control or bargaining power. There is a risk that acquiring authorities will be tempted to by-pass the negotiation stage where they perceive a particular owner as "difficult" and to use the Schedule 2 procedure. That, asserted CLA, would be "an extremely undesirable state of affairs".

Recommendations for reform

5.81 Our recommendation seeks to address two of the three deficiencies identified above. As we explained in our Consultative Report on Procedure, and for the same reasons, we do not believe that acquiring authorities should be entitled to a review of the surveyor's valuation. The acquiring authority initiates reference to the Lands Tribunal, and provision could be made in the Land's Tribunal's rules for the authority to lodge its view on the appropriate valuation at the reference stage. The valuer appointed by the Land's Tribunal would be required to have regard to the authority's submission. The submission would not of course in any way bind the process of valuation.

[86] Amendment of the Compulsory Purchase Act 1965, s 9 would not be appropriate because that provision is designed to bite where a compensation claim has been lodged, and compensation has been "agreed or awarded".

[87] See Recommendation 17(1) below.

5.82 Our recommendation first expands the qualifying criteria to be satisfied for use of the Schedule 2 procedure. Although we understand and sympathise with the concerns expressed by CLA, we believe that the controls of administrative law confer satisfactory protection on those who fear abuse by acquiring authorities. While the acquiring authority has a discretion to invoke the procedure in those circumstances where it may be applied, that is a discretion which must be exercised fairly and reasonably, and in the event of a failure to do so, the remedy of judicial review will be available.

5.83 As we indicated in our Consultative Report on Procedure, we believe that an authority should be able to act in order to promote the wider public interest where, for example, a landowner simply refuses to co-operate. That refusal should not be capable of unreasonably delaying a project, nor should it lead to a situation where the absence of a claim within the limitation period frustrates the ability of an authority to vest title at all. Our recommendation should help to alleviate these difficulties.

5.84 Secondly, our recommendation seeks to recast the procedure in modern and simplified terms. We should emphasise that the recommendation does not extend to the vesting declaration procedure because there the acquiring authority can proceed without regard to outstanding interests.

Recommendation (17) – Untraced and non-compliant owners

(1) Where the owner of any interest in the subject land either:

(a) cannot be found by the acquiring authority after making reasonable inquiry; or

(b) has been found, but is unwilling to deal with the authority; or

(c) has been found, but is prevented from dealing with the authority by reason of illness, absence or other circumstance,

the authority should be entitled to adopt the "non-compliance procedure" described in this recommendation.

(2) The authority may apply to the Lands Tribunal for appointment of a surveyor (selected from the surveyor members of the Lands Tribunal) to undertake a valuation which will assess the amount of compensation to be paid in respect of the interest. When making the application, the authority may submit to the Lands Tribunal (and its appointed surveyor) its own estimate of the appropriate amount payable, which submission will be for the sole purpose of informing the valuation process.

(3) Once the assessment has been made, the authority will hold the valuation and produce it on demand to the owner of the interest to which it relates, or to any other person with an interest in the subject land.

(4) All the expenses of, and incidental to, the obtaining of the valuation shall be borne by the authority.

(5) Following assessment of compensation, and subject to (6) below, the authority may then invoke the "deed poll procedure".

(6) Where any person, claiming to be entitled to compensation paid into court under this procedure, wishes to challenge the amount of compensation assessed by the valuation:

(a) before making application to the High Court for payment of the sum paid into court, the claimant may serve notice on the authority requiring the authority to refer the issue within a prescribed time limit to the Lands Tribunal for determination;

(b) pending determination by the Lands Tribunal, the High Court may make such orders for interim payment as it thinks fit;

(c) if the Lands Tribunal subsequently determines that a further sum in compensation should be paid by the authority, the authority shall make that payment in the manner directed within a prescribed time limit.

(6) OMITTED INTERESTS

5.85 It may be that following entry upon the subject land by the acquiring authority, it is discovered that certain interests have been overlooked during the acquisition process. In consequence, compensation has been neither determined nor paid, and the interest holder will understandably be aggrieved. Statutory provision is made to allow the authority to regularise the position.

Existing law

5.86 Section 22 of the Compulsory Purchase Act 1965 ("Interests omitted from purchase") makes the required provision. If it appears that an acquiring authority, having entered the subject land, did so without purchasing or paying compensation for "any estate, right or interest in or charge affecting" that land "through mistake or inadvertence",[88] the authority is nevertheless entitled to remain in undisturbed possession provided that (within the time limited by the provision[89]) they:

(1) purchase, or pay compensation for, the estate, right or interest in or charge affecting the land; and

(2) pay "full compensation for the mesne profits" to any person who may establish a right to it.

[88] For example, in genuine ignorance of a subsisting mortgage.

[89] That is six months after (a) the authority have notice of the estate, right, interest or charge, or (b) if it is disputed, the date when the claimant's right is finally established by law: Compulsory Purchase Act 1965, s 22(3). The three-year time limit contained in the Compulsory Purchase Act 1965 is disapplied in this context: see s 22(2).

Compensation shall be agreed or awarded and paid in the manner it would have been had the authority purchased before entering the land, "or as near to that manner as circumstances admit".[90]

5.87 There is no provision in section 22 for the stipulated time limit to be extended, whether by agreement or otherwise. Nor does it deal with the need to serve notice to treat and notice of entry.

5.88 The Court of Appeal has held that the acquiring authority has power to correct omissions outside the statute. This can be achieved by serving notice to treat *after* entry has been taken, so long as the statutory time limit for such service has not expired. In *Cohen v Haringey LBC*,[91] the acquiring authority had entered into possession of a property without having served notice to treat on the mortgagee. The Court of Appeal held that the authority could regularise the position retrospectively by serving notice to treat and notice of entry and that the possession of the authority would then become lawful 14 days after service of notice of entry. If, however, service within the time limit is not possible, neither the Lands Tribunal nor the court has power to rectify the omission, either at common law or under section 22 of the 1965 Act.[92]

5.89 Section 22 of the 1965 Act does not apply to (nor need it apply to) land acquired by vesting declaration.[93]

Deficiencies

5.90 In our Consultative Report on Procedure we outlined the difficulties of section 22 of the Compulsory Purchase Act 1965:[94]

(1) The time limit of six months takes no account of the time which may be required to settle the amount of compensation payable (which could well exceed the statutory period).

(2) The section does not apply where an acquiring authority is aware of the existence of the right or interest, but fails (for whatever reason) to serve the necessary notices.[95]

[90] Compulsory Purchase Act 1965, s 22(1).

[91] (1980) 42 P&CR 6 (CA).

[92] In *Advance Ground Rents Ltd v Middlesbrough BC* [1986] 2 EGLR 221 (LT), notice to treat was served on a mortgagee over seven years after the CPO became operative, and three-and-a-half years after the authority became aware of the mortgagee's existence (the delay resulting from death and an assignment). The Lands Tribunal held that the notice to treat was invalid and that the authority had lost its opportunity to rectify its omission. The reference land was no longer authorised to be acquired compulsorily.

[93] Land acquired by vesting declaration is deemed to be subject to constructive notice to treat served on "every person on whom, under section 5 of the Compulsory Purchase Act 1965, the acquiring authority could have served such a notice", and the authority is deemed to have "had knowledge of all the parties referred to in section 5": Compulsory Purchase (Vesting Declarations) Act 1981, s7(1), (2).

[94] Law Com CP No 169, paras 7.22-7.25.

(3) In view of the decision of the Court of Appeal in *Cohen v Haringey LBC*, it may be questioned whether any statutory provision is necessary.

(4) It does seem, however, that there is one important advantage in bringing a claim under the statute rather than at common law. Under section 22, compensation is calculated as at the date of entry on the land (excluding the value of any works carried out post-entry), [96] but under the procedure in *Cohen* there is no provision for back-dating the valuation.[97]

Furthermore, section 22 does not indicate who is to initiate proceedings for settling the compensation.[98]

Consultation

5.91 We did not make any specific provisional proposals on this issue, but we invited views on the possible replacement of section 22 and the *Cohen* procedure. This would be by a new provision giving a general power to rectify accidental omissions retrospectively within a defined time limit,[99] and providing for compensation to be assessed by reference to the date of the original entry.[100] We then asked consultees whether they considered the present rules for rectifying accidental omissions to be adequate for the purpose, and, if not, how they should be amended or replaced.[101]

5.92 Consultees agreed that it was necessary for there to be a procedure dealing with accidental omissions. The Welsh Development Agency, for example, indicated that in practice the chances of an acquiring authority missing a minor interest are too great not to have in place a correcting procedure.

5.93 The Highways Agency expressed concern about the current time limits. First, they believe that the section 22(3) time limit is too short, and should be lengthened. Secondly, they feel that it is unsatisfactory that, once the overall

[95] For example, where an authority knows of a mortgage on the subject land, but wrongly assumes the equity of redemption (the value of the land on which the mortgage is secured) is greater than the amount outstanding: see *Martin v London, Chatham etc Railway* (1866) LR 1 Ch 501; and *Stretton v GWR* (1870) LR 5 Ch 751 (where possession was taken without giving notice to treat to a known interest).

[96] Compulsory Purchase Act 1965, s 22(4).

[97] We pointed out that it seems, under *Cohen*, that the valuation date will be treated as the date of notional entry following service of the valid notice to treat and notice of entry. If works have been carried out by the authority after the date of actual entry, those works may have to be taken into account in assessing compensation. This would create an inconsistency. See Law Com CP No 169, para 7.25.

[98] As the editor of the *Encyclopedia of Compulsory Purchase and Compensation* notes (at para B-0499), it is probably in the interests of the authority that, once the right to compensation has been established, even if a claim has not been made, it then makes the reference to the Lands Tribunal. See *Caledonian Railway v Davidson* [1903] AC 22 (HL).

[99] We suggested 18 months from the date of entry and taking possession.

[100] Law Com CP No 169, para 7.26.

[101] Law Com CP No 169, para 7.26, Consultation issue (U)(2).

three years time limit has expired, an authority cannot then serve notice to treat or take any other step to regularise the position.[102]

5.94 The City of London Law Society reinforced our view that section 22 does not set out clearly enough the requirements being made of acquiring authorities. For example, it is not clear what an authority must do to "purchase" an omitted interest within the stipulated time. This could mean to complete the acquisition of the interest or, simply, to serve notice to treat in respect of it.

5.95 The Law Society suggested to us that the remit of section 22 is too narrow: that some provision should exist which allows for the rectification of mistakes, not just after entry on the land, but also before entry, and indeed at any time after the CPO has been made. They also felt that the rectification procedure should go wider than minor rights and interests, and that it should be capable of covering the omission of owners and occupiers. We believe that section 22 already covers "estate" owners.

Recommendations for reform

5.96 In our view section 22 was designed to be no more than a "slip rule" for rights and interests which have simply been overlooked by accident. The provision was not meant to operate as a vehicle whereby an authority can go back to the drawing board and identify significant interests which (with hindsight) it would like to have included in the order but failed to do so, either because the project now makes that desirable or because it failed to make proper enquiry at the time of making.

5.97 We believe that, although there is need for such a slip rule, the procedure should not be so open-ended that it causes uncertainty for interest-owners. Its availability needs, therefore, to be clearly delineated in terms both of the rights and interests it covers, and the time for its operation. Put simply, if an acquiring authority fails to operate the rule within the prescribed time, its occupation would become unlawful and it must either vacate the land or effect sale by mutual consent. We consider that an appropriate time limit would be 18 months. [103] In order to mitigate the potential harshness of this rule, however, we propose that the Lands Tribunal should have power to extend the time limit where it would be reasonable to do so, and no material harm would be caused to the land owner. As the time limit would be prescribed under regulations the power to extend could be incorporated within those same regulations.

[102] The Agency also raised a compensation issue: namely, if the notional rather than the actual date of entry is to be treated as the valuation date, whether interest on the compensation is payable from the later of these dates (which could be unfair to the claimant). Richard Rattle suggested to us that interest should run from the original (actual) date of entry.

[103] This would be in line with the reduced time limit envisaged by ODPM for serving notice to treat or making a vesting declaration (see para 4.11 above, and Policy Response Document (ODPM, July 2002), para 12(iii)).

5.98 We also feel there is lack of clarity as to the meaning of the term "to purchase" in section 22(1) of the 1965 Act.[104] That subsection should be construed so as to be compatible with section 11(1) of the same Act (powers of entry), given that there is a nexus between the two provisions. "To purchase" is undefined, but in the present context means "to serve notice to treat and notice of entry". We believe this should be made clear in amending legislation.

5.99 We recommend, therefore, that section 22 (and *Cohen*) be replaced by a provision in modern form, as set out below.

Recommendation (18) – Omitted interests

(1) An acquiring authority should be entitled retrospectively to rectify accidental omissions relating to interests and rights by serving notice to treat and notice of entry within a prescribed time limit (or within such longer period as is allowed by the Lands Tribunal).

(2) An acquiring authority should be entitled to refer disputes over compensation to the Lands Tribunal for determination within that time limit.

(3) Compensation should be assessed by reference to the date of the original entry on to the subject land.

(4) Section 22 of the Compulsory Purchase Act 1965 should be amended accordingly (and the expression "to purchase" in subsection (1) should be clarified).

(7) PAYMENTS INTO AND OUT OF COURT

Existing law

Payments into court

5.100 In certain circumstances, set out in the Compulsory Purchase Act 1965, an acquiring authority is entitled to enter the subject land, under notice to treat or vesting declaration procedures, before any compensation is assessed or paid.[105] The pre-condition of such entry is payment of compensation into court, as regulated by sections 25 and 26 of the 1965 Act. Further provisions governing payment into court and the administration of funds paid in are to be found in Part VI of the Administration of Justice Act 1982 and in the Court Funds Rules 1987.[106]

5.101 The circumstances where payment-in arises under the Compulsory Purchase Act 1965 are:

[104] "If after the acquiring authority have entered on any of the land... it appears that they have through mistake or inadvertence failed or omitted duly to purchase or to pay compensation for any estate [etc] affecting that land..."

[105] Compulsory Purchase Act 1965, s 11(1); Compulsory Purchase (Vesting Declarations) Act 1981, s 10(1).

[106] Our understanding from the Court Funds Office is that between 50 and 100 requests are made annually for payments-in in respect of compulsory purchase orders.

(1) Where the landowner refuses to convey or make good title;[107]

(2) Where the mortgagee of subject land refuses to convey, or make good title;[108]

(3) Where the acquired land is subject to a rentcharge and the person entitled fails to release or to make good title;[109]

(4) Where the acquisition is from a landowner who is under a legal disability;[110]

(5) Where the statutory alternative means for obtaining entry is used; [111]or

(6) Where payment is made in respect of common land but there is not a committee of commoners.[112]

5.102 Section 25(2) of the Compulsory Purchase Act 1965 provides that where the payment into court was "in respect of any lease, or any estate in land less than the whole fee simple, or of any reversion dependent on any such lease or estate", any interested person may apply to the court for an order as to investment or accumulation or payment out of court so as to preserve the equivalent of the benefit they would have had in the interest in land.[113] This enables the court to apportion fairly between interested parties, for limited estates, sums paid into court and income so generated.

5.103 Section 25(3) of the same Act provides that any person who has only a possessory title (and no documentary proof of ownership) is entitled to apply for payment of moneys out of court (and accrued interest) if no other valid claim is made for those moneys.[114]

5.104 Section 26 of the 1965 Act reproduces the complex provision from the Lands Clauses Consolidation Act 1845 for the payment of costs related to the administration of compensation paid into court. Examples include the costs of the purchase of the land and the investment of compensation, and the costs of obtaining orders for the payment of dividends and for payment out of court.[115]

[107] Compulsory Purchase Act 1965, ss 9(1), 25(1).

[108] Compulsory Purchase Act 1965, ss 14(4), 15(3), 16(5).

[109] *Ibid*, s 18(3).

[110] *Ibid*, Sched 1, para 6(2).

[111] *Ibid*, Sched 3, para 2.

[112] *Ibid*, Sched 4, para 7. Our terms of reference do not include a review of the provisions relating to common land.

[113] *Ibid*, s 25(2).

[114] *Ibid*, s 25(3).

[115] *Ibid*, s 26(2),(3).

Payments out of court

5.105 Where compensation money has been paid into court any interested party may apply to the court for payment out. Three provisions are of particular relevance:

(1) Section 9 of the Compulsory Purchase Act 1965 deals with the position where an owner of, or a person with an interest in, land fails to make title or convey the land. Any person who believes they are entitled may make a claim for payment out of money previously paid into court. The court may order distribution of the money or dividends "according to the respective estates, titles or interests of the claimants" and may also make "such other order as [it] thinks fit".

(2) Schedule 2 to the Compulsory Purchase Act 1965 provides for payment into court of compensation determined for land owned by absent or untraced owners following service of notice to treat.[116] Distribution may be ordered by the court, on the application of any person claiming, "according to the respective estates, titles or interests of the claimants", and likewise it may make any other order as it thinks fit.[117]

(3) Schedule 3 to the 1965 Act sets out an alternative procedure for obtaining entry, which makes specific provision for payment into and out of court. We have already indicated our view that Schedule 3 is obsolete and we have recommended its repeal, and we say no more of it here.

5.106 In addition, section 29 of the Local Government (Miscellaneous Provisions) Act 1976 relates to local authorities where money has not been paid out of court for more than 12 years following payment-in. Where an authority applies for repayment of unclaimed compensation the court may make such an order. The court, however, may make a subsequent order to the effect that the whole or part of the money transferred to the authority be paid by that authority to "another person" if the court considers that action to be just.[118]

Deficiencies

5.107 Provisions such as sections 25 and 26 of the Compulsory Purchase Act 1965 were designed in a different climate where payment into court was the usual pre-requisite to taking possession, and far more frequent an occurrence than it is today.[119] As we have explained above, modern procedures entitle an authority to effect entry before compensation is assessed or paid.

5.108 In our Consultative Report on Procedure we indicated the following deficiencies were inherent in the present legislation relating to payments-in:

[116] *Ibid*, s 5(3), Sched 2, para 2.

[117] *Ibid*, Sched 2, para 3.

[118] Local Government (Miscellaneous Provisions) Act 1976, s 29(1), (2).

[119] See Law Com CP No 169, para 7.32.

(1) Sections 25 and 26 of the 1965 Act are based on, and reproduce the substance of, the provisions on payment into court originally in the Lands Clauses Consolidation Act 1845.[120] These two sections are cast in a convoluted and archaic manner, and the procedure is in need of simplification.

(2) Section 26 of the 1965 Act, dealing with the reimbursement of incidental charges and expenses, is complex. In our Consultative Report on Procedure we quoted the editor of the *Encyclopedia of Compulsory Purchase and Compensation* as saying that two factors today render the section "a dead letter"[121]:

(a) The need to make payment into court is now rare because the disabilities which rendered payment necessary[122] "have been largely removed" and an authority can use the notice of entry procedure without paying money into court;

(b) Even in the cases excepted by section 26(1) (payments into court made in consequence of wilful refusal or wilful neglect to make title), the court has a discretion as to costs under section 50 of the Judicature Act 1925.

5.109 Under modern procedures, the need for payment into court is likely to arise only where owners are untraceable or are obstructive, and the appropriate route will be by deed poll (for which we have recommended a simplified "deed poll procedure").[123]

5.110 The procedure for payment out of court to claimants set out in section 9 of the 1965 Act could usefully be updated. We already make recommendations as to the future of both section 9 (failure to make title) and Schedule 2 to the 1965 Act (absent and untraced owners).[124]

5.111 Likewise, the Local Government (Miscellaneous Provisions) Act 1976 provisions relating to refunding of unclaimed compensation to local authorities are too narrow in their focus, and should be expanded to cover all forms of acquiring authority.

Provisional proposals

5.112 In our Consultative Report on Procedure we provisionally proposed:

(1) That sections 25 and 26 of the 1965 Act should be replaced by a simple provision:

[120] Lands Clauses Consolidation Act 1845, ss 78-80.

[121] *Encyclopedia of Compulsory Purchase and Compensation* vol 1, para B-0505.

[122] Compulsory Purchase Act 1965, Sched 1, para 6.

[123] See Part 5(1) and Recommendation 13 above.

[124] See Part 5(1) and Recommendation 13, and Part 5(5) and Recommendation 17 above.

(a) Giving the court power (subject to the rules of court), in relation to compulsory purchase compensation paid into court, to make orders for such moneys to be distributed in accordance with the interests of the relevant claimants, and to make incidental orders;

(b) To the effect that costs incurred in connection with payments into court shall be borne by an authority, unless the court orders otherwise;[125]

(2) That the Law Reform (Miscellaneous Provisions) Act 1976 be amended so as to extend its remit to all forms of acquiring authority.[126]

5.113 The change to section 25 of the 1965 Act would be linked to our proposal for a new and simplified "deed poll procedure". That procedure, operating hand-in-hand with the general provisions in Part IV of the Administration of Justice Act 1982 for managing funds in court,[127] would allow the High Court to make "such order as it thinks fit" in relation to the distribution of moneys paid into court.

Consultation

5.114 We asked consultees two questions:

(1) Whether they were aware of any practical problems arising from the provisions of the Compulsory Purchase Act 1965 for payments into and out of court and, if so, how should they be addressed.

(2) Whether they agreed that sections 25 and 26 should be replaced by a simpler provision as proposed.

5.115 In the main, those consultees who responded to us on this issue were of the view that the provisions are unnecessarily complex, and that they should be simplified as we suggested. As the procedures are rarely used in practice, with one exception respondents did not offer us examples of cases which had given rise to difficulty. The general feeling was that the provisions in sections 25 and 26 should be replaced and simplified. The Law Society suggested that some departmental guidelines on their operation, by means of circular, would be useful.

5.116 Westminster City Council drew our attention to what can happen when an authority adopts the vesting declaration (rather than notice to treat) route. Where subject land has become vested in an acquiring authority, section 10(1) of the Compulsory Purchase (Vesting Declarations) Act 1981 makes the authority liable to pay the appropriate compensation as would have been payable had it taken possession by notice of entry under the 1965 Act. The authority is deemed, under section 8(1) of the 1981 Act, to have executed a deed poll under Part I of the

[125] Law Com CP No 169, para 7.40 and Proposal 15.

[126] Law Com CP No 169, para 7.40.

[127] The Administration of Justice Act 1982 repealed and replaced the equivalent provisions in the Administration of Justice Act 1965, s4 (which is mentioned in section 25(1) of the Compulsory Purchase Act 1965): see 1982 Act, s 75 & Sched 9.

1965 Act. Because notice to treat is only deemed to be served under the 1981 Act, section 8(3) disapplies section 11(1) of the 1965 Act (notice of entry), and section 10(2) disapplies section 22 of, and Schedule 2 to, the 1965 Act (relating to absent and untraced owners).

5.117 Westminster City Council told us that where the vesting declaration procedure is used, and several claimants dispute the extent of their respective ownerships of the subject land (an issue which can only then be resolved by the Lands Tribunal), there is no mechanism by which the authority can make payment into court of the full compensation pending resolution of the dispute. It appears to us that sections 25 and 26 of the 1965 Act relate only to payments made under the 1965 Act, and do not apply to vesting declarations, unless it can be said that the deeming provision in section 8(1) of the 1981 Act brings them into play. We believe the issue should be clarified and that a mechanism should be devised which will allow for payments into court where the vesting declaration procedure is used.

5.118 Norman Osborn suggested to us that, as an alternative to replacing sections 25 and 26 with a simplified procedure, there could instead be put in place a certification procedure whereby the acquiring authority acknowledged its indebtedness to the landowner or owners in a binding certificate. This would protect claimants and would release authorities from the burdensome (and costly) administration attached to making payment into court, and later seeking repayment under section 29 of the 1976 Act. Some simple dispute resolution mechanism might be a useful adjunct. We are, however, not convinced that this alternative would provide claimants with sufficient security in the event of the acquiring authority ceasing to exist, nor that it would prove attractive for acquiring authorities which may wish to be relieved of any future involvement. We are also concerned that this proposal does not make adequate provision for the payment of interest. In the circumstances, we consider that retention of a scheme based upon payment into court, albeit modified in order to effect some simplification, is preferable.

5.119 Both the Highways Agency and the Welsh Development Agency indicated that the repayment procedure in section 29 should be available to all forms of acquiring authorities, and not just to local authorities.

Recommendations for reform

5.120 We believe that the procedure for payment into court contained in sections 25 and 26 of the Compulsory Purchase Act 1965 should be replaced with a simplified procedure. We also believe it would be useful to extend the remit of what is presently section 29 of the Local Government (Miscellaneous Provisions) Act 1976 in order to cover all forms of acquiring authority. Both these reforms should cover acquisitions under the notice to treat and the vesting declaration route.

5.121 The changes which we recommend elsewhere in this report[128] to section 9 of and Schedule 2 to the Compulsory Purchase Act 1965 should at the same time promote the updating and simplification of the arrangements for payment out of court.

Recommendation (19) – Payments into and out of court

(1) Sections 25 and 26 of the Compulsory Purchase Act 1965 (concerning payments into court) should be replaced by a simplified procedure (applying to acquisition both by notice to treat and by vesting declaration):

(a) giving the court power, subject to rules of court, to make orders in relation to money paid into court under the statutory provisions relating to compulsory purchase, for the distribution of such money in accordance with the interests of the claimants (and to make such incidental orders as it thinks fit);

(b) allowing for payment into court by an acquiring authority of the full compensation sum where individual claimants dispute the share of that sum due to them;

(c) providing that costs incurred in connection with payments-in shall be paid by the authority, unless the court determines otherwise.

(2) Section 29 of the Local Government (Miscellaneous Provisions) Act 1976 (relating to unclaimed compensation) should be extended so that it applies to all forms of acquiring authority.

[128] See n 126 above.

PART 6
SERVICE OF NOTICES

6.1 In our Consultative Report on Procedure we discussed, and made a provisional proposal relating to, the physical means whereby statutory notices should be served.[1] Presently a variety of different statutes make provision for service. We indicated that, in our view, these could usefully be rationalised.

Existing Law

6.2 The law presently creates disparities relating to notices in three ways:

(1) The two procedures for implementation of orders (notice to treat and vesting declaration) have different rules for service;

(2) Physical service is not defined consistently in the various legislative provisions; and

(3) The persons entitled to be served with different notices are likewise inconsistently defined.

Notice to treat procedure

6.3 Notices must be served at the following stages:

(1) Notice of making the order, before the order is submitted for confirmation[2] (which notice must be served on "every qualifying person"[3]);

(2) Notice of confirmation of the order (which must be served on each person on whom notice of making was required to be served);[4]

(3) Notice to treat (which must be served on "all the persons interested in, or having power to sell and convey or release, the land, so far as known to the acquiring authority after making diligent inquiry");[5] and

[1] Law Com CP No 169, Part III(3) and Proposal 1. See also discussion in Part IV(2) paras 4.9-4.11.

[2] Acquisition of Land Act 1981, ss 10(3), 12(1).

[3] Acquisition of Land Act 1981, s 12(1), as amended by the Planning and Compulsory Purchase Act 2004, s 100(5).

[4] Acquisition of Land Act 1981, s 15, as substituted by the Planning and Compulsory Purchase Act 2004, s 100(7). The confirmation notice must also be affixed to a conspicuous object or objects on or near the land comprised in the order, and published in one or more local newspapers.

[5] Compulsory Purchase Act 1965, s 5(1).

(4) Notice of entry (which must be served on the "owner, lessee and occupier" of the subject land where notice to treat has already been served).[6]

6.4 As we indicated in our Consultative Report on Procedure, although some forms of notice are served on occupiers as well as owners, notices to treat are required to be served only on "persons interested", which excludes persons who merely occupy. We have discussed this anomaly above.[7] Likewise, notice to treat does not presently have to be served where an authority seeks only to override, and not to extinguish, an existing right over land (such as an easement or restrictive covenant).[8]

Vesting declaration procedure

6.5 Notices must be served at the following stages:

(1) Notice of making the order (as with notice to treat, above);

(2) Notice of confirmation of the order (as with notice to treat, above);

(3) Preliminary notice, prior to execution of a general vesting declaration, inviting potential claimants to identify themselves and the land in which they have an interest[9] (which notice must be served on every person entitled to receive the "statutory notice of confirmation"[10]); and

(4) Notice of execution of a vesting declaration, which must be served on "every occupier of any of the land specified in the declaration (other than land in which there subsists a minor tenancy or a long tenancy which is about to expire[11])" and on "every other person" who has provided information in response to a preliminary notice invitation.[12] There is no requirement that owners and tenants of the land who do not occupy should be served with notice of execution, although as a matter of good practice acquiring authorities will serve all those persons interested of whom they are aware.

6 Compulsory Purchase Act 1965, s 11(1). "Owner" is defined as in the Acquisition of Land Act 1981, s 7(1).

7 See Part 3(2) above, and also previous discussion in Law Com CP No 169, paras 5.20, 5.21.

8 The effect of compulsory purchase on existing rights is discussed in Part 8 below.

9 Compulsory Purchase (Vesting Declarations) Act 1981, s 3(1), (3).

10 In other words, the notice of confirmation required to be published or served under the Acquisition of Land Act 1981, s 15: Compulsory Purchase (Vesting Declarations) Act 1981, s 3(5).

11 Each form of tenancy is defined in the Compulsory Purchase (Vesting Declarations) Act 1981, s 2. For these types of tenancy a further notice procedure exists: *ibid,* s 9.

12 Compulsory Purchase (Vesting Declarations) Act 1981, s 6(1).

6.6 As with notice to treat,[13] there is no express provision requiring notices to be served on those entitled only to rights over land.

Statutory provisions relating to service

6.7 Several statutes contain provisions relating to service of notices. Many have common features, but there are differences of detail.[14] The provisions are:

(1) Section 38 of the Land Compensation Act 1961 (relating to service of notices required under Parts III or IV of that Act);

(2) Section 30 of the Compulsory Purchase Act 1965 as amended (applying section 6 of the Acquisition of Land Act 1981 to service of notices under the 1965 Act);

(3) Section 233 of the Local Government Act 1972 (preserved by section 329(4) of the Town and Country Planning Act 1990);

(4) Section 6 of the Compulsory Purchase (Vesting Declarations) Act 1981 (applying what is now section 329 of the 1990 Act to service of notices of execution);[15]

(5) Section 6 of the Acquisition of Land Act 1981, as amended by section 100(2) of the Planning and Compulsory Purchase Act 2004 (relating to service of notices under the Acquisition of Land Act); [16] and

(6) Section 329 of the Town and Country Planning Act 1990 (relating to service of notices under that Act).

Deficiencies and provisional proposals

6.8 We have already highlighted the major disparities that result from these provisions. We should also note here the absence of express statutory provision for the service of notices on those entitled to rights over land (considered later in this Report).[17]

6.9 In the Consultative Report on Procedure, we referred to the absence of any general power for those acquiring authorities which are not local authorities to obtain information as to interests in the subject land.[18] We recognised the

[13] See para 6.4 above.

[14] See our discussion in Law Com CP No 169, paras 3.19, 3.20.

[15] The reference in s 6(2) as enacted was to Town and Country Planning Act 1971, s 283. This reference was amended by Planning (Consequential Provisions) Act 1990, s 4, Sched 2, para 52.

[16] Inserting “tenant” into the list of persons to whom the document should be addressed under s 6(4).

[17] See Part 8 below.

[18] Law Com CP No 169, para 3.18. Local authorities already have this power under Local Government (Miscellaneous Provisions) Act 1976, s 16.

difficulty of conferring general powers to compel the provision of information in view of the wide range of other bodies exercising compulsory purchase powers. We note, however, that the information powers available to local authorities have now been extended to all acquiring authorities.[19]

6.10 We envisaged that many of the deficiencies relating to service could be remedied by adapting the present rules in the Acquisition of Land Act 1981 (as applied also to the Compulsory Purchase Act 1965).[20] We also felt that site notices could be usefully employed in connection with interference with easements and other rights.[21] We accordingly proposed that there should be two forms of physical service:[22]

(1) *standard service*: that is, personal service, on an individual by registered letter or recorded delivery to their proper address, and on a company (or other body, including an unincorporated body) by service on an appropriate officer or member, at the registered or principal office; and

(2) *special service*: involving the fixing of notices on or near land ("site notices"). This would apply where names and addresses of the persons to be served cannot reasonably be ascertained, and in relation to those categories of interest or right where it is considered unreasonable to require the authority to effect standard service.

Consultation

Notice requirements

6.11 In our consultation we asked whether the Government's existing proposals to widen service, including by site notice, could be given effect by adapting the rules for service contained in the Acquisition of Land Act 1981.[23] Consultees in the main agreed that this would be an appropriate route.

6.12 One local authority observed that recorded delivery has an in-built deficiency: if the notice is not delivered to (and signed for) by the addressee at the premises, and is not collected from the post office by the addressee, it will be returned to sender and good service will not be presumed.[24] It was contended that this leaves a loophole for the less scrupulous landowner who wishes to evade service. Instead, service should be deemed adequate by first class ordinary mail.

6.13 While we understand the difficulty posed, we do not believe that ordinary posting is sufficient where a landowner's property rights (and human rights) are at stake.

[19] Planning and Compulsory Purchase Act 2004, s 105, inserting sections 5A and 5B into the Acquisition of Land Act 1981.

[20] Law Com CP No 169, para 3.22. The 1981 rules are applied by the Compulsory Purchase Act 1965, s 30, as substituted by the Acquisition of Land Act 1981, Sched 4, para 14(4).

[21] See Law Com CP No 169, paras 3.22-3.24.

[22] Law Com CP No 169, paras 3.23, 3.24, Proposal 1.

[23] Law Com CP No 169, para 3.24, Consultation issue (A)(1).

[24] See Interpretation Act 1978, s 7.

Every day a significant proportion of ordinary mail is either misdirected or goes undelivered, through no fault of the sender or addressee.[25] It would not be fair, we believe, to place a reverse burden of proof on a landowner to rebut a presumption of good service where no postal records can be accessed.[26]

6.14 Another consultee wondered whether the display of site notices could be disproportionately onerous, particularly where the land to be taken comprises small sub-divided plots. We are aware that the notice being displayed may run to several pages.[27] Site notices are, however, intended as an adjunct to standard service, providing a means whereby those whom the authority may find difficult to trace are alerted to the compulsory purchase being effected. While it may on occasion put authorities to considerable expense and inconvenience to display site notices, it is in our view an essential protection of the rights of those whose land is being affected, and we do not consider that the burden can fairly be described as disproportionate.

Primary or secondary legislation

6.15 We asked consultees whether, if there were to be "special service" provisions, they should be governed by secondary rather than primary legislation.[28]

6.16 ODPM expressed concern that creating a "special service" mechanism may cause procedural complications, particularly if it is necessary to prescribe categories of interest and circumstances by secondary legislation. They took the view that the changes being effected in the Planning and Compulsory Purchase Act 2004, involving the mandatory display of site notices in all cases, should be sufficient to deal with possible unidentified interests.

6.17 Some consultees felt that secondary legislation might give more flexibility for the future, but others (such as the Planning and Environment Bar Association and the Law Society) were more guarded and felt that the circumstances of special service should be laid down in primary legislation.

Other issues

6.18 Finally, we asked consultees whether there were other practical issues that we had not addressed in our provisional proposal.[29]

6.19 The Country Land and Business Association suggested that provision should be made for service of statutory notices on appointed agents in order to clarify the

[25] See "Millions of letters are lost in post" *The Times* 3 May 2004, "Millions of letters are wrongly delivered" *Sunday Times* 2 May 2004 and a number of other recent articles.

[26] The Local Government Act 1972, s 233 makes provision for simple service by post, but is out of step with other legislation. The Royal Mail offers a web-based facility for checking delivery where recorded delivery or registered post has been utilised.

[27] For example, where it is in respect of both confirmation of the order and preliminary notice of the making of a general vesting declaration.

[28] Law Com CP No 169, para 3.24, Consultation issue (A)(2).

[29] Law Com CP No 169, para 3.24, Consultation issue (A)(3).

effect of *Fagan v Knowsley MBC*.[30] This issue was also raised in the context of service of notice to treat.[31]

6.20 Our view is that service is governed by relatively modern legislation[32] which makes no provision for service on agents. As *Fagan* made clear, Parliament enacted a "complete code for the service of notices" in section 30 of the Compulsory Purchase Act 1965 which did not (in the absence of some form of estoppel) include service on an agent. We do not believe that the principle established in *Fagan* requires further clarification.

6.21 The Country Land and Business Association also argued for tightening of the rules relating to identification of interests. It claimed that a large number of authorities only make cursory checks (usually limited to a Land Registry search) before resorting to alternative means of service. The expression used in the legislation to describe the obligation is "diligent inquiry".[33] The High Court has held this to mean using "some reasonable diligence", which falls short of the need to make "very great inquiry".[34] What is reasonable in each case will be a matter of fact and degree.

6.22 We do not think that it is appropriate for primary legislation to be employed to spell out the steps which should constitute an adequate inquiry. This is better left to Departmental guidance.[35]

6.23 In connection with site notices, one consultee highlighted the problem of notices disappearing from sites shortly after they are posted: whether deliberately (by vandals or aggrieved landowners) or accidentally (by adverse weather conditions). We shall return to this concern below.

Legislative reform

6.24 Events have moved on since we published our Consultative Report on Procedure. Section 11 of the Acquisition of Land Act 1981 has been amended by the Planning and Compulsory Purchase Act 2004.[36] As well as publishing notice

[30] (1985) 50 P&CR 363 (CA). The owner of property subject to a CPO emigrated to Australia, leaving his brother to manage it. The acquiring authority assumed (wrongly) that the brother was the owner, and served him with notice to treat. The Court of Appeal held that, even if the brother were an authorised agent, section 30 of the Compulsory Purchase Act 1965 does not confer authority to serve an agent so as to bind the principal.

[31] See para 3.27 above.

[32] Compulsory Purchase Act 1965, s 30; Acquisition of Land Act 1981, s 6 (as amended by the Planning and Compulsory Purchase Act 2004, s 100(2)).

[33] See the Compulsory Purchase Act 1965, s 5(1), and the Acquisition of Land Act 1981, s 12(2A) as substituted by the Planning and Compulsory Purchase Act 2004, s 100(5)(b).

[34] *R v Secretary of State for Transport, ex p Blackett* [1992] JPL 1041, 1043 *per* Popplewell J. In this case the requesting of Office Copy entries from the Land Registry was sufficient because changes to the title were still pending first registration, and it was known that the landowners had deliberately split the land into small parcels and transferred them on in an attempt to frustrate implementation of the order.

[35] ODPM Circular 06/2004 deals with this only briefly (see App U para 16(p)).

[36] See section 100(4).

of making the CPO in one or more local newspapers for two successive weeks, the authority must affix a notice, in prescribed form, to a conspicuous object or objects on or near the land comprised in the order. The notice, which must be addressed to persons occupying or having an interest in the land, must (in similar terms to the newspaper notice):

(1) State that the order has been made and is about to be submitted for confirmation;

(2) Describe the land and state the purpose for which it is required;

(3) Name a place in the locality where a copy of the order and of the map referred to therein may be inspected; and

(4) Specify the time (not less than 21 days from the notice being first affixed) within which, and the manner in which, objections can be made.

6.25 We can see the force of the criticism that there is no obligation imposed on the authority, once it has affixed the site notice, to take reasonable steps to ensure that it remains in place for the objection period. On a strictly literal interpretation of the provision, the acquiring authority has complied with its statutory obligation by affixing the notice. On a purposive interpretation, which we would hope the courts would adopt, the notice must remain so affixed (in such condition as those to whom it is addressed can read its contents) for the period during which objections may be made. If the legislative opportunity arises, there would be advantage in imposing an additional, express, obligation, to display the notice for the objection period.

6.26 We do, however, welcome the acceptance of site notices as a means of publicising the compulsory purchase orders. We doubt that much by way of further legislative reform is now called for, although we do believe that in due course opportunity should be taken to rationalise the variants of formula used across the legislation for service where it is not practicable to identify (with name and address) persons entitled to be served.

Recommendation (20) – Service of notices and publicity

(1) The present rules relating to service of notices should remain in primary legislation, supplemented where necessary by departmental guidance, subject to the following.

(2) The different statutory formulations relating to service by site notice should be made consistent.

(3) Section 11(3) of the Acquisition of Land Act 1981 should be amended to place an obligation on acquiring authorities both to display a site notice and, so far as reasonably practicable, to keep it in place for the requisite period.

PART 7
DIVIDED LAND

7.1 Where part of land, which may or may not include buildings, is subject to compulsory purchase, the owner may in certain circumstances compel the acquiring authority to take the whole. In this Part, we consider the existing statutory provisions, setting out the proposals for reform made by CPPRAG in its Final Report,[1] and the response of Government to those proposals. We then explain our own provisional proposals and the reception accorded to them in the consultation process. Finally, we make recommendations for reform of the law.

Existing Law

7.2 The present law is to be found in several statutes, according to the subject matter of the acquisition (for example, whether the land includes buildings, and whether it is agricultural) and to the method of acquisition (notice to treat or vesting declaration) employed. Coverage is not comprehensive: there are certain circumstances falling entirely outside the statutory provisions.

7.3 These sources can be summarised as follows:

(1) Division of buildings by notice to treat: section 8(1) of the Compulsory Purchase Act 1965.

(2) Division of buildings by vesting declaration: section 12 of, and Schedule 1 to, the Compulsory Purchase (Vesting Declarations) Act 1981.

(3) Division of land appurtenant to a building by notice to treat: section 8(1) of the Compulsory Purchase Act 1965.

(4) Division of land appurtenant to a building by vesting declaration: section 12 of, and Schedule 1 to, the Compulsory Purchase (Vesting Declarations) Act 1981.

(5) Division of agricultural land by notice to treat: sections 53 to 57 of the Land Compensation Act 1973.

(6) Division of agricultural land by vesting declaration: section 53(5) of the Land Compensation Act 1973 and section 7 of the Compulsory Purchase (Vesting Declarations) Act 1981.

(7) Division of other land (being non-appurtenant and non-agricultural) by notice to treat: limited provision in section 8(2) of the Compulsory Purchase Act 1965.

[1] See *Fundamental review of the laws and procedures relating to compulsory purchase and compensation* Final Report (DETR, July 2000).

(8) Division of other land (being non-appurtenant and non-agricultural) by vesting declaration: no statutory provision.

7.4 In our Consultative Report on Procedure we included an outline of the existing law on how buildings and other land are treated when divided under both the notice to treat and the vesting declaration procedures.[3] In particular, we drew attention to two important differences between the two procedures.[4] Unlike the Compulsory Purchase Act 1965 (dealing with notices to treat), the Compulsory Purchase (Vesting Declarations) Act 1981:

(1) gives the Lands Tribunal power to consider the extent of the owner's land that the authority should acquire, and to substitute for the whole of the land a smaller area, including the portion which was proposed to be severed;[5]

(2) provides a normal limit for service of the owner's notice (28 days from the notice of the declaration[6]), and a limit of three months within which the authority must respond by withdrawing, agreeing or referring the matter to the Lands Tribunal.[7]

7.5 The division of agricultural land is governed by sections 53 to 57 of the Land Compensation Act 1973. These provisions apply to acquisitions by notice to treat or by vesting declaration.[8] We made clear in our Consultative Report on Procedure that we believed that these provisions, although complex, comprise a relatively modern procedure and that there was not an obvious case for altering it.[9] Our view on these provisions remains unchanged.

Deficiencies

7.6 We consider the principal criticisms of the current law to be as follows:

(1) Three separate and different statutory procedures operate today, distinguished by the type of landholding and by the form of acquisition.

(2) Not only is the language archaic, but it is employed inconsistently across the procedures. It should, we believe, distinguish simply between acquisition of part of a building (or its attached land) and acquisition of part of any other land.

3 See Law Com CP No 169, Part VI(2) paras 6.28-6.41.

4 See Law Com CP No 169, para 6.34.

5 Compulsory Purchase (Vesting Declarations) Act, s 12 and Sched 1, para 9.

6 *Ibid,* Sched 1, para 2. There is provision for extension of time if notice of the declaration was not received: para 10.

7 *Ibid,* Sched 1, para 4. If the authority fails to respond within three months they are treated as having withdrawn from the purchase: para 5.

8 Land Compensation Act 1973, s 53(1), (5).

9 Law Com CP No 169, Part VI, para 6.53.

(3) Although there is provision for counter-notice in all circumstances where a claimant wishes the authority to acquire the whole and not part of the land, it is not spelt out that counter-notice should be in writing.

(4) There is no consistent set of time limits for service of counter-notice.

(5) Under each of the existing three procedures, the claimant is defined differently. There should be a single definition of the class of those entitled to claim.

(6) The rules relating to treatment of small parcels of remaining land, and the provision of accommodation works,[10] set out in subsections 8(2) and (3) of the Compulsory Purchase Act 1965, should be repealed or at least updated.[11]

Provisional proposals

7.7 Our central proposal in the Consultative Report on Procedure was to rationalise and simplify the existing legislation. In particular, we proposed a single unified procedure whether the compulsory purchase was being implemented by notice to treat or vesting declaration. That procedure would be modelled upon the provisions of the more modern Compulsory Purchase (Vesting Declarations) Act 1981.[12]

7.8 We proposed that the archaic terminology (such as "house, building or manufactory") should be replaced, and that the procedure be made available whenever part of any building, or of any land attached to and used with a building, is being compulsorily acquired. The procedure would provide for service of a written counter-notice (which we termed a "divided property notice") within a prescribed time limit. Appeal would lie to the Lands Tribunal.

7.9 We considered, and provisionally rejected, the proposal contained in the Government's Policy Statement to remove any restriction on the type of landowner able to demand the compulsory purchase by the authority of their remaining land and to require only that the claimant prove that the part acquisition would have a materially detrimental effect on the value of that remaining land. Our provisional view was that such a provision would be too wide.[13]

7.10 We proposed that the Lands Tribunal should be empowered to determine (on a reference by the authority following the claimant's service of a counter-notice invoking the procedure):

[10] For example, the provision of a bridge or crossing or culvert such that the severed portion of land can be afforded reasonable access.

[11] These provisions are derived from the Lands Clauses Consolidation Act 1845, ss 93, 94.

[12] Law Com CP No 169, para 6.49.

[13] *Ibid*, para 6.54.

(1) that in the case of a building, the part proposed to be acquired can be taken without material detriment to the building or its use; or

(2) in the case of land attached to a building, the part proposed to be acquired can be taken without seriously affecting the amenity or use of the building.

In the event of such a determination by the Lands Tribunal, the acquiring authority would not be obliged to acquire the remainder of the claimant's land.

7.11 We took the provisional view that the "material detriment" test should be preserved insofar as it related to buildings and land held with buildings. These holdings are in a special category because of the direct impact the taking would have on the activities of the owner. Although CPPRAG in its Final Report had criticised the material detriment test for its subjectivity,[14] we indicated that we believed that it should stand for two reasons:

(1) It would be difficult to define more precise criteria without unduly limiting the scope of the protection;[15] and

(2) Subjective issues do have some part to play in the final decision as to valuation.[16]

7.12 Government, in its Policy Statement, adopted a line that did not seem to run counter to that approach. It said that it could:

> see no reason for any restriction on the type of landowner able to require an acquiring authority to acquire the whole of his landholding so long as he can demonstrate that taking only a part would have a materially detrimental effect on the value of the remainder.[17]

By "value" DTLR meant that the retained land would be less useful in some significant degree. The Department said that this approach:

> would also reinforce the need to establish objective criteria for determining whether or not taking only part of the landholding would be detrimental. This would be necessary both in order to ensure that the provision could be applied fairly between different acquiring authorities and to minimise the number of referrals to the Lands Tribunal.[18]

We agree.

7.13 We did feel, however, that holdings that are not linked to buildings - ordinary open land and agricultural land - should not be subject to the same test because that

[14] See CPPRAG Final Report (DETR, July 2000), para 133.

[15] See Law Com CP No 169, para 6.50.

[16] See also Policy Statement (DTLR, December 2001), App, para 3.43.

[17] DTLR Policy Statement, App, para 3.42.

[18] DTLR Policy Statement, App, para 3.42.

would place an undue burden on an acquiring authority to have to acquire land which it does not need. Any "material detriment" can adequately be redressed by compensation for injurious affection.[19] Non-agricultural open land is presently not catered for in legislation, but there is no obvious public policy reason why it should be omitted. We felt that there would be logic in adopting (and adapting) the "not reasonably capable of being farmed" formula, substituting "used" for "farmed". As with the Land Compensation Act 1973, which preserves the special provision for agricultural occupiers with lesser interests,[20] there would be a similar provision limiting the right to those who hold at least a "minor tenancy".[21] The net result would be that all forms of open land would then be subject to the "not reasonably capable" test. This would perpetuate and consolidate the distinction Parliament saw appropriate to draw in 1973.

7.14 The broader policy question that flowed from this was the extent to which the right to serve counter-notice and to invoke the procedure should be limited to those with relatively substantial interests in the land. We asked therefore, in general terms, whether the right to serve a divided property notice should apply to all categories of land in cases where the owner's retained land (or any part of it) is no longer reasonably capable of being used for the purpose for which he was using it at the time of the notice of acquisition.[22]

7.15 The remaining issue was how to deal with particularly small parcels of remaining land. These are currently governed by subsections 8(2) and (3) of the Compulsory Purchase Act 1965. We proposed, subject to the views of consultees, that these provisions should simply be repealed.[23]

Consultation

Unified procedure

7.16 We asked whether it would be right to apply a unified procedure to both notice to treat and vesting declarations and, if so, whether the mechanism of the Compulsory Purchase (Vesting Declarations) Act 1981 might be taken as the model.

7.17 There was unanimity amongst those consultees who responded on this issue that there should be a single unified procedure, and that the separate provisions should be rationalised. There was slight dissent[24] about using the Vesting Declarations Act as the model. For example, it was suggested that the "notice of

[19] See our recommendations relating to compensation for injury to retained land in Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286, paras 3.13-3.35 and Compensation Code Rule 4.

[20] Land Compensation Act 1973, s 55: "a person having no greater interest therein than as tenant for a year or from year to year". These persons are excluded from the right under the Land Compensation Act 1973, s 53(1).

[21] See also the Compulsory Purchase (Vesting Declarations) Act 1981, s 2(1).

[22] Law Com CP No 169, para 6.56, Consultation issue (Q)(2).

[23] *Ibid*, paras 6.51, 6.52.

[24] In the response from the Law Society.

objection to severance" mechanism[25] can have the effect of delaying the operation of the whole declaration (where it encompasses several parcels of land) and not merely the part subject to the notice. It does not seem to us, however, that this is necessarily the case. Indeed the 1981 Act provides that the interest in respect of which a properly served notice of objection to severance is served shall not vest in the acquiring authority, and the acquiring authority shall not be entitled to possession, until the notice is disposed of.[26] This indicates that despite service of the notice of objection, the remainder of the land being acquired does vest, and possession can accordingly be taken.[27]

7.18 The suggestion was also made by one consultee that the further procedure contained in the Transport and Works (Model Clauses for Railways and Tramways) Order[28] should be included in the unification exercise. We have not considered this in detail because the Transport and Works Act 1992 fell outside our original terms of reference.[29]

Material detriment

7.19 The proposal to widen the range of interest-holders who could serve counter-notice where buildings are not affected similarly produced a significant measure of consensus amongst consultees. In the Consultative Report on Procedure we indicated that complete removal of any restriction on the type of landowner able to require an acquiring authority to acquire the whole of his landholding in these circumstances, subject only to an "impact on value" test (as suggested by Government[30]), was undesirable. In many cases, we said, an undue burden would be placed on an authority by requiring it to acquire land it does not need. Instead, compensation for injurious affection should be sufficient to redress any material detriment.

7.20 We provisionally proposed that, for land not used with buildings, service of a notice should be limited to "the owner of any interest in the subject land (greater than a tenancy from year to year)" and that it should be available only where the retained land (or part of that land) is "no longer reasonably capable of being used

[25] Compulsory Purchase (Vesting Declarations) Act 1981, Sched 1, Part I.

[26] *Ibid*, Sched 1, para 3.

[27] The notice to treat procedure operates in the same way.

[28] SI 1992 No 3270.

[29] Sched 1 (model clauses for railways) art 24 and Sched 2 (for tramways) art 31 provide a mechanism akin to (but more detailed than) the 1965 Act, s 8 for the acquisition of part of certain properties. The time limit for service of counter-notice is 21 days; there is no time limit for the authority to respond, although in default of agreement the matter stands referred to the Lands Tribunal for determination and the authority is permitted to withdraw a varied notice to treat within six weeks following determination (subject to paying compensation for any loss or expense occasioned). We understand from ODPM that a separate review of the procedures is in hand, and it may well be that that review will want to address this aspect: see Law Com CP No 169, paras 1.32, 1.33.

[30] DTLR Policy Statement, App, para 3.42 (referred to in Law Com CP No 169, paras 6.45 and 6.54).

for the purpose for which [the owner] was using it at the time of the notice of acquisition."[31]

7.21 Two interesting suggestions were advanced by consultees. First, that a statutory test should be incorporated into the "reasonable capability" formula, such as whether the duration and physical effect of the construction works would adversely affect use, or whether costs associated with carrying on the business on the retained land only (such as non-diminishing overheads) would cease to make it viable. Without some qualification, it was said, the formula could be too open-ended. It would benefit from clarification. Secondly, and as a substantive matter, it was suggested that the formula should relate to the value of the retained land and not to its use.

7.22 In the Consultative Report on Procedure we drew attention to the Lands Tribunal decision in *Johnson v North Yorkshire CC*[32] on the factors to be taken into account when determining the issue of "not reasonably capable of being farmed ... as a separate agricultural unit". There, the Lands Tribunal held that the nature and effect of the acquiring authority's proposed use on the remaining land are relevant, but that a claimant's financial arrangements (such as the impact of proposed usage on land value and adequacy of security for a mortgage) are not. The Lands Tribunal indicated that, up to that point, there appeared to be no judicial decision which threw any light on the meaning of the phrase.[33] That still appears to be the case. Although we have no evidence of this decision causing practical difficulty to practitioners or to claimants, we are concerned that just as (in the context of compensation) all true losses suffered by a claimant should be recoverable, so too all true adverse effects should be taken into account in assessing whether an authority should be to acquire the whole of the landholding.

7.23 We should emphasise that our simple objective is to give expression to principles designed to inform new legislation, not to draft the detail of that legislation. We do not believe that the formula we have proposed needs to be constrained, nor that its focus should be different from that presently used in the context of section 53 of the Land Compensation Act 1973 (agricultural land). The present provisions speak of the land being "farmed" (in other words, the current use of the land and not its value) and they do not seek to lay down criteria for deciding whether reasonable capability has been shown, other than that the test is an objective one. We see no reason to depart from this approach. As we have stated above, we do not intend that the existing arrangements relating to agricultural land (and agricultural tenancies) should be altered. We believe there is benefit in consistency of approach.

Small parcels of land

7.24 We suggested in the Consultative Report on Procedure that the provisions of subsections 8(2), (3) of the Compulsory Purchase Act 1965 relating to small

[31] See Law Com CP No 169, para 6.56, Proposal 11(A), (1A).

[32] (1992) 65 P&CR 65 (LT): see Law Com CP No 169, para 6.37.

[33] (1992) 65 P&CR 65, 72 (LT).

parcels of separated land could be dispensed with. The Highways Agency agreed with us that section 8(2) could be repealed because it is now covered by sections 53 to 57 of the Land Compensation Act 1973, although the time limits in our proposal and those in the 1973 Act may need to be brought into line. The Agency was not, however, comfortable with repeal of section 8(3) because the provision protects an acquiring authority in instances where the cost of provision of access or accommodation works would exceed the cost of acquiring the separated land.

7.25 We accept that section 8(3) of the Compulsory Purchase Act 1965 can provide benefit to the public purse in such circumstances and we now recommend that it should be retained. We believe, however, that its terminology could be usefully modernised.

Default mechanism

7.26 In framing our proposal for divided land, we constructed a default mechanism whereby (following service of a counter-notice) failure to withdraw notice to treat, or to serve notice to acquire the whole or to refer the matter to the Lands Tribunal within the prescribed period would lead automatically to deemed withdrawal of the notice to treat (or deemed notice to treat where a vesting declaration had been executed).[34] We based this approach on the present arrangements in section 12 of and Schedule 1, paragraph 4 to the Compulsory Purchase (Vesting Declarations) Act 1981.

7.27 We are conscious that, in the same proposal, we then sought to provide that where reference to the Lands Tribunal did not occur within the prescribed period, the whole of the property would be deemed to be included in the notice to treat or declaration. That second provision was inconsistent. We have now concluded that it would be preferable, and would more effectively focus an acquiring authority's mind if, in the event of such default, the authority is deemed to have served notice of intention to acquire the whole. We provide for this in our recommendations.

Recommendations for reform

Simple procedure

7.28 We recommend that there should be a single procedure, applicable irrespective of whether the compulsory purchase is implemented by notice to treat or by vesting declaration, whereby an affected landowner can require the acquiring authority to purchase land which does not form part of that described in the compulsory purchase order (the "subject land").

Land with building

7.29 Where the subject land forms part only of any building, or of any land attached to and used with a building, the owner of an interest (being greater than a minor

[34] See Law Com CP No 169, Proposal 11(A)(4).

tenancy[35]) in that land should be entitled to require the authority to take the whole. The procedure should be invoked by service of a notice (a "divided property notice") by the claimant on the acquiring authority within a specified time of the notice of acquisition.[36]

7.30 If the claimant fails to prove to the satisfaction of the Lands Tribunal that the part proposed to be acquired can be taken:

(1) in the case of a building, without material detriment to the building or its use; or

(2) in the case of land attached to a building, without seriously affecting the amenity or use of the building;

the claimant will not be entitled to require the taking of the whole.[37]

Land without building

7.31 Where the authority seeks to acquire land which (a) does not comprise part of a building (and is not attached to and used with a building), and (b) is not agricultural land, and the land being acquired is held with other land,[38] then the owner of an interest in that land (being greater than a minor tenancy[39]) should be entitled to require the authority to take the whole (using the "divided property notice" procedure).

7.32 If the claimant fails to prove that taking the part proposed to be acquired will render the retained land not reasonably capable of being used for its current purpose, the claimant will not be able to require the taking of the whole.[40]

Mechanics of a divided property notice

FORM OF NOTICE

7.33 We have already provisionally proposed that it should be made clear that the divided property notice should be in writing. It seems to us, on further consideration, that the form of the notice should be prescribed. This would ensure consistency of practice, and it would enable the ODPM, or whichever government department has responsibility for compulsory purchase at the relevant time, to police the effective operation of the divided land procedure. It would, for instance,

[35] "Minor tenancy" includes tenancies from year to year or any lesser interest and long tenancies which are about to expire, as defined in the Compulsory Purchase (Vesting Declarations) Act 1981, s 2. See, further, Part 8(2) and Recommendation 23 below.

[36] Namely, notice to treat or notice of execution of a general vesting declaration.

[37] Presently the Compulsory Purchase Act 1965, s 8 fails to make clear on whom the onus of proof lies.

[38] See our discussion of compensation for injury to "retained land" in Law Com No 286, paras 3.13 and 3.32, where we endorsed use of the expression "held with".

[39] See n 35 above.

[40] This follows the Land Compensation Act 1973, s 53(1). The onus of proof appears, under this Act, to be on the claimant who must "justify" it: see s 54(1).

be extremely sensible for rules to require that the claimant specified in sufficient detail the additional land which he or she claimed should be acquired pursuant to the procedure.

TIME LIMIT

7.34 Presently the law is ambivalent about time limits for service of a counter-notice by a landowner. Section 8(1) of the Compulsory Purchase Act 1965 prescribes no time limit (nor even provides for written notice); Schedule 1, paragraph 2, to the Compulsory Purchase (Vesting Declarations) Act 1981 stipulates that in ordinary circumstances notice of objection to severance must be served within 28 days of service of the notice of execution;[41] and section 53(1) of the Land Compensation Act 1973 requires service within two months of notice to treat. In our Consultative Report on Procedure we suggested that a time limit of 28 days should be given for service of a divided property notice, and that the authority should have three months within which to respond.[42]

7.35 Given that we are not minded to recommend amendment of the provisions in the Land Compensation Act 1973, we believe that there should either be a 28 days' time limit for service, or power conferred on the Secretary of State to prescribe a time limit in regulations.[43] In any event, regulations should prescribe the information to be given to potential claimants, when the notice of acquisition is served, concerning the effect of such notice and the options available to the claimant. We deal below with the issue of response time.

AUTHORITY'S RESPONSE

7.36 On receipt of a divided property notice, the authority may take one of three routes.[44] Where it opts to withdraw the notice of acquisition, we believe that the claimant should have the right to claim compensation for abortive losses and expenses incurred[45] and the authority should forfeit the right (except with agreement of the claimant) to serve a further notice if the time limit contained in section 4 of the Compulsory Purchase Act 1965 is still running.

[41] Compulsory Purchase (Vesting Declarations) Act 1981, s 6.

[42] This is based upon the Compulsory Purchase (Vesting Declarations) Act 1981, Sched 1, para 4. This contrasts to the period of two months to serve counter-notice and two months to respond set down in Land Compensation Act 1973, ss 53(1), 54(1) (plus a further two months to refer to the Lands Tribunal). The 1973 Act does not provide an automatic default mechanism; instead, either party "may" refer the issue to the Tribunal.

[43] CAAV argued strongly against imposition of a 28-day limit on the ground that its shortness would impact particularly harshly on "sole trader" farmers who will need to take professional advice and who may be short-handed at times of harvest, crop establishment or silage-making.

[44] It may (1) serve notice withdrawing the notice of acquisition; (2) serve notice of intention to acquire the whole; or (3) refer the matter to the Lands Tribunal to determine the appropriate course.

[45] See our proposal in this regard in Part 9 below on Abortive Orders. The Transport and Works Model Clauses Order (see above) already makes limited provision for compensation.

7.37 Where an authority serves notice of intention to acquire the whole, specific provision will need to be made for the notice to treat to be varied accordingly.[46]

WITHDRAWAL

7.38 Unlike the Land Compensation Act 1973,[47] section 8 of the Compulsory Purchase Act 1965 and Schedule 1 to the Compulsory Purchase (Vesting Declarations) Act 1981 are silent as to the power of a claimant to withdraw the counter-notice. We believe this should be rectified. Any notice to treat deemed to have been served in consequence of the counter-notice will then be deemed withdrawn. It may be that the six weeks' limit for withdrawal (from compensation determination) in the 1973 Act could usefully be replicated in the unified procedure.

DEFAULT

7.39 The Compulsory Purchase (Vesting Declarations) Act 1981 provides a default mechanism. If an authority fails to take one of the steps set out in Schedule 1 paragraph 4 to that Act within the statutory period, at the end of that period it is deemed to have served notice withdrawing the deemed notice to treat.[48] The Compulsory Purchase Act 1965 contains nothing on these lines. We believe the deemed consequence is a useful default mechanism that should be incorporated in a new unified procedure. However, we consider that an authority would be better encouraged to act if it were at risk of being deemed to have served notice to take the whole (and to pay compensation on that basis). We recommend this approach.

7.40 The default time limit in the Compulsory Purchase (Vesting Declarations) Act 1981 is three months. That is longer than the two months in the Land Compensation Act 1973. In the interests of expedition and greater consistency, we recommend the shorter time limit here.

Eligibility of claimant

7.41 As we indicate above, consultees favoured our proposal to widen the range of interest-holders who could serve counter-notice.

7.42 In our Consultative Report on Procedure we suggested that it might be appropriate to limit the general right to those who have more than a "minor tenancy" (being a tenancy for a year or from year-to–year or a lesser interest), but it would be necessary to preserve the special provision in section 55 of the Land Compensation Act 1973 Act for agricultural occupiers with lesser interests.

7.43 Presently section 9(1) of the Compulsory Purchase (Vesting Declarations) Act 1981 makes special provision for land in which "there subsists a minor tenancy or a long tenancy which is about to expire". Both "minor tenancy" and "long tenancy

[46] Compulsory Purchase (Vesting Declarations) Act 1981, Sched 1, para 7 and Land Compensation Act 1973, s 54(2) already make provision for deemed variation.

[47] Section 54(3).

[48] Compulsory Purchase (Vesting Declarations) Act 1981, Sched 1, para 5.

which is about to expire" are defined in subsections 2(1) and (2). The right to enter only operates where notice to treat has been served on the tenant, and notice of entry has been served on "every occupier of any of the land in which the tenancy subsists".

7.44 Our recommendation would perpetuate the distinction between minor and more substantial interests, irrespective of whether the acquisition is by notice to treat or by vesting declaration, and of whether it involves built-upon or undeveloped land. This would have the effect of repeating the arrangement in the Compulsory Purchase (Vesting Declarations) Act 1981 and the Compulsory Purchase Act 1965 so that notice to treat would not be given automatically to minor tenants, but would be given to such tenants before entry could be effected.[49] Notice of entry would then be given to all occupiers.

7.45 In *Newham LBC v Benjamin* two judges in the Court of Appeal indicated that service of notice to treat in the case of "short tenancies", although not a necessity, was a useful practice,[50] and that there was no incongruity between service of notice to treat and the procedure under section 20 of the 1965 Act (which is a proviso mechanism).[51] Our recommendation does not seek to elevate this practice into a legislative requirement for the reasons discussed in relation to minor tenancies in Part 8 below.[52]

Lands Tribunal

7.46 The Lands Tribunal should continue to have jurisdiction to determine, on a reference by the acquiring authority, whether there has been material detriment, serious effect on amenity or use and lack of reasonable capability of use for previous purpose.

7.47 Under our recommendation different tests will be applied by the Lands Tribunal when determining the validity of a "divided property notice".[53] Those tests would turn on whether:

(1) a building is to be divided, or

(2) land attached to and used with a building is to be divided; or

[49] See procedure in Compulsory Purchase (Vesting Declarations) Act 1981, s 9(2) and Compulsory Purchase Act 1965, s 20. The latter provision needs recasting in order to clarify the procedural arrangements: see Part 8(2), paras 8.61, 8.62 and Recommendation 23(2) below.

[50] See [1968] 1 WLR 694, 701 *per* Danckwerts LJ, and at p 702, *per* Widgery LJ. Danckwerts LJ said "It seems to me that the notice to treat can well perform a useful function in announcing to persons concerned the desire of the acquiring authority to acquire the interests in the property. It also has the useful effect of demanding particulars of the interests of the various persons concerned, which... may well not be known to the acquiring authority."

[51] The *Newham* case actually turned on Lands Clauses Consolidation Act 1845, s 121, the predecessor to the 1965 Act, s 20.

[52] See Part 8(2), para 8.59 below.

[53] See Law Com CP 169, para 6.56, Proposal 11(A)(8).

(3) other land (not being used as agricultural land) is to be divided.

7.48 The criteria for (1) and (2) reflect those presently used in section 8(1) of the Compulsory Purchase Act 1965, although we think it sensible to add reference to "use" in (2). The test for (3) will reflect the approach used in the Land Compensation Act 1973, again employing the concept of the "use" of the land.

7.49 CAAV suggested that the formula should make clear that the "use" of the land or building refers to use by the claimant: in other words, a subjective rather than an objective use. It was said to us that the test should follow that which we have suggested for compensation for replacement buildings on severance.[54] We believe that our recommendation (below) relating to "other" non-agricultural land is framed in such a way that the "use" will reflect the use being made of the particular piece of land.

7.50 When applying each of the different tests, the Lands Tribunal should be required to take into account:

(1) the effect of the taking of part;

(2) the use to be made of the part proposed to be acquired; and

(3) in a case where the part is proposed to be acquired for works or other purposes extending to other land, the effect of the whole of the works and the use to be made of the other land.

This approach (which we incorporate in our recommendation) mirrors subsection 58 (1) of the 1973 Act, which applied to subsection 8(1) of the 1965 Act, and to Schedule 1, paragraph 8(2) to the Compulsory Purchase (Vesting Declarations) Act 1981.

Unexpired tenancies

7.51 Where part only of land comprised in a lease or tenancy "for a term of years unexpired" is acquired, rent is apportioned between the acquired land and the retained land. That apportionment may be effected by agreement or by determination of the Lands Tribunal.[55]

7.52 In the Consultative Report on Procedure we proposed that these provisions would continue to apply without need for substantive amendment. No consultee suggested that this was wrong.

[54] Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286 provides, in suggested Rule 5(3)(b) (on Consequential loss), for compensation for costs "reasonably incurred" in replacing buildings which are "required to enable the business to be continued", so long as the inclusion of such costs is not "unreasonable in all the circumstances".

[55] Section 19 of the Compulsory Purchase Act 1965 (for acquisition by notice to treat) and Schedule 1, paragraph 12 to the Compulsory Purchase (Vesting Declarations) Act 1981 (for acquisition by vesting declaration).

Agricultural land

7.53 The provisions in sections 53 to 57 of the Land Compensation Act 1973 would continue to apply.

Small parcels of land

7.54 The provisions in section 8(3) of the Compulsory Purchase Act 1965 would continue to apply subject to necessary updating. Section 8(2) of the 1965 Act should be repealed.

Recommendation (21) – Divided land (unified procedure)

(1) There should be a single procedure whereby a person holding an interest in land which is subject to compulsory purchase by an acquiring authority can require the authority to take other land held by him which does not form the subject of the compulsory purchase. This "divided land procedure" is as described in this recommendation.

(2) If the land specified in a "notice of acquisition" (the subject land) comprises part: (a) of any building, (b) of any land attached to and used with a building, or (c) of any other land (not being agricultural land), any person who owns an interest in the land (being greater than as tenant for a year or from year-to-year and not being a long tenancy about to expire), may serve on the acquiring authority a "divided property notice" requiring the authority to purchase his interest in the whole.

(3) A divided property notice, which shall be in writing and in prescribed form, shall specify the land that the claimant requires to be purchased by the acquiring authority and shall be served by a claimant within 28 days of service of the notice of acquisition.

(4) Where a divided property notice has been served, the authority may, within two months of service:

(a) serve notice of withdrawal of the notice of acquisition;

(b) serve notice to acquire the whole of the land; or

(c) refer the matter to the Lands Tribunal for determination.

(5) If the authority fails to take any such action within two months of service, it shall be deemed to have served notice to acquire the whole of the land.

(6) A claimant who has served a divided property notice may withdraw that notice at any time before compensation under it has been agreed or determined.

(7) The Lands Tribunal, on a reference, shall determine whether:

(a) in the case of a building, the part proposed to be acquired can or cannot be taken without material detriment to the building or its use;

(b) in the case of land attached to a building, the part proposed to be acquired can or cannot be taken without seriously affecting the amenity or use of the building;

(c) in the case of other land (not being agricultural land), the part proposed to be acquired can or cannot be taken without the retained land, or any part of it, being made not reasonably capable of use for the purpose for which it was used at the time of service of the notice of acquisition.

The burden of proof shall lie with the person serving the divided property notice.

(8) In determining any such reference, the Lands Tribunal shall:

(a) take into account not only the effect of the taking of part but also the use to be made of that part and, in a case where the part is proposed to be acquired for works or other purposes extending to other land, the effect of the whole of the works and the use to be made of the other land; and

(b) determine the area of the property which the acquiring authority ought to be required to take (and the notice to treat or vesting declaration shall be construed accordingly).

(9) Sections 53 to 57 of the Land Compensation Act 1973 (agricultural land) should continue to apply insofar as they are not affected by the above provisions.

(10) Sections 8(3) (small parcels) and 19 (apportionment of rent) of the Compulsory Purchase Act 1965 should continue to apply in updated form.

(11) Section 8(2) of the Compulsory Purchase Act 1965 should be repealed.

PART 8
INTERFERENCE WITH RIGHTS

8.1 During the course of compulsory purchase it will be necessary for the acquiring authority to deal with various rights and interests over the land being acquired. In this Part we consider the current law as it affects such rights and make recommendations for reform. We deal with interference with private rights (easements, covenants and analogous rights such as profits à prendre), with minor tenancies, with mortgages and rentcharges and finally with public rights of way.

(1) PRIVATE RIGHTS

Introduction

8.2 Land that is compulsorily purchased may itself be subject to rights such as easements and covenants which are exercisable for the benefit of neighbouring land. We shall refer to such rights as "private rights". The land over which such private rights are exercisable is termed the "servient land", and the neighbouring land with the benefit of such rights the "dominant land".

8.3 While the compulsory purchase order does not of itself result in the acquisition of private rights over the land, there are statutory powers, albeit exercisable only in limited circumstances, whereby the acquiring authority may expressly "extinguish" such rights. Where private rights are not expressly extinguished difficult questions concerning the enforceability of such rights may arise, both during the execution of the works and subsequently. The effect of the compulsory purchase order is to confer on the acquiring authority immunity from liability for any interference with the enjoyment of private rights attributable to the works being carried out under statutory authority. The scope and extent of this immunity (or, as it is sometimes known, "override"), which according to the circumstances may derive either from statute or from common law, is uncertain. Once the works have themselves been completed, the rights may revive and be enforced against the servient land. Should the servient land be disposed of by the acquiring authority at any time, a purchaser or other third party who obtains that land may be bound by the rights in accordance with ordinary principles of property law.

8.4 In our Consultative Report on Procedure we argued that the existing position gave rise to uncertainty which the acquiring authority should have the opportunity to dispel. We therefore proposed a new statutory procedure whereby either party (the acquiring authority or the claimant) may elect that the rights over the land be extinguished rather than merely overridden. This procedure would enable the acquiring authority to obtain clear title to the land, subject of course to payment of compensation to the dominant owner, and would thereby facilitate the onward transmission of acquired land free of incumbrances.

8.5 Where private rights are extinguished, the claimant would be entitled to compensation under the standard provisions for compensation on compulsory

purchase contained in Rules 1 to 6 inclusive of the Compensation Code.[1] In our Final Report on Compensation we recommended that there should be a separate entitlement to compensation where private rights are overridden.[2] The claimant should be entitled to the diminution in the market value of the dominant land and to any consequential loss not reflected in the loss of market value. This recommendation was given expression in Rule 17 of the Compensation Code.

Existing Law

8.6 Neither the Compulsory Purchase Act 1965 (dealing with the notice to treat procedure) nor the Compulsory Purchase (Vesting Declarations) Act 1981 (dealing with the general vesting declaration procedure) contains clear provisions concerning the interference with private rights over land.

8.7 Section 10(1) of the Compulsory Purchase Act 1965 defines the jurisdiction of the Lands Tribunal to determine compensation disputes as being:

> in respect of any land, or any interest in land, which has been taken for or injuriously affected by the execution of the works

and thereby recognises the existence of a right of compensation in such circumstances. It does not, however, acknowledge any right of compensation for loss caused by subsequent use,[3] nor does it set out any procedure for determining whether a right has been acquired (or extinguished) or simply interfered with (whether on a permanent or temporary basis).

8.8 The effect of a vesting declaration is that the land vests in the acquiring authority as though under the 1965 Act "any power to execute a deed poll had arisen in respect of all the land and all the interests therein", and the authority had duly exercised that power on the vesting date.[4] The reference to the 1965 Act obscures what might otherwise appear to be a clear statement that the authority obtains clear title, free of any interests. Indeed, it is thought (although the matter is not free from doubt) that the vesting declaration procedure does not operate automatically to extinguish easements and other similar rights over the subject land, because such rights would not be so extinguished had the acquiring authority been proceeding by the notice to treat procedure of the 1965 Act.[5]

[1] See Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286, Parts II to IV for proposed Rules 1-6

[2] Law Com No 286, paras 9.10-9.12.

[3] This is a deficiency which we have recommended remedying by legislation: see Law Com No 286, para 9.12, Rule 17 of the Compensation Code.

[4] Compulsory Purchase (Vesting Declarations) Act 1981, s 8(1).

[5] Law Com CP No 169, para 6.18. This understanding of the current law is acted upon by the Land Registry who do not routinely remove notice of easements and covenants encumbering the land that is subject to a general vesting declaration. On the contrary, it is their practice on first registration to place a protective entry on the register to the effect that the land will be subject to any easements and covenants that may have been imposed prior to the date of vesting.

Extinguishment

8.9 Private rights may be extinguished by invoking one of a number of express statutory powers.[6] Such provisions (which are relatively rare) allow the acquiring authority to obtain clean and unencumbered title from the outset. Alternatively, the acquiring authority may enter into an express agreement, usually in consideration for the payment of compensation, with the person entitled to the private right.[7] In the absence of extinguishment by either of these means, however, the compulsory purchase procedure will do no more than "override" the rights in question.

Override

8.10 In *Re Simeon and Isle of Wight RDC*,[8] Luxmoore J stated the broad effect of "override". Although the private rights may continue to bind the land, it is not possible to prevent the implementation of the statutory project by seeking to enforce the private rights in question:

> It is, I think, settled law that in all cases where land is subject to a burden which runs with it for the benefit of other land, a purchaser taking under compulsory powers takes the land subject to that burden like any other purchaser; but the covenant cannot be enforced by injunction in the Courts if the breach of it is attributable to the execution of the works authorised by the statute under which it was taken, or to the exercise of the statutory powers thereby conferred on the purchaser.[9]

8.11 Private rights may also be overridden by statute. Section 237 of the Town and Country Planning Act 1990 confers an immunity to carry out building operations on land acquired for planning purposes. It empowers local authorities to interfere with easements and other rights where land has been acquired or appropriated[10] for planning purposes provided that development is in accordance with planning permission and compensation is paid:

> The statutory objective which underlies section 237 ... is that, provided that work is done in accordance with planning permission, and subject to payment of compensation, a local authority should be permitted to develop their land in the manner in which they, acting bona fide, consider will best serve the public interest. To that end, it

[6] See Housing Act 1985, s 295; Town and Country Planning Act 1990, s 236; Channel Tunnel Rail Link Act 1996, s 7; Regional Development Agencies Act 1998, ss 19, 20 and Sched 6.

[7] B Denyer-Green, *Compulsory Purchase and Compensation* (6th edn, 2000), p 105.

[8] [1937] Ch 525.

[9] *Re Simeon and Isle of Wight RDC* [1937] Ch 525, 535 *per* Luxmoore J.

[10] "Appropriated" means, for land that is already held by an authority, changing the statutory purpose for which it is held.

is recognised that a local authority should be permitted to interfere with third party rights.[11]

8.12 Section 237 is, however, limited in its effect. In *Thames Water Utilities Ltd v Oxford City Council*,[12] a council had appropriated land to planning purposes and used its statutory powers to override a restrictive covenant affecting the land. The land was leased to a football club which was intending to build a stadium upon it, thereby contemplating use in breach of the restrictive covenant. The court held that although section 237 permitted temporary non-compliance with the covenant for the duration of the works of construction, it did not authorise the subsequent use of the land in breach of covenant.

Extent of immunity

8.13 Particular difficulty is caused when the acquiring authority wishes to dispose of the subject land for development, as there is a substantial risk that the rights, moribund during the execution of the authorised works or the period of authorised use, may then revive. On disposal of the subject land, the rights remain in suspension in so far as the use of the land continues to be for the purpose for which it was compulsorily acquired. If that original purpose is exceeded, however, immunity from enforcement of the overridden right will cease.

8.14 In *Marten v Flight Refuelling Ltd*,[13] agricultural land, requisitioned by the Air Ministry in 1942 in order to build an aerodrome, was sold in 1943 to its sitting tenant subject to a covenant restricting its use to that of agriculture. In 1947 the Air Ministry let into occupation an aviation company, and in 1958 the Ministry of Defence compulsorily acquired the land under the Defence Acts. The issue was the extent to which the covenant bound the aviation company, or continued in suspension. Wilberforce J held that the covenant could not be enforced so as to prevent use by the Air Ministry or its agents (the aviation company) for the purpose for which the land was acquired or use by the aviation company so far as its activities could be broadly treated as being done "for the purposes for which the airfield may be considered to have been acquired." The company was therefore protected in respect of its research into flight refuelling being conducted for the RAF, but not in respect of its other activities, in particular contract work being undertaken for the Belgian Air Force.

8.15 What is unclear from the limited authority available is whether the mere fact of payment of compensation[14] for the interference might perpetuate the suspension, notwithstanding the removal or termination of the original cause for the interference. It has been argued that following payment of compensation the acquired land should continue to benefit from immunity only as long as the

[11] *R v City of London Corporation, ex p Mystery of the Barbers of London* [1996] 2 EGLR 128, 129 *per* Dyson J.

[12] [1999] 1 EGLR 167. This first instance decision does not refer to the earlier, and arguably inconsistent, decision of Wilberforce J in *Marten v Flight Refuelling Ltd* [1962] Ch 115.

[13] [1962] Ch 115.

[14] Where the private right is not expressly released or extinguished by the terms of the agreement with the acquiring authority.

original cause of interference remains and the statutory scheme carries on.[15] If, therefore, the authority disposes of the land subject to the private rights, those rights may be exercisable once more against the authority's successors in title, notwithstanding payment of compensation.[16]

Deficiencies

8.16 In our Consultative Report on Procedure we identified various deficiencies in the present law, and came to the provisional view that statutory clarification was necessary.[17] The deficiencies are as follows:

(1) There is no universally applicable means whereby the acquiring authority can choose to extinguish private rights on payment of compensation;

(2) The effect of override is uncertain. In particular, it is not clear whether and when statutory immunity extends to successors in title of the acquiring authority;

(3) The *Thames Water Utilities*[18] decision has highlighted a limitation on the statutory powers contained in section 237 of the Town and Country Planning Act 1990 which appears to be unsatisfactory; and

(4) In general terms, clarification of the effect of interference with private rights and its relationship with the payment of compensation is much needed.

Provisional proposals

8.17 In our Consultative Report on Procedure we proposed a new statutory procedure whereby either party could elect to proceed on the basis of extinguishment of rights rather than simply overriding them to the extent required by the project.[19] That procedure was designed to address the four deficiencies identified.

8.18 The key procedural components of these proposals were that:

(1) There should be a presumption that private rights which attach to the subject land are overridden, unless (and save to the extent that) the acquiring authority elects to extinguish them;

(2) Where private rights are to be extinguished, the authority should proceed as though those rights are interests entitling the relevant owner to notice to treat. On completion of the purchase (or, if earlier, on taking of

[15] See B Denyer-Green, *Compulsory Purchase and Compensation* (6th edn, 2000), p 115. The author contends that in this respect it is arguable that *Marten v Flight Refuelling Ltd* is wrong.

[16] *Ibid*.

[17] Law Com CP No 169, para 6.22.

[18] [1999] 1 EGLR 167.

[19] Law Com CP No 169, paras 6.22-6.25 and Proposal 10.

possession by the authority), all rights to which the election relates shall be extinguished;

(3) Where private rights are to be overridden, immunity should attach to the erection, maintenance or use of any building or other work whether done by the local authority or by a person deriving title under them, if done in accordance with planning permission;

(4) Any person who suffers loss by the extinguishment or override of any right, is entitled to compensation under the Compensation Code;[20] and

(5) Where a compensation claim is made for rights which have been overridden, either party may elect for compensation to be paid on the basis of extinguishment (or partial extinguishment) of the right. In that event, the right shall be treated as extinguished (or partially extinguished) for all purposes.

Consultation

The need for legislative reform

8.19 In our Consultative Report on Procedure we first asked whether consultees agreed that, where there is to be interference with existing private rights, the position should be clarified by legislation.[21] Respondents were unanimous that the procedure for interference with private rights should be so clarified. Particular concern was expressed about the decision in the *Thames Water Utilities*[22] case and its impact on statutory immunity.

Election by the acquiring authority

8.20 We then asked whether consultees considered that the acquiring authority should elect to extinguish or to override rights from the outset and in the event that rights are to be extinguished, the authority should proceed by way of notice to treat.[23]

8.21 Most consultees agreed that the notice to treat procedure was the appropriate machinery to effect extinguishment of private rights, although some concern was expressed about the practical problems that may arise. In particular, the Law Society observed that the acquiring authority may not be aware of all private rights affecting the subject land. This may lead the authority, as the Welsh Development Agency argued, to serve notices on neighbouring landowners whether required or not.

[20] See Towards a Compulsory Purchase Code: (1) Compensation (2003) Law Com No 286, Part XII, Rules 1 (right to compensation for cessation of interest or right overridden) and 17 (interference with easements, etc).

[21] Law Com CP No 169, para 6.25, Consultation issue (P)(1).

[22] [1999] 1 EGLR 167.

[23] Law Com CP No 169, para 6.25, Consultation issue (P)(2).

8.22 English Partnerships advanced the argument that private rights should not be capable of being overridden and that extinguishment (with proper compensation) should therefore be the only means of dealing with them. The CPO should contain a schedule listing those private rights to be extinguished. This would provide certainty for the current and future owners of the land affected.

8.23 Although no other consultees argued that override should be abolished, there was some support for adoption in appropriate cases of the "scheduling" approach to private rights. Concern was, however, expressed that it would not always be practicable as the acquiring authority may not be aware of the private rights likely to be interfered with. One suggestion was to introduce a statutory presumption of extinguishment: that all easements affecting the subject land (whether or not "scheduled" to the order) would be extinguished unless the order provides to the contrary. Another was that it should be for the parties to agree whether rights are overridden or extinguished, and that in default of such agreement they should be overridden.

8.24 There was some concern about the appropriate timing of an election by the acquiring authority. We can see that it may often be difficult to identify rights that are likely to be affected, and the extent of interference, until the works have commenced. On the other hand, the need for certainty may dictate expedition.

8.25 In general, however, consultees supported our proposal that the acquiring authority should be entitled to elect between extinguishment and override.

Election by the affected party

8.26 We asked whether *either* party should be able to opt for extinguishment (or partial extinguishment).[24] This could be achieved by allowing the owner whose rights are to be interfered with to serve notice on the authority seeking extinguishment (instead of override) of those rights.

8.27 A significant majority of consultees agreed that affected owners should be entitled to elect extinguishment of their private rights, subject to certain caveats. It was suggested that it would be necessary to impose time limits for such an election, for instance, that the election would have to occur before service of notice of entry. It was also suggested that the owner's notice should be subject to appeal by the acquiring authority.

8.28 In response to this question, another important issue was raised: whether a landowner should have the right to oppose an election by an authority for extinguishment. RICS argued that extinguishment should not follow automatically once the election is made by the acquiring authority. Landowners should be entitled to object to an authority's intent to extinguish. For example (it was said), where there is to be an acquisition of open space land (protected by a covenant as to future use) for urban regeneration, and that land is to remain open space in the development project, why is it necessary to extinguish the covenant

[24] Law Com CP No 169, para 6.25, Consultation issue (P)(3)(b).

automatically? Surely that issue should only arise if, at a later date, the authority seeks to undertake infill construction on that land?

Extent of immunity

8.29 Finally, we asked consultees whether, in the event of "override", statutory immunity should apply both to erection and to use of any buildings or other works.[25] This issue arose from the decision in *Thames Water Utilities v Oxford City Council*[26] which gave a restrictive interpretation of section 237 of the Town and Country Planning Act 1990. We further proposed in the Consultative Report on Procedure that an extended section 237 should apply generally to all authorities exercising compulsory purchase powers, not just local authorities exercising planning powers.[27] Consultees favoured clarification and expansion along these lines.

Recommendations for reform

Procedure to be contained in legislation

8.30 We recommend that the procedure for interference with private rights following compulsory purchase should be set out clearly in legislation. It should apply to compulsory purchase under both the notice to treat and the vesting declaration procedures.

Presumption of override with election to extinguish

8.31 We believe that it is important to retain the flexibility currently afforded by the dual options of extinguishment and override. We resist the suggestion that acquiring authorities should be entitled only to extinguish private rights. While we can see the advantage of listing the rights being affected in a schedule to the order itself, and thereby providing certainty, we do not think this is practicable in all cases.[28]

8.32 The effect of extinguishment is that the right will be permanently eradicated. It will not be capable of subsequent revival. To insist upon extinguishment in all cases would impose greater liability to compensate upon the acquiring authority than currently applies. Where the acquiring authority only requires suspension of the rights for a limited period or for limited purposes, extinguishment may be a disproportionate response to the authority's needs. It should however continue to be a matter for the discretion of the acquiring authority whether it deals with private rights by means of extinguishment or "override". We consider that it would be highly unsatisfactory for those with private rights to be entitled to challenge the

[25] Law Com CP No 169, para 6.25, Consultation issue (P)(3)(a).

[26] See para 8.12 above.

[27] Law Com CP No 169, para 6.23. Powers analogous to section 237 can be found in New Towns Act 1981, s 19 and the Leasehold Reform, Housing and Urban Development Act 1993, Sched 20, para 5.

[28] At present, where rights are being acquired or extinguished compulsorily, it is open to the acquiring authority to "schedule" them: see ODPM Circular 06/2004, App U, para 16(l). This procedure is not available, however, where the rights are only being overridden.

election that is made as it could place serious obstacles in the way of the process of confirmation.

8.33 It is unrealistic, in our view, to expect acquiring authorities to be aware of all private rights which may affect the subject land. This is a further reason why "override" and its concomitant immunity is so important and so useful, as it enables works to be carried out pursuant to the CPO without prior identification of every possible infringement of private rights over the subject land.

8.34 We believe that we should retain "override", acknowledging that where works are being carried out the rights affected should be curtailed only so far as is necessary, and should be capable of subsequent revival. This would allow for flexibility in the process of land assembly where it may not be clear, until the works are under way, to what extent interference is required.

8.35 We therefore recommend that there should be a presumption that a CPO overrides private rights exercisable over the subject land, without need for the rights to be expressly identified in the order itself. At the same time, it should be open to the acquiring authority or the owner of the private right potentially overridden by compulsory purchase to elect to have the right extinguished.

Notice of election: timing and service

8.36 If the acquiring authority wishes to extinguish the rights, then it must identify them and make an election before the first notice date, that is the date of publication of the notice of making the order. Notice to extinguish (which we refer to as "notice of election") must be served by the authority on every "qualifying person", as newly defined in section 100(5) of the Planning and Compulsory Purchase Act 2004.[29] The recipient of the notice may object to the proposed extinguishment by serving counter-notice to such effect. The only ground of objection will be that the dominant land (that is, the land benefited by the right in question) will no longer be reasonably capable of being used for its current purpose. The objection will be determined by the Secretary of State as part of the order confirmation process. If there is no objection, then the authority should serve notice to treat on the owner of the right, and it will be duly extinguished on completion of the purchase or on taking of possession by the authority (if earlier).

8.37 Where a right is being overridden by an acquiring authority (no notice of election having been served), the owner of the right may in turn elect that the right be extinguished and compensation paid on that basis. In this case, the authority will have no right of objection or appeal.

8.38 If an authority proceeds on the basis of partial extinguishment of a right (serving notice of election accordingly), leaving the remainder to be overridden, a claimant should (we believe) be able to serve notice of extinguishment relating to that remainder.

[29] Amending Acquisition of Land Act 1981, s 12.

Effect of override

8.39 It is essential that legislation makes clear the effect of private rights being overridden. While the statutory purpose is being carried out (in accordance with planning permission) by the acquiring authority or by any person deriving title under it, the right will not be enforceable by the owner of the dominant land. This arrangement will protect not only the acquiring authority but also their successors in title such as purchasers of the freehold estate or tenants. Any works falling outside the statutory purposes will not benefit from statutory immunity.

Recommendation (22) – Interference with private rights

(1) Where an authority undertakes an operation on or uses land for a statutory purpose, and that land is subject to easements or other private rights, it should be presumed that such rights will be *overridden,* unless the authority elects to *extinguish* the rights (or any of them) over all or part of the land.

(2) Where rights over land are overridden, the erection, construction or maintenance of any building or work on land or any use of land, whether done by the authority or by a person deriving title under it, should be deemed lawful if done in accordance with planning permission and for the statutory purpose, notwithstanding interference with the rights.

(3) Where an authority elects to *extinguish* any right, it should be required to serve "notice of election" on every qualifying person on or before the first notice date, describing the right and its extent.

(4) On receipt of a notice of election, the qualifying person should be entitled either to:

> **(a) accept the notice; or**
>
> **(b) serve on the authority "notice of objection" to the proposed extinguishment within a prescribed period, which objection will be determined by the Secretary of State as part of the order confirmation process.**

(5) Notice of objection should be able to be upheld by the Secretary of State only on the ground that other land held by the qualifying person which benefits from the right will no longer be reasonably capable of being used for the purpose for which it is currently being used by that person.

(6) Where notice of election is accepted or notice of objection is not upheld, the authority should proceed as though the right in question was an interest entitling the owner to notice to treat; and, on completion of the purchase or on prior taking of possession by the authority, the right described in the notice of election shall be extinguished.

(7) Where any right is *overridden* by an authority, and work on, or use of, the land has commenced (whether by an authority or a person deriving title under it), the owner of the right should be entitled to serve on the authority "notice of extinguishment" requiring the authority to acquire the right (or part of the right) and extinguish it.

(8) Section 237 of the Town and Country Planning Act 1990 should be amended so that immunity extends to the use of "any building or work" (as well as to erection, construction, etc), and to any acquiring authority acting within its statutory powers for a statutory purpose, in accordance with such permissions or consents as are required.

(2) MINOR TENANCIES

Introduction

8.40 Where land is being compulsorily purchased, the acquiring authority must consider carefully the position of any potential tenants. There may be properties let on a fixed term which has many years to run as well as properties let on periodic tenancy which are terminable by service of notice to quit. Tenants may be protected by a regime of statutory security, for instance the Landlord and Tenant Act 1954, Part II (applying to business tenancies) or the Agricultural Tenancies Act 1995.[30]

8.41 The acquiring authority may decide to terminate the tenancy by exercising its powers as landlord under the tenancy agreement, for example, by serving notice to quit of an appropriate length on a periodic tenant. In the case of a fixed term tenancy to which no statutory security regime applies, it may simply allow the fixed term to expire. The advantage to the authority of letting the contract of tenancy take its course is that no compensation will be payable to the tenant, for the very good reason that the tenant will have suffered no loss as a result of the compulsory purchase. It may be, however, that this method of proceeding is not appropriate to the circumstances. Typically, the acquiring authority may require to terminate the tenancy, and to recover possession, expeditiously, before the date on which the tenancy agreement, together with any applicable regime of statutory security, will allow.

8.42 Statute has accordingly made provision for the effect of compulsory purchase of land on certain tenancies. We shall first consider section 20 of the Compulsory Purchase Act 1965, which deals with so-called "short tenancies" where an authority is proceeding with its main acquisition by notice to treat. We shall then examine section 9 of the Compulsory Purchase (Vesting Declarations) Act 1981, which sets out a procedure applicable to "minor tenancies" and also to certain other, longer, tenancies which are about to expire (hereafter "expiring tenancies"). The 1981 Act applies where an authority is proceeding with its main acquisition by vesting declaration.

8.43 In our Consultative Report on Procedure we proposed to retain the substance of the existing law, subject to restating that law in modern language. These

[30] The use of the term "minor tenancies" in relation to residential property may need further consideration in the event of implementation of the Law Commission's final recommendations in its Renting Homes project, which shifts the focus of housing law from residential tenancies to occupation agreements: see Interim Report (2003) Law Com No 284.

proposals, as we have already indicated,[31] attracted a considerable number of comments. In our Final Report on Compensation we took the view that there was no need for a separate set of compensation rules governing minor tenancies, and recommended that the general rules for compensation applying to the compulsory acquisition of other interests should be applied on the acquisition or extinguishment of such tenancies.[32]

Existing Law

Notice to treat procedure

8.44 Where the acquiring authority proceeds with its main acquisition by notice to treat, section 20(1) of the Compulsory Purchase Act 1965 applies:

> If any of the land subject to compulsory purchase is in the possession of a person having no greater interest in the land than as tenant for a year or from year to year, and if that person is required to give up possession of any land so occupied by him before the expiration of his term or interest in the land, he shall be entitled to compensation for the value of his unexpired term or interest in the land, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain.

8.45 The object of this provision, which derives from section 121 of the Lands Clauses Consolidation Act 1845, has traditionally been interpreted to be "to put short tenancies on a special footing of their own."[33] It is not therefore necessary (despite the apparently clear statement to the contrary in section 5 of the 1965 Act) for an acquiring authority to serve notice to treat on those with "short tenancies" as defined.[34]

8.46 Section 20 sets out no more than a statement of compensation entitlement. It was left to the Court of Appeal, in *Newham LBC v Benjamin*,[35] to elucidate the procedure underlying this provision. The authority could simply serve notice to quit in its capacity as landlord, or wait for the tenancy to expire, and thereupon recover possession. In either case, no entitlement to compensation, other than a possible claim for "disturbance" under the Land Compensation Act 1973,[36] would arise. Alternatively, the acquiring authority could expedite the recovery of possession by making a demand (through service of notice to treat) that the

[31] Law Com No 286, para 9.15.

[32] Law Com No 286, para 9.16, Rule 18 of the Compensation Code.

[33] *Newham LBC v Benjamin* [1968] 1 WLR 694, 700 *per* Lord Denning MR.

[34] The term "short tenancies" is used in *Newham LBC v Benjamin* [1968] 1 WLR 694. The 1965 Act refers, somewhat misleadingly, to the tenants affected by section 20 as "tenants at will, etc".

[35] [1968] 1 WLR 694. The provision being interpreted was the Lands Clauses Consolidation Act 1845, s 121, the precursor of section 20, and in all material respects the same.

[36] 1973 Act, ss 37, 38. We now refer to such loss as "consequential loss": see Law Com No 286, para 4.4 *et seq*, Rule 5 of the Compensation Code.

tenant leave earlier than his or her entitlement under the tenancy agreement. In that case, compensation pursuant to section 20 would be payable.

Vesting declaration procedure

8.47 Where the acquiring authority proceeds with its main acquisition by vesting declaration, the governing statute is the Compulsory Purchase (Vesting Declarations) Act 1981. It contains special rules which are applicable to land that is subject not only to a "minor tenancy" (that is "a tenancy from year to year or any lesser interest"[37]) but also to a "long tenancy which is about to expire".[38] This latter class of tenancy is intended to catch tenancies (of whatever duration) which shall terminate, or which are terminable, within one year of the vesting date: in other words, they are functionally equivalent to tenancies with an interest no greater than that enjoyed by tenants from year-to-year. The special procedure of the 1981 Act therefore applies to a wider range of tenancies than that of the 1965 Act.

8.48 The vesting declaration does not confer on the authority an immediate right to immediate possession, but anticipates the service of notice to treat, followed by notice of entry, on the occupiers of the land:

> (2) The right of entry conferred by section 8(1) above shall not be exercisable in respect of that land unless, after serving a notice to treat in respect of that tenancy, the acquiring authority have served on every occupier of any of the land in which the tenancy subsists a notice stating that, at the end of such period as is specified in the notice (not being less than 14 days) from the date on which the notice is served, they intend to enter upon and take possession of such land as is specified in the notice, and that period has expired.
>
> (3) The vesting of the land in the acquiring authority shall be subject to the tenancy until the period specified in a notice under subsection (2) above expires, or the tenancy comes to an end, whichever first occurs.[39]

General

8.49 Where the acquiring authority is proceeding by vesting declaration, notice to treat must, therefore, be served in order to terminate such tenancies in the absence of any contractual entitlement to do so. Where the authority is proceeding by notice to treat, on the other hand, no further notice to treat is required to be served in order to effect termination. The range of tenancies covered is wider in the case of

[37] Compulsory Purchase (Vesting Declarations) Act 1981, s 2(1).

[38] Defined in the Compulsory Purchase (Vesting Declarations) Act 1981, s 2(2) as "a tenancy granted for an interest greater than a minor tenancy, but having on the vesting date a period still to run which is not more than the specified period (that is to say, such period, longer than one year, as may for the purposes of this definition be specified in the declaration in relation to the land in which the tenancy subsists.)" It is to be assumed that the tenant will exercise options to renew, and the landlord will exercise options to terminate.

[39] Compulsory Purchase (Vesting Declarations) Act 1981, s 9.

the vesting declaration procedure than in the case of the notice to treat procedure.

8.50 As we explained in the Consultative Report on Procedure,[40] the advantage of these somewhat complicated provisions is that the acquiring authority is not initially concerned with those holding minor and expiring tenancies. It is open to the authority to allow fixed term tenancies to expire or to serve notice to quit pursuant to its rights under the tenancy or to come to terms with the tenant as to compensation or as to relocation. There is, it would appear, an attractive pragmatism underpinning the words in the statute.

Deficiencies

8.51 The statutory provisions are over-complicated, and section 20 is in need of restatement in modern terms. There are differences between the two procedures which have no sound rationale and which could usefully be eradicated.

Provisional proposals

8.52 We accordingly proposed that section 20 of the Compulsory Purchase Act 1965 should be restated in modern language, in accordance with the *Newham* case,[41] and that it should be expanded so as to include "long tenancies about to expire", thereby achieving consistency with section 9 of the Compulsory Purchase (Vesting Declarations) Act 1981.[42]

Consultation

8.53 We asked consultees whether they agreed that the current procedures for minor tenancies under the 1965 and 1981 Acts operated satisfactorily, and, if not, what amendments they believed should be made.[43] We also asked consultees whether section 20 of the 1965 Act should be restated in modern form, so as to achieve consistency with section 9 of the 1981 Act.[44]

8.54 While almost all consultees considered that section 20 of the 1965 Act should be restated in modern form, dissatisfaction was expressed by many about the current procedures.

8.55 As the *Newham* case indicates, it is common practice where the notice to treat procedure is being utilised to serve notice to treat on those holding such tenancies even though it is not required. This approach is viewed by some consultees as a sensible application of caution: for instance, there may be doubts as to the duration of the interests in question (and hence whether they fall within the class of minor tenancies at all). It also means that a tenant who expected to have their fixed term tenancy renewed at the end of the term (or periodic tenancy

[40] Law Com CP No 169, para 6.8.

[41] *Newham LBC v Benjamin* [1968] 1 WLR 694

[42] Law Com CP No 169, para 6.8, Proposal 9.

[43] Law Com CP No 169, Consultation issue (O)(1).

[44] Law Com CP No 169, Consultation issue (O)(2).

continue) obtains proper warning of the impending compulsory purchase of the tenanted land.

8.56 Criticism was made of the vesting declaration procedure by English Partnerships, arguing that it is not advantageous to an acquiring authority adopting that procedure to be required to serve notice to treat on minor tenancies and tenancies which are about to expire. They contend that it should be open to the authority to include all interests within a general vesting declaration without the need to pursue two separate routes in order to obtain full title (and thereby vacant possession). They contend that current law is unnecessarily complicated and they doubt the benefit of the dual system which does not require notice to treat under the 1965 Act but which makes it mandatory under the 1981 Act.

8.57 A more fundamental concern was the case for separate treatment of minor tenancies. Some consultees argued that having to distinguish certain types of property interest causes practical problems. First, many short-term tenants have an expectation that their tenancy will be renewed. Allowing their tenancies to expire by effluxion of time denies them the opportunity to arrange their affairs, and leaves them without compensation. Secondly, it can be difficult for acquiring authorities to establish whether a particular interest falls within the definition of minor tenancy. For this reason (as we have outlined above), authorities often serve notice on minor tenants.

8.58 Particular reference was made by the NFU and CAAV to tenancies of agricultural property; each proposing that notice to treat should be required in all such cases. Traditionally, a tenancy from year-to-year has been granted to an agricultural tenant on an indefinite basis and such tenancies have been protected under the agricultural holdings legislation. The Agricultural Tenancies Act 1995 now makes provision for "farm business tenancies". Any such tenancy granted for a term of more than two years will continue as a tenancy from year-to-year.[45] These consultees argued that the potential duration of the tenant's entitlement under this legislation was such that the tenant should be served with notice to treat.

Recommendations for reform

8.59 We believe that it is important that acquiring authorities have flexibility in the methods of acquisition open to them. Not only should they continue to be able to choose between notice to treat and vesting declaration, they should be free either to invoke the normal contractual means of termination of tenancies (notice to quit, expiry of a fixed term) or to expedite the process by taking earlier possession and paying compensation to the dispossessed tenant. It should therefore be a matter of discretion for the acquiring authority whether to give notice to quit, to wait for tenancies to expire or to terminate by giving notice to treat.

[45] Agricultural Tenancies Act 1995, s 5(1). The example was given of a tenancy granted for a ten-year fixed term which has eleven months remaining until its expiry. The effect of the statute is that the tenant would have the right to 23 months' possession before they could be required to deliver up under the tenancy agreement.

8.60 At the same time, we believe that it is important that tenants who are likely to be affected by the exercise of compulsory purchase powers should obtain adequate notice of the authority's intentions in this regard. It is incongruous that the existence of a mandatory duty to serve notice to treat on the tenant depends on the choice of proceeding made by the acquiring authority.

8.61 Since *Newham LBC v Benjamin*,[46] it has been good practice, where the acquiring authority has been proceeding by notice to treat and wishes to terminate minor tenancies, to serve notice to treat on the tenants themselves. We believe that this practice should now be given statutory recognition and that acquiring authorities should be required to serve notice to treat whichever procedure they are adopting to effect the main acquisition. Section 20 of the 1965 Act should therefore make clear that the taking of early possession is a matter for the discretion of the acquiring authority, but once that discretion is exercised positively, the service of notice to treat on the tenants affected becomes mandatory.

8.62 This would, in our view, effect the reform being sought by those seeking better protection for those holding farm business tenancies as they would now be entitled to notice to treat if the acquiring authority adopts the "early possession" route. Similar protection would be afforded to tenants in analogous situations, notably a person holding a business tenancy within Part II of the Landlord and Tenant Act 1954.

Recommendation (23) - Minor tenancies

(1) The procedure for dealing with minor tenancies, and long tenancies about to expire, applicable where the acquiring authority is proceeding by vesting declaration (and contained in the Compulsory Purchase (Vesting Declarations) Act 1981), should be retained without amendment.

(2) The law should be amended so as to ensure that analogous procedures, and protections, apply where the acquiring authority is proceeding by notice to treat under the Compulsory Purchase Act 1965. In particular:

(a) where the authority acquires land, it should be subject to any existing minor tenancy and any long tenancy which is about to expire;

(b) the authority should not be obliged to recover possession immediately on acquiring the land, and it should be entitled to allow such tenancies to expire, or to serve notice to quit in order to terminate them; and

[46] *Newham LBC v Benjamin* [1968] 1 WLR 694.

(c) if the authority wishes to terminate such a tenancy before it is entitled to do so under the tenancy agreement or otherwise, it should serve notice to treat, and notice of entry, on the occupier(s) of any of the land in which the tenancy subsists.

(3) MORTGAGES AND RENTCHARGES

Introduction

8.63 Where money has been lent on the security of the land being compulsorily purchased, the mortgagee (the lender) is entitled to notice to treat, and provision is made by sections 14 to 17 of the Compulsory Purchase Act 1965 for the applicable compensation procedures. Section 18 makes similar provision in relation to rentcharges.

8.64 In our Consultative Report on Procedure, we sought views of consultees concerning any practical problems encountered in these areas and, subject to responses, proposed the retention of these provisions in the 1965 Act. There are no relevant recommendations in our Final Report on Compensation, and the Compensation Code contains no provisions dealing with mortgages or rentcharges.

Existing Law

8.65 By section 14 of the Compulsory Purchase Act 1965, an acquiring authority may purchase or redeem the interest of a mortgagee either immediately or on six months' notice. In either case, the mortgagee must be paid the outstanding capital sum (the principal), all interest due under the mortgage and any costs and expenses incurred. If the authority elects for immediate purchase, the authority must also pay six months' additional interest to the mortgagee. There are default procedures operative in the event of the mortgagee failing to release his or her interest in the mortgage or failing to make good title.

8.66 Section 14 confers a power on the acquiring authority. It does not impose a duty. The Lands Tribunal cannot review the conduct of the authority in the sense of determining the date by which it should have exercised its statutory power. This was the basis of the claimant's case in *Shewu v Hackney LBC*.[47] A CPO was made in respect of the claimant's house in 1984, at which time the mortgage was in arrears (of an amount in the region of £9,000) and the mortgagee (the local authority) was seeking possession. Possession was not in fact taken pursuant to the compulsory purchase powers until 1996. In the interim, the arrears had increased to over £28,000. This sum was however considerably less than the value of the house. The Court of Appeal held that the Lands Tribunal had no jurisdiction to decide by which date the acquiring authority should have redeemed the mortgage (and thereby released the claimants from further liability for interest).

[47] [1998] 2 EGLR 232; (1999) 79 P & CR 47 (CA).

8.67 Where there is negative equity, section 15 of the 1965 Act applies. The mortgagee, the mortgagor (that is, "the person entitled to the equity of redemption") and the acquiring authority are required to come to agreement as to the value of the land or the compensation to be paid. In default of such agreement, the Lands Tribunal decides. The amount agreed or awarded must then be paid by the acquiring authority towards the mortgage debt. The liability of the mortgagor under the mortgage is not, however, discharged and insofar as there is a shortfall, the mortgagee will be entitled to claim that sum from the mortgagor.

Deficiencies

8.68 It did not appear to us at the time of the Consultative Report on Procedure that the provisions under consideration had given rise to particular difficulties in practice. Insofar as the mortgagor may be placed in a financial predicament by delay in the compulsory purchase, we felt that the proposals contained in the Policy Statement imposing tighter timelimits on exercise of compulsory purchase powers and amending procedures for advance payments would deal directly with the root cause of the problem.

Provisional proposals

8.69 We accordingly proposed to retain the existing provisions dealing with mortgages and rentcharges contained in the 1965 Act.[48] We did note the desirability of a simpler statement of the rules in any future consolidation.

Consultation

8.70 We asked consultees whether sections 14 to 18 of the 1965 Act gave rise to any practical problems which should be addressed.[49] More specifically, we asked consultees what they believed to be the practical benefits (if any) of the alternative options for dealing with mortgages contained in section 14.[50]

8.71 For the most part, consultees were unable to identify any real practical problems concerning these provisions, and the majority agreed with our provisional proposal.

8.72 The principal practical problem that was identified was that of "negative equity". CAAV believe that the claimant should not be put in a position of default by the misfortune of compulsory purchase, in particular where there has been no previous difficulty in servicing the mortgage debt. RICS has similar views. The acquiring authority should be required to put the claimant in the same (or similar) position as they were before the acquisition took place, and in order to achieve this it should take reasonable steps to ensure that any loan secured on the property (or any new property) should be of the same amount, and subject to the same conditions, as the previous mortgage. Both CAAV and RICS proposed that

[48] Law Com CP No 169, para 6.71.

[49] *Ibid*, Consultation issue (R)(1).

[50] *Ibid*, Consultation issue (R)(2).

the appropriate means of effecting this would be to require the acquiring authority to indemnify the claimant.

8.73 The Welsh Development Agency took a more commercial view of the mortgage agreement. The mortgage comprises a debt knowingly incurred by the mortgagor which the mortgagor should therefore be required to pay off. It is no more than a monetary loan secured on land, and analogous to a bank loan secured on business equipment.

8.74 We considered the question of negative equity in the course of our work on compensation for compulsory purchase. In our Final Report on Compensation, we considered that the only truly effective solution to the problem of negative equity would involve a very considerable expansion of the current law of consequential loss.[51] We do not consider it appropriate to re-open this issue now, as it is essentially a matter of compensation rather than procedure.

Recommendations for reform

8.75 It seems to us that the law should strike a fair balance between the competing rights of mortgagee, mortgagor and acquiring authority. It should take into account the effect of the compulsory acquisition on the relationship of mortgagee and mortgagor.

8.76 We do not think that it is possible to make a compelling case for reform of sections 14 to 18 of the 1965 Act. As one consultee put it, the provisions may not be "perfect", but they are "reasonably reliable in complex areas". There is no evidence of practical difficulties in their operation.

Recommendation (24) - Mortgages and rentcharges

The procedure for dealing with mortgages and rentcharges in the subject land (contained in the Compulsory Purchase Act 1965) should be retained in its current form, subject only to restatement in modern language in any future consolidation.

(4) PUBLIC RIGHTS OF WAY

Introduction

8.77 There is a statutory procedure available under section 32 of the Acquisition of Land Act 1981 whereby the acquiring authority may seek to extinguish a public right of way over the subject land.

Existing Law

8.78 Section 32 makes provision for what might be termed an "acquisition extinguishment order". The acquiring authority must be satisfied either that a

[51] Law Com No 286, para 4.29. As we explained at n 54, we would regard the loss occasioned by negative equity as one "based on the value of the land", and excluded today by the Land Compensation Act 1961, s 5 rule (6).

suitable alternative right of way has been or will be provided or that no alternative is required. The order is subject to confirmation by the Secretary of State.

8.79 Extinguishment of a right of way under an extinguishment order cannot take effect before:

> (a) the CPO has been confirmed (or if the Secretary of State is the acquiring authority, before the order is made);
>
> (b) the date the acquiring authority takes possession (if possession has been taken in exercise of the power contained in section 11 of the Compulsory Purchase Act 1965 or by agreement); or
>
> (c) the date the acquisition of the land is completed (if possession is not taken in exercise of the power as above).[52]

Deficiencies

8.80 In the absence of any information as to how the section 32 procedure worked in practice, we took the view in the Consultative Report on Procedure that it seemed useful to have a specific power of this kind in order to stop-up rights of way. We noted that there was an apparent overlap with powers statutorily conferred on highway authorities and planning authorities.[53]

Provisional proposals

8.81 We proposed that the current statutory power contained in section 32 of the Acquisition of Land Act 1981 should be retained without amendment.[54]

Consultation

8.82 We asked consultees how frequently this procedure was used in practice, and whether it gave rise to any practical difficulties.[55]

8.83 We were not entirely surprised by the general response that section 32 is little used, and indeed that its existence is not widely known. Some consultees admitted that they had never used the procedure as a result of ignorance. No particular problems had come to light when the procedure had been invoked, and it was generally felt that it should be retained.

[52] Acquisition of Land Act 1981, s 32(4). An order cannot be made in respect of a right of way crossing land containing "apparatus" (including telecommunications apparatus) belonging to a statutory undertaker without that undertaker's specific consent (which consent may not be unreasonably refused): s32(6).

[53] Highways Act 1980, ss 116-120; Town and Country Planning Act 1990, ss 209-217.

[54] Law Com CP No 169, para 6.77.

[55] Law Com CP No 169, Consultation issue (S).

Recommendation for reform

8.84 We accordingly confirm our provisional proposal to the effect that the procedure contained in section 32 of the 1981 Act should be retained without amendment.

Recommendation (25) – Public rights of way

Section 32 of the Acquisition of Land Act 1981 should be retained in its current form and should not be amended.

PART 9
ABORTIVE ORDERS

9.1 Not every compulsory purchase order that is made results in compulsory acquisition of the subject land. It may be that the acquiring authority decides, on re-consideration, that it no longer wishes to pursue its initial objectives, or that it should carry them out in a different way. It may be that circumstances change such that the project as originally envisaged by the acquiring authority is no longer realistic or desirable. The effect of compulsory purchase being "aborted", whether by express action by the acquiring authority or otherwise, is the subject of this Part.

9.2 English land law has never recognised any specific right to compensation for losses caused by proposals for compulsory purchase which are withdrawn or abandoned before service of notice to treat. Those affected prior to that date have had to rely on the strictly limited statutory provisions concerning "blight", now to be found in the Town and Country Planning Act 1990.[1] The blight provisions (enabling a landowner to require the promoter of a scheme to purchase the affected land at open market value) apply only in tightly defined circumstances and, as Government has itself recognised,[2] contain serious anomalies. Reform of blight law under planning legislation falls outside our terms of reference.

9.3 Under compulsory purchase law an objector ordinarily has no redress where an acquiring authority makes a compulsory purchase order but then fails to submit it to the confirming authority. The intended acquisition is simply allowed to lapse leaving the affected landowner with no recompense either for resulting financial losses, such as the cost of any professional advice, or for the anxiety it will inevitably have caused. Likewise, once an order has been confirmed it may be allowed to lapse by the acquiring authority before implementation (by notice to treat or vesting declaration), without any compensation rights accruing to the landowners affected.

9.4 As we explained in the Consultative Report on Procedure,[3] the CPPRAG Review considered that

> There is clearly a case in equity for a landowner to be compensated for **any** costs (other than those directly attributable to his opposition to the proposal) or other losses incurred which are directly attributable to the acquiring authority's decision to make the

[1] Section 149, Sched 13.

[2] *Compulsory Purchase and Compensation: delivering a fundamental change* (DTLR, December 2001) App, paras 4.2-4.6. We refer to this paper elsewhere in this report as the Policy Statement.

[3] Law Com CP No 169, para 8.20.

compulsory purchase order, irrespective of whether the land is ultimately acquired from him or not.[4]

9.5 Government subsequently accepted that there should be reform in two respects.[5] First, there should be a procedure for the notification of withdrawal of CPOs to those affected, and information relating to the making, withdrawal, confirmation, cancellation or refusal to confirm a CPO should be registrable as a local land charge.[6] Secondly, compensation should as a matter of principle be payable where the threat of compulsory purchase fails to materialise because the order is not confirmed, is withdrawn, is quashed, or is not implemented within the appropriate time limit after confirmation.[7]

9.6 In this Part, we consider how these objectives can best be achieved, reviewing the current procedure relating to "abortive" CPOsand the liability of acquiring authorities to compensate those affected by a failure to carry through the project as formerly intended. In Part 3(8) above we deal with the issue of local land charge registration.

9.7 We are not concerned in this Report with any losses incurred prior to the date when the acquiring authority makes the CPO. While we accept that there may be circumstances where losses may be fairly attributable to the threat of compulsory purchase following, for example, the authority's resolution to make a CPO, these are in our view more appropriately addressed by the law of blight.

9.8 We recognise that implementation of our recommendations may create an overlap of remedies available to those affected by compulsory purchase proposals. The Town and Country Planning Act 1990 provides that land in respect of which a CPO has been made and submitted for confirmation, or in respect of which an order has been confirmed but no notice to treat has yet been served, may fall within the definition of "blighted land" and the statute thereby confers the right on its owner to serve notice on the authority to purchase.[8] We accept that it would be desirable for compensation for compulsory purchase to dovetail neatly with remedies for blight, but insofar as it does not (and blight is outside the scope of our terms of reference), we would suggest that a bar on obtaining compensation twice over for the same loss should suffice at least as an interim measure.

Existing Law

[4] CPPRAG Review, para 188.

[5] See Law Com CP No 169, para 8.24.

[6] Policy Statement, para 3.9.

[7] Policy Statement, para 4.21.

[8] Town and Country Planning Act 1990, ss 149, 150 and Sched 13, para 22. The mere passing of a resolution by an authority to acquire premises by CPO, but where the order has not been made or sealed, falls outside Sched 13, para 22 because the order is not "in force" and there is no power to serve notice to treat: see *Jones Son & Vernon v Sandwell MBC* (1994) 68 P & CR 563 (LT).

9.9 Under current law, service of notice to treat is the defining moment in the process of compulsory purchase. Although the matter is not entirely free of doubt, an acquiring authority is apparently under no enforceable obligation to seek confirmation of the order once it has been made. Prior to service of notice of treat, there is no compensatory liability (excepting liability for blight) on the acquiring authority if it withdraws or abandons its CPO. This can lead to a lengthy period of profound uncertainty during which landowners and other affected persons do not know whether the authority will proceed to exercise the powers it has striven to obtain. Following service of notice to treat, however, there is much better protection for affected parties, as statute intervenes by making express provision for withdrawal of such notice and by conferring compensation rights on its recipient.

Before notice to treat

BETWEEN MAKING OF ORDER AND SUBMISSION TO CONFIRMING AUTHORITY

9.10 Section 2(2) of the Acquisition of Land Act 1981 provides that "A compulsory purchase order authorising a compulsory purchase by an authority other than a Minister shall be made by that authority and submitted to and confirmed by the confirming authority in accordance with Part II of this Act." We believe that this provision has given rise to some confusion as to whether submission is mandatory or discretionary. In particular, it has given rise to an understanding by ODPM that, once a CPO has been made, it must be submitted by the acquiring authority for confirmation. This construction is based on the mandatory words "shall be" which appear to qualify "made", "submitted to" and "confirmed".

9.11 We do not consider however that this is a correct interpretation of the provision. It is necessary to construe the sub-section as a whole, and to take account of its purpose and its context. Three separate stages of the process are contemplated: making, submission and confirmation. An acquiring authority is manifestly under no duty to make a CPO. A confirming authority is likewise under no duty to confirm an order which is submitted to it. Both making and confirmation are clearly matters within the discretion, exercisable in accordance with the powers conferred by statute, of the relevant authorities. What section 2(2) is saying is that where an acquiring authority decides to make an order, and where a confirming authority decides to confirm an order submitted to it, then the relevant authority must make, or confirm, that order in compliance with the provisions contained in Part II of the 1981 Act.

9.12 The same logic must inexorably apply to submission of the order, once made, by the acquiring authority to the confirming authority. It is up to the acquiring authority to decide whether, having made the order, it should submit it for confirmation. If it decides to submit, then it must submit in accordance with Part II of the Act. Section 2(2) dictates the procedure to be followed once the acquiring authority has made the decision to make or to submit, or the confirming authority

has made the decision to confirm. That statutory procedure is mandatory. The making, submission or confirmation is not.[9]

9.13 It is therefore open to an acquiring authority, subsequent to making a CPO, to decide not to proceed further by submitting it for confirmation. It must of course make any such decision in accordance with its public law duties and obligations, and a decision not to proceed may be susceptible to challenge by judicial review. But there is no statutory requirement that, once made, a CPO must then be submitted for confirmation.

9.14 We understand from ODPM that as a matter of practice, and in order to protect third parties, the Secretary of State adopts the approach that he or she is entitled to require submission so that the issue of withdrawal may be determined definitively. Once the order has been submitted for confirmation, and the Minister as confirming authority is therefore possessed of the unconfirmed order, the Minister must set up an inquiry or hearing if there is a valid objection.[10] At the inquiry the authority may then choose to apply for withdrawal or offer no evidence. Having "[caused] an inquiry to be held" the Minister then has power to award costs to a successful objector.[11] The Secretary of State takes the view that if this process were not adopted, an 'innocent' objector would have no means of recouping his wasted expenditure, albeit that an award of "costs" may result in less generous reimbursement than under a "losses or expenses" formula.

9.15 This pragmatic approach is not without difficulty. First, it may mean putting both parties to the unnecessary expense of preparing for and attending an inquiry which will almost certainly be an open and shut affair. Secondly, although an acquiring authority may have power to make (and advertise) an order, and to submit it for confirmation, there is no enforceable obligation that it should do so.

9.16 Both legislation and case law therefore fail to deal adequately with the question whether an authority may allow an order to lapse. In the context of making local plans under planning legislation, the courts have held that the consequences of abandonment and withdrawal are the same: the proposals disappear and it would

[9] See *R (Hargrave) v Stroud District Council* [2003] JPL 351 where the Court of Appeal, construing the Highways Act 1980, s 119(1), held that a council was under no duty to submit a public path diversion order for confirmation by the Secretary of State. Schiemann LJ stated, at 355, "If, as I think, the authority has a discretion as to whether or not to initiate the diversion process in the first place - by making the order under Highways Act 1980, section 119 - then one would expect it to have the power not to continue with the diversion process - by submitting the order - once it is furnished with reasons by the public for not doing so ... I see no policy reason why any such duty should be implied."

[10] Acquisition of Land Act 1981, s 13(2) formerly spoke of "any objection duly made", but has been replaced by s 13A which sets out the procedure for dealing with any "remaining objection", being a "relevant objection" which has not been withdrawn or legitimately disregarded (as substituted by the Planning and Compulsory Purchase Act 2004, s 100(6)). Remaining objections may now be determined by a written representations procedure as well as by inquiry or by hearing: see the Acquisition of Land Act 1981, ss 13A(2), (6) and 13B (as substituted). The decision to adopt the inquiry/hearing or written representations route is one for the confirming authority alone: see the Acquisition of Land Act 1981, s 13A(2), (3).

[11] See the Acquisition of Land Act 1981, s 5 and the Local Government Act 1972, s 250(5).

be purposeless to put them through the statutory procedure (including a public inquiry).[12] It may be that the same would apply in the context of compulsory purchase.

DURING SUBMISSION TO THE CONFIRMING AUTHORITY

9.17 ODPM Circular 06/2004 recently replaced Circular 02/2003.[13] Circular 02/2003 implied that the acquiring authority may withdraw the CPO post-submission and prior to any inquiry.[14] The latest Circular speaks, however, not of an order having been "withdrawn", but of an authority having indicated "formally that it no longer wishes to pursue the order".[15] It is probably the case that once the order has been submitted, it then becomes a matter solely for the confirming authority, and the acquiring authority is *functus officio* until the order has been confirmed.[16] In the interim, any application to withdraw would have to be made to the confirming authority, and that authority may refuse such an application. In our view, it would be sensible if the position could be clarified by legislation.

BETWEEN CONFIRMATION AND SERVICE OF NOTICE TO TREAT

Lapse or abandonment

9.18 Once an order has been confirmed, the acquiring authority must give notice of that fact.[17] An order becomes operative when its confirmation is first published.[18] At this juncture, the acquiring authority must decide whether to implement the order by notice to treat or by vesting declaration or a combination of both. Power to serve notice to treat or make a vesting declaration must be exercised within three years of the order becoming operative.[19] It appears that the authority may therefore allow the order to lapse before implementation, although no compensation entitlement flows.

Withdrawal

9.19 It is less clear whether an acquiring authority may unilaterally withdraw an order subsequent to its confirmation (but before service of notice to treat). There is no legislative provision for withdrawal (or compensation), and there is an argument

[12] See *R (Persimmon Homes Ltd) v North Hertfordshire DC* [2001] 1 WLR 2393, 2402 *per* Collins J.

[13] This Circular in turn replaced DoE Circular 14/94 referred to in Law Com CP No 169, para 8.9.

[14] Circular 02/2003, para 38 (timing of inquiry). This Circular was cancelled from 31 October 2004.

[15] Circular 06/2004, para 43.

[16] Confirmation of an order may be as submitted or with modifications: Acquisition of Land Act 1981, s 13(1), (2) (where no objection), s 13A (where objection remains), subject to s 14 (land not originally included in order).

[17] Acquisition of Land Act 1981, s 15.

[18] Acquisition of Land Act 1981, s 26(1).

[19] Compulsory Purchase Act 1965, s 4. For consideration of reform of this provision see Part 4(1) above, at paras 4.31. 4.34 and 4.35, and Recommendation 11 (time limits).

for saying that the authority is *functus officio* (because to hold otherwise would be to allow the acquiring authority to negate the confirmation).

After notice to treat

9.20 Where notice to treat has been served, the Land Compensation Act 1961 confers limited powers on the acquiring authority to withdraw such a notice, and stipulates the consequences for the CPO if notice to treat is served but then allowed to lapse.

WITHDRAWAL OF NOTICE TO TREAT

9.21 By section 31 of the 1961 Act, an acquiring authority may withdraw notice to treat which has been served on a claimant:

(1) within six weeks of delivery of a properly formulated claim for compensation by that claimant;[20] or

(2) if no such claim is delivered, within six weeks of the determination of compensation by the Lands Tribunal (unless the authority has entered into possession of the land by virtue of the notice to treat).

9.22 Notice to treat may be withdrawn under section 31, notwithstanding the fact that the acquiring authority has entered on and taken possession of the land.[21] In *R v Northumbrian Water Ltd, ex p Able UK Ltd*,[22] Carnwath J, as he then was, held that this was so because entry under the procedure contained in section 11 of the Compulsory Purchase Act 1965 did not affect the legal or equitable ownership of the land.

9.23 By section 31(3):

> Where the acquiring authority withdraw a notice to treat under this section, the authority shall be liable to pay compensation to the person to whom it was given for any loss or expense occasioned to him by the giving and withdrawal of the notice, but if the notice is withdrawn under subsection (2) of this section, not for any loss or expenses incurred by the claimant mentioned therein after the time when, in the opinion of the Lands Tribunal, a proper notice of claim should have been delivered by him.

9.24 The amount of any compensation will be determined by the Lands Tribunal in the event of disagreement between the parties.[23] The expression "any loss or

[20] The claim must comply with section 4(1)(b), 4(2) of the Land Compensation Act 1961. It must state "the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated."

[21] As they have a right to do under the 1965 Act, s 11 procedure (right of entry). See Law Com CP No 169, Part V, paras 5.23-5.28, for discussion of this topic.

[22] (1996) 72 P&CR 95 (QBD).

[23] Land Compensation Act 1961, s 31(4).

expenses" is wide enough to include any type of actual loss flowing directly from receipt of the notice (for example, being unable to develop or let the land) but it does not cover damages for personal inconvenience or anxiety or time expended.[24]

9.25 Where an acquiring authority serves notice to treat in respect of part only of land, and the landowner serves counter-notice requiring acquisition of the whole (pursuant to the procedure concerning divided land[25]), the authority is then entitled at common law to withdraw the notice to treat.[26] Such withdrawal, being outside section 31, does not, however, give rise to the right to compensation.

9.26 Section 31 of the 1961 Act does not apply to *deemed* notices to treat:

(1) Under section 54(2) of the Land Compensation Act 1973 (valid counter-notice in respect of divided agricultural land);[27]

(2) Under section 7(1) of the Compulsory Purchase (Vesting Declarations) Act 1981 (constructive notice to treat when vesting declaration executed);[28]

(3) Under section 139(3) of the Town and Country Planning Act 1990 (where a response notice indicating willingness to comply with a purchase notice has been served);[29]

(4) Under section 143(1) of the Town and Country Planning Act 1990 (where the Secretary of State confirms a disputed purchase notice or it is confirmed by default);[30]

(5) Under section 146(3) of the Town and Country Planning Act 1990 (where the Lands Tribunal declares an agricultural counter-notice valid);[31]

(6) Under section 154(2), (5) of the Town and Country Planning Act 1990 (where an objection to a blight notice not upheld by Lands Tribunal and blight notice valid in whole or in part);[32]

[24] *LCC v Montague Burton Ltd* [1934] 1 KB 360, 364 *per* Avory J. Compensatable loss is restricted to loss and expense incurred by the claimant in consequence of service of the notice to treat and withdrawal of that notice. Expenses incurred before the notice are not recoverable.

[25] See Part 7 above.

[26] *King v Wycombe Railway Co* (1860) 29 LJ Ch 462.

[27] Land Compensation Act 1973, s 54(4).

[28] Compulsory Purchase (Vesting Declarations) Act 1981, s 7(3). Where deemed notice to treat is withdrawn in response to a notice of objection to severance, it operates "notwithstanding section 7(3)": Compulsory Purchase (Vesting Declarations) Act 1981, s 12 and Sched 1, para 4.

[29] Town and Country Planning Act 1990, s 139(5).

[30] Town and Country Planning Act 1990, s 143(8).

[31] Town and Country Planning Act 1990, s 146(6) allows for withdrawal of deemed notice to treat but not under section 31 of the Land Compensation Act 1961.

(7) Under section 156(1), (2) of the Town and Country Planning Act 1990, blight notice may be withdrawn and deemed notice to treat will be deemed to be withdrawn. That withdrawal is not made under section 31 of the 1961 Act[33], and no compensation is payable in respect of the withdrawal;[34]

(8) Under section 160(2) of the Town and Country Planning Act 1990 (blighted part of agricultural unit).[35]

9.27 Where an authority withdraws notice to treat under section 31 of the 1961 Act, the CPO will itself be unaffected. Subject to the requirement that notice to treat must be served within three years of the order becoming operative, the authority may therefore serve a second, or even a third, notice to treat. In *Ashton Vale Iron Co Ltd v Bristol Corporation*,[36] a case concerning the procedure for divided land, the Court of Appeal held that when a notice to treat is validly withdrawn following service of a counter-notice by the affected landowner, the acquiring authority may re-serve notice to treat any number of times provided that the time limit for service is still valid. By parity of reasoning, it is surely open to the acquiring authority to re-serve notice to treat following withdrawal under section 31. On expiry of the period of six weeks referred to in the statute, however, the acquiring authority is no longer entitled to withdraw notice to treat.

LAPSE OR ABANDONMENT

9.28 Once the notice to treat ceases to have effect a different set of compensation provisions will apply. Section 5(2A) of the Compulsory Purchase Act 1965 provides that a notice to treat ceases to have effect three years after service, if certain action has not been taken,[37] unless the time is extended by agreement.[38] Where a notice to treat ceases to have effect, compensation for any loss is payable under section 5(2C), which provides:

> Where a notice to treat ceases to have effect by virtue of (2A) or (2B) of this section, the acquiring authority -
>
> (a) shall immediately give notice of that fact to the person on whom the notice was served and any other person who, since it was served, could have made an agreement under subsection (2B) of this section, and

[32] Town and Country Planning Act 1990, s 167.

[33] *Ibid.*

[34] Town and Country Planning Act 1990, s 156(4).

[35] Town and Country Planning Act 1990, s 167.

[36] [1901] 1 Ch 591 (CA).

[37] As inserted in section 5 of the Compulsory Purchase Act 1965 by the Planning and Compensation Act 1991, s 67. The action to be taken comprises agreement or award or payment or payment into court of compensation, execution of a general vesting declaration, entry on and taking possession of the land, or reference of compensation to the Lands Tribunal: see further Part 4(1), para 4.7 above.

[38] Compulsory Purchase Act 1965, s 5(2B). Failure to take action within the time limit may be by design or by default: the consequence will be the same.

(b) shall be liable to pay compensation to any person entitled to such a notice for any loss or expenses occasioned to him by the giving of the notice and its ceasing to have effect.

9.29 In default of agreement, compensation is determinable by the Lands Tribunal.[39] Lapse in these circumstances terminates that element of the order, as section 4 of the 1965 Act precludes exercise of any further implementation power. It seems to us, on a strict interpretation of the Act, that compensation is restricted to the consequences of service and lapse of the notice to treat and does not include any costs incurred by a landowner prior to service of the notice to treat.

9.30 A notice to treat may be withdrawn pursuant to the agreement of the parties, outside the statutory procedures. It is open to the parties in such circumstances to agree payment of compensation.[40]

After general vesting declaration

9.31 The effect of a vesting declaration is to vest title in land (except certain minor interests) in the acquiring authority, on a fixed date, without need for actual notice to treat or formal conveyance.[41] There is no provision for an authority unilaterally withdrawing a deemed notice to treat under the vesting declaration procedure, and the Compulsory Purchase (Vesting Declarations) Act 1981 expressly provides that the statutory power of withdrawal contained in section 31 of the 1961 Act is not exercisable.[42] Withdrawal of deemed notice to treat is however permissible where the divided land procedure has been invoked.[43]

Deficiencies

9.32 As we have already explained, the CPPRAG Review identified deficiencies with the existing law in relation to the compensation entitlements of landowners where compulsory purchase was threatened but not ultimately implemented, and Government has accepted the case for reform.[44] Government has accepted reform not only in this respect but also to ensure proper notification of withdrawal of compulsory purchase orders to those affected. We believe that the deficiencies can be summarised as follows. They relate essentially to the period before service of notice to treat. Section 31 of the Land Compensation Act 1961 provides a largely satisfactory compensation regime applicable where notice to treat is withdrawn by the acquiring authority.

[39] Compulsory Purchase Act 1965, s 5(2D).

[40] *Williams v Blaenau Gwent BC* (1994) 67 P&CR 393 (LT).

[41] Compulsory Purchase (Vesting Declarations) Act 1981, ss 7-9, and see Part 3(7) above.

[42] Compulsory Purchase (Vesting Declarations) Act 1981, s 7(3).

[43] Compulsory Purchase (Vesting Declarations) Act 1981, Sched 1, para 4(1)(a),4(2) specifically disapplying section 7(3) of the same Act. In such circumstances, the withdrawal takes effect under the 1981 Act, not under section 31 of the 1961 Act, and no compensation is therefore payable pursuant to the earlier statute.

[44] DTLR Policy Statement, App, paras 3.75, 3.76 and see Law Com CP No 169, paras 8.20-8.25.

9.33 First, the powers of acquiring authorities to withdraw compulsory purchase orders are not clearly set out in statute. Secondly, the circumstances in which an order is deemed to be withdrawn (for example by abandonment) are insufficiently clear. Thirdly, acquiring authorities are not currently required to notify those affected where an order is either withdrawn or deemed to be withdrawn. Fourthly, there should be a statutory right to compensation on actual or deemed withdrawal of a CPO.

Provisional proposals

9.34 In the Consultative Report on Procedure we set out our provisional proposals for change.[45]

9.35 We proposed the express conferment on acquiring authorities of power to withdraw the CPO at any time before implementation (that is, before service of notice to treat or execution of a vesting declaration) in respect of the land or part of the land in the same manner, and on the same persons, as would apply to notice of making of the order.

9.36 After implementation, power to withdraw (exercisable by serving notice on those entitled to service of notice to treat or vesting declaration) should be restricted. It should apply only by agreement between the parties, under any special statutory provision permitting withdrawal, as permitted by the procedures for divided land, or pursuant to section 31 of the Land Compensation Act 1961.

9.37 Withdrawal would render the CPO "abortive", and thereby engage the right to compensation. The same consequence would flow in four specific circumstances:

(1) Where confirmation of the order is refused by the confirming authority;

(2) Where the order is quashed by the High Court;

(3) Where, after the operative date, the acquiring authority fails to implement it by notice to treat or vesting declaration within the prescribed period; and

(4) Where, following service of notice to treat, the acquiring authority fails to enter on and take possession of the land within the prescribed period.

9.38 If any of the four specific circumstances arise, rendering the order abortive, the authority should forthwith give notice of that fact (and of the correlative right to compensation) to all those entitled to individual notice of making of the order.

9.39 Each person entitled to individual notice of making of the order, and each person served with a notice which is later withdrawn, may then claim compensation from the acquiring authority for any loss or expenses occasioned by the making of the order and its becoming abortive or by the withdrawal of the notice.

9.40 No compensation should, however, be payable in two instances:

(1) Where the authority withdraws an order, having certified in the order that it was made wholly or mainly for the purpose of securing the improvement, maintenance or management of existing property;

(2) Where, following service of a blight notice under section 150 of the Town and Country Planning Act 1990, notice to treat is deemed to have been withdrawn under section 156(2) of that Act.

9.41 Finally, where notice is given that an order has become abortive, or an order or notice has been withdrawn, the acquiring authority should be required to cause the amendment of the register of local land charges.

Consultation and Recommendations for reform

Compensation liability

9.42 In our Consultative Report on Procedure we asked generally whether a right to compensation should arise in the circumstances defined in our provisional proposal.[46] A substantial majority of consultees supported this proposal in general terms. It would be necessary, of course, for the claimant to prove, and to mitigate, their losses, but it was thought, as one consultee put it, that it would be unfair if no such compensation were available. Serious concerns were, however, expressed by two acquiring authorities as to the potential extent of liability they might incur in the event of an expansion of compensation entitlement.

9.43 The Law Society suggested that it would assist the mitigation of loss if the court had power to quash decisions to confirm CPOs in addition to the power to quash the order itself.[47] We accept the logic of this view. We have already made a recommendation to this effect.[48]

Who should be entitled to claim?

9.44 In our Consultative Report on Procedure we asked whether the right to compensation should be restricted to those entitled to individual notice of making of the order, or, if not, how the right should be limited or defined.[49] There was general acceptance of the need to place some restrictions on entitlement to claim.

9.45 As we have explained in Part 2 above, Government has recently taken steps to amend section 12 of the Acquisition of Land Act 1981 so that notice of making of an order must now be served on a "qualifying person".[50] This extends the class of

[45] Law Com CP No 169, paras 8.32-8.47 and Proposal 18.

[46] Law Com CP No 169, Consultation issue (AA)(1).

[47] Under the procedure contained in Part IV of the Acquisition of Land Act 1981.

[48] See Part 2(4) above and Recommendation 3(3).

[49] Law Com CP No 169, Consultation issue (AA)(2)(a).

[50] See Part 2(3) above.

persons entitled to individual service, removing the previous exclusion of those holding tenancies for a month or less.

9.46 One consultee argued that the right should be limited to those entitled to receive notice to treat, and one contended that it should be limited to those defined as "statutory objectors". The argument was also put that entitlement to claim should be assessed at the date of implementation.

9.47 We believe that it is important not to exclude any persons on a basis which may appear arbitrary, and that the class of claimants should not be unduly restricted. It does not by any means follow that because a person can establish that they fall within the defined class[51] they will therefore be able to prove loss consequential upon the abortive order. Further, we consider that as a matter of principle parties should be able to claim for losses sustained at any time following the making of the order and that there should be no artificial limit based on the date of implementation. That is the basis of the reform we recommend.

Acquisitions for purposes of enforcement

9.48 We drew attention in our Consultative Report on Procedure to the manner in which CPOs are sometimes used by local authorities with housing and environmental health functions to assist in the enforcement of repairing or maintenance obligations owed by owners of residential property.[52] We referred to the use made by the City of Westminster of CPOs as an integral part of their private sector housing strategy.[53]

9.49 The specific problem we identified concerned withdrawal by such authorities of CPOs, or notices to treat, following an undertaking by the owner of property which has fallen into serious disrepair to refurbish that property.[54] In such circumstances, where the owner has failed to comply with statutory notices to remedy, it seems objectionable to the authorities who are using compulsory purchase powers in this way that the owner should then be able to claim compensation from the authority. In effect, they would be seeking to profit from their own wrongdoing.

9.50 We asked whether consultees agreed that there should be an exception where the acquiring authority certifies that the order is made for the purpose of securing the improvement, maintenance or management of existing property, and, if so, whether the Lands Tribunal should be able to disallow the exemption where the

[51] By the "defined class" of persons entitled to claim we mean those who are "qualifying persons" as defined in Acquisition of Land Act 1981, s12 (as amended). See further Recommendation 26(11) below.

[52] Law Com CP No 169, paras 8.48 *et seq*.

[53] Law Com CP No 169, para 8.50.

[54] The practice whereby authorities give undertakings not to implement an order where an owner agrees to withdraw objection to its confirmation, and to carry out the works required, is recognised (although not specifically approved) by the ODPM in Circular 06/2004 at App E, para 17 (orders made under housing powers). The Bar Council has expressed to us some concern about the legality of such arrangements.

authority has itself acted unreasonably. Responses were mixed: some concerns were expressed about the underlying principle and others about the detail of the machinery. Some consultees appeared to suggest that the use of compulsory purchase to secure compliance with repairing obligations was inappropriate, in that it is premature for an authority to make such an order if it is intended to give the owner latitude in order to comply. But there was also concern that merely agreeing with a claimant that an order should be aborted should automatically engage the right to statutory compensation.

9.51 We believe that this application of compulsory purchase should be kept within clear bounds. We consider that the concerns of principle can be met by making clear that the exemption will only operate where statutory notice has been served and has demonstrably been breached, giving rise to a court-based or other remedy. This will narrow its remit. We suggested in our provisional proposal that the mechanism for achieving exemption would be certification, in the CPO itself, of the purpose of the order. Consultees felt that that imposed an unfair burden on the claimant who then had to prove that they were not a wrongdoer. We accept this view, and our recommendation is modified accordingly.

9.52 First, we accept that if the authority is at fault, compensation should not be refused. If an order is made, but its confirmation is refused or the order or the confirmation is quashed because it is defective, the claimant should not be penalised.

9.53 Secondly, we consider it essential that the nature and extent of the breach being enforced should be clearly specified. We intend to recommend therefore that non-compliance with the following statutory notices or orders may allow acquiring authorities to invoke the exemption:

(1) Sections 189 and 190 of the Housing Act 1985 (requirement to repair dwelling etc unfit for human habitation and requirement to repair dwelling etc in state of disrepair, respectively);[55]

(2) Section 215 of the Town and Country Planning Act 1990 (power to require proper maintenance of land);

(3) Section 48 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (repairs notice prior to compulsory notice of acquisition of listed building); and

(4) Where a statutory order which has been served under sections 264 and 265 Housing Act 1985 (closure of dwelling etc unfit for human habitation and demolition of dwelling etc unfit for human habitation, respectively) has not been quashed on appeal.

[55] These provisions in the Housing Act 1985 (and ss 264, 265) are expected to be replaced in due course by a new system for enforcement of housing standards currently contained in the Housing Bill before Parliament.

This approach builds on the rubric for exclusion of loss payments under the new regime set out in the Planning and Compulsory Purchase Act 2004.[56] It may be that in the future this list of enactments will need to be modified or extended, and it may be useful therefore if new legislation were to include a regulation-making power for this purpose.

Delay

9.54 Finally, we asked consultees whether they agreed that there should be no right to compensation arising simply out of delay in completing the purchase procedures.[57]

9.55 Almost all the consultees responding on this issue agreed, not least because an acquiring authority has no control of timescales during the confirmation process, and it would therefore be unfair to impose liability to compensate. If unreasonable delay were to occur during the process, the appropriate remedy is likely to be by way of judicial review.

9.56 We have adjusted our earlier proposal to take on board the issues dealt with above, and to make the proposal clearer by differentiating withdrawal of orders and of notices to treat, and separating out the circumstances, mechanics and compensation consequences of withdrawal (actual and deemed). We have not made any specific recommendations concerning the effect of withdrawal of notice to treat on the continuing validity of the compulsory purchase order which the notice was intended to implement. It does, however, occur to us, although we accept it is a matter of some complexity depending on the scope and extent of the order concerned, that it would benefit transparency if acquiring authorities were entitled to withdraw the compulsory purchase order immediately following withdrawal of notice to treat.

Recommendation (26) – Abortive orders

Liability prior to making a compulsory purchase order

(1) Subject to the law relating to blight, an acquiring authority should be under no liability to pay compensation until, and save and insofar as, a compulsory purchase order has been made, and compensation should not be payable by the authority in respect of any loss or expense incurred before the date on which notice of the order being made is first published ("the first notice date").

Withdrawal of orders by the acquiring authority etc

(2) A compulsory purchase order should be capable of being withdrawn by an acquiring authority (by giving notice of withdrawal to those persons entitled to receive notice of making the order) at the following times:

[56] See the Planning and Compulsory Purchase Act 2004, s 108 inserting a new section 33D into the Land Compensation Act 1973.

[57] Law Com CP No 169, Consultation issue (AA)(2)(c).

(a) from the first notice date until the date on which it is submitted to the confirming authority for confirmation;

(b) from the date on which notice of its confirmation is first published until the date on which notice to treat is served or the date on which a vesting declaration is executed.

(3) An acquiring authority should be entitled to withdraw from the purchase of any subject land for a period of six weeks from the date on which a claim for compensation is made or (where no such claim is made) from the date on which compensation is determined by the Lands Tribunal.

(4) An acquiring authority should also be entitled to withdraw from the purchase of any subject land as permitted by section 8(1) of the Compulsory Purchase Act 1965, section 54(3) of the Land Compensation Act 1973, section 12 of and Schedule 1, para 4, to the Compulsory Purchase (Vesting Declarations) Act 1981, and any other statutory provision permitting withdrawal.

Deemed withdrawal of orders etc

(5) A compulsory purchase order should be treated as withdrawn:

(a) where the acquiring authority fails to submit the order to the confirming authority for confirmation within the prescribed time limit;

(b) where the confirming authority refuses to confirm the order; and

(c) where the order is quashed by the High Court.

(6) An acquiring authority should be treated as having withdrawn from the purchase of any subject land:

(a) where, after publication of the notice of confirmation, the acquiring authority fails within the prescribed time limit to serve notice to treat or to execute a vesting declaration;

(b) where a notice to treat ceases to have effect pursuant to section 5(2A) or section 5(2B) of the Compulsory Purchase Act 1965;

(c) where, after service of notice of entry, the acquiring authority fails to enter on and take possession of the land before the notice ceases to have effect.

Notice of withdrawal

(7) Where an acquiring authority withdraws a compulsory purchase order as set out in (2) above, the acquiring authority should be required to give notice of withdrawal to all qualifying persons (as defined in section 12 of the Acquisition of Land Act 1981, as amended).

(8) Where a compulsory purchase order is deemed to be withdrawn as set out in (5) above, the acquiring authority should be required to give notice of withdrawal to all qualifying persons as soon as is reasonably practicable.

(9) Notice of withdrawal should be in prescribed form and should set out the right to claim compensation.

(10) Once an order has been confirmed, notice of withdrawal may relate to the whole of the subject land or to such part as corresponds to the whole of an individual plot held by a qualifying person.

Compensation liability on withdrawal

(11) On withdrawal of an order, or on withdrawal from the purchase of any subject land, the acquiring authority should be liable to pay compensation to any qualifying person in respect of any loss or expenses caused by the making of the order or the withdrawal of the order or the withdrawal from the purchase as the case may be.

(12) The amount of any compensation should be determined (in default of agreement) by the Lands Tribunal, and assessed in accordance with the principles relating to consequential loss set out in the Compensation Code.

(13) Compensation should carry interest at the rate prescribed under section 32 of the Land Compensation Act 1961 from the date of notice of withdrawal until its payment.

Exclusions from compensation liability

(14) Where the order is withdrawn as at the time referred to in (3) above, compensation should not cover any loss or expense incurred after the time when, in the opinion of the Lands Tribunal, a proper notice of claim should have been delivered by the claimant.

(15) Compensation should not be required to be paid where a statutory notice which had been served in relation to the subject land under any of the following provisions had become operative, and had not been complied with, at the first notice date:

(a) Sections 189 and 190 of the Housing Act 1985 (requirement to repair unfit dwelling and requirement to repair dwelling in disrepair);

(b) Section 215 of the Town and Country Planning Act 1990 (power to require proper maintenance of land);

(c) Section 48 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (repairs notice prior to compulsory acquisition of listed building).

(16) Compensation should not be required to be paid where a statutory order has been served in relation to the subject land under sections 264 or 265 of the Housing Act 1985 (closure and demolition of unfit dwellings) and has not been quashed on appeal.

(17) Compensation should not be required to be paid where, following service of a blight notice under section 150 of the Town and Country Planning Act 1990, notice to treat is deemed to have been withdrawn under section 156(2) of that Act.

(18) The Secretary of State should be empowered by regulations to add to or amend the list of exclusion circumstances.

Withdrawal of notices to treat

(19) Where a notice to treat has been served by an acquiring authority, that notice should be entitled to be withdrawn unilaterally (by notice of withdrawal) only in the circumstances set out in section 31(1), (2) of the Land Compensation Act 1961, or in (21) below, or by agreement with the recipient of the notice.

(20) Where a notice is withdrawn in such circumstances or by agreement, the order should remain valid (and further notices may be served) until the expiry of the period set out in section 4 of the Compulsory Purchase Act 1965.

(21) Where, in the case of land proposed to be divided, notice to treat in respect of part only of the subject land has been served by the acquiring authority, and the recipient of the notice has within the statutory time limit to be prescribed served notice of objection to severance under section 8(1) of the Compulsory Purchase Act 1965, the authority should have the right either:

(a) to withdraw the notice to treat, subject to paying compensation for any loss or expenses occasioned to the recipient by the giving and withdrawing of the notice; or

(b) to amend the notice to treat to cover the whole of the subject land (in which case compensation will be payable in the usual way for the land acquired).

(22) The provisions relating to withdrawal of notice to treat deemed to have been served under section 54(2), (3) of the Land Compensation Act 1973 (severance of agricultural land) and under section 12 of the Compulsory Purchase (Vesting Declarations) Act 1981, and Schedule 1, paragraph 4(1)(a) thereto, should continue to apply, and compensation should be payable for such withdrawal.

(23) Where notice is withdrawn under section 31(1), (2) of the Land Compensation Act 1961, the acquiring authority should be liable to pay compensation to the person to whom notice was given for any loss or expenses occasioned to him by the giving and withdrawal of the notice (in accordance with section 31(3), (4) of that Act).

(24) Such compensation should be assessed on the same basis and subject to the same rules and procedures as that applicable under (11) above.

PART 10
SUMMARY OF RECOMMENDATIONS

Recommendation (1) – Ministerial, and Non-ministerial body, orders

(1) The separate procedures for the authorisation of compulsory purchase orders, contained in section 2 of and Schedule 1 to the Acquisition of Land Act 1981, relating to orders made by Ministers and orders made by other bodies, should be amalgamated.

(2) The new unitary procedure should encompass two stages:

(a) "making" by the acquiring authority, and

(b) "confirmation" by the confirming authority (which will include delegated confirmation).

(3) The new unitary procedure should make special provision, in highway acquisitions, for joint consideration by the Ministers responsible for highways and for planning respectively.

Recommendation (2) – Entry for surveying purposes

(1) An acquiring authority should be entitled to enter upon land in order to carry out necessary surveys prior to the compulsory purchase order being made provided that it is considering a distinct project of real substance genuinely requiring such entry upon the land.

(2) Section 15 of the Local Government (Miscellaneous Provisions) Act 1976 should be extended to apply to all authorities which have compulsory purchase powers.

(3) The county court should have jurisdiction to control the unlawful exercise by acquiring authorities of their powers of entry for surveying purposes by restraining entry or by making entry subject to such conditions as it specifies.

(4) Section 11(3) of the Compulsory Purchase Act 1965 should be repealed and replaced by a modern provision based on, or incorporated within, section 15 of the Local Government (Miscellaneous Provisions) Act 1976.

Recommendation (3) – Legal challenge

(1) Any challenge to the validity of a decision to confirm (or to refuse to confirm) a compulsory purchase order should be made pursuant to the statutory review procedure contained in Part IV of the Acquisition of Land Act 1981, and no such challenge shall be made by way of judicial review.

(2) Any challenge to earlier stages of the compulsory purchase process (such as making the compulsory purchase order) should be by way of judicial review.

(3) Under the statutory review procedure, the High Court should be entitled in the exercise of its discretion to quash the determination of the confirming authority to confirm the compulsory purchase order as an alternative to quashing the whole order. Where the High Court makes such an order that a determination be quashed, it should be entitled to remit that determination to the appropriate authority with a direction that the authority re-consider its determination in accordance with the findings of the court.

Recommendation (4) – Procedures for implementation

(1) Implementation of a compulsory purchase order, once it has been confirmed by the confirming authority, should be effected only by notice to treat or by vesting declaration.

(2) The implementation procedure contained in section 11(2) of, and Schedule 3 to, the Compulsory Purchase Act 1965 should be repealed without replacement.

Recommendation (5) – Notice to treat

(1) An acquiring authority should be required to serve notice to treat in prescribed form on any owner of a freehold or leasehold interest in the land, any mortgagee (whether legal or equitable), any person entitled to the benefit of a contract to create a freehold or leasehold interest, and any lawful occupier of the subject land.

(2) It should not, however, be required to serve notice to treat on those holding “minor tenancies”, those with the benefit of an easement or profit à prendre over the subject land, or those entitled to enforce a restrictive covenant over the subject land.

(3) An acquiring authority should be entitled, in the exercise of its discretion, to serve notice to treat in prescribed form on any person (other than those set out in (1) above) who owns an interest in, or occupies, the subject land.

(4) In section 5(2)(c) of the Compulsory Purchase Act 1965, there should be substituted reference to compensation being paid for loss incurred in accordance with the four compensation heads (as exist currently or as proposed).

(5) In section 20 of the Compulsory Purchase Act 1965, the right to compensation (and allied procedure) afforded to a minor tenant should be extended to any person holding a long tenancy which is about to expire (as defined in section 2(2) of the Compulsory Purchase (Vesting Declarations) Act 1981).

Recommendation (6) – Notice of entry

Section 11(1) of the Compulsory Purchase Act 1965 should be amended so that notice of entry (in addition to service on every owner, lessee and occupier of subject land or part of that land) shall also be affixed to a conspicuous object or objects on or near the land and the display maintained, so far as is reasonably practicable, for its period of validity.

Recommendation (7) – Unauthorised entry

Section 12 of the Compulsory Purchase Act 1965 should be repealed without replacement.

Recommendation (8) – Refusal of Entry

(1) While the procedure enabling the acquiring authority to issue a warrant for possession (under section 13 of the Compulsory Purchase Act 1965) should be retained, the warrant should be issued to High Court enforcement officers rather than to the sheriff.

(2) The costs of the warrant should be borne initially by the acquiring authority subject to recoupment from the person refusing entry. The acquiring authority should be entitled to deduct such costs from any compensation payable to that person. Where costs exceed the level of compensation payable, they should be recoverable as a civil debt.

(3) The Lands Tribunal should have jurisdiction to decide whether the sum claimed by the acquiring authority as costs of enforcement is reasonable in all the circumstances of the case.

Recommendation (9) – Distress

(1) Section 13(4) and (5) of the Compulsory Purchase Act 1965 should be repealed without replacement.

(2) Section 29 of the Compulsory Purchase Act 1965 should be repealed without replacement.

Recommendation (10) – Local land charge registration

(1) The following should become registrable as local land charges for the purposes of the Local Land Charges Act 1975:

(a) making of the compulsory purchase order; and

(b) service of notice to treat in respect of any land under section 5 of the Compulsory Purchase Act 1965.

(2) Amendment of the register, to reflect withdrawal or lapse of the compulsory purchase order or of notices being varied or ceasing to have effect, should be governed by the Local Land Charges Rules.

(3) Failure to register as a local land charge should not invalidate the order or notice, but any person adversely affected by such failure should be entitled to claim compensation for consequential loss suffered in accordance with section 10 of the Local Land Charges Act 1975.

(4) To achieve consistency of approach, ODPM should provide authorities with guidance on the desirability of attaching informal notes to the register on the current status of an order and its state of implementation.

Recommendation (11) – Time limits

(1) The powers exercisable pursuant to the compulsory purchase order should only be exercisable for a prescribed period (being less than the current period of three years) from the date on which the order becomes operative.

(2) On the expiration of the prescribed period the compulsory purchase order should cease to have effect. Section 4 of the Compulsory Purchase Act 1965 should be amended accordingly.

(3) An acquiring authority should be treated as having exercised powers by service of notice to treat or by execution of a general vesting declaration but not otherwise.

(4) A notice to treat should cease to have effect on the expiration of a prescribed period (being less than the current period of three years) from the date on which the notice to treat is served, save and insofar as it relates to land in respect of which:

(a) compensation has been agreed or awarded or has been paid or paid into court;

(b) a general vesting declaration has been executed;

(c) the acquiring authority has served notice of entry; or

(d) reference has been made to the Lands Tribunal for determination of the compensation payable.

(5) A notice of entry should not take effect until the expiry of a prescribed period from the date on which it is served, and it should cease to have effect on the expiration of a prescribed period from the date of service, save and insofar as it relates to land in respect of which entry has been made and possession taken. Where notice of entry has expired without entry being made, it should not be permitted to serve any further notice in respect of the land to which the expired notice relates.

(6) The time limits referred to in (4) and (5) above should be capable of extension by agreement between the acquiring authority and those persons owning land or interests in land.

Recommendation (12) – Limitation periods

(1) Where the acquiring authority has proceeded by notice to treat or by vesting declaration and compensation has not been agreed, the issue should be referred to the Lands Tribunal for determination:

(a) (under the existing law) within six years of the date when the claimant knew, or ought reasonably to have known, of the taking of possession of the subject land or its vesting in the acquiring authority; or

(b) (under the amended law) within three years of the claimant's date of knowledge, in accordance with the "core regime", with a "long-stop" period of ten years.

(2) Following agreement, or determination by the Lands Tribunal, of the amount of compensation payable by the acquiring authority, that amount should be recoverable by the claimant within:

(a) twelve years (under the existing law), or

(b) ten years (under the amended law)

of the date of agreement or determination as the case may be.

(3) Following payment of compensation into court by an authority, the claimant should apply for payment out within:

(a) twelve years (under the existing law), or

(b) ten years (under the amended law)

from the date of the payment into court, subject to the proviso that the court may order payment to a claimant subsequently where it is satisfied that there are good reasons for an application not having been made previously, or that there are other exceptional circumstances.

(4) Section 9 of the Limitation Act 1980 should be amended accordingly.

Recommendation (13) – Deed poll procedure

(1) If, after compensation in respect of any land or interest in land has been agreed or determined, the person entitled:

(a) refuses to accept the compensation; or

(b) fails to make out title to the satisfaction of the acquiring authority; or

(c) refuses to convey or release the land as directed by the acquiring authority,

the authority should be entitled to proceed by the "deed poll procedure" as described in this recommendation.

(2) The acquiring authority should be entitled to pay into the High Court the compensation payable in respect of the relevant land, or interest, accompanied by a description of the person or persons entitled (so far as known to the authority). The compensation so paid into court should be placed to the credit of those persons.

(3) On payment into court as above, the acquiring authority should be entitled to execute a deed poll describing the relevant land and the circumstances of the payment, and giving the names of the persons to whose credit the compensation is paid.

(4) On execution of the deed poll, all the interests in respect of which the compensation was so paid should vest absolutely in the acquiring authority, together with the right to immediate possession as respects those interests.

(5) The acquiring authority should be required to make a reference to the Lands Tribunal within the limitation period applicable for such references (or within such extended period as the Lands Tribunal may allow) for compensation to be assessed.

(6) On the application of any person claiming any part of the money paid into court, or any interest in any part of the land in respect of which it was paid into court, the High Court should be entitled to order its distribution according to the respective interests of the claimants, and to make such incidental orders as it thinks fit.

(7) The incidental provisions of section 28 of the Compulsory Purchase Act 1965 (sealing of deed polls, stamp duty, etc) should be incorporated, save for section 28(3) which should be repealed.

(8) The costs incurred in connection with a payment into court under this proposal should be borne by the authority, save as the court otherwise orders.

Recommendation (14) – Completion of purchase

(1) Where notice to treat has been served and compensation has been agreed or determined, there should be deemed (as now) to be in place a contract of sale of the subject land between the claimant and the acquiring authority.

(2) The contract of sale should be enforceable by action by either party for specific performance.

(3) The concept of a vendor's lien, in the context of compulsory purchase, should be abolished by statute.

(4) Schedule 5 to the Compulsory Purchase Act 1965 (prescribed forms) should be repealed.

Recommendation (15) – Costs of Completion

(1) Section 23 of the Compulsory Purchase Act 1965 should be repealed and replaced by a provision that the acquiring authority should pay to those persons who have incurred them all reasonable costs in connection with the completion of the compulsory purchase (so far as not covered by any other provisions).

(2) The costs incurred should be assessed by the Costs judge. This duty of assessment should remain in the High Court and not be transferred to the jurisdiction of the Lands Tribunal.

Recommendation (16) – Persons with limited powers

(1) Where the owner of any interest in the subject land has limited power to deal with that land (including disposal), the acquiring authority should be entitled to proceed by the "limited powers procedure" as described in this recommendation.

(2) The authority may apply to the Lands Tribunal for:

(a) appointment of a surveyor (selected from the surveyor members of the Tribunal) to undertake a valuation which will determine the amount of compensation to be paid in respect of the interest. When the application has been made, both the authority and the owner may submit to the Lands Tribunal (and its appointed surveyor) their own assessments of the appropriate amount payable, which submissions will be for the sole purpose of informing the valuation process;

(b) an order empowering the owner to dispose of the interest to the authority on such terms and conditions as the Lands Tribunal considers appropriate (including as to the manner of payment of the compensation).

(3) Schedule 1 to the Compulsory Purchase Act 1965 should be repealed.

Recommendation (17) – Untraced and non-compliant owners

(1) Where the owner of any interest in the subject land either:

(a) cannot be found by the acquiring authority after making reasonable inquiry; or

(b) has been found, but is unwilling to deal with the authority; or

(c) has been found, but is prevented from dealing with the authority by reason of illness, absence or other circumstance,

the authority should be entitled to adopt the “non-compliance procedure” described in this recommendation.

(2) The authority may apply to the Lands Tribunal for appointment of a surveyor (selected from the surveyor members of the Lands Tribunal) to undertake a valuation which will assess the amount of compensation to be paid in respect of the interest. When making the application, the authority may submit to the Lands Tribunal (and its appointed surveyor) its own estimate of the appropriate amount payable, which submission will be for the sole purpose of informing the valuation process.

(3) Once the assessment has been made, the authority will hold the valuation and produce it on demand to the owner of the interest to which it relates, or to any other person with an interest in the subject land.

(4) All the expenses of, and incidental to, the obtaining of the valuation shall be borne by the authority.

(5) Following assessment of compensation, and subject to (6) below, the authority may then invoke the “deed poll procedure”.

(6) Where any person, claiming to be entitled to compensation paid into court under this procedure, wishes to challenge the amount of compensation assessed by the valuation:

(a) before making application to the High Court for payment of the sum paid into court, the claimant may serve notice on the authority requiring the authority to refer the issue within a prescribed time limit to the Lands Tribunal for determination;

(b) pending determination by the Lands Tribunal, the High Court may make such orders for interim payment as it thinks fit;

(c) if the Lands Tribunal subsequently determines that a further sum in compensation should be paid by the authority, the authority shall make that payment in the manner directed within a prescribed time limit.

Recommendation (18) – Omitted interests

(1) An acquiring authority should be entitled retrospectively to rectify accidental omissions relating to interests and rights by serving notice to treat and notice of entry within a prescribed time limit (or within such longer period as is allowed by the Lands Tribunal).

(2) An acquiring authority should be entitled to refer disputes over compensation to the Lands Tribunal for determination within that time limit.

(3) Compensation should be assessed by reference to the date of the original entry on to the subject land.

(4) Section 22 of the Compulsory Purchase Act 1965 should be amended accordingly (and the expression “to purchase” in subsection (1) should be clarified).

Recommendation (19) – Payments into and out of court

(1) Sections 25 and 26 of the Compulsory Purchase Act 1965 (concerning payments into court) should be replaced by a simplified procedure (applying to acquisition both by notice to treat and by vesting declaration):

(a) giving the court power, subject to rules of court, to make orders in relation to money paid into court under the statutory provisions relating to compulsory purchase, for the distribution of such money in accordance with the interests of the claimants (and to make such incidental orders as it thinks fit);

(b) allowing for payment into court by an acquiring authority of the full compensation sum where individual claimants dispute the share of that sum due to them;

(c) providing that costs incurred in connection with payments-in shall be paid by the authority, unless the court determines otherwise.

(2) Section 29 of the Local Government (Miscellaneous Provisions) Act 1976 (relating to unclaimed compensation) should be extended so that it applies to all forms of acquiring authority.

Recommendation (20) – Service of notices and publicity

(1) The present rules relating to service of notices should remain in primary legislation, supplemented where necessary by departmental guidance, subject to the following.

(2) The different statutory formulations relating to service by site notice should be made consistent.

(3) Section 11(3) of the Acquisition of Land Act 1981 should be amended to place an obligation on acquiring authorities both to display a site notice and, so far as reasonably practicable, to keep it in place for the requisite period.

Recommendation (21) – Divided land (unified procedure)

(1) There should be a single procedure whereby a person holding an interest in land which is subject to compulsory purchase by an acquiring authority can require the authority to take other land held by him which does not form the subject of the compulsory purchase. This "divided land procedure" is as described in this recommendation.

(2) If the land specified in a "notice of acquisition" (the subject land) comprises part: (a) of any building, (b) of any land attached to and used with a building, or (c) of any other land (not being agricultural land), any person who owns an interest in the land (being greater than as tenant for a year or from year-to-year and not being a long tenancy about to expire), may serve on the acquiring authority a "divided property notice" requiring the authority to purchase his interest in the whole.

(3) A divided property notice, which shall be in writing and in prescribed form, shall specify the land that the claimant requires to be purchased by the acquiring authority and shall be served by a claimant within 28 days of service of the notice of acquisition.

(4) Where a divided property notice has been served, the authority may, within two months of service:

(a) serve notice of withdrawal of the notice of acquisition;

(b) serve notice to acquire the whole of the land; or

(c) refer the matter to the Lands Tribunal for determination.

(5) If the authority fails to take any such action within two months of service, it shall be deemed to have served notice to acquire the whole of the land.

(6) A claimant who has served a divided property notice may withdraw that notice at any time before compensation under it has been agreed or determined.

(7) The Lands Tribunal, on a reference, shall determine whether:

(a) in the case of a building, the part proposed to be acquired can or cannot be taken without material detriment to the building or its use;

(b) in the case of land attached to a building, the part proposed to be acquired can or cannot be taken without seriously affecting the amenity or use of the building;

(c) in the case of other land (not being agricultural land), the part proposed to be acquired can or cannot be taken without the retained land, or any part of it, being made not reasonably capable of use for the purpose for which it was used at the time of service of the notice of acquisition.

The burden of proof shall lie with the person serving the divided property notice.

(8) In determining any such reference, the Lands Tribunal shall:

(a) take into account not only the effect of the taking of part but also the use to be made of that part and, in a case where the part is proposed to be acquired for works or other purposes extending to other land, the effect of the whole of the works and the use to be made of the other land; and

(b) determine the area of the property which the acquiring authority ought to be required to take (and the notice to treat or vesting declaration shall be construed accordingly).

(9) Sections 53 to 57 of the Land Compensation Act 1973 (agricultural land) should continue to apply insofar as they are not affected by the above provisions.

(10) Sections 8(3) (small parcels) and 19 (apportionment of rent) of the Compulsory Purchase Act 1965 should continue to apply in updated form.

(11) Section 8(2) of the Compulsory Purchase Act 1965 should be repealed.

Recommendation (22) – Interference with private rights

(1) Where an authority undertakes an operation on or uses land for a statutory purpose, and that land is subject to easements or other private rights, it should be presumed that such rights will be *overridden,* unless the authority elects to *extinguish* the rights (or any of them) over all or part of the land.

(2) Where rights over land are overridden, the erection, construction or maintenance of any building or work on land or any use of land, whether done by the authority or by a person deriving title under it, should be deemed lawful if done in accordance with planning permission and for the statutory purpose, notwithstanding interference with the rights.

(3) Where an authority elects to *extinguish* any right, it should be required to serve “notice of election” on every qualifying person on or before the first notice date, describing the right and its extent.

(4) On receipt of a notice of election, the qualifying person should be entitled either to:

(a) accept the notice; or

(b) serve on the authority "notice of objection" to the proposed extinguishment within a prescribed period, which objection will be determined by the Secretary of State as part of the order confirmation process.

(5) Notice of objection should be able to be upheld by the Secretary of State only on the ground that other land held by the qualifying person which benefits from the right will no longer be reasonably capable of being used for the purpose for which it is currently being used by that person.

(6) Where notice of election is accepted or notice of objection is not upheld, the authority should proceed as though the right in question was an interest entitling the owner to notice to treat; and, on completion of the purchase or on prior taking of possession by the authority, the right described in the notice of election shall be extinguished.

(7) Where any right is *overridden* by an authority, and work on, or use of, the land has commenced (whether by an authority or a person deriving title under it), the owner of the right should be entitled to serve on the authority "notice of extinguishment" requiring the authority to acquire the right (or part of the right) and extinguish it.

(8) Section 237 of the Town and Country Planning Act 1990 should be amended so that immunity extends to the use of "any building or work" (as well as to erection, construction, etc), and to any acquiring authority acting within its statutory powers for a statutory purpose, in accordance with such permissions or consents as are required.

Recommendation (23) – Minor tenancies

(1) The procedure for dealing with minor tenancies, and long tenancies about to expire, applicable where the acquiring authority is proceeding by vesting declaration (and contained in the Compulsory Purchase (Vesting Declarations) Act 1981), should be retained without amendment.

(2) The law should be amended so as to ensure that analogous procedures, and protections, apply where the acquiring authority is proceeding by notice to treat under the Compulsory Purchase Act 1965. In particular:

(a) where the authority acquires land, it should be subject to any existing minor tenancy and any long tenancy which is about to expire;

(b) the authority should not be obliged to recover possession immediately on acquiring the land, and it should be entitled to allow such tenancies to expire, or to serve notice to quit in order to terminate them; and

(c) if the authority wishes to terminate such a tenancy before it is entitled to do so under the tenancy agreement or otherwise, it should serve notice to treat, and notice of entry, on the occupier(s) of any of the land in which the tenancy subsists.

Recommendation (24) – Mortgages and rentcharges

The procedure for dealing with mortgages and rentcharges in the subject land (contained in the Compulsory Purchase Act 1965) should be retained in its current form, subject only to restatement in modern language in any future consolidation.

Recommendation (25) – Public rights of way

Section 32 of the Acquisition of Land Act 1981 should be retained in its current form and should not be amended.

Recommendation (26) – Abortive orders

Liability prior to making a compulsory purchase order

(1) Subject to the law relating to blight, an acquiring authority should be under no liability to pay compensation until, and save and insofar as, a compulsory purchase order has been made, and compensation should not be payable by the authority in respect of any loss or expense incurred before the date on which notice of the order being made is first published ("the first notice date").

Withdrawal of orders by the acquiring authority etc

(2) A compulsory purchase order should be capable of being withdrawn by an acquiring authority (by giving notice of withdrawal to those persons entitled to receive notice of making the order) at the following times:

(a) from the first notice date until the date on which it is submitted to the confirming authority for confirmation;

(b) from the date on which notice of its confirmation is first published until the date on which notice to treat is served or the date on which a vesting declaration is executed.

(3) An acquiring authority should be entitled to withdraw from the purchase of any subject land for a period of six weeks from the date on which a claim for compensation is made or (where no such claim is made) from the date on which compensation is determined by the Lands Tribunal.

(4) An acquiring authority should also be entitled to withdraw from the purchase of any subject land as permitted by section 8(1) of the Compulsory Purchase Act 1965, section 54(3) of the Land Compensation Act 1973, section 12 of and Schedule 1, para 4, to the Compulsory Purchase (Vesting Declarations) Act 1981, and any other statutory provision permitting withdrawal.

Deemed withdrawal of orders etc

(5) A compulsory purchase order should be treated as withdrawn:

(a) where the acquiring authority fails to submit the order to the confirming authority for confirmation within the prescribed time limit;

(b) where the confirming authority refuses to confirm the order; and

(c) where the order is quashed by the High Court.

(6) An acquiring authority should be treated as having withdrawn from the purchase of any subject land:

(a) where, after publication of the notice of confirmation, the acquiring authority fails within the prescribed time limit to serve notice to treat or to execute a vesting declaration;

(b) where a notice to treat ceases to have effect pursuant to section 5(2A) or section 5(2B) of the Compulsory Purchase Act 1965;

(c) where, after service of notice of entry, the acquiring authority fails to enter on and take possession of the land before the notice ceases to have effect.

Notice of withdrawal

(7) Where an acquiring authority withdraws a compulsory purchase order as set out in (2) above, the acquiring authority should be required to give notice of withdrawal to all qualifying persons (as defined in section 12 of the Acquisition of Land Act 1981, as amended).

(8) Where a compulsory purchase order is deemed to be withdrawn as set out in (5) above, the acquiring authority should be required to give notice of withdrawal to all qualifying persons as soon as is reasonably practicable.

(9) Notice of withdrawal should be in prescribed form and should set out the right to claim compensation.

(10) Once an order has been confirmed, notice of withdrawal may relate to the whole of the subject land or to such part as corresponds to the whole of an individual plot held by a qualifying person.

Compensation liability on withdrawal

(11) On withdrawal of an order, or on withdrawal from the purchase of any subject land, the acquiring authority should be liable to pay compensation to any qualifying person in respect of any loss or expenses caused by the making of the order or the withdrawal of the order or the withdrawal from the purchase as the case may be.

(12) The amount of any compensation should be determined (in default of agreement) by the Lands Tribunal, and assessed in accordance with the principles relating to consequential loss set out in the Compensation Code.

(13) Compensation should carry interest at the rate prescribed under section 32 of the Land Compensation Act 1961 from the date of notice of withdrawal until its payment.

Exclusions from compensation liability

(14) Where the order is withdrawn as at the time referred to in (3) above, compensation should not cover any loss or expense incurred after the time when, in the opinion of the Lands Tribunal, a proper notice of claim should have been delivered by the claimant.

(15) Compensation should not be required to be paid where a statutory notice which had been served in relation to the subject land under any of the following provisions had become operative, and had not been complied with, at the first notice date:

(a) Sections 189 and 190 of the Housing Act 1985 (requirement to repair unfit dwelling and requirement to repair dwelling in disrepair);

(b) Section 215 of the Town and Country Planning Act 1990 (power to require proper maintenance of land);

(c) Section 48 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (repairs notice prior to compulsory acquisition of listed building).

(16) Compensation should not be required to be paid where a statutory order has been served in relation to the subject land under sections 264 or 265 of the Housing Act 1985 (closure and demolition of unfit dwellings) and has not been quashed on appeal.

(17) Compensation should not be required to be paid where, following service of a blight notice under section 150 of the Town and Country Planning Act 1990, notice to treat is deemed to have been withdrawn under section 156(2) of that Act.

(18) The Secretary of State should be empowered by regulations to add to or amend the list of exclusion circumstances.

Withdrawal of notices to treat

(19) Where a notice to treat has been served by an acquiring authority, that notice should be entitled to be withdrawn unilaterally (by notice of withdrawal) only in the circumstances set out in section 31(1), (2) of the Land Compensation Act 1961, or in (21) below, or by agreement with the recipient of the notice.

(20) Where a notice is withdrawn in such circumstances or by agreement, the order should remain valid (and further notices may be served) until the expiry of the period set out in section 4 of the Compulsory Purchase Act 1965.

(21) Where, in the case of land proposed to be divided, notice to treat in respect of part only of the subject land has been served by the acquiring authority, and the recipient of the notice has within the statutory time limit to be prescribed served notice of objection to severance under section 8(1) of the Compulsory Purchase Act 1965, the authority should have the right either:

(a) to withdraw the notice to treat, subject to paying compensation for any loss or expenses occasioned to the recipient by the giving and withdrawing of the notice; or

(b) to amend the notice to treat to cover the whole of the subject land (in which case compensation will be payable in the usual way for the land acquired).

(22) The provisions relating to withdrawal of notice to treat deemed to have been served under section 54(2), (3) of the Land Compensation Act 1973 (severance of agricultural land) and under section 12 of the Compulsory Purchase (Vesting Declarations) Act 1981, and Schedule 1, paragraph 4(1)(a) thereto, should continue to apply, and compensation should be payable for such withdrawal.

(23) Where notice is withdrawn under section 31(1), (2) of the Land Compensation Act 1961, the acquiring authority should be liable to pay compensation to the person to whom notice was given for any loss or expenses occasioned to him by the giving and withdrawal of the notice (in accordance with section 31(3), (4) of that Act).

(24) Such compensation should be assessed on the same basis and subject to the same rules and procedures as that applicable under (11) above.

(*Signed)* ROGER TOULSON, *Chairman*
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

STEVE HUMPHREYS, *Chief Executive*
7 October 2004

APPENDIX A
IMPACT OF OUR RECOMMENDATIONS

INTRODUCTION

A.1 At each stage of this project we have borne in mind the likely effects of our recommendations. In our Consultative Report on Procedure we set out the existing law and the deficiencies in the law as we saw them. We then constructed a series of provisional proposals (based on our understanding of the practical implementation of compulsory purchase, drawn in part from our discussions with practitioners in the field) and laid out a number of consultation questions for a wider audience.[1] We are most grateful to those who responded with specific information and general comments, and we have had careful regard to those responses in formulating our final recommendations in this report.

A.2 In our previous Final Report we focussed on Compensation issues.[2] In this report we restrict ourselves to matters of practice and procedure. Government, in its original terms of reference,[3] asked us to review (in the context of compulsory purchase procedure) the following:

(1) The implementation of compulsory purchase orders;

(2) Compensation where compulsory purchase orders are not proceeded with; and

(3) The procedure relating to the making and confirmation of compulsory purchase orders.[4]

A.3 In preparing this report we have adopted a format which addresses these issues in a sequence which follows broadly the chronology of an order's life.

A.4 In our Final Report on Compensation we recommended a comprehensive Compensation Code which (if enacted) would operate as a single and self-contained mechanism, and which would make the complex rules in this area more accessible and more comprehensible. That approach was not appropriate for our present task. Whereas the rules relating to compensation are to be found in an amalgam of statutory and case law, in the main the principal rules on procedure are to be found in statute: the Compulsory Purchase Act 1965, the Acquisition of Land Act 1981 and the Compulsory Purchase (Vesting Declarations) Act 1981. These last two pieces of legislation are relatively modern and comprehensible; the 1965 Act, by contrast, has neither of these virtues,

[1] Law Com CP No 169, para 11.15. We specifically sought comment which encompassed "a practical and cost-benefit viewpoint" as well as from a legal perspective.

[2] Law Com No 286.

[3] Lord Chancellor and Minister for Housing and Planning (DTLR), 12 July 2001.

[4] This last-mentioned topic was added later with the agreement of the ODPM.

partly because it came into being as a consolidation of the much earlier Lands Clauses Acts.

A.5 As we indicated in our Consultative Report on Procedure, our priority in this report has been to focus on a systematic review of the 1965 Act in order to identify and address significant defects and anomalies in its working. At the same time we have identified the more limited aspects of other procedural statutes which raise problems and which merit legislative change. In undertaking this task we have had regard to a series of proposals for reform which were put forward by the ODPM in parallel with some of our work over the past three years (and a proportion of which have now been implemented in the Planning and Compulsory Purchase Act 2004).

A.6 As with our proposals for reform of compensation law, our aim has been to find ways in which the law on procedure can be simplified, codified (where applicable) and, in due course, consolidated. The starting point will probably be piecemeal legislative amendment, but we are hopeful that, with the minimum of delay Government resources and Parliamentary time will become available for consolidation (and the creation of a single Procedure Code to stand alongside our recommended Compensation Code).

A.7 The benefits of modernisation in this area are not readily quantifiable in terms of either economics or social impact. But in the following analysis we endeavour to provide indicators of the advantages which we believe will flow. We deal only with the topics where we are proposing some significant change to the existing law.

TOPICS

Surveys before making an order

A.8 At present the ability of an acquiring authority to enter upon land as a preliminary to making a compulsory purchase order varies depending upon the nature of the authority. We recommend that the power to enter to survey should be extended to all authorities who are considering and preparing to make an order in respect of "a distinct project of real substance genuinely requiring such entry upon the land." We believe this formulation, coupled with the safeguard that an aggrieved landowner can apply to the county court for review of the exercise of the power of entry, should rationalise the power and should assist authorities who presently may only enter with the subject land owner's consent. We believe that it is illogical to require an authority to defer a physical site appraisal until the post-confirmation implementation stage. The early identification of site difficulties, and the need to identify as accurately as possible any occupiers who may need relocating, seems to us essential to minimise disruption to affected persons as soon as practicable and to ensure that the scheme for development (in its design and phasing) is as realistic and as cost-effective as possible. The benefits for occupiers and for the authority will vary from project to project, but have the potential to save both hardship and wasted expenditure. Careful planning in the early stages of an acquisition and development project is essential in order to reduce delays and to facilitate project management.

Legal challenge of orders

A.9 The effects of our recommendation on court challenge are twofold. First, we believe it would be helpful to spell out the availability and boundaries of the court review mechanisms: that judicial review is the vehicle for challenge of an order up to and including its making by an acquiring authority; and that statutory review should be the vehicle for challenge once an order enters the confirmation stage. Secondly, we believe that the court should have the power to quash a defective confirmation decision, but to leave the order (which has been "made") in place so that only the confirmation process need be repeated.

A.10 Our aim in these proposals is to provide certainty as to use of the appropriate procedure by an aggrieved party, and to provide the court with flexibility of remedy. These changes should reduce room for uncertainty (and wasted costs by using the wrong vehicle for challenge); provide the additional benefits of the judicial review process when challenging the actions of acquiring authorities;[5] and avoid the incurring of wasted costs, and burdensome delays, which could flow from the need to restart the order-making process from scratch. If the making of an order is valid, our proposal would mitigate the effect of defective confirmation and the consequent drain on public moneys.

Notice to treat

A.11 We recommend, amongst other things, that where the notice to treat route is to be adopted by an acquiring authority, notice to treat should be served in prescribed form accompanied by explanatory notes. Prescription will ensure consistency of practice amongst authorities which should aid practitioners in advising their clients; and should ensure that notices are clear, comprehensible and contain the minimum information which will enable a recipient to compile an adequate compensation claim. The standard notes to recipients will explain their rights and, in certain circumstances, the content of the notice may be made more understandable if it is accompanied by a plan delineating the affected land.

A.12 In our view these changes will remove the opportunity for uncertainty on the part of landowners and, in turn, that should prevent the waste of professional costs and expedite the implementation process.

Notice of entry

A.13 We recommend that the mechanics of service of notice of entry should be brought into line with the requirements for service of other forms of notice. This would involve displaying a site notice relating to intended entry (post-confirmation) on or near the affected land. Additional service by this route would help to ensure (hand-in-hand with the Government's proposal to firm-up the time limits for notices to take effect) that affected landowners and occupiers are given proper opportunity to order their affairs and minimise disruption.

[5] See our discussion of the flexibility inherent in judicial review at para 2.62 above.

Distress

A.14 We recommend that the archaic arrangements for levying distress, as a means of enforcement of payment by parties involved in the compulsory purchase process, should be repealed. We believe that the remedy is outmoded and inappropriate for use in the present context. Moreover, it has been overtaken by new enforcement procedures contained within the Courts Act 2003. The effect of our recommendation should be cost neutral.

Local land charge registration

A.15 We believe that the system for compulsory acquisition of land and interests in land not owned by the state should be made as open and transparent a process as possible. We are conscious that an individual citizen's right to protection of his or her property is now a right enshrined in the Human Rights Act 1998.

A.16 Against this backcloth we have recommended that additional key steps in the making and implementation process should be registrable as local land charges. We do not believe that the cost of registration which will fall on acquiring authorities and registration authorities will be more than minimal, and that any burden should be more than outweighed by the benefit to affected landowners who will be alerted to the need to pursue further enquiries. As we say in our report,[6] there should be no adverse effect on the land registration process under the Land Registration Act 2002.

Time limits for validity

A.17 Government has already proposed significant foreshortening of time limits within the implementation stage. The rationale for stricter time limits is that the compulsory purchase process will be subjected to a discipline which will achieve greater fairness and efficiency, what the Government describes as "a fair balance between the interests of acquiring authorities and of those whose property is to be acquired."[7] Having examined the issues carefully we endorse that approach. We do, however, temper the rigidity of the Government's intended rubric by suggesting that some flexibility will need to be built into the system.

A.18 We believe that expediting the timetable for acquisition, and by setting out clear deadlines, will help to focus the minds of all parties involved, and will help to reduce the costs that can flow from a protracted process. The overall aim should be to provide greater certainty for the participants in the system, and to limit the hardship and adverse economic consequence of blight. It is impossible, of course, to forecast the savings because they will vary from project to project, depending on the nature of the development or use intended and the size of the landtake involved.

[6] See paras 3.121, 3.122 above.

[7] Policy Response Document (ODPM, July 2002), para 12(iii), cited at para 4.11 above.

Limitation periods

A.19 Our recommendations relating to statutory time limits for making compensation claims to the Lands Tribunal and the court (for determination of quantum and for recovery of compensation moneys) are designed to rationalise those limits, both under the present law and under the law on limitations if it were to be changed in accordance with our previous recommendations. We also suggest that the limitation provisions should be standardised in their application to both the notice to treat and the vesting declaration routes.

A.20 In our view this rationalisation should clarify the position for parties and should prevent the prosecution of unproductive litigation. We also believe that finite limits will assist acquiring authorities in their financial planning because they will be able to rely on an end-date for their potential liabilities.

Deed poll procedure

A.21 The deed poll procedure (presently in two provisions of the Compulsory Purchase Act 1965, but not so termed) provides a mechanism for an acquiring authority to determine compensation and to effect transfer of title unilaterally. This procedure is available (a) where the landowner refuses to accept tendered compensation, or to make good title, or to convey the subject land, and (b) where the landowner is absent from the UK or cannot be found after diligent inquiry. In our recommendations we seek to achieve two objectives. First, to restate the existing law, but in modernised form. Secondly, to extend availability of the procedure to those persons who are either unwilling or unable to deal with the authority (for whatever reason). These changes should ensure that an authority is neither frustrated in its endeavours nor unable to counter delay in implementation. Alleviating these difficulties should, in our view, help to simplify and expedite matters, and thus (if only minimally) reduce authorities' costs.

Omitted interests

A.22 We recommend re-enactment in new legislation of the slip-rule which allows an acquiring authority, within a fixed time, to rectify accidental omissions relating to rights and interests using the notice to treat route. This is not designed to allow an authority *carte blanche* so that it can go back and add into the project significant interests that, with the benefit of hindsight, it would like the project to have embraced. In its re-enactment the rule should set out more precisely its availability in terms of the rights and interests it is designed to cover, and the time for its operation. These changes will, in our view, create more certainty for landowners who are subject to operation of the rule, and thus help minimise professional costs. By the same token, retention of the statutory provision in modified form will continue to provide a cost-effective tool for acquiring authorities who otherwise would need to promote supplemental orders.

Payments into and out of court

A.23 The purpose of our recommendation is to simplify the present overcomplicated arrangements for making payments into and out of court, and to extend section 29 of the Local Government (Miscellaneous Provisions) Act 1976 to all forms of acquiring authority so that they will be able more easily to obtain a refund of unclaimed compensation within a set time. These changes should, in our view, make the system more flexible and allow the court to lay down procedural rules

which may be adapted more easily in the coming years to fit changing circumstances. They are designed, also, to provide more certainty to authorities (for example, in financial forecasting and outlay) who are seeking to act in the public interest.

Service of statutory notices

A.24 Government has recently made changes to the Acquisition of Land Act 1981 in respect of service of certain notices, which are designed to ensure that the risk of unidentified interests not coming to light in a timely manner will be minimised. In particular, there is now provision for affixing site notices. We recommend taking that further by ensuring that the different statutory formulations relating to service by site notice are made consistent, and extending the obligation on acquiring authorities to ensure (so far as reasonably practicable) that site notices are kept in place for the requisite period. We do not see this as imposing any more than a minimal additional burden on authorities, and we believe any burden will be outweighed by the time (and inconvenience) which may be saved at later stages in the implementation process.

Divided land

A.25 We recommend a unified procedure for dealing with claims which involve an objection to an authority's proposal to take subject land in such a way that a landholding is divided.

A.26 As we indicated in our consultative report, the present law on severance derives from a variety of sources, and in parts is archaic or confused. We believe that the law will be made more understandable and accessible if it is recast as a unified mechanism, covering implementation by both notice to treat and by vesting declaration. We have recommended that the procedure should be extended to cover any form of land (beyond residentially-developed land and agricultural land) which is to be divided. We appreciate that this extension may have cost implications for acquiring authorities (probably of only marginal significance), but we believe that it is only fair that all landowners are treated in an equitable manner.

A.27 We have also adjusted our suggestion for a default mechanism whereby the authority would be deemed now to have opted to take the whole of the subject land if it fails to respond to a claimant's "divided property notice". We have introduced this change of emphasis so that acquiring authorities will have the incentive to respond in a timely and positive manner. We do not believe this should add to authorities' costs if they ensure that they have put in place effective project management arrangements.

Interference with private rights

A.28 The law relating to interference with existing private rights lacks clarity in two major respects: first, as to the extent of immunity which is afforded to acquiring authorities (whether particular rights are extinguished or are simply overridden) and, second, whether immunity through override extends to authorities' successors in title. Both these issues need resolution so that public-private joint venture developments in particular can proceed with certainty. In our

recommendations we suggest the creation by statute of a presumption of override with the ability of an authority to elect extinguishment.

A.29 We believe that the adjustments we advocate will have the effect of achieving greater certainty which should, in turn, lead to the avoidance of wasted costs for authorities at later stages in the compulsory acquisition process, and to fairer compensation settlements. So, for example, where compensation is paid on the basis of extinguishment, the nature of the payment will be reflected in both quantum and finality of the settlement.

Abortive orders

A.30 We are conscious that, under the existing law, affected landowners may suffer unduly if an authority makes an order but then (for whatever reason) fails to progress it to confirmation or implementation.

A.31 Our recommendations are designed to provide a logical and comprehensive code for withdrawal and abandonment of orders, in terms of both the giving of notice and the conferment of rights of compensation. Our aim is to achieve greater openness and transparency in the way in which authorities deal with affected landowners. We do this in part by making recommendations for extension of the registration of key steps in the local land charges register (see above). We believe that should be supplemented by a notice-serving and compensation mechanism. We are aware that in certain circumstances (where an authority has had to proceed to compulsory acquisition as a means of enforcing housing or planning legislation), authorities have to employ the tool of compulsory purchase as a weapon of last resort and that it would not ordinarily be appropriate to impose a compensation burden for withdrawal on the public purse.

A.32 We consider that reform in this area is long overdue, and we do not believe that the additional cost which will need to be borne by acquiring authorities in the relatively small number of cases where orders have to be aborted is likely to be significant or disproportionate. We believe also that these new rules should not dissuade authorities from initiating orders where genuine need for land acquisition or assembly arises, but they should encourage authorities to make and manage orders in as efficient a manner as possible.

APPENDIX B
TABLE OF REPEALS AND AMENDMENTS

We list in the following table those current statutory provisions relating to procedural aspects of compulsory purchase which we recommend should be the subject of either repeal or amendment. We include within "amend" below the need to replace a provision in whole or in part. Where a section of a specified Act is not mentioned in the first column below, it should be assumed that no amendment to that provision is recommended.

Statutory provision	**Repeal or amendment**	**Source or destination**
Compulsory Purchase Act 1965		
Section 1(5)[1]	Repeal	Paragraph 5.58.
Section 2[2]	Repeal	Paragraph 5.67; Rec 16(3).
Section 4	Amend	Paragraph 4.35; Rec 11(2).
Section 5(1)	Amend	Paragraph 3.31; Rec 5(2).
Section 5(2)(c)	Amend	Paragraph 3.19(2); Rec 5(4).
Section 5(2A)	Amend	Paragraph 4.33; Rec 11(4).
Section 8(1)	Amend	Paragraphs 7.28-7.50; Recs 21(1)-(8) & 26(4).
Section 8(2)	Repeal	Paragraph 7.54; Rec 21(11).
Section 8(3)	Amend	Paragraph 7.54; Rec 21(10).
Section 9(1)-(4)	Amend	Paragraphs 5.16, 5.17 & 5.25-5.28; Rec 13(1)-(5).

[1] Section 1(5) of the 1965 Act is included in this list for repeal because the mechanism for appointment by two JPs of a third surveyor to make a valuation (in Schedule 1) is obsolete: see Recommendation 16 above.

[2] Section 2 of the 1965 Act gives effect to the procedure relating to persons without legal power to sell their interests in Sched 1 to that Act.

Section 9(5)	Amend	Paragraph 5.27; Rec 13(6).
Section 10(1)	Amend	Paragraph 8.30; Rec 22.
Section 11(1)	Amend	Paragraphs 3.53-3.56; Rec 6.
Section 11(2)[3]	Repeal	Paragraph 3.14; Rec 4.
Section 11(3)	Amend	Paragraph 2.29; Rec 2(4).
Section 12	Repeal	Paragraph 3.62; Rec 7.
Section 13(1),(2),(3) & (6)	Amend	Paragraphs 3.80-3.82; Rec 8.
Section 13(4), (5)	Repeal	Paragraph 3.90; Rec 9(1).
Sections 14-18	Amend	Paragraph 8.76; Rec 24.
Section 19	Amend	Paragraphs 7.51, 7.52; Rec 21(10).
Section 20	Amend	Paragraph 3.31; Rec 5(5) & Paragraph 8.61; Rec 23(2).
Section 22	Amend	Paragraphs 5.96-5.99; Rec 18.
Section 23	Amend	Paragraphs 5.53, 5.54; Rec 15.
Sections 25, 26	Amend	Paragraphs 5.17, 5.120; Rec 19(1).
Section 28(1),(2)	Amend	Paragraphs 5.17, 5.25; Rec 13(7).
Section 28(3)	Repeal	Paragraph 5.20; Rec 13(7).
Section 29	Repeal	Paragraph 3.90; Rec 9(2).

[3] Section 11(2) of the 1965 Act activates the alternative procedure for obtaining entry in Sched 3 to that Act.

Schedule 1[4]	Repeal	Paragraph 5.67; Rec 16(3).
Schedule 2[5]	Amend	Paragraphs 5.82-5.84; Rec 17.
Schedule 3[6]	Repeal	Paragraph 3.14; Rec 4(2).
Schedule 5[7]	Repeal	Paragraphs 5.40, 5.41; Rec 14(4).
Local Government (Miscellaneous Provisions) Act 1976		
Section 15	Amend	Paragraph 2.30; Rec 2(2),(4).
Section 29	Amend	Paragraph 5.120; Rec 19(2).
Limitation Act 1980		
Section 9	Amend	Paragraph 4.59; Rec 12(4).
Acquisition of Land Act 1981		
Section 2[8]	Amend	Paragraph 2.18; Rec 1.
Section 10(1)	Amend	Paragraph 2.18; Rec 1.[9]

[4] Section 2 of the 1965 Act gives effect to the procedure relating to persons without legal power to sell their interests in Sched 1 to that Act.

[5] Section 5(3) of the 1965 Act gives effect to the procedure for absent and untraced owners in Sched 2 to that Act.

[6] Section 11(2) of the 1965 Act activates the alternative procedure for obtaining entry in Sched 3 to that Act.

[7] Section 23(6) of the 1965 Act gives effect to the prescribed forms of conveyance set out in Sched 5 to that Act.

[8] Section 2(3) of the Acquisition of Land Act 1981 gives effect to the procedure for purchases by ministers in Sched 1 to that Act.

[9] Recommendation 1 provides for amalgamation of the ministerial and non-ministerial procedures and the repeal of Sched 1 to the Acquisition of Land Act 1981. It is implicit in that recommendation that section 10(1) of that Act will also require amendment.

Section 11(3) Sections 23-25 Schedule 1[10]	Amend Amend Repeal	Paragraph 6.25; Rec 20. Paragraphs 2.61-2.66; Rec 3. Paragraph 2.18; Rec 1.
Compulsory Purchase (Vesting Declarations) Act 1981		
Section 8 Schedule 1[11]	Amend Amend	Paragraphs 3.110, 8.8, 8.30; Rec 22. Paragraphs 7.28-7.52; Rec 21.
Town and Country Planning Act 1990		
Section 237	Amend	Paragraphs 8.29, 8.39; Rec 22(8).

[10] Section 2(3) of the Acquisition of Land Act 1981 gives effect to the procedure for the making of ministerial orders set out in Sched 1 to that Act.

[11] Schedule 1 to the Compulsory Purchase (Vesting Declarations) Act 1981 is given effect by section 12 of that Act.

APPENDIX C
RESPONDENTS TO CP 169

Surveyors

J C Pagella, Montagu Evans Surveyors

Lawyers and members of the Judiciary

Bar Council Law Reform Committee

Lord Justice Brooke

Michael Curry, Member of Lands Tribunal for Northern Ireland

Barry Denyer-Green, Barrister, Falcon Chambers

Law Society

City of London Law Society

Norman E Osborn, Retired Solicitor

Emrys Parry, Bond Pearce

Planning and Environmental Bar Association

Malcolm Spence QC, 2–3 Gray's Inn Square

District Judge Michael Tennant, Law and Procedure sub-committee, District Judges' Association

Local authorities

East Sussex County Council (Richard Rattle)

Northumberland County Council

Westminster City Council

Statutory bodies

British Waterways

English Partnerships

London Transport Property

Representative bodies

Association of Chief Estates Surveyors

Association of Local Land Charge Officers

Central Association of Agricultural Valuers

Country Land and Business Association

Estates & Wayleaves Forum (Electricity Supply Industry)

National Farmers Union

Royal Institution of Chartered Surveyors

Tenant Farmers' Association

Commercial organisations

Cross Rail

London Underground Limited

National Grid

Westfield Shoppingtowns Limited

Government Departments and executive agencies

Highways Agency

HM Land Registry

Lord Chancellor's Department (now Department for Constitutional Affairs, DCA)

Office of the Deputy Prime Minister (ODPM)

Planning Inspectorate

Valuation Office Agency

Welsh Development Agency