PLANNING AND ENVIRONMENT BAR ASSOCIATION

RESPONSE TO LAW COMMISSION CONSULTATION PAPER 267 ON COMPULSORY PURCHASE

PEBA is the specialist Bar association for barristers who specialise in planning, environment, compulsory purchase, highways, housing, rating and other aspects of local government law. In connection with compulsory purchase and compensation, PEBA members advise and act for both acquiring authorities and landowners / occupiers and are able to provide views based on considerable knowledge and experience.

Membership of PEBA is open to all barristers who have a significant part of their practice in the fields of planning, the environment, and local government law. PEBA does not represent any sectional interest. PEBA is a non-political entity. PEBA is regularly consulted by Government departments and others in relation to proposals for reform of either policy or legislation within its specialist areas. PEBA sees its role as seeking to inform decision-makers as to the practical implications of proposed reforms to regulatory regimes or relevant policy or guidance, based on the experience of its membership within its areas of practice, with a view to facilitating reforms that will enable better and more effective regulatory regimes and (hopefully) discouraging or modifying reforms that would work against such outcomes.

PEBA supports the Law Commission's work to update the proposals for the reform of compulsory purchase law following the Law Commission's 2003/2004 reports 'Towards a Compulsory Purchase Code' (Nos 286 and 291). The case for reform in this field, and action by the Law Commission, remains as strong as it ever was. Compulsory purchase powers will become increasingly important as more action is taken in the coming years to tackle the climate and nature emergencies, as we highlighted in our July 2021 submission to the Law Commission's consultation on its 14th programme of law reform. The few piecemeal reforms which have been made by Government in the last two decades have not addressed the underlying need for or benefits of wide and genuine reform.

That said, we recognise the rather limited terms of reference which have been given to the Law Commission for this project and provide this consultation response bearing the terms of reference in mind. We do not in this response answer all questions posed in the consultation, but rather those where PEBA barrister members have the most experience and therefore, we hope, the most useful feedback to assist the Law Commission in its work.

Consultation Question 1.

16.1 We invite consultees' views as to whether they are aware of:

(1) any circumstances in which the provisions of the Lands Clauses Consolidation Act 1845 are still relied on? (If so, please provide details of the circumstances and the specific provisions); or

(2) any other reasons why the repeal of the 1845 Act might prove to be problematic?

Paragraph 1.16

An example of a case in which the 1845 Act was relevant is *Bridgestart v LUL* [2004] EWCA Civ 793, where it was applied by the London Underground Act 1992. We are not aware of any more recent litigation which has directly engaged the 1845 Act. Some current powers of compulsory purchase do rely on the 1845 Act, such as the Military Lands Act 1892. If the 1845 Act is to be repealed, other legislation which depends on it will need to be amended, including the 1892 Act.

Consultation Question 2.

16.2 We invite consultees to provide data and evidence-based views on the likely impacts (economic and social) of the provisional proposals in this consultation paper.

Paragraph 1.64

It seems likely that the proposals will have economic and social impacts, by increasing the use of CPO powers. It is also likely that the proposals will lead to different compensation entitlement in individual cases. It is not possible at this stage, especially without draft provisions available, to form a view on the number of cases in which a change would occur or the overall scale of the change.

Consultation Question 3.

16.3 We invite consultees to tell us if they believe or have evidence or data to suggest that any of our provisional proposals could result in advantages or disadvantages to certain groups whether or not these groups are protected under the Equality Act 2010.

Paragraph 1.67

In our experience, for both regeneration and infrastructure schemes, compulsory purchase disproportionately affects persons with protected characteristics. This is because the owners and occupiers of land viewed as suitable for such schemes tend to be those from under-represented groups in terms of race and religion/belief. We do not consider, however, that the proposals will necessarily result in disadvantages for certain groups with protected characteristics beyond this general point.

Consultation Question 4.

16.4 We provisionally propose that any future consolidation of compulsory purchase legislation should state expressly that a compulsory purchase order should not be authorised unless there is a compelling case in the public interest for the compulsory acquisition. Do consultees agree?

Paragraph 2.25

We agree. This is a fundamental principle which is well-established in case law and policy. Whilst it is well-understood and applied in practice, it is vitally important. With increasing changes to policy and legislation to promote the use of CPOs, and to reduce compensation in some cases beyond the open market value of the interest in land taken, we consider that it is important for this basic principle to be set out in legislation so that it cannot be eroded or undermined by changes in policy which may come in the future. The statement of this principle would be sufficient without any further elaboration or definition.

Consultation Question 5.

16.5 We provisionally propose that the separate procedures for the authorisation of compulsory purchase orders (in Part II 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. Do consultees agree?

Paragraph 2.31

We agree. It should also be reflected through changes to relevant secondary legislation and guidance.

Consultation Question 6.

16.6 We invite consultees' views as to the most appropriate terminology to be used in future consolidated legislation to describe the stages in the authorisation process for a compulsory purchase order. In particular, would it be best to describe an order as being:

(1) first "prepared in draft" and then "made" (as ministerial orders currently are);

(2) "made" and then "confirmed" (as non-ministerial orders currently are);

(3) "applied for" and then "made" (as development consent orders and Transport and Works Act orders currently are); or

(4) something else, and if so, what?

Paragraph 2.38

It would help to have uniform terminology, but we do not have strong views about any of the options. Option 2 reflects current practice and so is the option best understood by practitioners. Option 3 does not reflect the substance of what happens with CPOs and so could be misleading.

Consultation Question 7.

16.7 We invite consultees' views as to whether a non-ministerial compulsory purchase order should be executed, as now, when it is "made", or whether it should be executed at the end of the authorisation process, once the order has been modified (if applicable) and confirmed by the confirming authority.

Paragraph 2.46

At the end of the process.

Consultation Question 8.

16.8 We provisionally propose that when publicising the making of a compulsory purchase order by site notice, there should be an express obligation upon acquiring authorities (so far as reasonably practicable) to keep the notice in place for the duration of the objection period. Do consultees agree?

Paragraph 2.51

We agree, with the 'reasonably practicable' qualification. Introducing an absolute obligation would empower objectors to be able to prevent progress with CPOs by simply taking down the site notices each time they are put up.

Consultation Question 9.

16.9 We invite consultees' views as to whether the lack of an express role in section 16 of the Acquisition of Land Act 1981 for the confirming authority causes problems in practice.

Paragraph 2.66

Section 16 provides considerable power to statutory undertakers to prevent CPOs from being confirmed. It is rare for the process to work as intended, with the undertaker's Minister taking a decision on serious detriment. The need to do that presents a serious impediment to a CPO being confirmed. In practice, s16 is sometimes used by undertakers to bolster their leverage in what are essentially commercial negotiations about land or rights being acquired by agreement and subject to protective terms or limitations. This use of the s16 power cannot be justified as being in the public interest, especially where many statutory undertakers today are essentially commercial organisations, or at least operate commercially in practice. It would be better if statutory undertakers were simply required to make their case on detriment to the confirming authority, rather than having a de facto veto power which can be used for essentially commercial purposes.

Consultation Question 10.

16.10 We provisionally propose that section 31 of the Acquisition of Land Act 1981, which contains a power for the "appropriate Minister" to authorise (jointly with the confirming authority) the acquisition of a statutory undertaker's land without a certificate under section 16, should be repealed. Do consultees agree?

Paragraph 2.70

No. Whilst this provision may be little used in practice, it presents a safeguard against the abuse (or at least over-enthusiastic use) of the s16 power and where in practice the parent Department of the statutory undertaker will be inclined to fight the undertaker's corner, even where that is not in the overall public interest. The ability to invoke the s31 procedure, even if more theoretical than practical, helps ensure that statutory undertakers do not abuse their strong position. Moreover, there might be cases where a CPO should be confirmed notwithstanding that it would cause serious detriment to an undertaking, in the wider public interest. It is more likely that the two Ministers acting jointly would be properly placed to reflect the correct overall public interest position, than the undertaker's Minister acting under s16. Section 127 of the Planning Act 2008 provides a sufficient level of protection.

Consultation Question 11.

16.11 We provisionally propose that section 17 of the Acquisition of Land Act 1981, which requires an order acquiring statutory undertakers' or local authorities' land to be subject to special parliamentary procedure in certain circumstances, should be repealed. Do consultees agree?

Paragraph 2.77

We agree. SPP is increasingly anomalous. It is also incredibly burdensome and a disincentive to the use of CPO powers by some authorities in some cases. Statutory undertakers in particular receive more than enough protection under s16, as considered above.

Consultation Question 12.

16.12 We invite consultees' views as to whether the provisions of section 19 of the Acquisition of Land Act 1981 for the protection of common land etc. cause any problems in practice.

Paragraph 2.82

There are problems inherent in the definition of open space (land used for the purposes of public recreation), including what constitutes "public recreation". There are also problems in practice on the application of the definition of open space to the facts of particular cases. An example is the issue which arose in the case of the London Borough of Brent (South Kilburn Regeneration Phase 2 - Land North Of Chippenham Gardens) Compulsory Purchase Order 2016 (decision letter dated 17 April 2018) on whether highway land can be open space for these purposes. Other examples from practice include difficulty in ascertaining for sure whether the scale, intensity and nature of a use is sufficient to qualify. Ultimately, whether land is used for the purposes of public recreation is a judgement call on which an acquiring authority, objectors and a confirming authority could differ. This uncertainty is a disincentive to the use of CPO powers in some cases.

As noted above, SPP is incredibly burdensome and a disincentive to the use of CPO powers by some authorities in some cases. The practical requirement to provide suitable exchange land for any significant parcels of common land, open space, etc which are being acquired for purposes other than that of their preservation or management provides protection of such land. Some PEBA members would agree with the Law Commission that SPP is an unnecessary complication given the extent to which these issues are debated at the inquiry, whilst others would consider that it would be inappropriate to reduce the current level of procedural protection for that category of land.

Consultation Question 13.

16.13 We have identified three possible options for reform (or not) of the statutory review procedure in Part IV of the Acquisition of Land Act 1981. These are:

(1) Option 1 (no change – leave the existing ambiguity): do nothing to the existing statutory framework and allow any further development in the law to be undertaken through decisions of the courts.

(2) Option 2 (impose greater clarity on the existing framework as we understand it): any challenge to the validity of a compulsory purchase order should be made under the statutory review procedure, and no such challenge may be made by judicial review. The law should be changed to allow an application for statutory review to be lodged once a compulsory purchase order has been made. Judicial review could only be used to challenge decisions made prior to the making of the order.

(3) Option 3 (our 2004 recommendation): any challenge to the validity of a decision to confirm a compulsory purchase order should be made pursuant to the statutory review procedure, and no such challenge may be made by way of judicial review. Any challenge to earlier stages in the process, up to submitting the order for confirmation, should be made by judicial review.

We invite consultees' views on their preferred option and the reasons for their preference.

Paragraph 2.102

Our preferred option is Option 1. We would not agree that the current position is uncertain or undefined or ambiguous. It is common to have statutory provisions which only allow legal challenges at the end of a process, eg with local plans (see eg *Manydown v Basingstoke and Deane BC* [2012] EWHC 977 (Admin)). That is not odd (para 2.97). It provides protection against challenges to what is an on-going process. That is the position with CPO challenges, as para 2.100(2) recognises. Options 2 and 3 would both introduce additional High Court challenge points into the CPO process. They would allow opponents of schemes multiple bites of the cherry in High Court litigation. The result would be to allow opponents to slow down the process of schemes by exposing them to multiple legal challenges, whereas the current position limits the number of legal challenges which can be launched. This strikes the right balance between allowing legal challenges, to uphold the rule of law, but preventing schemes getting bogged down in litigation brought by opponents and designed to delay and frustrate schemes. Allowing a legal challenge after making but before confirmation of a CPO would also be to duplicate in large part what falls to be considered during a CPO inquiry. If a CPO is legally flawed when it is made, then that normally falls to be considered during a CPO inquiry. Government guidance requires consideration of whether the right legal power has been used, whether the CPO has been correctly made, and whether the relevant legal procedures, and duties such as those under the Human Rights Act 1998 and the Equality Act 2010, have been complied with. There would, in at least most cases, be an alternative remedy provided by the inquiry process and no need for a legal challenge prior to confirmation.

<u>Consultation Question 14.</u>

16.14 We invite consultees' views as to whether the statutory review procedure in Part IV of Acquisition of Land Act 1981 should be amended so that "persons aggrieved" by a decision to refuse to confirm a compulsory purchase order must use that procedure, instead of judicial review.

Paragraph 2.107

We do not think that the current situation necessitates a change. Nor do we see significant advantages arising from the proposed change. But we do not oppose the change.

<u>Consultation Question 15.</u>

16.15 We provisionally propose that an acquiring authority, when it serves a notice to treat, must have made a clear decision to proceed with the purchase of the subject land. A corollary of this is that, where an acquiring authority has not made such a decision, it may not serve a notice to treat merely to extend its power to compulsorily acquire land beyond the initial time limit for implementation. Do consultees agree?

Paragraph 3.75

We agree.

<u>Consultation Question 16.</u>

16.16 We provisionally propose that:

(1) the currently alternative procedures for implementing a compulsory purchase order (notice to treat and the general vesting declaration) should be replaced by a single unified procedure; and

(2) the single unified procedure should be based on the more modern general vesting declaration procedure, with suitable modifications.

Do consultees agree?

Paragraph 3.109

We agree. This makes sense for the reasons given in the consultation paper.

Consultation Question 17.

16.17 We invite views from consultees on whether the unified single procedure which we propose above should contain suitable modifications aiming to retain the flexibility and other features currently driving the use of the notice to treat procedure in a minority of acquisitions. In particular, some options include:

(1) having a vesting period of anywhere between three months and three years after the execution of a general vesting declaration to mirror the three-year default expiry period of a notice to treat;

(2) permitting acquiring authorities to bring forward the vesting date, by agreement with the landowner (as section 8A of the Compulsory Purchase (Vesting Declarations) Act 1981 currently only permits the date to be postponed by agreement);

(3) introducing an alternative statutory notice procedure to acquire minor or long tenancies which are about to expire, replicating the effect of section 9(2) of the Compulsory Purchase (Vesting Declarations) Act 1981;

(4) commencing the temporary possession provisions in sections 18 to 31 of the Neighbourhood Planning Act 2017 either generally or to the extent that they relate to the implementation of CPOs; and

(5) making provision for the withdrawal of a general vesting declaration, applying some or all of the provisions in section 31 of the Land Compensation Act 1961 that apply to notices to treat.

We welcome consultees' views on these, or any other options for retaining the flexibility driving the use of the notice to treat procedure in a minority of acquisitions.

Paragraph 3.110

We agree that the new procedure should contain suitable modifications aiming to retain the flexibility and other features currently driving the use of the notice to treat procedure. We support the options set out at (1) to (5) above.

Questions 18 to 40 are not addressed in this response.

Consultation Question 41.

16.41 We provisionally propose that the terms used in the legislation to refer to the counter-notice procedure under Schedule A1 of the Compulsory Purchase (Vesting Declarations) Act 1981 and

Schedule 2A of the Compulsory Purchase Act 1965 should be amended so that they are more descriptive and link more directly to the purpose of the notice. Do consultees agree?

Paragraph 5.17

We agree.

<u>Consultation Question 42.</u>

16.42 We provisionally propose that a counter-notice under Schedule A1 of the Compulsory Purchase (Vesting Declarations) Act 1981 (and Schedule 2A of the Compulsory Purchase Act 1965) should be in a prescribed form, specifying the extent of the claimant's interest in the land and the land that the claimant requires to be purchased by the acquiring authority. Do consultees agree?

Paragraph 5.22

We agree.

<u>Consultation Question 43.</u>

16.43 We provisionally propose that, under Schedule A1 of the Compulsory Purchase (Vesting Declarations) Act 1981, a counter-notice must be served within 28 days of service of the notice required by section 6 (notices after execution of declaration) of the 1981 Act. Do consultees agree?

Paragraph 5.33

We agree.

<u>Consultation Question 44.</u>

16.44 We provisionally propose that the Upper Tribunal must make an order specifying a new vesting date for the land proposed to be acquired if, under Schedule A1 of the Compulsory Purchase (Vesting Declarations) Act 1981:

(1) the acquiring authority refers the counter-notice to the Upper Tribunal;

(2) the acquiring authority has not specified a new vesting date for the land proposed to be acquired under paragraph 12(2); and

(3) the Upper Tribunal determines that the authority does not need to purchase any of the additional land.

Do consultees agree?

Paragraph 5.38

We agree.

<u>Consultation Question 45.</u>

16.45 We provisionally propose that there should be an express mechanism for the claimant to withdraw a counter-notice in Schedule A1 to the Compulsory Purchase (Vesting Declarations) Act 1981. The mechanism should make provision for a new vesting date of the original land in the general vesting declaration upon withdrawal of a counter-notice. Do consultees agree?

Paragraph 5.41

We agree.

<u>Consultation Question 46.</u>

16.46 We provisionally propose that the categories of land which qualify for the divided land procedure, in Schedule A1 of the Compulsory Purchase (Vesting Declarations) Act 1981 (and Schedule 2A of the Compulsory Purchase Act 1965), are simplified and modernised. The divided land procedure should be available where the acquiring authority proposes to acquire part only:

(1) of any building; or

(2) of any land belonging to a building.

(For the avoidance of doubt, we interpret these conditions so that they would be satisfied where an authority acquires a building without the land which belongs to it, or the land belonging to a building without the building.) Do consultees agree?

Paragraph 5.46

We agree. The phrase “belonging to” is sufficiently clear to be applied in practice and does not need to be specifically defined.

<u>Consultation Question 47.</u>

16.47 We provisionally propose that the material detriment and amenity and convenience tests should continue to apply where the acquiring authority refers a counter-notice under Schedule A1 of the Compulsory Purchase (Vesting Declarations) Act 1981 (or Schedule 2A of the Compulsory Purchase Act 1965) to the Upper Tribunal (Lands Chamber). The Tribunal shall determine:

(1) in the case of a partial acquisition of a building and the land which belongs to it, whether the part proposed to be acquired can be taken without material detriment to the remainder; or

(2) in the case of a partial acquisition of the land belonging to a building (without acquiring any part of the building), whether the part proposed to be acquired can be taken without seriously affecting the amenity or convenience of the building.

Do consultees agree?

Paragraph 5.54

We agree.

<u>Consultation Question 48.</u>

16.48 We invite consultees' views as to whether the amenity and convenience test plays an important role in practice where authorities are pursuing the partial acquisition of a house with a park or garden. We also invite views about whether the amenity and convenience test could be abolished, so that the only question for the Upper Tribunal would be whether the partial acquisition of a building and/or land belonging to a building would cause material detriment to the remainder.

Paragraph 5.55

We consider that the amenity and convenience test could be abolished.

<u>Consultation Question 49.</u>

16.49 Based on our research, we suspect that section 8(2) of the Compulsory Purchase Act 1965 (divided land provision for small parcels of rural land) is rarely used. We provisionally propose that it should be repealed. Do consultees agree?

Paragraph 5.58

We agree.

<u>Consultation Question 50.</u>

16.50 Are there any other points consultees might wish to draw to our attention (not covered in their answers to any other questions) relating to the procedures for the authorisation of compulsory purchase orders or to the procedures for the implementation of a compulsory purchase?

Paragraph 5.60

No.

<u>Consultation Question 51.</u>

16.51 We provisionally propose that compensation for a compulsory purchase of land should no longer be regarded as a "single global figure". Compensation should be assessed in accordance with each of the four heads of compensation. In particular, it should be made clear in legislation that compensation for disturbance (and any other matter not directly based on the value of land) is a separate and distinct head of compensation, not part of the value of the land acquired. Do consultees agree?

Paragraph 6.14

On balance, no. The proposal to codify in legislation the principle that claims under different heads of compensation must be mutually consistent would ensure that the main effect of the "single global figure" principle is not lost, but there might be undesirable consequences from such a change. The main undesirable consequence could be attempts by a claimant to refer separate parts of a compensation claim to the tribunal separately, at different times (eg a r2 claim first, and then, once that was resolved, later a r6 claim). This would create additional complications and costs for public authorities which ought to be avoided. It should still be the case that a claimant has to make one claim for compensation, once and for all. The tribunal has case management powers sufficient to allow a claim to be determined in parts, if that is justified on the facts of the particular case. Our instinct is, unless the Law Commission can be sure that there will not be unforeseen consequences, only to change the law where there is a good reason to do so. Simply tidying up, when we are dealing with a fundamental principle which has influenced the development of compensation case law over decades, might well not be a good enough reason.

Consultation Question 52.

16.52 We invite consultees' views as to whether or not the principle of equivalence ought to be given statutory expression in any newly codified and consolidated compulsory purchase legislation.

Paragraph 6.23

We agree with the Law Commission that it should not. The proper role of the principle of equivalence in the compensation code has recently been considered by the Court of Appeal and the Supreme Court in the *Curzon Park* proceedings. The position is now settled. If there is ambiguity in an assumption that the statute requires to be made, then the principle of equivalence may assist in resolving the ambiguity, but it is not an overriding independent and free-standing principle; even if the legislation gives rise to surprising (or even unintended) results, the court is not free to depart from it by reference to a general principle such as that of equivalence (see *Secretary of State for Transport v Curzon Park Ltd* [2021] PTSR 1560 at [39] and [43]; see also [80], [82] and [86]-[87]). The principle of equivalence provides some guidance for the interpretation of legislation but is imprecise and subject to any clear intention of Parliament to depart from it or to modify its application as expressed in the legislative provisions (see *Secretary of State for Transport v Curzon Park Ltd* [2023] 1 WLR 2762 at [57]). The Law Commission is right to say that it is not an over-riding principle in assessing compensation. It is not to be used to guide the assessment of individual claims, including r6 claims. We agree that introducing a principle of fair compensation would be subjective, vague and imprecise. We agree that codification is not necessary and doing so would bring the risk that it is treated in practice as more than just seeking to preserve the current position.

Consultation Question 53.

16.53 We provisionally propose that, subject to any other rule to the contrary, the interests giving rise to a right to compensation are those in existence at the valuation date (rather than the date of the notice to treat). The nature and extent of those interests (eg what other interests they are subject to; the length of any unexpired term etc.) is to be taken as the nature and extent at that date. Do consultees agree?

Paragraph 6.32

On balance, yes. We think this is probably a good idea. Compulsory purchase procedure needs to ensure that the interests acquired are those which exist at the valuation date in order to ensure parity.

Consultation Question 54.

16.54 We provisionally propose that section 4 of the Land Compensation Act 1961 (costs of proceedings in the Upper Tribunal) should be repealed without replacement. Do consultees agree?

Paragraph 6.42

We agree. Section 4 introduces considerable litigation risk for both claimants and acquiring authorities, especially in cases where the costs of tribunal litigation are out of proportion to the size of the claim, which is not uncommon. Repealing s4 is unlikely to change practice in the foreseeable future, as the Lands Chamber's Practice Directions will provide for much the same effect in practice where an offer is made and not beaten (see para 25.10). However, removing s4 will not only remove the anomaly identified by the Law Commission, in providing in primary legislation for the determination of costs in tribunal proceedings, but also allow space in the future for the tribunal's rules and practices to develop incrementally over time to keep pace with good practice in tribunal litigation.

<u>Consultation Question 55.</u>

16.55 We invite consultees' views as to whether there are any issues in practice with compensation for a compulsory acquisition assessed under rule (2) of section 5 of the Land Compensation Act 1961.

Paragraph 7.10

We do not think that there are any, as the position is now very well understood based on a considerable body of case law. This includes that the purchaser in the open market transaction is a hypothetical or notional character, without the identity of a particular legal person with specific personal characteristics, and so cannot be the claimant itself or any particular individual associated with the claimant. The Court of Appeal said in *Walton v IRC* [1996] RVR 55 at 57 that each of the parties is "a hypothetical abstraction". As it has been put by the tribunal, "for the purpose of the hypothetical exercise the parties are to be conceived as two passengers on the Clapham omnibus" (see *Mountview Estates v Enfield LBC* (1969) 20 P&CR 729 at 734). Both parties to the assumed sale are hypothetical characters and the characteristics of the actual parties are not to be taken into account. In *Transport for London v Spirerose* [2009] 1 WLR 1797, Lord Walker said at 1806B that the valuation should focus on "a hypothetical sale by a willing vendor without any identification of the hypothetical purchaser". The r2 assessment is "not concerned with the notional characteristics of the parties" to the hypothetical transaction (*Mountview* at 434). This is in part to exclude from the assessment any value to the owner which the interest has in excess of its market value. This ensures that the r2 valuation reflects true open market value. Where a property is occupied by a business, it would almost always be the case that the occupier would be prepared to outbid the market if the occupier's interest was offered for sale under the statutory hypothesis required by r2. This is because that would allow the occupier to continue operating their business without incurring any moving and setting-up costs, or any business interruption, and while maintaining the full goodwill of the business. Even if the actual occupier was not able to bid, then a connected party would be in the same position of being able to outbid the market. Such a connected party might be: a related company or entity; a director, shareholder or senior employee of an occupying company; a partner in an occupying partnership; or, a family member or friend, especially where farmland or a family business was involved. To value the interest in land taking such bidders into account would be fundamentally wrong and contrary to long-established practice.

The consultation raises at paragraph 7.7 the issue of some land having a negative value. This is not an issue in practice in our experience. Certainly there should be no suggestion that a person who has an interest in land taken from them compulsorily should pay an acquiring authority, even if the taking of the interest effectively relieves them of a liability when judged in open market value terms. Many occupiers of land are able to make a beneficial use of land, and often an income from land, even if the interest would be viewed as a liability by the open market. Such persons should not be disadvantaged by being required to pay an acquiring authority for losing their interest. It is bad enough that the r2 value would be assessed at nil under the current rules.

Consultation Question 56.

16.56 We invite consultees' views on whether equivalent reinstatement requires further definition in legislation and, if so, how it should be defined.

Paragraph 7.24

We agree with the Law Commission that r5 works reasonably well in practice. It is also very rarely invoked and so the practical need for any additional clarity is limited. It would be better for the Law Commission to focus its effort on improving the law where it is regularly relevant in the real world.

Consultation Question 57.

16.57 We provisionally propose that for equivalent reinstatement, there should be no provision for betterment deductions. Do consultees agree?

Paragraph 7.32

We agree.

Consultation Question 58.

16.58 We consider that under the existing law, compensation for severance and injurious affection (under section 7 of the Compulsory Purchase Act 1965) is assessed solely by reference to diminution in market value of the retained land. We therefore provisionally propose that this rule is codified in any future consolidated legislation. Do consultees agree?

Paragraph 7.44

We agree. To do otherwise would increase entitlement to compensation in a way which the Law Commission is seeking to avoid. Codification of this particular rule would increase clarity and therefore be beneficial.

Consultation Question 59.

16.59 We provisionally propose that express provision be made to allow for assessment of severance and injurious affection (under section 7 of the Compulsory Purchase Act 1965) based on a "before and after" valuation, if the parties agree or the Upper Tribunal so determines. Do consultees agree?

Paragraph 7.54

No. The parties will not agree if the use of this valuation method significantly affects the compensation payable. It is not sensible to provide that the valuation method may be used if the tribunal determines, as that would require alternative valuations to be presented in evidence, significantly increasing the cost of tribunal litigation. The appropriate valuation method would not be known until the tribunal's decision was issued. It would introduce complexity, uncertainty and risk which is hard to reconcile with the Law Commission's terms of reference (para 1.1(2)).

There are also good reasons why the "before and after" valuation would not be appropriate in principle. First, it would cut across normal and well-established practice. The "before and after" valuation method is conceptually complex and often not well understood in practice by valuers. Secondly, the "before and after" valuation method will not be applicable in many cases, because the r2 and s7 valuations must be carried out in compliance with different rules and assumptions, including the no-scheme principle and planning assumptions. The r2 valuation is done effectively ignoring the scheme and assuming that the land taken was offered for sale on its own in the open market as at the valuation date, with the rest of the world remaining as it in fact was at the valuation date but without the scheme. The s7 assessment is based on the diminution in value caused by the execution of the scheme works, with the scheme being taken into account in the 'after' valuation but not in the 'before' valuation. Thirdly, case law has established that the assessment of r2 and s7 compensation should be done as separate exercises (see eg *South Eastern Rlwy v London CC* [1915] 2 Ch 252 at 260, *Cooke v SSE* (1974) 27 P&CR 234 at 238, *Hoveringham Gravels v Chiltern DC* (1977) 35 P&CR 295 at 301 and 305, *Abbey Homesteads v SSfT* [1982] 2 EGLR 198 at 211F-G, *ADP&E Farmers v DfT* [1988] 1 EGLR 209 at 216C and 217M, and *Ramac v Kent CC* [2014] RVR 207 at para 62). Changing that will not only depart from established case law but also change the entitlement to compensation, contrary to the Law Commission's stated approach (para 1.46).

<u>Consultation Question 60.</u>

16.60 We provisionally propose that any newly consolidated compulsory purchase legislation should positively state the entitlement to, and explain the assessment of compensation for, disturbance. It should largely codify the existing body of case law:

(1) that there must be a causal connection between the compulsory acquisition and the loss in question;

(2) that the loss must not be too remote; and

(3) that the loss must have been reasonably incurred.

Do consultees agree?

Paragraph 8.16

We agree, but with a qualification in respect of the third point, the duty to mitigate. What was said in *Shun Fung* was that: "If a reasonable person in the position of the claimant would have taken steps to eliminate or reduce the loss, and the claimant failed to do so, he cannot fairly expect to be compensated for the loss or the unreasonable part of it. Likewise, if a reasonable person in the position of the claimant would not have incurred, or would not incur, the expenditure being claimed, fairness does not require that the authority should be responsible for such expenditure". This is more sophisticated than simply saying the loss must have been reasonably incurred. This nuance and sophistication should be preserved in the drafting when the duty to mitigate is codified. If not, the result will be to change the basis of compensation, contrary to the approach the Law Commission is seeking to take (para 1.46).

Consultation Question 61.

16.61 Rule (6) of section 5 of the Land Compensation Act 1961 currently refers to compensation for "disturbance or any other matter not directly based on the value of land". We provisionally propose that the terminology used for this head of compensation is replaced and modernised with the general term "consequential loss". We think that this would make clear that compensation under this head encompasses losses on the part of owners whether or not they are in occupation of the land. Do consultees agree?

Paragraph 8.25

We agree.

Consultation Question 62.

16.62 We invite consultees' views as to whether there is an advantage to retaining section 10A of the Land Compensation Act 1961 (expenses of owners not in occupation) in the interests of certainty. (For clarity, this would be without prejudice to the general rule that consequential losses of landowners not in occupation are allowable under the second limb of rule (6) of section 5 of the 1961 Act.)

Paragraph 8.30

We consider that it would be beneficial to repeal s10A. In most cases, it is in effect redundant, as the Law Commission observes (para 8.28).

Consultation Question 63.

16.63 We invite consultees' views on the operation of section 10A of the Land Compensation Act 1961 (expenses of owners not in occupation) in practice. In particular, we invite views on the one-year time limit under the provision.

Paragraph 8.31

The one year time limit is problematic, because it is in practice too short in many cases.

Consultation Question 64.

16.64 We provisionally propose that consequential losses incurred after the notice of the making of a compulsory purchase order should be recoverable. Exceptionally, earlier losses may be recovered where there is a prior agreement with the acquiring authority or where the Upper Tribunal (Lands Chamber) has determined that, having regard to the special circumstances of the case, it would be unfair to refuse compensation. Do consultees agree?

Paragraph 8.36

No. It would be unfair to prevent some losses caused by the threat of compulsory purchase from being recoverable, providing it can be shown that there is a causal connection between the compulsory acquisition and the loss in question. The 'exceptional' caveat is no real counter to this unfairness. If the loss is significant, an acquiring authority will not agree to it being recovered when it does not have to. Requiring a claimant to argue a special circumstances case as an exception before the tribunal would add a layer of complexity and cost which would prevent many claimants from pursuing such a claim. It would also add uncertainty and risk, especially in costs liability, for a claimant who chose to pursue such a claim in the tribunal. This change also seems to offend the approach of not seeking to increase or decrease the entitlement to compensation (para 1.46). The test should remain the normal one of causation, as is the current position.

<u>Consultation Question 65.</u>

16.65 We invite consultees' views as to whether any codification of disturbance rules should make specific provision to include costs reasonably incurred in replacing buildings, plant or other installations needed for a business, if attributable to the acquisition and not adequately reflected in other heads of compensation.

Paragraph 8.44

We do not think that specific provision is required. The general rules should be sufficient to resolve such issues satisfactorily in particular cases.

<u>Consultation Question 66.</u>

16.66 We provisionally propose that it should be expressly stated in legislation that the valuation date for injury to retained land (ie land which is held with the land acquired) is the same as that for the land acquired. Do consultees agree?

Paragraph 9.15

We agree. This is the current practice, but it would provide useful clarity for this particular rule to be codified expressly.

<u>Consultation Question 67.</u>

16.67 We invite consultees' views as to whether post-valuation date evidence should be taken into account in the assessment of compensation for injury to retained land. If so, should it be subject to any limitations or conditions?

Paragraph 9.24

We do not think that the consultation document's discussion of this issue, including the argument in *Elitestone Limited v National Grid Gas Plc* [2015] UKUT 0452 (LC), properly grapples with the real issue. Nor did the tribunal's decision in *Castlefield Property Limited v National Highways Ltd* [2023] UKUT 217 (LC). There are two separate stages involved to the assessment of s7 compensation. The first stage is to ascertain the damage which has been sustained by the exercise of the power conferred, as required by the wording of s7. That task of ascertaining the damage should be undertaken having regard to the actual exercise of the power as at the date of assessment, and how the power is reasonably anticipated to be exercised thereafter (if relevant). It is not necessary to wait for the damage actually to have occurred before compensation is assessed, but where the works have in fact been executed by the time compensation comes to be assessed, the damage should be assessed by reference to what has actually been done. Where damage runs into the future, as with the use of the works, that is assessed by judging what is likely in the future. Otherwise, the damage should be assessed based on what has actually happened. Where, at the time of the assessment of compensation, the powers have actually been exercised to any extent, it is necessary to base the assessment on the damage (if any) that arises from the actual exercise of the powers which has taken place. Not only does this make practical sense, and reflect the wording of s7, but it also reflects the principle of equivalence and the presumption of reality, both of which guide statutory construction in the field of compensation. That will involve having regard to matters of fact which occurred both before and after the valuation date. That might include where proposed mitigation or accommodation works anticipated at the valuation date were not in fact delivered by the acquiring authority, as anticipated or at all. That might also include where extra mitigation or accommodation works, not proposed at the valuation date, are in fact undertaken by the date of assessment or are anticipated to be undertaken in the future after the date of assessment. The second stage is then the valuation exercise to ascertain the diminution in value caused by that damage. That valuation exercise should be undertaken standing at the valuation date, having regard only to what was known and reasonably anticipated as at that date. That is how valuation exercises are undertaken generally, in both compulsory purchase compensation and for other purposes (eg taxation). The Law Commission's discussion does not sufficiently distinguish between the two different and distinct stages. The first should be undertaken having regard to "post valuation date evidence", but the second should not.

<u>Consultation Question 68.</u>

16.68 We provisionally propose that where the date of possession precedes the date of assessment, the valuation date for rule (6) of section 5 of the Land Compensation Act 1961 may differ from the valuation date for rule (2). Items of consequential loss that are incurred after the date of possession (but before the date of assessment) may be assessed as actual, rather than anticipated, losses. Do consultees agree?

Paragraph 9.35

We do not think that the consultation document's discussion of this issue fully grapples with the position. It is in principle wrong to speak of there being a "valuation date" for r6 losses. There is no need for such a date. Costs and losses claimed under r6 should be assessed based on the actual amounts incurred at the time each of the costs and losses were incurred. On-going costs or losses should not be reduced to a single valuation date. The payment of interest on the costs and losses from the date they were incurred to the date on which payment of compensation is made will deal with the position for past costs and losses. For future costs and losses, to be incurred after the date of assessment, they should be assessed in the anticipated amounts likely to be incurred at the time they are expected to be incurred, then reduced to a net present value to account for accelerated receipt of funds to pay for future costs and losses. If there is to be a "valuation date" for r6 losses, that date should not be tied to the r2 valuation date and items of consequential loss that are incurred after the date of possession (but before the date of assessment) should be assessed as actual, rather than anticipated, losses.

<u>Consultation Question 69.</u>

16.69 We provisionally propose that the valuation date for equivalent reinstatement is put on a statutory footing in accordance with the rule in Birmingham Corporation v West Midland Baptist (Trust)

Association *(that it is the date on which commencement of the work of reinstatement became, or is expected to become, reasonably practicable). Do consultees agree?*

Paragraph 9.37

We agree.

<u>Consultation Question 70.</u>

16.70 We invite consultees' views as to whether any reforms could usefully be made to the statutory rule (in section 4 of the Acquisition of Land Act 1981) that new interests or enhancements (where not reasonably necessary and undertaken with a view to obtaining more compensation) are to be disregarded in the assessment of compensation.

Paragraph 9.43

The substance of the statutory rule in s4 of the Acquisition of Land Act 1981 should be preserved, so that its effect remains unchanged. We agree that it may be that the drafting can be simplified, providing the substantive effect of s4 is unchanged.

<u>Consultation Question 71.</u>

16.71 We provisionally propose that section 50 of the Land Compensation Act 1973 (compensation where occupier is rehoused) should be retained and simplified in any future consolidated compulsory purchase legislation. Do consultees agree?

Paragraph 9.47

We agree.

<u>Consultation Question 72.</u>

16.72 We provisionally propose that it is made clear in legislation that the rule against compensation for uses that are contrary to law (currently in rule (4) of section 5 of the Land Compensation Act 1961) applies to all heads of compensation. Do consultees agree?

Paragraph 9.53

We agree. There is authority to provide that r4 applies to r6 compensation (eg eg *Taff v Highways Agency* [2009] UKUT 128 (LC)), but it would help to clarify the law as proposed in this particular respect.

<u>Consultation Question 73.</u>

16.73 We provisionally propose that rule (4) of section 5 of the Land Compensation Act 1961, whereby increased value caused by illegal use is to be disregarded in the assessment of compensation, should be re-cast to make it clear that only breaches of the criminal law or the law as contained in statute fall within the scope of this provision. Do consultees agree?

Paragraph 9.61

On balance, we do not agree. It is hard to see why a claimant should be entitled to compensation for a use of land which they do not have the right to carry on, whether under public general legislation or under a private law provision (such as a lease covenant or a restrictive covenant).

<u>Consultation Question 74.</u>

16.74 We invite consultees' views as to whether the "detrimental to health" limb of rule (4) of section 5 of the Land Compensation Act 1961 should be retained.

Paragraph 9.62

Given the modern day scale of regulation through legislation of activities which might be detrimental to health, we think it is likely that this limb can be repealed without changing the entitlement to compensation in all but a handful of very rare cases. This seems to be the view of the Law Commission (para 9.58).

<u>Consultation Question 75.</u>

16.75 We provisionally propose that the principle in Horn v Sunderland Corporation*, that claims under the different heads of compensation must be mutually consistent, is codified in legislation. Do consultees agree?*

Paragraph 9.71

We agree. This is especially important if the "single global figure" principle is to be removed.

<u>Consultation Question 76.</u>

16.76 We provisionally propose that the duty to mitigate loss caused by the compulsory acquisition should be expressly stated in legislation. It should make it clear that the burden of proof in demonstrating a failure to mitigate lies with the acquiring authority. Do consultees agree?

Paragraph 9.77

Please see the answer to Question 60 above. The duty to mitigate is primarily relevant to r6 claims. It is not relevant to r2 or s7 claims. We agree that it would assist if it was codified that the burden of proof in an allegation of a failure to mitigate falls on the acquiring authority. That is well-established in case law but it would be beneficial to make this particular point clear in statute. The duty to mitigate is based on what a reasonable person in the position of the claimant would have done. It is not in that sense entirely objective, since it depends on the circumstances constituting the "position of the claimant". We agree that the ruling in *Bailey v Derby* should be reversed. The ill-health of a claimant ought not to be irrelevant in judging what was reasonable.

<u>Consultation Question 77.</u>

16.77 We invite consultees' views on the operation of the no-scheme rule in sections 6A-6E of the Land Compensation Act 1961 and whether there are any issues with these provisions in practice.

Paragraph 10.9

To date, it is not apparent that there are significant issues with these provisions in practice. There is a lack of clarity about whether the non-statutory *Pointe Gourde* principle was intended to survive the codification which ss6A-6E implemented. The recommendations of the Law Commission in its 2003 report on reform of compulsory purchase legislation included a provision expressly providing that the new statutory no-scheme principle would supersede the non-statutory *Pointe Gourde* principle so as to "clear the decks". However, there was no express provision included in the Neighbourhood Planning Act 2017 as recommended by the Law Commission to provide that "all previous rules, statutory or judge-made, relating to disregard of "the scheme" will cease to have effect". There are general presumptions that Parliament does not intend to impliedly abrogate a common law rule by statute. It would be possible for the *Pointe Gourde* principle to remain and be applied as a supplement to the statutory provisions, as it was prior to the enactment of the NPA 2017. This leaves uncertainty about whether the *Pointe Gourde* principle will be applied by the tribunal as a supplement to the statutory scheme in ss6A-6E.

<u>Consultation Question 78.</u>

16.78 We invite consultees' views as to whether rule (3) of section 5 of the Land Compensation Act 1961 serves any independent purpose that would not be covered by the newly codified no-scheme rule in sections 6A-6E of the 1961 Act. Can rule (3) be safely repealed?

Paragraph 10.19

The fact that there have been tribunal cases relying on r3 in recent years, including the *PLA v TfL* and *Miller v NRIL* cases cited at paragraphs 10.15-10.16, suggest that it is very useful in practice. For r3 to have been important in two cases in the last twenty years, when hardly any compensation cases are fought through to decision after a hearing in the tribunal (because most cases settle before that point), suggests that r3 does serve a useful purpose in a material number of cases. Moreover, s3 fulfils a different function from that served by ss6A-6E. Sections 6A-6E require the effect on value of "the scheme of development underlying the acquisition" to be disregarded. Rule 3 is markedly wider. It requires to be disregarded the special suitability or adaptability of the land for any purpose to which it could be applied only in pursuance of statutory powers or for which there is no market apart from the requirements of any authority possessing compulsory purchase powers. Sections 6A-6E not a substitute for r3.

<u>Consultation Question 79.</u>

16.79 In the no-scheme rule cancellation assumption of section 6A(4) of the Land Compensation Act 1961, the cancellation date for the acquiring authority's scheme is the valuation date of the subject land. In the cancellation assumption for planning assumptions in section 14(5)(a) of the 1961 Act, the cancellation date is the launch date for the scheme. We invite consultees' views as to:

(1) whether this discrepancy gives rise to any difficulties; and

(2) whether the cancellation dates should be harmonised to be the valuation date.

Paragraph 10.39

This difference does not give rise to any real difficulties in practice. We do not consider that there is a need to harmonise the two dates, since they perform two different functions. Nor do we consider it is fair to describe the difference as a "discrepancy". There is no real case to change either date, since they were selected in recent times based no doubt on a policy decision made by Government at the time. Although the Government did not follow the Law Commission's recommendations that the date should be the same for both purposes, and should be the valuation date, it must be assumed that the Government was aware of the Law Commission's recommendations and decided not to follow them in this case for good reasons. The launch date was selected for use in the Localism Act 2011, and this was not changed when the Neighbourhood Planning Act 2017 was brought forward. Indeed, in 2016 the Government stated that it considered the launch date cancellation to be appropriate for planning assumptions (para 10.36). Whilst we do not know what those reasons are, it seems to us to risk going beyond the Law Commission's terms of reference for the current project to re-visit what were policy decisions made in relatively recent times. We do not accept that there is inconsistency in the reasoning (para 10.37). It is readily understandable that it is appropriate to have a degree of speculation about what the planning position would have been with an earlier cancellation date (the launch date), given how much planning policy and decision-making in the run-up to the valuation date would have been affected by the scheme proposals advancing.

<u>Consultation Question 80.</u>

16.80 We invite consultees' views on how well the amendments to the provisions on advance payments, introduced by the Housing and Planning Act 2016 to require and enable earlier payment by acquiring authorities, are working in practice. Have they led to payments being made early enough to be of practical use to claimants? If not, why not?

Paragraph 11.14

These amendments are working reasonably well in practice and have improved matters. We agree, however, that the penalty interest provisions in s52B of the 1973 Act should be brought into effect to further improve the position. We consider that it would be over-stating matters to say that there is no means of enforcing the provisions. Although a judicial review would not be the ideal remedy for this, it can be effective in practice. In particular, the ability to send a pre-action letter under the judicial review pre-action protocol would be effective to escalate the position within an acquiring authority and to secure a better outcome for claimants, without the need to actually commence any proceedings. If there is to be a substantive change, which we agree would be outside the scope of this project, then we consider that it would be more appropriate to confer the role on the First-tier Tribunal Property Chamber rather than the Upper Tribunal Lands Chamber (see para 11.25).

<u>Consultation Question 81.</u>

16.81 We invite consultees' views as to whether the model claim form introduced by Government in 2017 has helped to improve the quality of information provided to acquiring authorities sufficient to enable proper consideration of advance payment requests.

Paragraph 11.19

The model claim form has helped. We do not consider that it would make much difference to make the use of the model claim form a statutory requirement. The problem in practice is not the completion of the claim form, it is the provision of supporting explanation and information which should accompany the claim form. It would be much harder to legislate for that.

Consultation Question 82.

16.82 We invite consultees' views as to whether there are any problems with the operation of basic and occupier's loss payments in the Land Compensation Act 1973.

Paragraph 11.53

We agree that it would be desirable to clarify in legislation that the value of the interest for the purposes of the loss payments is confined to the r2 compensation value, and does not include other heads of compensation. We also support the reversal of the percentages which has previously been proposed by the Government (para 11.50) and is now included in the Planning and Infrastructure Bill.

Consultation Question 83.

16.83 We provisionally propose that individuals without a compensatable interest who are disturbed from agricultural land should be eligible for a mandatory disturbance payment rather than merely a discretionary payment. Do consultees agree?

Paragraph 11.58

We agree.

Consultation Question 84.

16.84 Currently, interest runs from the date when the subject land vests in the authority or, if earlier, the date when the authority takes possession of the land. We provisionally propose that for losses other than market value of the subject land and severance or injurious affection, the Upper Tribunal (Lands Chamber) should have a discretion to determine a different date from which interest runs (if not agreed between the parties). Do consultees agree?

Paragraph 11.69

We agree.

Consultation Question 85.

16.85 We invite consultees' views on problems arising with the operation of the existing arrangements for interest in the context of compensation for compulsory purchase.

Paragraph 11.74

The current level of interest, at 0.5% below the standard rate, is generally unfair. We would support changing it to at least 1% (if not 2%) above the Bank of England base rate. We think that the prospects of this leading to "gaming" (para 11.72) is very limited and more than outweighed by the need to be fair to those who are entitled to statutory compensation. We consider, however, that changing this rate would increase entitlement to compensation (para 1.46). It ought therefore to remain a policy choice for Government.

Consultation Question 86.

16.86 Are there any other points consultees might wish to draw to our attention (not covered in their answers to any other questions) relating to the rules governing the assessment of compensation for a compulsory purchase?

Paragraph 11.76

We consider that the Law Commission is correct to say that the reforms in the Levelling-up and Regeneration Act 2023 for directions to disregard the prospect of planning permission do mean landowners may now receive less than full market value for their land (para 7.12). This is regrettable, as is the provision in cl 91 of the Planning and Infrastructure Bill which seeks further to extend this. In our July 2022 consultation response to DLUHC, PEBA said: "In summary, the proposals are misconceived and create substantial and unjustified unfairness in the operation of compulsory purchase. They would be counter-productive and unworkable, and would fail to achieve the policy objectives set out in the consultation document." This remains our view. Our July 2022 consultation response is available here: https://peba.org.uk/wp-content/uploads/2022/09/PEBA-response-to-CP-compensation-reforms-consultation-July-2022.pdf.

Questions 87 to 92 are not addressed in this response.

Consultation Question 93.

16.93 We provisionally propose that section 10 of the Compulsory Purchase Act 1965 (along with the McCarthy Rules) and Part 1 of the Land Compensation Act 1973 be amalgamated into a single code dealing with compensation for loss due to public works (where no land is taken from the claimant). Do consultees agree?

Paragraph 13.38

On balance, no. Whilst having a single, amalgamated code would be neat, there seem to us to be significant challenges in doing so in a way which does not increase or decrease entitlement to compensation. At the moment, it is hard to succeed in claims under either s10 or Part 1. Changes that modernise and simplify the law and make it more accessible in respect of these two provisions are likely to increase the number of successful claims. Drafting which seeks to amalgamate the two whilst seeking the overall balance of the existing law will be exceptionally hard to achieve. It might be that, given the difficulty of the task, and the need to keep within the terms of reference, this exercise is simply not worth the effort. There are also risks. Part 1 claims have in the last decade or so been susceptible to 'ambulance chasing' types of claims, where areas are leafleted to try to drum up claims from householders which are then pursued, with multiple claims made at the same time against a scheme. The financial value of the claims are out of proportion to the costs of litigating such claims. Many are settled before they reach the tribunal, or before the tribunal hearing, given the nuisance value of the claims, the unpredictability of outcomes given the subjective nature of Part 1 tribunal decisions, and the adverse costs risk. Often claimants recover little or no compensation when cases settle, although authorities will often pay a good proportion, if not all, of the claimants' legal and expert costs which have been incurred. This practice seems to be of little benefit to claimants, given the limited compensation recovery and the inevitable stress involved in bringing litigation, costs risks, and potentially being cross-examined in the tribunal. This practice seems to have calmed in the last few years. The risk is that creating a single, amalgamated code providing for compensation for depreciation caused by public works will reignite this practice, contrary to the overall public interest.

<u>Consultation Question 94.</u>

16.94 We invite consultees' views as to whether compensation for loss caused by execution of public works (as opposed to their use) should continue to be payable only to the extent that a claim against the authority would have succeeded at common law apart from the immunity conferred by the statute.

Paragraph 13.51

Yes. Any change to this would make it easier to succeed in claims and therefore go beyond the Law Commission's terms of reference and increase the burden of compensation on public authorities.

<u>Consultation Question 95.</u>

16.95 Assuming that section 10 of the Compulsory Purchase Act 1965 and Part 1 of the Land Compensation Act 1973 are brought together into a unified code for compensation where no land is taken, we invite consultees' views as to whether:

(1) the restriction of compensation to depreciation of existing use value only, applicable at present to claims under Part 1 of the 1973 Act for use of public works, should also be made applicable to claims for execution of public works;

(2) there should be no such restriction for claims relating to either the use or execution of public works; or

(3) as now, the restriction should be applicable to claims relating to use of public works, but not their execution.

Paragraph 13.61

Option 3. Options 1 and 2 would decrease or increase (respectively) entitlement to compensation in a way which the Law Commission is seeking to avoid. The existing balance of compensation ought to be preserved in order to accord with the Law Commission's terms of reference.

<u>Consultation Question 96.</u>

16.96 Assuming that section 10 of the Compulsory Purchase Act 1965 and Part 1 of the Land Compensation Act 1973 are brought together into a unified code for compensation where no land is taken, we invite consultees' views as to whether the rateable value limit, applicable at present only to claims under Part 1 of the 1973 Act, should apply:

(1) to all claims under the unified code; or

(2) to no claims under the unified code.

Paragraph 13.64

Option 2, since the rateable value limit makes little or no difference in practice.

<u>Consultation Question 97.</u>

16.97 We provisionally propose that the £50 threshold for claims should be uprated to take account of inflation and that it should apply to claims for depreciation in the value of land caused both by the execution and use of public works (assuming that section 10 of the Compulsory Purchase Act 1965 and Part 1 of the Land Compensation Act 1973 are brought together into a unified code for compensation where no land is taken). Do consultees agree?

Paragraph 13.67

Yes. It is likely that uprating the £50 threshold for inflation would bring the figure to a little over £500 (using the Bank of England inflation calculator online). This would be a sensible limit in practice.

Questions 98 to 101 are not addressed in this response.

<u>Consultation Question 102.</u>

16.102 We provisionally propose that there should be an official Government-sanctioned list of all general powers to acquire land compulsorily should be published and maintained by the Government. Do consultees agree?

Paragraph 15.32

We agree.

<u>Consultation Question 103.</u>

16.103 We seek consultees' views about whether there are any potential omissions or anomalies in the various powers of compulsory purchase provided for by public general Acts. Is there any clear need for a new power of compulsory purchase where one does not exist at present?

Paragraph 15.36

There is a need to provide for modern compulsory purchase powers for defence purposes. Existing powers are found in legislation such as the Defence Act 1842 and the Military Lands Act 1892.

<u>Consultation Question 104.</u>

16.104 We invite consultees' views on whether there ought to be a basic and standardised ancillary power to acquire rights over land which would apply wherever a primary power to compulsorily purchase land exists.

Paragraph 15.44

We think that there should.

Consultation Question 105.

16.105 We invite consultees' views on whether and (if so) how any ambiguity in the definition of "acquiring authority" in section 172 of the Housing and Planning Act 2016 (Right to enter and survey land) ought to be resolved.

Paragraph 15.53

The s172 power to survey land should not be available to any person who might apply for a TWAO or a DCO. In line with the reasoning in *Sawkill*, it should be limited to organisations with a particular standing. We suggest that the power is conferred on public authorities (and not purely private entities). The definition of a public authority from the Freedom of Information Act 2000 or the Human Rights Act 1998 could be employed in this context.

Consultation Question 106.

16.106 We provisionally propose that section 11(3) of the Compulsory Purchase Act 1965 should be repealed, but its effect should be retained by amending section 172 of the Housing and Planning Act 2016 to allow surveys after confirmation of a compulsory purchase order (as well as "in connection with a proposal"). Do consultees agree?

Paragraph 15.58

We agree.

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