Office of the
Deputy Prime Minister

Creating sustainable communities

Government response to Law Commission Report: Towards a Compulsory Purchase Code

December 2005

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Written Statement

The Government's response to the Law Commission's Report on compulsory purchase law is set out below. It was presented to the House of Commons on 15 December 2005 by the Minister of State for Housing and Planning, Yvette Cooper, in a written statement in which she said:

"The Deputy Prime Minister has today placed copies of his response to the Law Commission's report: "Towards a Compulsory Purchase Code" in the libraries of the House and has also placed the response on the ODPM website. The Commission presented their report to Parliament in two parts: on Compensation (Law Com No 286) in December 2003 and on Procedures (Law Com No 291) in December 2004.

"In 2000 the Compulsory Purchase Policy Review Advisory Group (CPPRAG) had recommended changing the compulsory purchase of land powers, procedures and compensation arrangements. The most pressing changes were put in the Planning and Compulsory Purchase Act 2004 and included strengthening local authority powers to acquire land for the creation of sustainable communities as well as making the compensation fairer to those losing their land.

"CPPRAG also proposed the Government should work with the Law Commission on how to replace the whole of the current raft of statute and case law on compulsory purchase and compensation by a single statute expressed in modern language. ODPM and its predecessor departments (DETR and DTLR), along with the Welsh Assembly Government, have been working on this with the Commission since 2000.

"Although the Commission's recommendations identify a basic framework for reforming the structure of the law, they do not set out the detailed provisions needed to ensure fairness to those affected, as well as speed and simplicity. The ever-evolving complexity of the statute and case law has shown that these aims cannot always easily be reconciled. As the Law Commission have demonstrated, there are no quick and easy solutions and moving towards a simpler and more readily accessible set of laws would still require substantial further work.

"The Government would like to have a single simple compulsory purchase code expressed in modern English. But finding further legislative time for this needs to be balanced against the Government's many other priorities. Given the changes providing immediate and tangible improvements were in the 2004 Act, implementing the Law Commission's proposals is not a practicable proposition for the foreseeable future.

"The Government considers it more important to maintain a stable legislative framework providing certainty both for acquiring authorities and for those whose properties may need to be acquired. This should encourage acquiring authorities to exercise their compulsory purchase powers wherever this makes sense in the public interest to further their wider policy objectives."

The Government's Response

INTRODUCTION

1. ODPM and its predecessor Departments (DETR and DTLR) have been working with the Law Commission since 2000 to consider the scope for modernising the law relating to compulsory purchase procedures and compensation. This paper forms the culmination of that process. It sets out the Government's response to the Commission's Final Report: "Towards a Compulsory Purchase Code", which was published in two instalments. The first Final Report, on Compensation (Law Com No 286), was presented to Parliament in December 2003. The second, on Procedures (Law Com No 291), was presented in December 2004.

2. We are grateful to the Law Commission for undertaking this work. This unique opportunity for a rigorous analysis of the complex issues involved in securing the compulsory acquisition of land has provided an informed basis for assessing the extent to which further legislative change might be justified.

3. This response has been prepared by ODPM in consultation with the Welsh Assembly Government, and with input from the Department for Constitutional Affairs (DCA) on those issues for which they are the lead Department. In accordance with the procedure agreed by the Ministerial Committee on the Law Commission, it was sent formally to the Chief Executive of the Law Commission on 15 December 2005. At the same time, Parliament was informed of our response by means of the Written Statement which is set out at the front of this response and which was also submitted to DCA for circulation to the members of the Ministerial Committee. This response is freely accessible on the ODPM website at www.odpm.gov.uk/planning under 'Planning Information'.

BACKGROUND

4. As the Commission point out in their reports, the law on compulsory purchase is a patchwork of diverse rules, derived from a variety of statutes and cases over a period stretching back to 1845. Many of these rules are expressed in ways which make them difficult to interpret, giving rise to anomalies and inconsistencies. The Government have long recognised that these complexities have contributed to the reluctance of many authorities to make full and effective use of their compulsory purchase powers to facilitate land assembly for regeneration and major infrastructure projects. Our subsequent initiative to create sustainable communities reinforced the need to look in depth at the reasons for this reluctance and whether there was scope for simplification.

5. The extensive programme of review began in 1997 with the setting up of an Interdepartmental Working Group on Blight. They recommended in their final report[1] that a fundamental review of the laws and procedures relating to compulsory purchase was needed and DETR accordingly set up a panel of external experts in 1998 to undertake

1 published by DETR in December 1997

this task. This Group (CPPRAG)[2] published its final report in July 2000, and amongst its recommendations it urged the Government to work in consultation with the Law Commission in considering how best to consolidate, codify and simplify the law.

6. In order to facilitate this, at the same time as considering the scope for implementing CPPRAG's other recommendations, we then set up two parallel work-streams. One of these resulted in DTLR publishing: "Compulsory Purchase and Compensation: delivering a fundamental change" in December 2001. This sought views on our responses to CPPRAG's recommendations for policy changes, and was followed by a Policy Statement in July 2002 setting out our intentions for change. Those proposals which did not require further consideration were then implemented in Part 8 of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) and associated secondary legislation and guidance.

7. The Commission's Final Reports and this response represent the culmination of the other work-stream, examining the scope for reforming the law. This has involved an innovative approach with both a closer degree of collaborative working than for many Law Commission projects and some financial assistance from us. The terms of reference for the project required the Commission to make proposals for simplifying, consolidating and codifying the law, although it was accepted from the outset that they would not have sufficient resources to be able to prepare a draft Bill as part of their project.

PROPOSALS FOR A COMPENSATION CODE

8. In line with their terms of reference, the Commission's proposals for a compensation code are based on identifying a structure for simplifying, consolidating and codifying the law. However, it has become clear to the Government during the course of the project that, irrespective of the merits of so doing, it was going to be too ambitious to consider repeal and replacement as a practicable possibility in the foreseeable future. Whilst they have identified the areas of difficulty and put forward some outline solutions, the Commission had neither the time nor the resources to enable them to provide a clear basis for instructing Parliamentary Counsel on the full range of issues which would need to be embraced by such a Bill. A substantial amount of work therefore remains, to which the Government would find it difficult to commit resources for the foreseeable future having regard to their numerous other legislative priorities.

9. As any such further work would take a considerable amount of time, there would inevitably be a considerable time-lag before it could be implemented. Furthermore, although the Government has always acknowledged that the convoluted state of the compulsory purchase legislation as it currently stands does not make it readily accessible, we also need to take account of the fact that attempting to restate the current provisions in more accessible language could give rise to a new body of case law. We acknowledge that that is a risk with any attempt to modernise the terms in which the law is expressed. But given the major impact of compulsory purchase on owners and their instinct to maximise the compensation achievable, we feel that particular care would need to be taken in drafting to minimise that risk which could otherwise simply result in more delay, uncertainty and expense.

2 the Compulsory Purchase Policy Review Advisory Group

10. A number of the "Rules" proposed by the Commission would form important elements of any future compensation code, but as they would not make any significant changes to established policy, we do not intend to consider them in any depth in this Response. These are Rules 1, 2, 3, 4, 6, 8, 9, 10, 11, 12, 14, 15(1), 17, 18 and 19, as well as Rule 22 which concerns compensation for injurious affection and does not depend on the exercise of compulsory purchase powers. Some of these would, though, require considerable further work to give effect to the indicative proposals set out by the Commission.

11. The Commission's **Rule 5** deals with compensation for disturbance and other losses not directly based on the value of the land taken. They have proposed the term "consequential loss" to describe these. Rule 5 builds on CPPRAG's concern that there has never been a clear statement in statute of the principles under which entitlement to compensation for disturbance and other losses not directly based on the value of the land can be paid. We specifically asked the Commission to look at this in depth, and we endorse their recommendation that any new statute should adopt established principles and follow closely the traditional wording so as, amongst other considerations, to underline the link with existing case law. Because the principles are so well established, we do not propose to devote resources to giving statutory effect to them in advance of any general codification of the law.

12. In responding to CPPRAG's Final Report, we rejected their recommendation that there was no need to retain Rule 4 of section 5 of the Land Compensation Act 1961 (the 1961 Act) which is concerned with disregarding illegal uses in determining the value of land. On the contrary, we considered it appropriate to retain an updated and simplified form of that Rule, and the Commission's proposed **Rule 7** follows our view by placing the emphasis on disregarding elements of value or loss which are "attributable to a use which is contrary to law".

13. In their **Rule 13** the Commission consider the need for a new set of rules governing the extent to which the project underlying the scheme should be disregarded in assessing the value of the land, and in their **Rule 14** they consider the planning assumptions which should be applied for valuation purposes.

14. It is universally agreed that the current basis for assessing compensation disregarding the effect of the scheme for which the land is required and the provisions for taking account of planning assumptions[3] are convoluted and difficult to apply. Indeed, this was acknowledged by Lord Nicholls of Birkenhead in his judgment on *Waters and others (Appellants) v. Welsh Development Agency (Respondents)*[4], in which he identified the need to simplify the law. He also emphasised the need to maintain the basic tenet that the aim of compensation is to provide a fair financial equivalent for the land taken. We agree that this is the aim of compensation. We also agree with Lord Nicholls that this area of the law is complex and sometimes obscure. However, for the reasons set out below we do not propose to bring forward proposals for its reform at the present time.

15. The concept of equivalence underlies the existing statutory and case law provisions. It protects an acquiring authority from having to pay a price inflated by its own regeneration activities or special location requirements and also protects landowners from any depression in the value of their land caused by the blighting implications of any such project. As the Commission correctly point out, it has also led to the complexity

3 as set out in section 6 of, and the First Schedule to, the Land Compensation Act 1961

4 House of Lords, 28 April 2004

of the current arrangements, which can appear contradictory and often obscure in their reasoning because they are largely derived from case law. It also needs to be borne in mind, though, that this case law has evolved in an attempt to be fair to all parties in a wide range of circumstances. Therefore, as the Commission's own description of the history of the no-scheme[5] rule shows, it has provided a degree of flexibility to accommodate differing circumstances.

16. The Commission acknowledge that the main problem is to define "the scheme" which is to be disregarded for valuation purposes. As they explain, this would originally have been set out in the private Act of Parliament giving the right to acquire the land in question, but the evolution of public Acts giving generic compulsory purchase powers has severed that direct link. The Commission propose that this could be dealt with by introducing a new concept of a "statutory project", which they define as the project for which the acquiring authority has been authorised to acquire the subject land. This new concept might provide a valuable starting point for new legislation but would require substantial further development.

17. In particular, there would need to be some mechanism for defining what was to be regarded as the "statutory project" in any particular case, with an opportunity for those with an interest at stake to have their views taken into account. The Commission's suggestions for settling this[6] would require further analysis and testing with potential claimants and other stakeholders. Considerable further work would therefore be needed to devise an appropriate framework for defining the statutory project.

18. The Commission also propose that, in valuing the subject land at the valuation date it is to be assumed that the statutory project has been cancelled on that date. The advantage of that proposal is that it would simplify the assumptions to be made because there would be no need to devise a parallel history for how the land might have been developed if that project had never been conceived. It also would be consistent with the approach in respect of planning status following the case known as *Fletcher Estates v the Secretary of State*[7]. However, it could militate against ensuring that the owner received a fair financial equivalent for the land taken in cases where his land had been sterilised from other development over a number of years while the statutory project was being worked-up.

19. Both these considerations would need detailed work to ensure that a replacement code was not only simple to understand but also capable of fair application over a range of circumstances. The work which the Commission has done in identifying the issues to be resolved provides a helpful start, but it leaves a vast amount of work remaining to be done to provide workable solutions which could be set out in statute. In practice, the compensation payable can already be determined on the basis of the facts in the majority of cases whilst, whatever changes might be attempted, the relatively few large and complex cases would probably still end up being referred to the Lands Tribunal. We do not consider therefore that the amount of effort and resources which would be required can be justified at the present time in the light of the Government's overall priorities.

20. We have considered whether it would be possible to deal with these particular problems in advance of a general codification of the law. However, in our view, this in itself would require very substantial resources and would be difficult to achieve in isolation.

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5 Appendix D to Part 1 of the Final Report – Compensation

6 see paragraphs 7.26 to 7.28 of Law Com No 286

7 [2000]2 AC 307, HL

21. In their **Rule 15(2)**, the Commission propose repealing section 23 of the 1961 Act, which provides for compensation where permission for additional development is granted after acquisition. because they found no evidence of it being used. We agree with CPPRAG, though, that it is not unreasonable for the original landowner to benefit from any change in the purpose for which his land had been taken. We do not therefore consider that this change would be appropriate.

22. We also do not consider the Commission's proposed **Rule 16** to be necessary. It restates a right to compensation for the acquisition of new rights over land, but this is already provided in the legislation granting the powers to create such rights. Even if all the statutes relating to compulsory purchase procedures and compensation were to be repealed and replaced by a consolidated Act, the individual enabling powers would still stand.

23. The Commission propose in their **Rule 20** that the Lands Tribunal should have jurisdiction to determine any claim relating to damage to land or to the use of land where it arises out of substantially the same facts as a compensation claim which has been referred to the Tribunal. This makes sound practical sense. Implementation would be a matter for the Lord Chancellor, and DCA have agreed to consider the most appropriate legislative means to take this forward.

24. CPPRAG commented that the current arrangements under which interest is paid on delayed compensation payments[8] amount in effect to a penalty on the claimant. We made no direct response to this in our response to CPPRAG in 2001, but said that we felt that we should await the outcome of parallel work which the Commission were then undertaking on the power of the courts to award compound interest. This Report on Pre-Judgment Interest on Debts and Damages[9] is now under consideration by DCA and, so as not to anticipate the outcome of that, the Commission did not make any recommendations in **Rule 21** about the adequacy of existing interest rates or the introduction of a power to award compound interest. They do, though, make recommendations about a power for the Lands Tribunal to vary rates of interest and the dates from which it should become payable. These are laudable in intention, but would involve devising complex legislative provisions.

RECOMMENDATIONS FOR CHANGES TO PROCEDURE

25. Although the Commission did not set out to devise a comprehensive code for compulsory purchase procedures, a number of their recommendations do not make significant changes to established law. It would therefore only be relevant to consider their merits as part of a major consolidation exercise and we do not intend to consider them in any depth in this Response. These are recommendations 1, 3, 4, 6, 11(3), (5) and (6), 13 (except 13(5)), 14, 15, 16, 17, 18, 19, 20, 21, 23, 24 and 35. Of the other recommendations, we agree with recommendations 7, 8, 9, 10, 12, 22 and 26, but have concerns about recommendations 2, 5, 11(1), (2) and (4), 13(5), 17 and 18. However, these are only preliminary views. We would need to examine them in more detail, including through extensive consultation, before going forward with legislation were such an opportunity to arise in the future.

8 on a simple interest basis and at a rate 0.5% below base rate

9 Law Com No 287, published on 24 February 2004

26. While we agree with the Commission that it is appropriate for all authorities with compulsory purchase powers to be entitled to enter onto land in order to carry out necessary surveys before making a compulsory purchase order, we do not consider that their **recommendation 2** is necessary. Given that such powers are already generally available as part of the relevant enabling powers[10], we are not convinced of the need also to extend section 15 of the Local Government (Miscellaneous Provisions) Act 1976 to all authorities having compulsory purchase powers.

27. **Recommendation 5** proposes that there should be prescribed forms for serving a notice to treat. However, the Commission acknowledge that this would require a number of different versions to take account of the potential range of interests and circumstances. We also note that various consultees told the Commission that the number and complexity of the templates required would be more confusing for both acquiring authorities and claimants than leaving authorities to devise their own formats. Furthermore, 5(5) proposes extending the provisions of section 20 of the Compulsory Purchase Act 1965 (the 1965 Act)[11] to long tenancies about to expire[12], and we are not clear how that would benefit them. Given that such tenants currently have a right to be served with a notice to treat[13], we feel that replacing that with the provisions of section 20 could potentially adversely affect their compensation entitlement.[14] We are not therefore convinced of the need for recommendation 5.

28. We agree with the Commission that the sums specified in section 12 of the 1965 Act are derisory as payments to compensate for unauthorised entry by an acquiring authority or its contractors. However, as they point out, a claim for damage could be brought by civil action. Thus, although their proposal in **recommendation 7** for the repeal of section 12 is desirable, we do not see it as being essential.

29. **Recommendations 8 and 9** relate to section 13 of the 1965 Act and are matters for DCA. The Government agrees that a warrant for possession should be issued to High Court enforcement officers rather than to the sheriff, and DCA propose to incorporate an appropriate provision in the Courts and Tribunals Bill. Such a Bill was announced in the Queen's Speech in November 2004, although it was not subsequently introduced in that Parliamentary session. The recommendation to repeal the provisions relating to the levying of distress follow from this, and DCA agree that it should be implemented as soon as a suitable legislative opportunity arises.

30. As the Commission say in relation to **recommendation 10**, we endorsed CPPRAG's view that certain key stages in the compulsory purchase process should be registered as local land charges. We are grateful for the further work which the Commission have done on

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10 for example: section 167 of the Local Government, Planning and Land Act 1980 (re UDCs); section 163 of the Leasehold Reform, Housing and Urban Development Act 1993 (re EP); and section 21 of the Regional Development Agencies Act 1998 (re RDAs). Such powers are also included in the model clauses normally applied to Transport and Works Act Orders

11 Section 20 of the 1965 Act provides that a tenant who has an interest no greater than as a tenant for a year, or from year to year, is not entitled to a notice to treat, but is entitled to compensation if he is required to give up possession before his term has expired

12 as defined in section 2(2) of the Compulsory Purchase (Vesting Declarations) Act 1981

13 derived from the requirement in section 9(2) of the Compulsory Purchase (Vesting Declarations) Act 1981 that a notice to treat is to be served in respect of that tenancy

14 by, for example, removing the scope for taking account of the value deriving from any potential right to renew their leases

this with HM Land Registry and we accept their recommendations. Recommendation 10(1), (2) and (3) will need to await a suitable legislative opportunity, but we have incorporated the guidance suggested in 10(4) into the Compulsory Purchase Procedure Manual[15].

31. While we recognise that the Commission are following the commitment which we gave in our Policy Statement in 2002, we now feel that the proposal in **recommendation 11** that the period for exercising compulsory purchase powers should be reduced from three years following confirmation[16] needs further consideration. Although shorter time-limits would be beneficial to those whose property is affected, concerns have been expressed that it may not always be feasible to do all the necessary work, including assembling the funds to acquire the properties, within a shorter period. There could therefore be a risk that reducing the time-limit could have the perverse effect of discouraging authorities from exercising their compulsory purchase powers.

32. The Commission's proposals in **recommendation 12** for limiting the period during which compensation disputes can be referred to the Lands Tribunal are linked to their proposals for statutory time-limits in their Report *Limitation of Actions*[17]. In July 2002, the Government accepted the Commission's recommendations in that Report in principle subject to further consideration of certain aspects, and announced its intention to introduce legislation when a suitable opportunity arises. We consider that there is merit in simplifying and clarifying the law of limitation for the benefit of compensation claimants, and accept the Commission's proposals that appropriate changes should be made as part of amending the law of limitation.

33. **Recommendation 13(5)** would impose a new duty on acquiring authorities to make a reference to the Lands Tribunal within the limitation period if the claimant had not already done so. However, it is not clear to us how such a duty could be enforced against a reluctant authority if the claimant had not already shown sufficient interest in the matter to refer the matter to the Tribunal himself.

34. On **recommendation 22**, we agree with the Commission that there is a major problem arising from the judgment on the *Thames Water Utilities Ltd v Oxford City Council*[18] case that, although section 237 of the Town and Country Planning Act 1990 (the 1990 Act) permits temporary non-compliance with a restrictive covenant for the duration of the works of construction, it does not authorise the subsequent use of the land in breach of that covenant. This judgment also has implications for analogous powers in other types of enabling legislation[19], and we agree that it would be highly desirable to resolve the anomaly as soon as a suitable legislative opportunity arises. In the meantime, an acquiring authority which wants certainty can apply to the Lands Tribunal under section 84 of the Law of Property Act 1925 for the extinguishment or modification of a restrictive covenant. Alternatively, it could purchase an insurance policy to cover the risk of infringing a private right.

15 November 2005 update

16 as currently provided for in section 4 of the 1965 Act

17 Law Com No 207, 2001

18 [1999] 1 EGLR 167

19 including: paragraph 6 of Schedule 28 to the Local Government, Planning and Land Act 1980 (re UDCs); paragraph 5 of Schedule 20 to the Leasehold Reform, Housing and Urban Development Act 1993 (re EP); and paragraph 2 of Schedule 6 to the Regional Development Agencies Act 1998 (re RDAs)

35. The difficulty arises because it does not seem to us that the solution proposed by the Commission would be sufficient to achieve the desired end. Where private rights of way are concerned, section 236 of the 1990 Act and analogous provisions[20] provide for their extinguishment where land is being acquired compulsorily, with compensation payable in accordance with the provisions in the 1961 Act. In contrast, section 237 of the 1990 Act and its equivalents provide for the overriding of other private rights (irrespective of whether the land is acquired compulsorily), with compensation payable under section 7 or 10 of the 1965 Act[21]. Hence, the issue which led to the judgment in the *Thames Water Utilities* case derives from the fact that section 10 of the 1965 Act refers to compensation for the execution of works, but not for their subsequent use. We are concerned that, in proposing to rectify this problem by amending section 237 of the 1990 Act, (and extending it to all bodies with compulsory purchase powers), the Commission have not indicated how they would overcome the difficulties caused by the current cross-reference to section 10 of the 1965 Act. Substantial further work would therefore be required if a suitable legislative opportunity were to arise.

36. As the Commission acknowledge, throughout the review process we have supported the case in equity for reimbursing any actual costs and losses incurred by those whose property is affected by a compulsory purchase order which is not then implemented. We have also taken the view that these payments should relate to all such costs and losses incurred from the date on which that order is made[22]. We therefore agree in principle with the Commission's **recommendation 26** if an appropriate legislative opportunity were to arise. In the meantime, most of the costs and losses likely to be suffered as a result of an acquiring authority's decision not to implement a confirmed order are already covered. This is because claimants are most likely to incur expenses in preparing for what they expect to be their displacement[23] following service of the notice to treat, and the payment of costs and losses suffered due to the withdrawal[24] or lapse[25] of a notice to treat is already provided for in statute.

CONCLUSION

37. The Commission's review of the law on compulsory purchase procedures and compensation forms the culmination of a lengthy and thorough examination of ways in which the process might be improved. The underlying aim has been to see whether it could be made quicker, simpler and fairer to meet the concerns of those who criticise the current arrangements and claim that they act as a deterrent to achieving effective land assembly. It has been an enormous and complex task.

20 including paragraph 5 of Schedule 28 to the Local Government, Planning and Land Act 1980 (re UDCs); paragraph 4 of Schedule 20 to the Leasehold Reform, Housing and Urban Development Act 1993 (re EP); and paragraph 1 of Schedule 6 to the Regional Development Agencies Act 1998 (re RDAs)

21 or the provisions in section 63 or 68 of the Lands Clauses Consolidation Act 1845 which have similar effect but which were replaced by the 1965 Act provisions for acquisitions under most (but not all) compulsory purchase powers

22 or made in draft in the case of a ministerial CPO

23 and which could have been claimed as disturbance costs had the transaction been completed

24 section 31(3) of the 1961 Act

25 section 5(2C) of the 1965 Act

38. The bulk of the reforms proposed by the Commission arise from their remit to make recommendations for consolidating and codifying the law. However, in the light of the substantial amount of additional work which would remain to be done to turn their compensation proposals into a workable code, we do not consider that that can currently be justified. Had we been contemplating the introduction of a procedure for the compulsory acquisition of land where no such powers had previously existed, the Commission's proposals for a single simple code expressed in modern English would have had much to commend it. However, as that is far from reality, any attempt to repeal and replace the whole of the existing legislative framework would not only require considerable resources, but would run the risk of creating its own difficulties.

39. This means that the main value to us of the Commission's review of the law has been in confirming that there are no quick and easy solutions which could make the compulsory purchase process less daunting for both potential acquiring authorities and those whose property needs to be expropriated. The need to protect the interests of the latter acts as a counterweight to attempts to make the acquisition process quicker and simpler and also explains much of the complexity of the ever-evolving statute and case law. Therefore, following the changes in the 2004 Act, we see advantage in maintaining a period of stability where acquiring authorities can be certain of the ground rules within which they are operating. This will enable them to exercise their compulsory purchase powers to further their wider policy objectives wherever that makes sense in the public interest.