Compulsory Purchase—A Model for Law Reform?

By Sir Robert Carnwath CVO, Chairman, Law Commission for England and Wales

Introduction

By common consent, the law of compulsory purchase and compensation has become "an unwieldy and lumbering creature". That is the description used in the DETR's "Fundamental Review".[1] The Review refers to the roots of the law in the Lands Clauses Consolidation Act 1845, and the carrying forward of "the Victorian Concepts and Antiquated Phraseology" leading to "difficulties in interpretation, or even comprehension". These problems were discussed in detail by Guy Roots Q.C., in a paper to this Conference last year.[2]

Some of the blame must go to the caution of those tackling the subject in the early 1960s. Guy Roots expressed surprise that in 1965, when much of the 1845 Act was re-enacted in the Compulsory Purchase Act 1965, the opportunity was not taken to repeal the 1845 Act in its entirety. Similar concerns were expressed at the time.[3] The opportunity might also have been taken to bring the language up to date. The 1965 Act itself preserves wording which, as Lord Wilberforce once observed, may bear "little perceptible relation" to the interpretation it has been given by "a century of judicial effort to keep the primitive wording . . . in some sort of accord with the realities of the industrial age".[4]

Another villain in the piece is the Town and Country Planning Act 1959, largely reproduced in the Land Compensation Act 1961.[5] The 1959 Act had been designed to remedy the "two price system", whereby public acquisitions continued to be at little more than existing use value, even after the restoration in 1954 of a more normal market for private transactions.[6] I was lucky enough to collaborate, in the mid-1970s, with Sir Frederick Corfield Q.C. in the writing of a new work on the subject of compulsory purchase law.[7] His account in the book of the background of the 1959 provisions is illuminating.[8] He had direct experience as a practitioner of the effects of the radical policy changes of the post-war period. As Captain Corfield M.P., he promoted a seven-page Private Members' Bill to

[1] "Fundamental Review" of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report (July 2000). I shall refer to this as "the Review". Its publication was announced in a Parliamentary Answer by the Minister (Nick Raynsford M.P.) on the July 27, 2000. The DETR also published a report on the operation of the Crichel Down rules (the administrative rules under which land surplus to requirements may be offered back to the original owner or successors). The Minister invited views on the two reports by October 13, which would be taken into account in preparing the government's response.

[2] "Compulsory Purchase: Unlocking of the Potential" by Guy Roots Q.C., J.P.L. Occasional Paper No. 27, at 34.

[3] Hansard H.C. 28.7.65 vol. 717 col. 640 (Graham Page M.P.). The 1965 Act applied to compulsory purchases within Schedule 1 to the Acquisition of Land (Authorisation Procedure) Act 1946, principally government departments and local authorities. There may have been nervousness in tackling the range of local and private Acts since 1845 which had drawn on the 1845 Act. It is only recently that there has been in existence anything like a complete table of private and local legislation: see Law Commission Chronological Table of Local Legislation 1797–1994 (1996) Law Com. 241; Chronological Table of Private and Personal Acts 1539–1997 (1999) Law Com. 256.

[4] *Argyle Motors (Birkenhead) v. Birkenhead Corporation* [1975] A.C. 99, 129. He was speaking of what is now section 10 of the Compulsory Purchase Act 1965, dealing with compensation for injurious affection where no land is taken. See now *Wild Tree Hotels Limited v. Harrow LBC* [2000] 3 All E.R. 289, 294.

[5] Graham Page M.P. suggested that the opportunity should have been taken in 1965 to bring together the subject-matter of both the 1961 and 1965 Acts in one consolidating statute: Hansard (above) col. 640–1.

[6] The Town & Country Planning Act 1947 transferred to the state all the development rights to land in return for a share in a compensation fund of £300m. The Town and Country Planning Act 1954 restored a more normal market for development land, but limited compensation on compulsory purchase to existing use value plus a notional share of the 1947 value.

[7] Compulsory Acquisition and Compensation by Sir Frederick Corfield Q.C. and R. J. Carnwath, Butterworths (1978).

[8] *Ibid.*, Cap 1.

deal with the "two-price system"; it was taken over by Government and turned into a 77 page Bill,[9] which eventually became the 1959 Act.

At the time there were differing views as to its comprehensibility. The Minister, introducing it, described it as "on this very difficult subject ... a positive gem of lucidity".[10] Captain Corfield commented ruefully that his Bill had been accused of "oversimplification", a criticism which no-one could make of the Government's Bill. He quoted a colleague: "I have got the Bill and the Explanatory Memorandum and I am now looking for the memorandum which explains the explanatory memorandum."[11]

With hindsight, now that the "two-price system" is a distant memory, the 1959 Act seems a very complicated way of achieving the simple objective of market value. It has to be seen as the source of some of the more incomprehensible provisions in compensation law. Parts were memorably described by Harman L.J. in a case in 1964 as "a monstrous legislative morass", through which the court had found itself "staggering from stone to stone, ignoring the marsh gas exhaling from the forest of schedules lining the way on each side".[12]

Against this background, it is not surprising that the first recommendation of the Review is that:

> "... new compulsory purchase and compensation legislation, consolidating, codifying, and simplifying the law ... should be prepared in consultation with the Law Commission and brought before Parliament at the earliest opportunity."[13]

As Chairman (since February 1999) of the Law Commission I had been consulted during the process of the Review, and I strongly endorsed that recommendation. This Paper provides an opportunity to say something about the Commission and its methods of working, and how we might approach the task suggested by the Review.

What is the Law Commission?

The Law Commission was established in 1965 by the Law Commissions Act of that year.[14] It was the brainchild of Lord Gardiner, Lord Chancellor in the Wilson Government. He originally saw a very ambitious role for the Law Commission, as overseeing the drafting of all Government legislation.[15] What emerged was a more realistic compromise, which preserves a healthy balance of independence and co-operation in relations with Government Departments, and has stood the test of time for thirty five years.

The Commissioners consist of a Chairman and four other Commissioners appointed by the Lord Chancellor. The Chairman is traditionally a High Court Judge seconded to the post for normally three years. The other Commissioners are lawyers of suitable standing, selected from barristers, solicitors, judges or academics. The Commission's principal statutory function, as stated in section 3(1) of the Act, is to review the law:

> "with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the

[9] See Hansard HC 13.11.58 vol. 595, col. 583.
[10] *ibid.*, col. 583: J. R. Bevins M.P., Parliamentary Secretary, Ministry of Housing and Local Government.
[11] *ibid.*, col. 608. Of this comment, Corfield observed charitably: "I do not think it as bad as that. However, it is complicated ... ."
[12] *Davy v. Leeds Corporation* [1964] 3 All E.R. 390, 394, speaking of what is now section 6 of the Land Compensation Act 1961.
[13] Review para. 24.
[14] The same Act created a Scottish Law Commission.
[15] For a vivid account of the establishment of the Law Commission see Stephen Cretney: Law, Law Reform and the Family, Oxford 1998, chapter 1.

> reduction of the number of separate enactments and generally the simplification and modernisation of the law . . . ."[16]

In practice, the Chairman has a general supervisory role and takes the lead in negotiations with Ministers and Government Departments. Each of the other Commissioners is responsible for a particular area of law (at present: common law, criminal law, property and trust law, and company and commercial law). Each Commissioner other than the Chairman works with a team normally consisting of two to three government lawyers and two to three research assistants (usually students who come fresh from University for one or two years).

In addition to the Law Reform Teams, the Commission has two teams which are potentially very important to a project such as compulsory purchase. The first is a team of Parliamentary draftsmen (usually four or five in number), who are seconded to the Commission from the Office of Parliamentary Draftsmen in Whitehall.[17] An important and distinctive feature of the Law Commission's work, as compared to that of other advisory groups, is that, where appropriate, our final Reports are accompanied by a draft Bill, giving effect to our recommendations, in a form suitable for presentation to Parliament. Experience shows that the ability to work directly with Parliamentary Counsel is a vital discipline in testing our law reform proposals. The Parliamentary draftsmen also undertake a limited number of pure consolidation projects. These benefit from a streamlined procedure in Parliament, but for that reason the scope for modernisation or improvement is very limited.

Secondly, there is a Statute Law Revision Team whose task is to review areas of statute law in order to get rid of obsolete enactments. There have been sixteen Statute Law (Repeals) Acts since 1965, which have repealed some 4,600 enactments, including over 2,000 complete Acts.[18] Unfortunately this particular task is Sisyphean. Parliament produces something like 3,000 A4 pages of legislation per year of primary legislation, compared to some 300 A5 pages a hundred years ago.

An important practical constraint on our work is the need to have an eye to the political realities of the legislative programme. Although we are independent of Government, we are in practice dependent on them to put our proposals into effect. To ensure that our work accords with subjects likely to be of Parliamentary concern, all our projects stem from programmes agreed by the Lord Chancellor,[19] or specific references by Government Departments.[20] One difficulty with this arrangement, of course, is that political priorities are often short-term, whereas systematic law reform takes time. This makes it important that the projects selected generally avoid matters of high political controversy, and that our proposals are robust enough to survive changes in administrations. This approach has proved relatively successful over the years. Although the delays in the implementation of our recommendations are frustrating, viewed over thirty five years, some 70 per cent of the Commission's law reform proposals have found their way into legislation in one form or another. It is necessary to be patient.[21]

Political cycles are also important, because they affect the competition for Parliamentary time from other Government priorities. The last years of the Conservative Government saw a higher than normal implementation rate, with the implementation of ten Law Commission reports in 1995, and eight in

[16] Law Commissions Act 1965, section 3(1).

[17] Skilled Parliamentary draftsmen are limited and in great demand; their availability is one of the main constraints on the planning of major codification projects.

[18] See Law Commission 33rd Annual Report (1998), para 6.9.

[19] We are currently working under the 7th Programme (Law Com 259), approved June 1999.

[20] A recent example was the Law of Double Jeopardy in Criminal Proceedings, on which we received a reference from the Home Secretary in July 1999 (following the MacPherson report on the Stephen Lawrence Inquiry). We have since published a Consultation Paper (CP No. 156).

[21] For example, the Contracts (Rights of Third Parties) Act 1999 followed recommendations made in our Report on Privity of Contract (Law Com No. 242) published in 1996. That Report records that similar proposals were first put forward in 1973 (in connection with the Law Commission's work on a possible Contract Code), and revived in a Consultation Paper (CP 121) in 1991.

1996.[22] The first two years of the present Government were less successful, given the huge programme of the new Government. However there were two Acts last year,[23] and the important Trustee Bill is before Parliamentary at present. The Lord Chancellor in particular has indicated his strong support for the Law Commission's work, and has established an Interdepartmental Committee under David Lock M.P., to work closely with the Law Commission on setting the programme and assisting implementation.[24] There are also initiatives for improving Parliamentary procedures for handling law reform bills.

The DETR Review

When I was appointed Chairman at the beginning of last year, I was already aware of the "Fundamental Review" under way at the DETR. I was not a member of the Review team. However, it is a subject of which (apart from the book which I have mentioned) I had some practical experience at the Bar.[25] I therefore followed its progress with interest, and responded on behalf of the Law Commission during the consultation stages.

The immediate political impetus for the Review was connected with the setting up of the Urban Task Force, under Lord Rogers. The review of compulsory purchase law was announced to Parliament in June 1998, at the same time as the announcement of Lord Rogers's Task Force. An interim report was published by the Review team in December 1998. It recorded the strong support from a number of bodies (including the Law Commission) for modernisation of the law. The final report of the Task Force,[26] published in 1999, saw compulsory purchase as a "powerful tool" for securing urban regeneration. They called for the legislation to be "consolidated and streamlined", They identified the way in which owners are compensated as "one of the major stumbling blocks". They were particularly concerned that actions taken by public authorities to redevelop could result in "sharp increases in land and property values"; compensation should be based on the prevailing market value immediately before the announcement of the plans, but there should be additional payments of 10 per cent for all properties to "lubricate the system".[27]

In commenting on that report, the Minister Nick Raynsford M.P., emphasised that "enthusiasm for regeneration" should not be used as an excuse to erode the "vital safeguards" to protect the rights of those whose land is to be taken.[28] However, there was no disagreement that a fair, efficient and accessible system of compensation could play a vital part in streamlining the process of compulsory purchase.

The Final Report of the Review was published at the end of July of this year. I have already referred to the first recommendation for new compulsory purchase and compensation legislation, to be prepared in consultation with the Law Commission. In making that proposal, the Review envisaged that their recommendations would be brought into the new Code. They also emphasised that "in framing the new statute, particular care should be taken to bring the language up to date . . .".[29]

[22] See 31st (1995) and 32nd (1996) Law Commission Annual Reports.
[23] Contracts (Rights of Third Parties) Act 1999, and Trustee Delegation Act 1999.
[24] Announced in a Written Answer by the Lord Chancellor 8.12.99: Hansard HL 8.12.99 WA 87.
[25] Most recently, I had acted as Counsel for the Hong Kong Government in the Hong Kong Lands Tribunal and Court of Appeal, in the case which reached the Privy Council (after I had become a Judge) in *Director of Buildings and Lands v. Shun Fung Ironworks Ltd* [1995] 2 A.C. 111. Since the case took over 263 days in the Lands Tribunal (spread over 2 years), and some five weeks in the Court of Appeal, there was adequate time to investigate most aspects of compensation law (which in Hong Kong is also based on the 1845 Act). Lord Nicholls's Opinion in the Privy Council is now the leading authority on the law of disturbance.
[26] Towards and Urban Renaissance: Final Report of Urban Task Force (DETR 1999).
[27] *Ibid.*, pp. 228-31.
[28] Speech at Symposium "Compulsory Purchase: An Appropriate Power for the Twenty-First Century?" (February 22, 1999).
[29] Review Para 24. They also suggested that procedures should as far as possible be standardised, and should be included in the new statute, along with "a clearly defined Compensation Code".

The Review also included a number for detailed recommendations relating to both law and practice. I have attempted to summarise the main points in an Appendix to this Paper. I shall refer to come of them later in discussing the possible contents of a new Code.

A Law Commission reference?

Although the Chairman's role at the Law Commission is mainly supervisory, there is scope to advance a particular project within one's own sphere of interest.[30] For me, this would be a unique opportunity to tackle a problem area of the law, the difficulties and anomalies of which have been all evident to me all my professional life.

Apart from keeping in touch with the successive Chairmen of the Review team,[31] I have had some preliminary discussions with the President of the Lands Tribunal[32] and others on the form the project might take. However, it has been necessary to wait for the completion of the Review, and the Ministerial response to it, before knowing whether we could begin work in earnest. It is in some ways frustrating that this process has already taken us well into the second half of my term at the Law Commission. I am also conscious that, with the possibility of an imminent election, there will be many other competing pressures on the Government programme. My hope would be that this subject will be seen as sufficiently important, and politically neutral, for these pressures not to stand in the way of the making of a reference in the near future. If I am to play any significant part in the project, we need to make an early start to planning the work programme, and, in particular, the availability of drafting resources when needed.

Apart from the Review itself, there are three other considerations,[33] which make this a particularly suitable time to consider codification. In the first place, there seems unlikely in the foreseeable future to be major political controversy about the objectives. The principal aims of streamlining procedures, while ensuring fair compensation to landowners, are uncontroversial. There seems no sign of a revival of the radical differences that used to exist over the recoupment of betterment.[34]

Secondly, the Human Rights Act, introducing the relevant provisions of the European Convention, is likely to draw attention to anomalies and inequalities in the system. This is not the place for an examination of the implications of the Convention for compulsory purchase law.[35] The basic principles of compensation law are unlikely to fall foul of the Convention, which gives a wide latitude to States in formulating general principles of compensation.[36] Problems are more likely to arise where blight is caused by unduly protracted proceedings.[37] Problems may also arise if the compensation provisions are applied in a way which is arbitrary or discriminatory.[38]

Thirdly, there have recently been three especially important and illuminating decisions of the House of

[30] Thus, my immediate predecessor, Arden J., a company law expert, took the lead for the Commission in Papers on Shareholder Remedies (LC 246) and Directors' Duties (LC 261).

[31] Graham Cory (until November, 1999) and Jean Nowak, both of the DETR.

[32] George Bartlett Q.C.

[33] Another factor is the recent publication of a new comprehensive work on the subject (Butterworths Compulsory Purchase and Compensation Service, by a team led by Guy Roots Q.C.). While it is frustrating for the editors of such a work to find their efforts overtaken by new legislation, it may also be gratifying to know they have assisted that process.

[34] See Corfield and Carnwath, *op. cit.*, pp. 4ff.

[35] See Compulsory Purchase, Compensation and Human Rights by Michael Redman 1999 J.P.L. 315. The main Articles are: Article 6 (Fair Procedures); Article 8 (Respect for Private Life and the Home); Article 1 on First Protocol (Right not to be Deprived of Possessions, "except in the public interest and subject to the conditions provided for by law"); Article 14 (Non-discrimination in relation to Other Rights).

[36] See *Lithgow v. United Kingdom* (1986) 8 E.H.R.R. 329; *James v. United Kingdom* (1986) 8 E.H.R.R. 123.

[37] See, *e.g. Sporrong v. Sweden* (1983) 5 E.H.R.R. 35, and *Guillemin v. France* (September 2, 1998, unreported).

[38] See, *e.g.* Michael Barnes Q.C. "Public Authorities and Land Compensation" (in *Essential Human Rights Law*, by Members of Wilberforce Chambers). He suggests a line of argument whereby section 10 of the 1965 Act (see above) might have to be re-interpreted, to secure non-discrimination in the treatment of injurious affection as between those who lose land and those who do not.

Lords or Privy Council, which have reviewed contentious areas of the existing law. They are *Shun Fung* (see above), which re-states both general principles and those relating specifically to disturbance; *Fletcher Estates v. Secretary of State*[39] which clarifies the law on certificates of appropriate alternative development[40]; and *Wild Tree Hotels Ltd. v. Harrow L.B.C.*,[41] on principles of injurious affection where no land is taken. A series of authoritative statements of the existing law, such as these, provides a firm basis for either codification or selective reform.[42]

Planning a New Code

If a reference to the Law Commission is made, in the light of the recommendations of the Review, the first task will be to establish, in consultation with the Department and other interested parties, the general scope of the Commission's study and the framework of the Code which might result.[43] There are theoretical attractions in starting with a clean sheet of paper and going back to basics. Practical politics, however, argue in favour of a less ambitious approach. While a pure consolidation would not be a worthwhile exercise, there are advantages in limiting substantive change to those areas where it is essential. The more that the new legislation can be seen to encompass principles already well established in the law, the more likely it is to attract cross-party support, and reduce its demands on Parliamentary time.

At this stage, without pre-empting the remaining stages of consultation, or Government decisions, it is possible to offer some preliminary suggestions as to what might be included and excluded, and how the task might be approached.

I would be inclined to exclude from the Commission's work one subject covered by the Review, that is, the adequacy of statutory powers of acquisition. As the Review team recognised, authorities already enjoy a wide range of statutory powers of compulsory purchase, including powers for urban regeneration.[44] They saw the main need being for better understanding of the practicalities of compulsory purchase, and improved management.[45] At this stage I would also exclude the "Crichel Down" procedures,[46] until a decision is made whether to give them a statutory basis.

For different reasons, I would also exclude access rights of utilities. The Review team pointed to some of the unnecessary complexities and anomalies of the existing law, but rightly saw those as matters to be rationalised in discussion between the suppliers and the sponsoring departments.[47]

On the other hand, I would be inclined to include a subject not covered by the review: that is, "reverse" compulsory purchase procedures. They are the procedures by which an owner can compel an authority to purchase land, which is blighted by a public scheme (blight notices) or otherwise incapable of beneficial use (purchase notices). The Review notes that they were the subject of a separate government study three years ago.[48] They do not say what action, if any, is to be taken in response to

[39] [2000] 2 W.L.R. 438.
[40] Land Compensation Act 1961, section 17.
[41] See above.
[42] They can be contrasted with some earlier, less fortunate, incursions of the House of Lords in to this field, which have had to be remedied by Parliament: *e.g. Rugby Water Board v. Foottit* [1973] A.C. 202 (see Land Compensation Act 1973, section 48); *Margate Corp v. Devotwill* [1970] 3 All E.R. 864 (see Land Compensation Act 1961, section 14(5)–(8), inserted by Planning and Compensation Act 1991, section 64).
[43] Many of the issues have been discussed in the 1980 report of the Australian Law Reform Commission (Land Acquisition and Compensation—A.L.R.C. 14). Their recommendations have been put into effect in subsequent national and state legislation: see Lands Acquisition Act 1989 (Cth); Land Acquisition (Just Compensation) Act 1991 (NSW). They will provide useful precedents for the drafting of the U.K. legislation.
[44] They referred, in particular, to Town and Country Planning Act 1990, section 226, as providing the necessary powers for schemes of urban regeneration: para 30.
[45] Paras 28–38.
[46] See note 1 above.
[47] Review para. 218.
[48] Interdepartmental Working Group on Blight: Final Report (DETR 1997).

that study. I would see them ultimately as a natural part of the new Code. They are an important part of the protection for owners against unreasonable use of compulsory powers. Their existing place in the Town and Country Planning Act[49] is somewhat anomalous, since they are not confined to blight caused by planning powers.[50] They have grown up piecemeal over a long period, and the existing rules are complicated and not easy to apply. They also throw up some special compensation problems.[51]

On that basis, the Code would cover the following main[52] headings:

(i) Making and confirmation of CPO
(ii) "Reverse" compulsory purchase (blight notices and purchase notices)
(iii) Implementation of CPO (notice to treat or vesting declaration)
(iv) Procedures for assessing compensation (Lands Tribunal)
(v) Principles of compensation where land is taken
(vi) Post-implementation procedures (completion, missing owners etc)
(vii) Compensation where no land is taken
(viii) Abortive compulsory purchase orders.

An early decision also needs to be made which of these headings should be given immediate priority. For example, (i) would not be an obvious candidate for early attention by the Law Commission. The procedures for making and confirmation of orders have been reasonably successfully consolidated in the Acquisition of Land Act 1981, most of which could (if desired) be incorporated into a Code almost as it stands. Although the review called for "standardisation", their main recommendations related to practice rather than law reform. More fundamental change, if it comes, is likely to go beyond the subject of compulsory purchase, and to be led by the need for a radical re-appraisal of the public inquiry and inspectorate system, arising from the Human Rights Act.[53]

In the immediate future, our work might concentrate on what I would call the core problem areas of the existing compulsory purchase law—(iv) to (vii) in the above list. I would envisage a 5-point plan of attack to deal with the main issues:

(i) Repeal of 1845 Act. (Consequential provision would be needed to ensure that the many Acts which incorporate the 1845 Act are brought into the new system);
(ii) Simplified code for implementation, with choice of notice to treat or vesting declaration (drawing together 1965 Act procedures for acquisition by notice to treat and notice of entry, and 1981 Act[54] procedure for vesting declarations);
(iii) Consult Lands Tribunal on any changes needed to their jurisdiction and powers[55];
(iv) Compensation:
  (a) Repeal 1919 rules;

[49] Town and Country Planning Act 1990, Part VI.
[50] *ibid.*, Sched. 13.
[51] For example, identifying the "scheme" of acquisition, where the purchase is initiated by the landowner, not the authority: see, *e.g. Birmingham D.C. v. Morris and Jacombs* (1976) 33 P. & C.R. 27.
[52] There are many other detailed provisions which would need to be taken into account, dealing with special cases such as mortgages, minerals, common land, statutory undertakers etc.
[53] There are increasing doubts as to whether present procedures satisfy the "independence" requirements of Article 6: see the judgment of Lord MacFadyen in the Outer House, *County Properties v. Scottish Ministers* 25.7.00 (unreported) Professor Malcom Grant makes a strong case for reconstituting the Inspectorate as part of a separate Environmental Court or Tribunal, which might include the Lands Tribunal: see his Study for the DETR Environmental Court Project: Final Report (DETR, February, 2000).
[54] Compulsory Purchase (Vesting Declarations) Procedure Act 1981.
[55] The Review group (paras 62–71) did not suggest major change to the Lands Tribunal. It acknowledged that the "common perception" that its procedures are "inevitably slow and costly" was based to large extent on ignorance, which needed to be countered by better information. It welcomed their adoption of the "Woolf" objectives in their procedures, and endorsed their call for a more flexible statutory costs regime (now LCA 1961, section 4).

(b) State basic right to compensation: principle of equivalence, and normal constituents of compensation;
(c) Simplify and rationalise provisions relating to assumed planning permissions;
(d) Simply and rationalise provisions (and common law rules) for disregarding "the scheme";
(e) Unified code for additional payments (home loss etc);
(f) Amended rules on equivalent reinstatement.[56]
(g) Amended or "merged" rules for compensation where no land is taken.

(v) Review and rationalise incidental provisions (mainly in the 1965 Act) relating to completion of title, missing interests, limitation,[57] special categories of land etc.

For the categories other than Compensation, the exercise is principally one of consolidation and modernisation of what exists. The tasks are largely technical, and the policy choices limited. Accordingly in what follows I shall concentrate on the subject of Compensation, which requires more radical rethinking.

Compensation

For the most part, the underlying principles of the modern law are reasonably well settled and understood. However, they are virtually impossible for the non-specialist to extract from the statutes. In some areas (notably (d) in the above list), sorting out the tangle requires some difficult policy decisions.

Starting with the relatively uncontentious, the first requirement is for a simple statement of the principles of compensation: equivalence,[58] and the traditional division in to market value of the land, disturbance, and severance or injurious affection.[59] The six so-called "rules" in section 5 of the 1961 Act (taken from the 1919 Act) do not provide a suitable starting point for a modern code. Two (rule 2—market value; and rule 5—equivalent reinstatement) are essential to the modern scheme; rules 1 and 6 are obsolete and can be discarded.[60]

I would also like to jettison Rule 3 (special purchaser). Its precise purpose and practical effect are unusually obscure.[61] It requires the "special suitability or adaptability" of the land to be left out of account in two cases[62]: first, where it is for a purpose to which it could only applied "in pursuance of statutory powers",[63] and, secondly, where it is one for which there is no market apart from the special needs of a particular purchaser.[64] Apart from the practical difficulties of applying either of these tests, it is

[56] The Review Team recommended some detailed changes to the existing rules, and a possible extension of the concept to owner occupiers of low value houses where there has been a collapse of the local market (paras 158–174).

[57] See *Hillingdon L.B.C. v. ARC Ltd* [1999] Ch. 139, which established that the Limitation Act 1980, section 9 applies to compensation claims following notice to treat. There is a specific statutory limitation period for claims following vesting declarations: Compulsory Purchase (Vesting Declarations) Act 1991, section 10(3). The Law Commission is already engaged in a review of the Limitation Acts; a final report is due next year.

[58] See *per* Lord Nicholls in the *Shun Fung* case [1995] A.C. at p. 125, describing the "principle of equivalence": "No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller but subject to these qualifications a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation; a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount."

[59] See, *e.g.* Land Acquisition (Just Terms Compensation) Act 1991, section 55 (New South Wales).

[60] Rule 1 (no allowance for fact that acquisition is compulsory) was a response to over-generous 19th C juries; and rule 6 (disturbance) merely preserves the common law (which would be codified separately as part of the new statute.)

[61] The House of Lords seems to have found similar difficulty: see, *e.g. Blandrent Investment Developments v. British Gas* [1979] 2 E.G.L.R. 18, HL; *Herts C.C. v. Ozanne* (1991) 62 P. & C.R. 1, HL.

[62] A third case, relating to "the requirements of any authority possessing compulsory purchase powers" was repealed in 1991: Planning and Compensation Act 1991, section 70. It is not clear to me why the repeal stopped there.

[63] In practice, it is difficult to think of any uses to which land can only be put "in pursuance of statutory powers" (as opposed to statutory authorisations, such as planning permission etc): see *Herts C.C. v. Ozanne* (above).

[64] In practice, there is nearly always a market of some kind, for example a speculator, willing to buy with a view to possible sale to the particular purchaser: See *Blandrent v. British Gas*, above.

not at all clear why, if such "special suitability" is a feature of the land, the dispossessed owner should not have the benefit of its value,[65] particularly since the acquiring authority may often be a privatised utility, operating for the benefit of its shareholders.[66]

Rule 4 (exclusion of value due to unlawful, immoral or unhealthy uses), as the Review team observes, dates from a time before effective planning and public health legislation. It is too absolute. If the uses are at risk of enforcement action, that will be reflected in value. If not, it is presumably because they are sufficiently innocuous for the authorities to have condoned any breach.[67]

In policy terms, there seem to be three main problem areas: (c) assumed planning permissions, (d) exclusion of value attributable to the scheme, and (g) compensation where no land is taken. As to the last, the approach of the Commission will depend on whether, as the Review suggests, compensation should be substantially extended, in effect to equate with that applicable where land is taken. If not, the Commission's task may simply be to rationalise what exists in the 1965 and 1973 Acts.

The Review's proposals for assumed permissions also provide clear guidance as to the policy choices. As they rightly observe, sections 14–22 (which are derived from the 1959 Act to which I have referred) are unnecessarily complicated and attach unrealistic importance to the development plan. On the other hand, where development potential may be a significant element in market value, machinery which enables the planning status of the land to be determined by planning authorities, rather than the Lands Tribunal, can be useful. What is needed, therefore, is a modified version of the section 17 certificate procedure.[68]

One potentially sensitive policy issue raised by the Review is whether, as now,[69] the land should be assumed to have the benefit of permission for the authority's own development. The Review team questions the justification for this, consistently with the "principle of equivalence", in cases where the permission would not have been granted apart from the authority's scheme.[70] However, it may be thought that this concession to the dispossessed owner,[71] albeit anomalous, is too well established to warrant its repeal.[72]

The other main area in which the existing law needs re-thinking, and probably the most difficult task, is to sort out the complex and often inconsistent statutory[73] and common law provisions giving effect to the so-called *Pointe-Gourde* principle.[74] The Review rightly described this area of the law as "complex and convoluted and urgently in need in rationalisation". They do not, however, deal in any detail with how this might be achieved. They suggest that, first, Ministers will have to decide "a fundamental policy issue . . . whether the effects of the scheme should be taken into account for valuation purposes".

[65] For example, the "marriage value" to the owner of adjoining land: *cf. I.R.C. v. Clay* [1914] 3 K.B. 466, the effect of which Rule 3 was apparently designed to reverse.

[66] The Review Team saw this rule as a "a subset" of the general principle for disregarding the effects of the scheme, and thought that it should be "subsumed" into any restatement of those principles (paras 99–106). (This may be a fair explanation of the first part of the rule, but not the "special purchaser" element, which may have nothing to do with the "scheme".)

[67] The Review Team propose repeal. Alternatively, there may be a case for a residual discretion, as proposed in the Law Commission's Paper on Illegality in Contract CP 154, para. 7.2–10.

[68] The *Fletcher Estates* case (above) has cleared the air, resolved some of the difficulties. However, the "relevant date" needs to be precisely defined.

[69] LCA 1961, section 15(1).

[70] Para. 111.

[71] It may not be a major concession in practice. In most cases, it is likely that the assumed permission would have been available in the no-scheme world. In others, the assumed permission may be of very limited value to a private owner: see, *e.g. Myers v. Milton Keynes D.C.* [1974] 1 W.L.R. 696.

[72] A related issue is whether the dispossessed owner should have the value of subsequent permissions granted within 10 years of acquisition. Sections 23–28 of the LCA 1961, which conferred such a right, were repealed by the Land Commission Act 1967, but revived by the Planning and Compensation Act 1991. The Review team do not propose their repeal (para. 118), although this again is a concession to the dispossessed owner which may be hard to justify in terms of principle, unless the permission would have been obtained in the scheme world.

[73] The Review team mention LCA 1961, section 6, and rule (3) of section 5 (para. 98). Section 9 (considered in the Review para. 107–8) is also relevant; as are LCA 1961, section 14(5)–(8) and LCA 1973, section 48.

[74] After *Pointe-Gourde Quarrying & Transport Co. v. Subintendent of Crown Lands* [1947] A.C. 565.

If the principle is to be retained, they see the choice as between (a) retaining the existing rule by disregarding the scheme from its inception or (b) changing to the approach adopted by the House of Lords in the *Fletcher Estates* case which:

> "would involve imagining that the scheme had been cancelled at the date of valuation, but which would avoid the need to imagine what might have happened in the area if there had been no scheme at all".[75]

On this point, the Review does not seem to me as helpful as usual. There are of course policy issues to be resolved, in drawing the balance between the public and private interest. However, the *Pointe-Gourde* principle itself is an important element of the concept of equivalence, and in turn of fairness as between the individual and the authority. The problem is not so much the concept, but the technical difficulty of giving it effect in a practical way. The absurdly complex provisions of the Land Compensation Act 1961 section 6–8 show how not to do it. The *Fletcher Estates* case suggests a way forward, but not necessarily the only way.

If the Law Commission were to become involved, I would want to carry out more detailed study of this subject, and consultation on a range of possible solutions. It would also be useful to see how the problem is tackled in other jurisdictions. At this stage I would make two observations. First, we need to dispense with the wholly unrealistic idea that the issue can be treated simply as an open-ended one of fact for the Tribunal. The "scheme" needs to be defined, and limited in area and time. It is far too nebulous a concept[76] to be a satisfactory basis, on its own, for determining rights to compensation. Large differences in value may depend on arbitrary choices between wider or narrower versions of the scheme.[77] It may require the Tribunal to rewrite history in a way which can only speculative:

> "The further back in time one goes, the more likely it is that one assumption as to what would have happened will follow another and the more difficult it is likely to reach a conclusion in which anybody can have confidence."[78]

The statutory versions of the concept[79] have also failed because they are two wide-ranging. The Review refers to the example of the London Docklands Development Area, where valuations have to be carried out on the assumption that the Development Area had never happened.[80] This involves wholly unrealistic speculations about how the history of the area might otherwise have developed. It may also have the effect of re-creating a "two-price system",[81] in which compensation is awarded at less than the prevailing market value in the area.

My other observation is that a distinction may need to be drawn between decreases and increases in value. They tend to be seen merely as two sides of the same coin.[82] However, the policy implications can be very different. The right of the owner to be protected against decreases in value caused by the threat of compulsory purchase can be seen as an important part of his property rights.[83] At present the most effective protection may be section 9 of the 1961 Act (disregard of depreciation caused by the prospect of compulsory acquisition), which has been generously interpreted in practice.[84] The Review

[75] Review para. 102–4.
[76] "A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on . . .": per Lord Denning M.R., *Wilson v. Liverpool City Council* [1971] 1 All E.R. 628, 634.
[77] See, *e.g. Bolton M.B.C. v. Tudor Properties* 19.4.00 CA.
[78] per Lord Hope, *Fletcher Estates* case (above) at p. 449G.
[79] See especially LCA 1961, section 6, Sched 1, which requires the disregard of development as part of a New Town or Urban Development scheme.
[80] Review para. 101.
[81] See section 1 above.
[82] See, *e.g. Melwood Units Property Co. v. Main Roads Commissioners* [1979] A.C. 426, PC.
[83] Protected by Article 1 of Protocol 1 to the Convention.
[84] See, *e.g. Jelson v. Blaby D.C.* [1978] 1 All E.R. 548.

recommends its retention, and extension to indications relating to adjoining land.[85] It may be open to question whether any further protection is needed.

The other side of the coin—that of increases in value—raises different issues, to which the Urban Task Force drew attention.[86] Where the purpose of the scheme is to promote regeneration, the aim of limiting values to those before the announcement of the scheme may be seen as reasonable in principle, provided that it is given effect in a way which is fair and workable. In the light of the Task Force's recommendation, I would be surprised if Ministers were to be attracted by the suggestion that it might be abandoned altogether.[87] What may be more attractive is some limitation of its scope: perhaps, a limit in time for the rewriting of history (say, five years); and a procedure to enable the "scheme" to be identified at an early stage,[88] so that uncertainty does not inhibit sensible negotiations on compensation.

Conclusion

This area of the law exhibits, in an extreme way, the defects of many parts of our substantive law. It has moved forward by fits and starts over decades or centuries, accumulating assorted debris on the way, and pushed occasionally in one direction or another by opposing political forces. The result may be seen as an archetypal case of what the Law Commission is for. Every one of the functions enumerated in our Act will be needed: systematic reform, codification, elimination of anomalies, repeal of the obsolete, reduction of numbers of statutes, and general simplification and modernisation.

However, the task cannot be carried out by the Law Commission alone. There are also important policy decisions to be made, both in tidying up the law and deciding on possible changes, which require the attention of Ministers, following public consultation, and ultimately Parliament. In this kind of case, there are obvious disadvantages in the traditional model, whereby the law reform project is handed over to the Law Commission, with very little Departmental input until completion. Unless the policy has been agreed before the project starts, much work (including scarce drafting resources) may be wasted, and the overall timescale may be unnecessarily prolonged. A better model in this kind of case may be a combination of forces working alongside each other. The Department, working as here with an expert group of advisers, takes the lead in identifying the subjects for law reform project and the main policy options. While their work continues on refining and consulting upon those options, the Law Commission can begin the task of sorting out the existing law, and carrying out its own consultation in parallel. The overall programme can also be planned with an eye to the legislative programme.

For these reasons, the title of this paper was deliberately ambiguous. I wanted to propose a possible model for reform of the law of compulsory purchase. However, I also expected there to be lessons which could be drawn for law reform more generally. The Government has stated its intention "to keep the law up-to-date, relevant and useable".[89] I have attempted in this paper to show, with reference to one area of the law, why that aim is so important, and how practically it may be achieved.

[85] Para. 108.
[86] See above.
[87] Review para. 103.
[88] Possibly in the Order itself, so that it can be subject to objection, and the issue resolved at that stage by the confirming Minister.
[89] Modernising Justice (LCD, December, 1998).