



The Law Commission and The Scottish Law Commission

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LEVEL CROSSINGS

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and Secretary of State for Justice
by Command of Her Majesty*

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**THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION**

LEVEL CROSSINGS

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PART 3

CLOSURE OF LEVEL CROSSINGS



Footbridge at Fishbourne, East Sussex, built to provide a step-free replacement for the public footpath user-worked level crossing. The local authority and Network Rail are co-operating to seek permanent closure of the level crossing. Credit: Network Rail.

INTRODUCTION

- 3.1 In this Part we recommend a new system to make it easier to close level crossings where appropriate and to make any necessary provision for their replacement. The new system will be tailored specifically to level crossings and will provide a streamlined and speedier process than that currently in place.
- 3.2 Level crossings pose a risk and an inconvenience to both road and rail users. Bridges or underpasses may replace some level crossings without causing any undue inconvenience; other crossings are not needed at all. Many level crossings, whether public or private, provide important access routes for the users, and replacement by an alternative route across the railway would not be adequate. A wheelchair user or horse rider, for example, could not use a steep bridge instead of a level crossing. We recognise the importance of balancing the needs of all users in making appropriate decisions about whether to close individual level crossings.
- 3.3 Under the new system, a closure order will extinguish the public or private right of way over a level crossing. A closure order will also be able to provide for the diversion of a right of way, and the replacement of a crossing with a bridge or underpass, including any necessary planning permission and compulsory acquisition of land.
- 3.4 In developing the new system we have had to take account of the fact that the closure of level crossings involves both legal and physical changes. The legal changes would include the extinguishment of rights of way over a level crossing and might include the creation of a new right of way in the case of diversion of the crossing or the building of a bridge or underpass. The physical changes might include the removal of barriers and signs, and in the case of replacement, the building of a bridge or underpass or the diversion of the highway or road.

DO WE NEED A NEW SYSTEM FOR CLOSING LEVEL CROSSINGS?

3.5 In the consultation paper, we set out the existing methods by which level crossings may be closed.¹ These are as follows.

- (1) An order under the Transport and Works Act 1992 or the Transport and Works (Scotland) Act 2007 may be made in relation to, or ancillary to the construction or operation of a railway, including the extinguishment of a public or private right of way over a level crossing.
- (2) An order under section 118A of the Highways Act 1980 may be made to stop up, or under section 119A to divert, footpaths and bridleways which cross railways, in the interests of safety. These powers only apply in England and Wales.
- (3) An order may be made by a magistrates' court, under section 116 of the Highways Act 1980, to stop up a highway (including a footpath or bridleway) if the highway is unnecessary or can be diverted so as to make it more convenient to the public. A request may be made by a developer or other person for the highway authority to apply for an order under section 116. This power only applies in England and Wales.
- (4) In Scotland, there are no equivalent powers to those in sections 118A and 119A of the Highways Act 1980 to close or divert level crossings. There is a general power in section 68 of the Roads (Scotland) Act 1984 for roads authorities to stop up a "road", where it has become dangerous to the public or is unnecessary, and there is a suitable alternative road or none is necessary. This power does not apply to public paths created by agreement under section 30 of the Countryside (Scotland) Act 1967.²
- (5) Under section 90(1) of the Title Conditions (Scotland) Act 2003 the Lands Tribunal for Scotland has the power to vary or discharge title conditions. Servitudes are title conditions.³ Therefore, where a servitude of way crosses the railway the Lands Tribunal for Scotland has the power to discharge the servitude in order to close the crossing. But in practice private rights of way across railways are rarely constituted as servitudes. Rather, they are created as statutory rights under the Railways Clauses Consolidation (Scotland) Act 1845, or other legislation.⁴
- (6) A voluntary discharge agreement in Scotland or deed of release in England and Wales may be made between the railway operator and the beneficiary of a private right of way to extinguish the right of way across

¹ Joint Consultation Paper, Part 6.

² Whilst s 30 of the 1967 Act has now been repealed for most purposes it remains subject to a savings provision provided for in the Land Reform (Scotland) Act 2003, sch 2, para 7. As a result of the savings provision certain paths continue to be governed by the 1967 Act and are still known as "public paths".

³ Title Conditions (Scotland) Act 2003, s 122(1).

⁴ For a discussion of statutory rights of way in Scotland, see the section commencing at para 12.14 in the Joint Consultation Paper.

the railway.⁵ Where the beneficiary of a private right of way is not willing to enter into a discharge agreement or deed of release, the only way of closing such a crossing is by using the procedure under the Transport and Works Acts. Network Rail has, however, closed many crossings by way of discharge agreement and deed of release.

- (7) The Secretary of State may require a railway operator to create a bridge or underpass to replace a public level crossing where appropriate in the interests of safety. This power is contained in section 7 of the Railways Clauses Act 1863,⁶ but the provision only applies where it has been specifically incorporated into a special Act for the construction of a railway.

- 3.6 Our provisional view in the consultation paper was that there is a gap in the current statutory powers to close level crossings.⁷ Although it is possible to close an individual level crossing under the Transport and Works Acts, these procedures were designed for larger transport projects of regional or national significance. The procedures are too cumbersome, expensive and time-consuming for use to close an individual crossing on local convenience or safety grounds.⁸ In practice it is difficult for a railway operator to close a public vehicular level crossing without the highway or roads authority's agreement. Similarly it is difficult for the railway operator to close a private level crossing without the agreement of the beneficiary of the right of way concerned.

Consultation

- 3.7 Consultation responses reflected a tension between the railway industry's interest in closing crossings where possible, and others interested in facilitating public and private access rights.⁹ Most of those who commented on the proposal to create a new system for closing level crossings supported it. In addition to the Office of Rail Regulation and Network Rail, highway authorities, the Highways Agency and some access groups including Scotways and Ramblers, all supported the creation of a new closure procedure.
- 3.8 In its policy document, *Our approach to managing level crossing safety*, Network Rail says that the most effective way to reduce level crossing risk is to close crossings. While purely private level crossings may be closed by agreement, Network Rail expresses the view that the closure of public level crossings is "notoriously more difficult" under the current law. Closure also poses problems for Network Rail in economic terms. Network Rail explains:

Network Rail is subject to the requirements of the Health and Safety at Work Act etc 1974 to reduce risk 'so far as is reasonably

⁵ In Scotland, the equivalent to "beneficiary" of a right of way is the "holder".

⁶ The power in s 7 applies to Scotland as well as to England and Wales.

⁷ Joint Consultation Paper, Part 6 and paras 7.28 to 7.30.

⁸ The best practice under the Transport and Works Act 1992 is set out in guidance published in 2006: Department for Transport, *A Guide to TWA Procedures* (2006), <http://assets.dft.gov.uk/publications/twa-procedures-guide/procedures-guide.pdf> (last visited 1 September 2013).

⁹ Consultation Analysis, paras 8.161 to 8.182.

practicable'. In simple terms this means that the cost, time and effort required in providing a specific risk reduction measure needs to be commensurate with the safety benefit that will be obtained as a result of its implementation. Network Rail's health and safety management system (part of its safety authorisation issued by the Office of Rail Regulation) sets out the company's approach towards prioritisation of safety expenditure.

In the majority of cases the risk associated with individual level crossing use is insufficient to make a clear case for its closure and/or diversion. It is therefore necessary to understand any other benefits that can be factored in, for example reduced operational or maintenance costs, avoidance of forthcoming renewal costs, improved operating performance or funding obtained from other parties involved such as the Highways Agency, local councils or private housing developers. Management judgement also forms a key part of the decision process when qualitatively the risk warrants something to be done but the case for closure and/or diversion is not necessarily clear-cut.¹⁰

- 3.9 Several access groups thought that a new procedure was unnecessary as the existing procedures under the Transport and Works Acts and, in England and Wales, the Highways Act 1980 were adequate. The National Farmers' Union was against the proposal, particularly in relation to private level crossings. They expressed the view that closure of such crossings on safety grounds was generally a result of increased volume or speed of rail traffic. The Department for Transport, which is responsible for making decisions under the Transport and Works Act 1992, did not agree that the 1992 Act procedure was too expensive or time-consuming, but nonetheless supported an alternative closure process appropriate for individual level crossings.
- 3.10 Some consultees considered that there was a risk that the availability of a closure order might lead railway operators to seek to close level crossings without considering alternative solutions. One County Council suggested that before any closure process was commenced, a road-rail partnership group should be invited to consider whether remedial works might address the problem in a cost-effective way.
- 3.11 Several consultees, including the Country Land and Business Association, a Local Access Forum and the British Horse Society, proposed that the provision of an adequate alternative route across the railway should be a prerequisite for any closure order to be approved. The alternative route should be safe and should take into account both the character of the route and any additional distance to be travelled by the level crossing user.

Discussion

- 3.12 Our aim is to create a more streamlined procedure than the existing procedures under the Transport and Works Acts. It will be specifically designed for closing individual level crossings. It is intended to be less cumbersome, reasonably

¹⁰ Network Rail, *Managing Level Crossing Safety*, <http://www.networkrail.co.uk/level-crossings/types-of-level-crossing/> (last visited 1 September 2013).

quick, and include predictable time limits. The procedure should also ensure a fair hearing, provide for all relevant factors to be properly taken into account, and include consideration of alternatives to closure. We want the new procedure to be able to provide all the powers required in connection with closure of a level crossing, including the extinguishment of rights and, where necessary, planning permission, the acquisition of land and compensation.

- 3.13 We considered whether the Transport and Works Acts could be amended to provide for a new closure procedure specifically for level crossings, or whether a suitable scheme could be created in subordinate legislation under the existing Transport and Works Acts. There are several differences between the procedure set out in the Transport and Works Acts and the procedure we want to create. When considering the closure of an individual level crossing, it should not generally be necessary to provide the same level of process as for a project of regional or national significance. For example, there is no need to hold a public inquiry to consider the closure of an individual level crossing.
- 3.14 In addition, we want to create a system for the compulsory extinguishment of rights of way, together with a suitable system of compensation. We also want to provide a bespoke system for compulsory purchase, which meets the requirements of article 1 of Protocol 1 to the European Convention on Human Rights, in terms of justifiable interference with property rights. At the same time, we want the compulsory purchase system to be suitable for the size and types of projects and land interests involved in the replacement of level crossings.
- 3.15 We want to create a procedure that is shorter and more predictable, in terms of time, than procedures under the Transport and Works Acts.
- 3.16 We want to provide a comprehensive scheme, including all the relevant procedures in one Act, so far as possible. For simplicity and efficiency, we want to provide as much of the closure scheme as possible on the face of the legislation. We intend that procedural rules should be proportionate to the small size and nature of the projects concerned.
- 3.17 The new procedure is not intended to be appropriate for the more complex cases or those where the closure of a level crossing is part of a larger development. Those should continue to be dealt with under the Transport and Works Acts. It is, however, intended to deal with cases where the closure proposal is controversial.
- 3.18 We considered whether any of the existing powers to close level crossings will become obsolete as a result of the new procedure. Most, however, are contained in legislation which applies more widely, such as the power to stop up a highway under section 116 of the Highways Act 1980 in England and Wales.¹¹ As mentioned above, the only provisions specifically designed for level crossing closures are sections 118A and 119A of the Highways Act 1980. As this procedure is quick and efficient and limited to closure on the grounds of safety, we do not think it appropriate to prevent local authorities from using it in the limited circumstances where it applies. We do not recommend the repeal or exclusion of any of the existing procedures by which level crossings can be closed.

¹¹ The equivalent provision for Scotland is the Roads (Scotland) Act 1984, s 68.

Recommendation

- 3.19 **We recommend that there should be a new statutory system for closing public and private level crossings, with or without replacement, by means of level crossing closure orders.**

- 3.20 This recommendation is given effect by Part 2 of and the Schedule to the draft Level Crossings Bill.

EUROPEAN CONVENTION ON HUMAN RIGHTS

- 3.21 The Human Rights Act 1998 makes it unlawful for a public authority, including a court or tribunal, to act in a way which is incompatible with rights under the European Convention on Human Rights.¹² The new closure system will engage several articles of the Convention.

- 3.22 First, landowners' peaceful enjoyment of their land is protected under article 1, Protocol 1 to the European Convention on Human Rights, although the public or general interest may justify interference with rights over land if a compelling case is demonstrated.

- 3.23 Second, article 8 of the Convention requires respect for a person's private and family life and that person's home. The right to respect for family life is not an absolute right, but does have to be taken into account by public authorities when they decide whether and how to take a particular action which will cut across this right. The national authority making any closure order will have to give careful consideration to the extent to which the public interest is served by compulsory extinguishment or acquisition of rights affecting a person's home as part of the closure order.

- 3.24 The Convention requires a fair balance to be struck between the public interest and private rights and also between the private rights of one individual and another. Where a Convention right is a qualified one, the aim of any interference must be in accordance with the qualification. Interference with the peaceful enjoyment of possessions must, for example, be in the public interest; interference with the right to respect for privacy and family life must be necessary in a democratic society.¹³ The interference must also be proportionate. In relation to article 1 of Protocol 1, it is necessary to establish that there is a compelling case in the public interest in order to authorise any interference or acquisition. Provided that this threshold is met, the interference does not necessarily have to be the least intrusive option available.¹⁴

- 3.25 States are given a margin of appreciation in applying Convention rights. The

¹² Human Rights Act 1998, s 6(2) qualifies this obligation where a statute requires the public authority to act in a way which is incompatible with a Convention right and cannot be read in any other way.

¹³ On the meaning of "necessary in a democratic society", see, for example, *S v The United Kingdom* (2009) 48 EHRR 50 (App Nos 30562/04 and 30566/04) at [101], where the retention of DNA samples by the police was found to be in breach of article 8 as it was not necessary.

¹⁴ *R (on the application of Clays Lane Housing Co-operative) v The Housing Corporation* [2004] EWCA Civ 1658, [2005] 1 WLR 2229; *R (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Energy and Climate Change* [2012] EWHC 46 (Admin), [2012] 2 All ER 849, at [144].

breadth of the margin depends on the nature and importance to the individual of the right in issue. When considering interference with peaceful enjoyment of possessions in the public interest, the European Court of Human Rights will only interfere with the state's interpretation of what is in the public interest if it is manifestly without reasonable foundation.¹⁵

- 3.26 Third, the scheme must contain adequate procedural safeguards to ensure a fair hearing and so comply with article 6 of the Convention, where engaged, and the rules of natural justice. The European Court of Human Rights has held that article 6(1) will be satisfied where administrative authorities make decisions which determine civil rights and obligations, provided that there is then access to an independent and impartial tribunal which exercises full jurisdiction. A planning inspector, subject to an appeal on a point of law to the High Court met this test.¹⁶
- 3.27 In developing the new closure procedure, we have borne in mind both the need to comply with the requirements of the European Convention on Human Rights and the importance of creating as streamlined a procedure as possible.



Lydney Road level crossing, Lydney, Gloucestershire, on the main line between Gloucester and Newport. A full-barrier level crossing controlled by a crossing keeper at the signal box shown in the picture. Credit: Rail Accident Investigation Branch.

¹⁵ *James v United Kingdom* (A/98) (1986) 8 EHRR 123 and *Lithgow v United Kingdom* (A/102) (1986) 8 EHRR 329, applied by the Court of Appeal in, for example, *R. (on the application of SRM Global Master Fund LP) v Treasury Commissioner and others* [2009] EWCA Civ 788; [2009] UKHRR 1219.

¹⁶ *Bryan v United Kingdom* (1996) 21 EHRR 342, considered by the House of Lords in the *R (Alconbury) v Secretary of State for the Environment* [2001] UKHL 23, [2001] 2 All E R 929.

CLOSURE PROCEDURE

- 3.28 In this section we describe the new closure procedure in more detail. In the consultation paper, we proposed the new closure system in general terms, and made proposals about how the procedure should work, including the nature of the decision-making authority and time limits.¹⁷
- 3.29 The new closure procedure should not tip the balance of convenience unreasonably in favour of rail interests at the expense of other level crossing users, nor should it compromise the safety of rail or non-rail users of level crossings.

Decision-making authority

- 3.30 In the consultation paper we proposed that under the new system for closure of level crossings, the Secretary of State, the Scottish Ministers and Welsh Ministers should have the power to make level crossing closure orders.
- 3.31 We also proposed that the function of making level crossing closure orders in relation to level crossings in Scotland should be transferred to the Scottish Ministers by way of executive devolution. As we explained in Part 1 of this report, this can be effected either by means of a transfer of functions order under section 63 of the Scotland Act 1998 or by including the transfer in the Bill. We have decided to include the transfer in the Bill. Similarly for Wales, the power to determine closure orders for level crossings in Wales will be transferred to Welsh Ministers in the Bill.
- 3.32 We also considered whether the local highway or roads authority should determine applications to stop up highways crossing the railway with a right of appeal to the appropriate national authority.¹⁸ On reflection it became clear that this would not work in practice. The stopping up of the highway or road will be an integral part of the closure application. The overall decision to close the level crossing will have to be considered as a whole, including any proposals for replacement, planning permission, compulsory purchase and other associated works. It will not be feasible for the local authority to determine the stopping up application without reference to the rest of the proposal. We have decided that it will be sufficient for the local highway or roads authority to be a statutory consultee, notified of any closure application, and for any representations to be given due weight by the appropriate national authority.
- 3.33 Consultees supported the proposal that decisions relating to level crossing closure should be taken at national level.¹⁹ We therefore adhere to the view that the Secretary of State in relation to England, the Scottish Ministers in relation to Scotland and the Welsh Ministers as regards Wales should have the power to determine applications for level crossing closure orders. We refer in the report and draft Bill to the decision-maker as the “appropriate national authority”.

¹⁷ Joint Consultation Paper, paras 8.58 to 8.119.

¹⁸ Joint Consultation Paper, paras 8.81 and 8.82.

¹⁹ Consultation Analysis, paras 8.239 to 8.250.

Cross-border applications

- 3.34 We considered who should be responsible for a cross-border application where part of a closure project falls on one side of the English-Welsh or Scottish-English border and part on the other side. We understand that there are no level crossings which straddle the English-Scottish border, nor any within a mile of the border on the mainline network. However, it is still possible that a project could require the diversion of a road, or other works across the border. We concluded that it would be best to require separate applications to be made on each side of the border in these rare circumstances. A closure order will have to be made in Scotland for the parts of a project which lie in Scotland. A separate closure order will have to be made in England for the parts of a project that lie in England. The appropriate national authorities will have the power to co-operate with each other.
- 3.35 There are, however, some 20 level crossings within one kilometre of the English-Welsh border, most of them on the border between Herefordshire and Wales, where the track runs along the boundary for some distance. There is, therefore, a possibility that a closure project could have an impact in both England and Wales.
- 3.36 We considered whether to follow the approach of the Transport and Works Act 1992. Functions under the Transport and Works Act 1992 have largely been transferred to Welsh Ministers, but orders which would have effect in both Wales and England are exempted.²⁰ Under this system, the Bill would provide that the appropriate national authority from one of the countries would determine the application, including any provision for works in the other jurisdiction. Where a Transport and Works order would have effect in both England and Wales, the Secretary of State would make the order, subject to the agreement of Welsh Ministers. The Level Crossings Bill could make similar provision for closure orders which would have effect in both England and Wales. Alternatively, it could provide for Welsh Ministers to determine cross-border applications.
- 3.37 The advantage of designating a single decision-maker is simplicity. The decision-maker can use the same procedure as that for deciding an application for an order that has effect solely within their own country. There would be less potential for logistical difficulties caused by working with another authority, and the final decision would not have to be reached through a potentially lengthy process of negotiation and agreement between joint decision-makers.
- 3.38 The disadvantage of designating a single decision-maker for cross-border projects is that a decision-maker from one country would be making decisions concerning changes that would take place in the other country. As details of application procedure are left to each of the appropriate national authorities to provide by means of rules, decisions about works in Wales could be decided under English procedural rules. It might be felt that the decision-maker lacked accountability to those on the other side of the border who were affected by the decision.
- 3.39 An alternative procedural approach would be to designate the appropriate

²⁰ National Assembly for Wales (Transfer of Functions) Order 1999, sch 1, SI 1999 No 672. The Government of Wales Act 2006, sch 11, para 30 transferred the functions of the Welsh Assembly to Welsh Ministers.

national authorities for each jurisdiction as joint decision-makers in cross-border situations. This would avoid the constitutional problems outlined above and reflect the fact that the situation affects both jurisdictions. A joint decision would require a high level of co-ordination and co-operation between the two different decision-makers. Co-operation would be required not simply as to the final decision on whether to grant the order and the powers it should contain, but also over which procedure should be used, given that each decision-maker will have developed their own procedural rules.

- 3.40 A third possibility would be to follow the approach taken by the Transport and Works Act 1992 in relation to Scotland and make no provision for cross-border applications: two closure orders would be required or primary legislation.
- 3.41 As it stands, the draft Level Crossings Bill makes no special provision for the possibility, albeit rare, of a cross-border application. The appropriate national authority is determined by the location of the level crossing to be closed. The Department for Transport, in consultation with the Welsh Government, may wish to consider whether to include provision for joint decision-making. This could include the creation of powers to make joint procedural rules.

Recommendations

- 3.42 **We recommend that the appropriate national authority should have the power to determine applications for level crossing closure orders for both private and public level crossings.**
- 3.43 **We recommend that the “appropriate national authority” should be the Secretary of State in relation to level crossings in England, the Scottish Ministers in relation to crossings in Scotland and the Welsh Ministers in relation to crossings in Wales.**
- 3.44 These recommendations are given effect by clauses 11 and 31 of the draft Level Crossings Bill.
- 3.45 **We recommend that the Secretary of State, in consultation with the Welsh Ministers, should consider whether to make provision for joint decision-making where a level crossing closure order involves changes on both sides of the English-Welsh border.**

Applications for closure orders

- 3.46 The railway operator, local highway or local roads authority for the area in which a level crossing sits would be entitled to apply to the appropriate national authority for a closure order.
- 3.47 In the consultation paper, we included the Office of Rail Regulation in our proposed list of applicants. The Office of Rail Regulation pointed out that it is well placed as safety and economic regulator to assist with the mediation of disputes over closure and should not, therefore, be entitled to apply for a closure order.²¹
- 3.48 If an individual or group wants a level crossing to be closed, the appropriate

²¹ Joint Consultation Paper, para 8.63. Consultation Analysis, para 8.178.

course will be to make representations to the local highway or local roads authority to apply for a closure order.

3.49 The applicant will submit an application to the appropriate national authority. In addition to seeking the extinguishment of the right of way over the crossing, the application might also seek:

- (1) the extinguishment of an easement or servitude;
- (2) the extinguishment of a statutory right of way or a public right of way;
- (3) compulsory purchase of land in connection with replacement;
- (4) deemed planning permission to build a bridge or underpass;
- (5) the diversion of a highway or road; and
- (6) the creation of a new right of way across the railway.

3.50 The application might also detail the works to be carried out in connection with the closure or replacement of the crossing and, the apportionment of costs and other matters.

3.51 The detailed form and contents of applications, the procedures for submitting them and provision about notice of applications, should be dealt with by procedural rules made by the appropriate national authority.

When should the level crossings closure procedure be used?

3.52 Although the closure procedure is designed to close individual level crossings, the draft Bill does not provide any express restriction on the scale of any closure project. There may be circumstances in which the closure procedure could be used to close several level crossings, where, for example, a series of similar private level crossings along a single line could be closed without replacement. We wish to leave that to the national authorities' discretion. The national authorities may issue guidance on when to use the new closure procedure.

3.53 As soon as reasonably practicable after receiving an application for a closure order, the appropriate national authority will have to decide whether the application should be dealt with under the new closure procedure or under other procedures, such as the Transport and Works Acts, or, in England and Wales the Highways Act 1980.

3.54 The appropriate national authority must consider whether the proposals set out in the application are of national significance or in Scotland will constitute a national development.²² There is little guidance on what constitutes a project of national significance in England and Wales. The Encyclopaedia of Planning Law and Practice notes the lack of statutory guidance and says that such a project would:

be expected to affect a significant part of the country rather than a small part of it. It would therefore have to affect physically a

²² "National development" is defined in the Transport and Works (Scotland) Act 2007 by reference to the Town and Country Planning (Scotland) Act 1997.

substantial area either directly or because of a product, such as a major tidal energy barrage. It would probably be costly for a project of its type and would have major land use and environmental effects ... Other more local projects might also be referred to Parliament if, for example, the local environmental impact raised issues of national importance.²³

- 3.55 If the appropriate national authority considers that the proposals are of national significance or constitute a national development, then the application should be dealt with under the appropriate Transport and Works Act, rather than the level crossings closure procedure.²⁴ Otherwise, the appropriate national authority must consider whether, in any event, the application should be dealt with under the appropriate Transport and Works Act.
- 3.56 In deciding on the appropriate procedure to be used, the national authority must have regard to all relevant matters, including:
- (1) whether the proposals may need to be referred to a public local inquiry;²⁵ and
 - (2) whether any powers available to the national authority under the Transport and Works legislation, which are not available under the new closure procedure, might need to be used.
- 3.57 Where the appropriate national authority decides that an application should not be dealt with under the closure procedure, the application will be deemed to have been withdrawn.
- 3.58 In practice, we expect an applicant to discuss with the office of the appropriate national authority which procedure will be the most appropriate to follow so as to avoid filing an application under the wrong procedure.
- 3.59 We have not included a specific time limit on the face of the Bill for this initial decision to be made. Procedural rules might impose a period with an application continuing under the level crossings closure procedure if no decision is made to exclude it within that period.
- 3.60 If the application is deemed to have been withdrawn under this procedure, it will be open to the applicant to make a fresh application under the appropriate Transport and Works Act. We have not recommended the creation of any system for transferring applications from one procedure to the other. The decision-maker will be the same under both procedures. This should not have any effect on any subsequent application under either of the Transport and Works Acts, save for the decision-maker having imputed knowledge of the earlier application.

²³ Official Report, Standing Committee A, Col. 196: January 14, 1992, per Mr P McLoughlin, MP, Minister for Shipping, as quoted in *Encyclopedia of Planning Law and Practice*, vol 3, para 2-3417. The Planning Act 2008 defines a nationally significant infrastructure project for the purposes of that Act in s 14 as including a project consisting of highway-related development or the construction or alteration of a railway. We do not think that the closure of a level crossing would, in itself, come with this definition.

²⁴ Draft Level Crossings Bill, sch, para 5.

²⁵ A public local inquiry would not be available under the level crossings closure procedure.

- 3.61 We have not provided anything in the draft Bill to prevent subsequent applications from being made, nor do we wish to create a specific procedure for rejecting an application that is re-submitted. The appropriate national authority could, of course, reject an application on the same grounds again, either declining to consider it on the grounds that this process is not appropriate or on substantive grounds.
- 3.62 Although we have not created a statutory duty to give reasons, we expect the decision-maker to do so. Public law often requires the decision-maker to give reasons for the initial decision on the procedure to be used, notwithstanding the absence of a specific duty to do so in the relevant legislation, and we expect the same to apply here.²⁶ Such a decision will be susceptible to judicial review.
- 3.63 This initial decision will be made on the basis of limited information. At the end of the application procedure, taking into account all the evidence that has become available, the appropriate national authority may reach a substantive decision to reject the application on the grounds that the level crossing should not be closed under this procedure. For example, the application might turn out to be more complex, or the national authority might take the view that a public local inquiry is appropriate.

Recommendation

- 3.64 **We recommend that the appropriate national authority should be required to decide as soon as reasonably practicable whether the application for a closure order should be deemed to be withdrawn on the grounds that:**
- (1) the proposals are of national significance or in Scotland would constitute a national development, and the application should be made under the Transport and Works legislation; or**
 - (2) the proposals do not fall within paragraph (1) but the application should in any event be dealt with under the Transport and Works legislation.**
- 3.65 This recommendation is given effect by paragraph 5 of the Schedule to the draft Level Crossings Bill.

Exclusion from the closure procedure

Land owned in common and land owned by the National Trust or the National Trust for Scotland

- 3.66 The Transport and Works Act 1992 requires special parliamentary procedure to be followed if an order under the Act authorises compulsory purchase of National Trust land or common land which would trigger that procedure if authorised under the Acquisition of Land Act 1981.²⁷ We propose to follow this policy.²⁸

²⁶ For a recent discussion of the extent of a general duty to give reasons in public law, see Mark Elliott, "Has the common law duty to give reasons come of age yet?" [2011] *Public Law* 56.

²⁷ Transport and Works Act 1992, s 12.

- 3.67 In Scotland, there is no equivalent provision in the Transport and Works (Scotland) Act 2007. However there are equivalent requirements for additional parliamentary scrutiny of compulsory purchase of such land.²⁹ We therefore intend to exclude from the new closure order procedure any proposals that involve common or open spaces in Scotland and land held inalienably by the National Trust for Scotland.³⁰

Local authority land, statutory undertakers and Crown land

- 3.68 In England and Wales various other compulsory acquisitions are subject to special parliamentary procedure, including land belonging to a local authority or statutory undertaker who maintains its objection to the purchase.³¹ In Scotland compulsory purchase of rights over land owned by local authorities or statutory undertakers requires special parliamentary procedure if the owner of the land maintains its objection to the acquisition.³²
- 3.69 The level crossing closure procedure does not automatically exclude cases involving local authority land. The main parties likely to be concerned with the closure of a public level crossing will be the railway operator and the highway authority, which is part of the local authority. In circumstances where the local authority, exercising its highway authority powers, supports the scheme, there may be no need to apply for compulsory purchase under this procedure. However, if the local authority is opposed, the appropriate national authority should have the power to decide what is in the public interest.
- 3.70 Like the Transport and Works Act 1992³³ and the Transport and Works (Scotland) Act 2007³⁴ the new closure procedure contains a consultation and hearing process. This will ensure that local authorities have adequate opportunity to make representations and to voice any opposition to any project. We expect it will only be necessary to purchase land compulsorily under the new procedure where a replacement bridge or underpass is to be built. The area of land required is therefore likely to be small, being land sufficient for the foot of a bridge or start of an underpass on either side of the railway.
- 3.71 We think it unlikely that statutory undertakers' land will be subject to compulsory purchase, but have not excluded such land from our procedure. We have also

²⁸ Draft Level Crossings Bill, cl 12(3)(a).

²⁹ See Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, sch 1, paras 9 and 11.

³⁰ Draft Level Crossings Bill, cl 12(3)(b).

³¹ Acquisition of Land Act 1981, ss 16 and 17 and sch 3, paras 3 and 4. Where a statutory undertaker maintains its objection, it will only be possible to acquire the land compulsorily if the Secretary of State certifies that the acquisition will not detrimentally affect the undertaking or that the undertaker has or can acquire land which will make good any such detriment. Certain public authorities listed in the 1981 Act are exempted.

³² Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, sch 1, para 9. Similar provision as is described above for England and Wales is made with regard to statutory undertakers in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, sch 1, para 10.

³³ Transport and Works Act 1992, s 11.

³⁴ Transport and Works (Scotland) Act 2007, s 9.

chosen not to provide for the automatic extinguishment of statutory undertakers' rights over or under land on compulsory purchase.³⁵ In the normal course of events, we expect that the applicant will seek to reach an agreement with a statutory undertaker. If an agreement cannot be reached, express provision will have to be made in the closure order if statutory undertakers' rights are to be extinguished and appropriate compensation provided for the interference with property rights in breach of article 1 of Protocol 1 to the European Convention on Human Rights. The draft Bill makes clear that a closure order can make more generous provision for compensation than that required by the Bill.³⁶

3.72 We are not automatically excluding local authority or statutory undertakers' land from the new procedure. Closure orders may include such land.

3.73 We are also not providing for the automatic exclusion of certain types of Crown land where the appropriate permission is given.

Recommendations

3.74 **We recommend that land owned in common and land owned by the National Trust or the National Trust for Scotland should be excluded from the level crossings closure procedure.**

3.75 **We recommend that local authority land, Crown land and statutory undertakers' land and rights over or under land should not be automatically excluded from the level crossings closure procedure.**

3.76 These recommendations are given effect by clauses 12(3) and 30 of the draft Level Crossings Bill.

Notice of application

3.77 The applicant for a closure order will be required to display a notice at the site of the level crossing and any proposed replacement. The applicant will also be required to publish notice of the application in a local publication and on the internet to enable national organisations with an interest in level crossings to engage in consultation. This might include national disability organisations or access rights groups.

3.78 The applicant will also be required to give notice to the persons listed below. As a minimum, notice must include the name and address of the applicant, a summary of the proposed closure order and details of how to obtain further information about the application and procedure to be followed.

3.79 Notice must be given to:

- (1) any person whom the applicant knows or suspects to be directly affected by the application; (the applicant has to make reasonable enquiry to find out who is a directly affected person, namely an owner, lessee, tenant of

³⁵ The automatic extinguishment of rights on compulsory acquisition is discussed below. We have applied the Town and Country Planning Act 1990, s 236 for England and Wales and the Title Conditions (Scotland) Act 2003, s 106 for Scotland.

³⁶ Draft Level Crossings Bill, cl 12.

whatever tenancy period, or occupier of affected land);

- (2) any other person required to be notified by compulsory purchase legislation: section 12 of the Acquisition of Land Act 1981 or paragraph 3(b) of Schedule 1 to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947;³⁷ this includes persons with easements, servitudes, restrictive covenants, real burdens to be extinguished as well as, in England and Wales, mortgagees;³⁸
- (3) the railway operator, the local highway or local roads authority (whichever is not making the application) and any other highway or roads authority affected; the closure might take place within the area of one local highway or local roads authority, but the proposed replacement might be built in a different local highway or local roads authority area; both should be given notice;
- (4) any person who would be required by the order to pay for any of the works;
- (5) any relevant planning authority; again, there may be more than one;
- (6) the Health and Safety Executive; we have included the Executive as the body responsible for health and safety regulation that is outside the remit of the Office of Rail Regulation;
- (7) the Office of Rail Regulation;
- (8) Scottish Natural Heritage, if access rights established by Part 1 of the Land Reform (Scotland) Act 2003 are exercisable at track level across the railway track at the level crossing; and
- (9) the operator of any tramway that crosses the track at the level crossing, sits adjacent to or shares the level crossing with the railway.

3.80 The draft Bill does not restrict the applicant from giving notice to others in addition to those required to receive notice. Rules may also provide for additional persons to be given notice of a closure application.

Recommendation

3.81 **The applicant should be required to display notices of the closure application, to publish notices and to give notice to affected persons.**

3.82 This recommendation is given effect by paragraph 3 of the Schedule to the draft Bill.

³⁷ Sch 1, para 3(2) of the 1947 Act requires notice to be given to owners, lessees and occupiers (except tenants for a month or any period less than a month) of the land and those with real burdens or servitudes over the land.

³⁸ Servitudes and real burdens are the terms used in Scots law. The equivalent in Scotland to a mortgagee is a heritable creditor.

Consultation on applications for closure orders

- 3.83 The appropriate national authority must carry out consultation before determining a closure application.
- 3.84 We have not recommended a minimum or maximum consultation period.³⁹ The power for the national authority to make procedural rules provides sufficient flexibility for the consultation process to be developed as appropriate. Our intention is that the period should be prescribed in the procedural rules relating to consultation. This would ensure that overall the procedure remains predictable and that the consultation process is appropriate for the scale and nature of the projects concerned. A full public consultation period is an important element in assisting the national authority to reach a decision in the public interest with the fullest information available.
- 3.85 Procedural rules might provide for other matters relating to consultation, such as the process for publicising and giving notice of consultation and the form in which consultation responses should be submitted, as well as matters relating to how consultation responses might be considered.
- 3.86 During the consultation period, any person may submit their views on the proposed closure and the appropriate national authority will have a duty to give due consideration to any representations made before reaching a decision.
- 3.87 As we explained in Part 2 of this report, public law imposes the following requirements on consultation:
- (1) consultation must be undertaken when the proposals are still in a formative stage;
 - (2) adequate information must be given to enable consultees properly to respond;
 - (3) adequate time must be provided in which to respond; and
 - (4) the decision-maker must give conscientious consideration to consultation responses.⁴⁰
- 3.88 The consultation provisions in the draft Level Crossings Bill are intended to meet these requirements.

Recommendation

- 3.89 **We recommend that the appropriate national authority should be required to carry out public consultation before determining an application for a closure order.**

³⁹ The Cabinet Office provides guidance on consultation, which the Department for Transport will take into account when deciding on an appropriate consultation period. The current guidance is Cabinet Office, *Consultation Principles* (2012), and may be found at <https://www.gov.uk/government/publications/consultation-principles-guidance> (last visited 1 September 2013).

⁴⁰ These requirements were proposed by Steven Sedley QC (as he then was) in *R v Brent London Borough Council, ex parte Gunning* (1986) 84 LGR 168 and adopted by Hodgson J at 189.

- 3.90 This recommendation is given effect by paragraph 6 of the Schedule to the draft Bill.

Hearings relating to applications for closure orders

- 3.91 In the consultation paper, we proposed that after the expiry of the consultation period the decision-maker should usually reach a decision on the basis of the facts and circumstances set out in the relevant papers. We proposed that where there is disagreement the decision-maker should usually invite representations to be made in writing. The decision-maker could, however, exceptionally decide to convene a hearing before a person appointed by the decision-maker.⁴¹

Consultation

- 3.92 Network Rail and the Heritage Railway Association supported the proposal that a hearing should only be held in exceptional circumstances. Many consultees opposed the limitation on oral hearings. Local access groups, the Country Land and Business Association, Sills and Betteridge Solicitors and others expressed the view that fairness required an oral hearing to be available on the request of those with an interest in a level crossing, or statutory consultees. As there would often be considerable local interest in the closure of a level crossing, where a highway or road was to be stopped up, a public inquiry should be available. Some went further and suggested that a public inquiry should take place unless all statutory consultees agreed that the matter be dealt with by way of written representation.
- 3.93 The Department for Transport and Department for Communities and Local Government expressed the view that it should, in general, be possible to deal with closure applications by way of written representations, but that the procedure had to comply with article 6 of, and article 1 of protocol 1 to the European Convention on Human Rights which might require a hearing in some circumstances, for example where the compulsory acquisition of land was proposed.
- 3.94 The Department for Transport made three other points. First, in some cases, the nature and extent of objections can make an oral hearing the most efficient method of considering all relevant matters. Secondly, the current procedures under the Highways Act 1980, in England and Wales, for stopping up or diverting a highway provided for an automatic oral hearing and our proposals were inconsistent with this. Lastly, it would not be appropriate to reject an application for a closure order part-way through the procedure on the grounds that it would be better determined under the Transport and Works Act 1992 procedure. This could lead to delay and unnecessary cost implications for the applicant. This could, however, be mitigated, by careful guidance.
- 3.95 Some consultees suggested adopting the procedure used for changes to public paths. Under that procedure, the planning inspectorate makes an initial decision on how they intend to deal with the case, but an objector may still ask for an oral hearing. The proposal will automatically go to an inquiry if a local authority is

⁴¹ Joint Consultation Paper, paras 8.100 to 8.104.

amongst the objectors.⁴²

Discussion

3.96 The new system is intended to be quicker, cheaper and less onerous than the procedures under the Transport and Works Acts, which have seldom been used solely to close a level crossing.⁴³ The concept of fairness under article 6 of the European Convention on Human Rights does not require there to be an oral hearing, provided there is sufficient opportunity to make written representations.⁴⁴ As discussed above, an administrative decision-making process may satisfy the requirements of article 6 so long as there is then access to an independent and impartial tribunal which exercises full jurisdiction.⁴⁵

3.97 We have concluded that the closure procedure should not provide for there to be any public local inquiries. This is an important distinction between the closure procedure and the Transport and Works Acts procedures. There are, however, circumstances where an oral hearing might be appropriate. We have decided that the appropriate national authority should be given the power to appoint a person to hear oral representations following consultation. We think these circumstances will be exceptional, but we do not think it appropriate to restrict the appropriate national authority's power to convene a hearing to exceptional circumstances. We would expect the power to be exercised sparingly. However, the authority would be *required* to appoint a person to hear oral representations where any of the following request the right to be heard:

- (1) a directly affected person;
- (2) any person whose land is subject to a proposed compulsory purchase order;⁴⁶
- (3) whichever of the railway, local highway or local roads authority for the level crossing concerned is not the applicant;
- (4) the highway or roads authority for the area where the proposed replacement crossing would be located;
- (5) any relevant planning authority if deemed planning permission is required; or
- (6) the Health and Safety Executive, if deemed planning permission is

⁴² Consultees' views on hearings are discussed in the Consultation Analysis, paras 8.172 to 8.174; 8.269 to 8.270 and 8.343 to 8.356.

⁴³ In Scotland the Transport and Works (Scotland) Act 2007 has not to date been used to make an order for the closure of a level crossing.

⁴⁴ *Lloyd v McMahon* [1987] AC 625. This was applied in the Court of Appeal in *Abbey Mine Ltd v The Coal Authority* [2008] EWCA Civ 353, where Laws LJ stressed the fact-specific nature of the inquiry at [26]. Similarly in *Bank Mellat v H M Treasury* [2013] UKSC 39, Lord Sumption cited *Lloyd v McMahon* and stressed the case sensitive nature of natural justice at [35] to [36].

⁴⁵ *R (Alconbury) v Secretary of State for the Environment* [2001] UKHL 23, [2001] 2 All E R 929.

⁴⁶ Those required to be given notice under Acquisition of Land Act 1981, s 12 or Acquisition of Land Act (Authorisation Procedure) (Scotland) Act 1947, sch 1, para 3(b).

required.

- 3.98 Hearings would be held in public. The person appointed by the national authority to hold a hearing would have the power to invite any other persons to make oral representations, including members of the public.⁴⁷
- 3.99 Procedural rules may make provision for combined hearings to consider more than one closure application. This might occur where applications are made to close a series of level crossings along a single railway line.

Costs or expenses of a hearing

- 3.100 Our intention is that in general, the applicant should bear the costs or, in Scotland, the expenses of any hearing. The person appointed to hold a hearing should have the power to direct that the costs or expenses incurred by the appropriate national authority in holding a hearing should in whole or in part be met by the applicant or any person who makes oral representations.
- 3.101 Where the person appointed to hold a hearing makes a direction regarding the costs or expenses, the appropriate national authority may arrange for the costs or expenses to be certified. The portion of the costs or expenses that a person is to bear would be recoverable by the appropriate national authority as a civil debt or, in Scotland, a debt due to the Scottish Ministers.⁴⁸ We would expect guidance to provide examples of those rare occasions when a participant in the process other than the applicant would be ordered to pay some level of costs.

Recommendations

- 3.102 **We recommend that the appropriate national authority should be given the power to appoint a person to convene a hearing.**
- 3.103 **We recommend that the appropriate national authority should be required to convene a hearing at the request of any of the following:**
- (1) a directly affected person;**
 - (2) any person whose land is subject to a proposed compulsory purchase order;**
 - (3) whichever of the railway operator, local highway or local roads authority for the level crossing concerned is not the applicant;**
 - (4) the highway or roads authority for the area where any proposed replacement crossing would be located;**
 - (5) any relevant planning authority if deemed planning permission is required;**
 - (6) the Health and Safety Executive, if deemed planning permission is required.**

⁴⁷ Draft Level Crossings Bill, sch, para 8(2).

⁴⁸ Draft Level Crossings Bill, sch, para 8(7).

- 3.104 **We recommend that a person appointed to hold a hearing be given the power to direct that the applicant or any person who makes oral representations is to bear some or all of the costs, or in Scotland, the expenses incurred by the appropriate national authority in relation to the hearing.**
- 3.105 These recommendations are given effect by paragraphs 7 and 8 of the Schedule to the draft Level Crossings Bill.

Factors to be considered in determining an application

- 3.106 In the consultation paper we invited views on whether a statutory obligation should be imposed on the national authority to take into account a non-exhaustive list of factors, in deciding whether or not it was the public interest to make a closure order. We invited comments on a suggested list of factors to be taken into account. The factors we proposed were:
- (1) safety of users of the crossing (including information as to the incidence of accidents at the level crossing);
 - (2) costs involved in maintenance of the crossing compared with costs involved in closing or closing and replacing the crossing;
 - (3) the effect of closure as opposed to retention (in the case of public level crossings) on the efficiency of the rail and road networks;
 - (4) the effect (in the case of public level crossings) on the integrity of the network of non-vehicular public rights of way;
 - (5) the effect of closure compared to retention of the crossing on the local community;
 - (6) the effect on those holding private rights over the crossing;
 - (7) the usability of the level crossing or its potential alternatives for all level crossing users;
 - (8) the convenience of level crossing users; and
 - (9) the effect on the environment and local amenity.⁴⁹

Consultation

- 3.107 Consultees supported the introduction of a statutory list of criteria to be considered in determining an application for closure. Most consultees were keen that the list be neither hierarchical nor exhaustive. The relevant factors would vary according to the type of crossing and other local considerations. The weight given to a particular factor would also vary and might only become clear following local consultation. Consultation responses supported the inclusion of the factors listed in the consultation paper, but with more guidance on what each factor should include.⁵⁰

⁴⁹ Joint Consultation Paper, para 8.67.

⁵⁰ Consultation Analysis, paras 8.183 to 8.244.

Discussion

- 3.108 The purpose of listing factors is to help the appropriate national authority in considering relevant factors as well as guiding consultees, but without restricting the national authority in terms of the range of considerations or the weight to be given to any particular one. Setting out a list of the most commonly relevant and important criteria is intended to provide both guidance and reassurance to all parties that these matters would be taken into account.
- 3.109 We considered whether to follow the model of the Railways Act 2005, which creates a statutory duty to carry out an assessment of whether criteria set out in guidance are met. This combines the statutory requirement to apply the criteria with the flexibility to amend them where appropriate, without amending primary legislation. We concluded that core factors should be included in the primary legislation so as to require their consideration by the appropriate national authority. The courts have held that there is a greater significance to be given to a factor listed in legislation as a relevant consideration.⁵¹ The House of Lords in *Tesco Stores Ltd v Secretary of State for the Environment* made a distinction between the court's role in determining relevant factors and the decision-maker's discretion as to how to weigh competing factors.

It is for the courts, if the matter is brought before them to decide what it is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense.⁵²

- 3.110 If a statute does not specify the considerations to be taken into account in arriving at a discretionary decision, it will be for the decision-making body to decide what is relevant and this decision will only be subject to review on *Wednesbury* grounds.⁵³
- 3.111 We considered carefully the position of safety. Safety is an important factor in determining a closure application, but should not necessarily override other factors.⁵⁴ The national authority should consider the factors on the statutory list, giving appropriate weight to each, as well as any additional relevant factors. When deciding what weight to give to different factors, the national authority would be bound to give significant weight to safety if safety is affected by the proposal. There may be applications for closure where safety is not the

⁵¹ See, for example, *R v Westminster Housing Benefit Review Board, ex parte Mehanne* [2001] UKHL 11 at [13], [2001] 1 WLR 539.

⁵² *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, Lord Keith of Kinkel at 764 G-H.

⁵³ *R v Secretary of State for Transport, ex parte Richmond-Upon-Thames London Borough Council* [1994] 1 WLR 74, Laws J at 95 C.

⁵⁴ For a discussion on the effect of paramountcy in a statute, see *J v C* [1970] AC 668, Lord MacDermott at 710H. The House of Lords was considering the Guardianship of Infants Act 1925, s 1, which provided that the court "...shall regard the welfare of the infant as the first and paramount consideration."

determining or even a significant factor, perhaps because one option has minimal effect on safety, but a significant effect on other factors.

- 3.112 On reflection, we have concluded that it would not be appropriate for the draft Bill to list all the factors which we consider might be relevant. There is a risk that by listing numerous factors, the list might be treated in practice as exhaustive. The draft Bill includes a list of the main factors, which must be taken into account by the appropriate national authority in making a decision on an application for a closure order. The appropriate national authority would be obliged to take into account any other relevant factors.

Recommendations

- 3.113 **We recommend that the appropriate national authority should be required to take into account the following list of factors in considering an application for a level crossing closure order:**

- (1) The safety of the public.**
- (2) The convenience of the public.**
- (3) The efficiency of the transport network.**
- (4) The cost of maintaining the crossing.**
- (5) The need for the crossing and its significance for the local community.**
- (6) The cost and environmental impact of any works needed to replace the crossing or upgrade other crossings.**

- 3.114 **We recommend that the statutory list of factors should not be in hierarchical order, nor should the list be exhaustive.**

- 3.115 These recommendations are given effect by clause 14 of the draft Level Crossings Bill.

Making the decision on a closure application

- 3.116 After considering the factors, the appropriate national authority will decide whether it is in the public interest to make a closure order containing the proposals specified in the application, with or without modifications.

- 3.117 The national authority may decide on any of the following grounds not to make a closure order:

- (1) that it does not think it is in the public interest to close or replace the level crossing or part of the level crossing concerned.
- (2) that the proposals could be achieved by other means; that is that it would be more appropriate for the application to be decided under the appropriate Transport and Works Act, or other legislation.
- (3) that the applicant has failed to comply with a material requirement

imposed on it by or under the Schedule to the draft Bill.

- 3.118 We think that the appropriate national authority should have a degree of flexibility in reaching decisions. It may grant part of an application and defer its decision on the rest of the application to a different time.
- 3.119 A decision may be deferred, for example, to enable more than one application or parts of more than one application to be considered at the same time.⁵⁵ This might happen where a number of similar applications relating to crossings on the same railway line are being considered.
- 3.120 Where the appropriate national authority is considering making modifications to the proposed scheme, which amount to material changes, it must notify those it considers likely to be affected, and give them an opportunity to make representations. Any representations must be given due consideration before a final decision is reached.⁵⁶

Overarching test for making a closure order

- 3.121 The closure procedure is intended to balance the need to make closure easier by creating a more streamlined scheme with the need to safeguard the rights of landowners whose property rights will be affected by the scheme.
- 3.122 As we explained earlier, the national authority must act in a way that is compliant with the European Convention on Human Rights. Where compulsory purchase is concerned, interference with property rights will only be justified if it is in the public interest.⁵⁷ Other Convention rights may also be engaged, including the right to respect for private and a family life, and the right to a fair hearing.⁵⁸ A requirement that the scheme is in the public interest will require an assessment of proportionality so as to ensure that the requirements of the European Convention on Human Rights are met.⁵⁹
- 3.123 A level crossing closure order may contain several elements which are inter-dependent. Whether it is in the public interest to make an order closing one level crossing may depend on the availability of an alternative route across the railway. The provision of a bridge as an alternative may depend on obtaining planning permission to build the bridge and the compulsory acquisition of small plots of land on either side of the railway on which the bridge will be built. This inter-dependence requires a single threshold to be applied to the whole of a closure

⁵⁵ Draft Level Crossings Bill, sch, para 9(3).

⁵⁶ Draft Level Crossings Bill, sch, para 9(4).

⁵⁷ See para 17 of ODPM Circular 06/2004 on Compulsory Purchase and the Crichel Down Rules and paras 9 to 17 of Scottish Planning Circular 6/2011 on Compulsory Purchase Orders. See also Lord Denning in *Prest v Secretary of State for Wales* (1982) 81 LGR 193, CA, cited with approval by Lord Collins in *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437, at [10].

⁵⁸ Arts 8(1) and 6(1) respectively of the European Convention on Human Rights.

⁵⁹ See *Bexley London Borough Council v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 323 at [46] and *Tesco Stores Ltd v Secretary of State for Transport and the Regions and Wycombe DC* (2000) 80 P&CR 427, 429. See above under the heading "European Convention on Human Rights".

application. We recommend that the threshold for making a closure order should be that it is in the public interest to close or replace the crossing. Where compulsory acquisition is included in the proposal, the public interest will be interpreted in light of the fact that compulsory acquisition is an interference with a person's quiet enjoyment of their property.

Recommendations

3.124 **We recommend that the appropriate national authority should have the power to make a closure order, with or without modification.**

3.125 **We recommend that the appropriate national authority should have the power to make a closure order if it is in the public interest to close or replace the level crossing or part of the level crossing concerned.**

3.126 These recommendations are given effect by clause 11(1) of and paragraph 9(1)(a) and (b) of the Schedule to the draft Level Crossings Bill.

3.127 **We recommend that the appropriate national authority should have the power to decide on any of the following grounds not to make a closure order:**

- (1) **that it is not in the public interest to close or replace the level crossing or part of the level crossing concerned;**
- (2) **the proposals in the application could be achieved by other means;**
or
- (3) **the applicant has failed to comply with a material requirement imposed on it by or under the Schedule to the draft Level Crossings Bill.**

3.128 This recommendation is given effect by paragraph 9(1)(c) and (2) of the Schedule to the draft Level Crossings Bill.

Publishing the decision on a closure application

3.129 The appropriate national authority should be required to publish its decision on a closure application and notify certain persons of the outcome of the closure application.

3.130 The list of persons to be notified of a closure *decision* is more restricted than the list of those to be notified of a closure *application*. We concluded that some groups did not require notification of the decision if they had chosen not to respond to the consultation. The following people must be notified of a decision:

- (1) the applicant;
- (2) whichever of the railway operator, local highway or local roads authority for the area in which the level crossing is situated was not the applicant; this might include more than one authority if the project straddled an administrative border;
- (3) any person who made representations during the consultation process;

- (4) directly affected persons, namely, any owner, lessee, tenant, or occupier of affected land; as with notification of applications, the appropriate national authority will be under a duty to take reasonable steps to discover whether a person is directly affected; and
- (5) any other person who may be specified in rules made by the appropriate national authority.

3.131 This list provides the minimum requirement for notification and the national authority may add to the list in rules. Notice must at least contain the main reasons for the decision and considerations on which it was based; an outline of the participation of the public in the decision-making process; and details of how to challenge the decision.

3.132 The purpose of publication is that the public at large should have access to information about the outcome of the closure application. The appropriate national authority may make rules about how notice of the decision should be published.

Recommendation

3.133 **We recommend that the appropriate national authority should have a duty to publish its decision on a closure application and to notify certain persons of the outcome of the application.**

3.134 This recommendation is given effect by paragraph 10 of the Schedule to the draft Level Crossings Bill.

Duty to send copies of closure orders to the Office of Rail Regulation and others

3.135 As soon as reasonably practicable after making a closure order, the appropriate national authority will be required to send a copy of the order to the Office of Rail Regulation. The national authority will also be required to send a copy of any order that creates a right over land, or extinguishes or restricts a private right or private interest in or over land to, the Chief Land Registrar or the Keeper of the Registers of Scotland.⁶⁰

Recommendations

3.136 **We recommend that the appropriate national authority should be required to send a copy of a closure order to the Office of Rail Regulation as soon as reasonably practicable after making the order.**

3.137 **We recommend that if a closure order creates a right over land, or extinguishes or restricts a private right or private interest in or over land, the appropriate national authority should be required to send a copy of the order, in relation to land in England or Wales, to the Chief Land Registrar**

and in relation to land in Scotland, to the Keeper of the Registers of Scotland.

- 3.138 These recommendations are given effect by paragraph 11 of the Schedule to the draft Level Crossings Bill.

Register of closure orders

- 3.139 In the consultation paper, we proposed that level crossing closure orders should be statutory instruments.⁶¹ Of the small number of consultees who responded to this proposal, the majority supported it on the grounds that it would assist in making the orders publicly available.⁶²
- 3.140 On further consideration, we have concluded that closure orders should be administrative orders rather than statutory instruments. The rationale for proposing that closure orders should be statutory instruments was to ensure that they would be made publicly available. On reflection we have concluded that closure orders can be brought to the attention of those who might wish to be aware of them by means of a requirement to publish them and for the Office of Rail Regulation to include details of closure orders in a register it already maintains.
- 3.141 Under section 72 of the Railways Act 1993, the Office of Rail Regulation is under a duty to keep a register of various matters in connection with its role as the safety and economic regulator for the railways. We take the view that closure orders should be recorded on that register. The Bill includes a provision amending section 72 of the 1993 Act to give effect to this.
- 3.142 The Office of Rail Regulation should have a duty to enter details of closure orders on the register it maintains under the 1993 Act and to make the orders publicly available. This will ensure that there is a single central collection of closure orders. Publication on the internet will be adequate so long as paper copies are also available on request.

Recommendations

- 3.143 **We recommend that closure orders should be administrative orders, not statutory instruments.**
- 3.144 **We recommend that the Office of Rail Regulation should have a duty to include details of closure orders on the register maintained under section 72 of the Railways Act 1993 and to make the register and the orders publicly available, whether by publication on the internet or otherwise.**

⁶⁰ The duty on the appropriate national authority to send a copy of a closure order to the Keeper of the Registers of Scotland only applies where the changes made by the closure order take effect unconditionally on the making of the order. Where a closure order contains conditions, it would be for the appropriate national authority to include provisions in the order requiring a copy of the order to be sent to the Keeper once the conditions have been met.

⁶¹ Joint Consultation Paper, para 8.111.

⁶² Consultation Analysis, paras 8.366 to 8.372.

- 3.145 The second of these recommendations is given effect by clause 27 and paragraph 11(1) of the Schedule to the draft Level Crossings draft Bill.

Time limits under the closure procedure

- 3.146 In the consultation paper, we proposed that the procedure for closure should be subject to short time limits at each stage, including consideration by the national authority.⁶³
- 3.147 In the case of a simple closure application not involving diverting a road, we suggested the following time limits:
- (1) serving of application to commencement of consultation: one month;
 - (2) consultation: 12 weeks; and
 - (3) determination by the national authority (following any further proceedings necessary): 2 months.

Consultation

- 3.148 Consultation responses were mixed on the question of time limits. Network Rail, some local authorities, access groups, Ramblers, the Open Spaces Society, the Association of Train Operating Companies and the Rail Safety and Standards Board all supported short time limits in principle. However, almost equal numbers of consultees opposed the time limits set out in the consultation paper, most wanting longer periods for consultation on proposed closure.⁶⁴

Discussion

- 3.149 We have concluded that the appropriate national authority is best placed to determine the time limits which should apply to the various stages in the procedure. For example, the draft Bill provides that the national authority may make rules about the consultation requirements, including the time allowed for making representations on a closure application as part of the consultation.⁶⁵

Contents of a closure order

- 3.150 A level crossing closure order will extinguish the rights of way across the railway at the level crossing concerned. In the case of replacement of part of the level crossing, the closure order will extinguish such rights of way as specified in the order. In addition a closure order may:
- (1) extinguish any other rights of way over the level crossing, or any path beyond the crossing needed to close or replace the crossing;
 - (2) create new rights over the railway or other land to replace or upgrade a level crossing; rights which compete with the new rights can be restricted or extinguished by the closure order;

⁶³ Joint Consultation Paper, paras 8.94 to 8.102.

⁶⁴ Consultation Analysis, paras 8.311 to 8.342.

⁶⁵ Draft Level Crossings Bill, sch, para 6(2) and (3).

- (3) authorise the compulsory acquisition of land to replace the closed level crossing or upgrade another crossing; if land is to be compulsorily acquired for these purposes, competing rights over the land, such as access rights or rights of statutory undertakers to maintain apparatus on the land can be extinguished;
- (4) provide for the carrying out of works required to close the level crossing, replace it or upgrade other crossings; for example an order can make provisions about the works required to upgrade a footpath level crossing to allow vehicular use; and
- (5) apportion the costs of these works between the applicant and others.⁶⁶

3.151 In addition, a closure order may make other ancillary provision required to give full effect to the order.

3.152 The power to make ancillary provisions includes the power to amend, repeal or revoke statutory provisions of local application, such as provisions in a special Act relating to the level crossing concerned. Many level crossings were created by the implied inclusion in a special Act of section 68 of the Railways Clauses Consolidation Act 1845 or section 60 of the Railways Clauses Consolidation (Scotland) Act 1845. These sections provide that the railway company “shall make and at all times thereafter maintain” level crossings “for the accommodation of the owners and occupiers of lands adjoining the railway.” The closure order will supersede any provision in a special Act requiring a level crossing to be maintained. However, the appropriate national authority may wish to repeal any provision in a special Act which created that level crossing, for the avoidance of doubt and to tidy up the statute book.

3.153 If a closure order is made, it can include conditions which must be satisfied before the closure can take effect, including any diversion of highways or roads or other paths, the building of any replacement crossing, bridge or underpass and any other works.⁶⁷ Any temporary closure permitted for the duration of the works will cease to have effect if the works are not completed within the three year duration of the closure order, or within four years if, exceptionally, an extension is granted.⁶⁸

3.154 Where a closure order sets conditions to be met before the closure can take effect, it must also set out the process for establishing whether and when those conditions have been met and for notifying interested parties of progress.⁶⁹ The requirements would be particular to each project and the order would need to include any procedures for inspection and certification of the works to be carried out. Permanent closure would only take effect once any such conditions had been met.

⁶⁶ The apportionment of costs is discussed below under the heading “Apportionment of costs of works under a closure order”.

⁶⁷ Draft Level Crossings Bill, cl 15(1).

⁶⁸ The duration of closure orders is dealt with later in this Part.

⁶⁹ Draft Level Crossings Bill, cl 15(2).

Recommendation

3.155 **We recommend that a closure order should extinguish all or some of the rights of way over a level crossing or part of a crossing with or without replacement.**

3.156 **We recommend that a closure order may:**

- (1) **extinguish any other right or interest to or across the railway and so much of any other right of way as necessary to give effect to the closure or replacement;**
- (2) **create new rights of way for the purposes of upgrading or replacing a level crossing;**
- (3) **authorise the compulsory acquisition of land for the purposes of upgrading or replacing a level crossing;**
- (4) **make provision for the works required to close or replace a level crossing;**
- (5) **apportion the costs of the works between the applicant and others; and**
- (6) **make any ancillary provisions required to give full effect to the closure order.**

3.157 These recommendations are given effect by clauses 11, 12 and 13 of the draft Level Crossings Bill.

3.158 **We recommend that the power to make ancillary provision should include the power to amend, repeal or revoke special Acts or other statutory provisions of local application in connection with a closure order.**

3.159 This recommendation is given effect by clause 12(1)(e) and (7) of the draft Level Crossings Bill.

Power to make rules and regulations relating to closure orders

3.160 The draft Bill makes provision for the appropriate national authority to have the power to make rules relating to the closure procedure set out in the Schedule to the draft Bill. The power includes the power to dispense with compliance with rules relating to the closure procedure that would otherwise apply or to require compliance with rules that would *not* otherwise apply. We have included an obligation on each national authority to consult with the other national authorities before making rules, with a view to making consistent rules for England, Scotland and Wales wherever possible.

3.161 The appropriate national authority may also make regulations for the purpose of ensuring the assimilation of procedures under other enactments, for example procedures requiring consents or permissions other than those provided for in the draft Level Crossings Bill.

Recommendations

- 3.162 **We recommend that the appropriate national authority should have the power to make rules about the making of closure applications.**
- 3.163 **We recommend that each national authority should be required to consult the other national authorities before making rules, with a view to creating consistent rules.**
- 3.164 **We recommend that the appropriate national authority should have the power to make regulations providing for the assimilation of procedures required under other enactments in connection with a closure scheme.**
- 3.165 These recommendations are given effect by clause 22 of and paragraph 2(1) and 13 of the Schedule to the draft Level Crossings Bill.

Environmental impact assessments

- 3.166 The Environmental Impact Assessment Directive sets out general principles to be adopted by Member States for the assessment of environmental effects of development.⁷⁰ Paragraph (7) of the Preamble provides:

Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.⁷¹

- 3.167 Environmental impact assessments would usually be required for projects that proceed under the Transport and Works Acts. The Directive indicates that Member States may integrate environmental impact assessments into the development consent process or may create a separate process. In order to comply with the Directive, the Transport and Works Act 1992 procedure was amended by the Transport and Works (Assessment of Environmental Effects) Regulations 1998.⁷²
- 3.168 The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 apply to a development where it is classified as an Environmental Impact Assessment development.⁷³ All Environmental Impact Assessment development applications must be accompanied by an environmental statement in which the likely environmental effects of the proposed development are examined. That statement is then available to the public and

⁷⁰ 85/337/EEC.

⁷¹ The law relating to environmental impact assessment emanates from Council Directive 85/337/EEC, codified in the Council Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment Directive 2011).

⁷² SI 1998 No 2226. The Transport and Works (Scotland) Act 2007 includes provisions implementing the Directive.

⁷³ SI 2011 No 1824. Similar provision is made for Scotland in the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011 No 139).

consultees as part of the consultation process on the proposed development. Responses to that exercise, together with the environmental statement, are then available to the decision-maker. Development consent cannot be granted without consideration of the environmental information by the relevant decision-maker. All developments listed in Schedule 1 to the Regulations are Environmental Impact Assessment developments. They are projects that are likely to have a high impact on the environment. Those listed in Schedule 2 are developments that may have a significant effect on the environment. There is a screening process to determine whether a Schedule 2 project is an Environmental Impact Assessment development.

- 3.169 The threshold for assessment is where a project is likely to have significant effects on the environment. Annex 2 to the Council Directive lists certain projects which may require a full assessment. These include the construction of railways, roads, harbours and port installations. We think it highly unlikely that any project under the level crossing closure procedure could amount to the construction of a railway.
- 3.170 If the closure proposals set out in an application for a closure order would be of national significance, or in Scotland would be a national development, the application will be excluded from the closure procedure and deemed to have been withdrawn. If a project has a significant impact on the environment we would expect the appropriate national authority to decide that the application should not be dealt with under the closure procedure as it is not appropriate. However, it remains possible that at least a screening process might be required in order to determine whether a project is likely to have a significant effect on the environment.⁷⁴
- 3.171 The draft Level Crossings Bill provides that where a national authority makes a decision about a closure application, it must notify certain persons. If the decision were to make a closure order and the order included provision for works of environmental significance, the notice would be required to describe the steps to be taken to avoid, reduce and if possible off-set major adverse environmental effects of the works. These provisions aim to implement the Environmental Impact Assessment Directive. Our interpretation of its requirements takes account of the way these have been implemented by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and the Transport and Works Act (Assessment of Environmental Effects) Regulations 1998.⁷⁵

Apportionment of costs of works under a closure order

- 3.172 In the consultation paper, we invited consultees to comment on our provisional

⁷⁴ The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 do not apply to deemed planning permission. The requirements of the Environmental Impact Assessment Directive have been applied to applications for orders under the Transport and Works (Scotland) Act 2007 through the Transport and Works (Scotland) Act 2007 (Applications and Objections Procedure) Rules 2007, SSI 2007 No 570. Under the Applications and Objections Rules, all applications for orders under the 2007 Act which would authorise a project of a type listed in Annex I or Annex II to the Directive must include an Environmental Statement.

⁷⁵ Transport and Works (Assessment of Environmental Effects) Regulations 1998, SI 1998 No 2226.

proposal that level crossing closure orders should be capable of including provision for the apportionment of costs of closure and replacement.⁷⁶

- 3.173 The Department for Transport, Network Rail, the Association of Train Operating Companies, the transport advisory group Passenger Focus and various access groups all proposed that the default rule should be that the applicant pays for closure, unless contrary provision is made in the closure order. They all supported the suggestion in the consultation paper that section 255 of the Highways Act 1980 provided a suitable model for the apportionment of the costs of closure. Network Rail added that the economic model AXIAT developed by the Rail Safety and Standards Board could be used in conjunction with section 255 of the 1980 Act to make recommendations on the apportionment of costs.⁷⁷
- 3.174 We have concluded that the costs of works associated with closing a level crossing should be borne by the applicant. But there should be a power for the national authority to make provision in a closure order requiring that some or all of the costs of any works should be borne by someone other than the applicant.

Modification and revocation of closure orders

- 3.175 There may be circumstances where non-material amendments are required after a closure order has been made. Under the Town and Country Planning Act 1990 and the Town and Country Planning (Scotland) Act 1997, provision is made for non-material modifications to planning permission. We consider that similar provision should be made to enable the appropriate national authority to amend closure orders after they have been made, if the authority is satisfied that the amendment is not material. Whether a change is material or not is a question of fact left to the individual decision-maker to determine in light of the circumstances of the case.
- 3.176 The closure procedure requires full consultation before the appropriate national authority decides whether it is in the public interest to make a closure order. We do not think it appropriate to allow material changes to be made to the closure order once it has been made. If the applicant wants to change the scheme in any material way, a fresh application to the appropriate national authority for a new closure order should be made.
- 3.177 The applicant, whichever of the local highway or local roads authority, or railway operator is not the applicant for the closure order, and a directly affected person⁷⁸ may apply to the appropriate national authority for a closure order to be amended. The national authority should have the power to make rules about the procedure for making and determining applications for non-material amendments to closure orders.
- 3.178 We considered whether it should be possible to revoke a closure order, either at the request of the applicant, or on the national authority's own volition. When a closure order is in force, land affected by the order would be "blighted land". Land

⁷⁶ Joint Consultation Paper, paras 8.88 to 8.93.

⁷⁷ Consultation Analysis, paras 8.295 to 8.310.

⁷⁸ "Directly affected person" is defined in the draft Level Crossings Bill, sch, para 1(6) as "any owner, lessee, tenant, or occupier of affected land".

may be described as blighted where:

“...the land is the subject of some public plan or proposal, which is either approved or going through the approval process, and which will ultimately require the purchase of the land for a public purpose, whether by compulsion or otherwise. It is the threat of purchase for some public purpose which puts off other potential purchasers and thereby blights the land.”⁷⁹

- 3.179 We accept that a power to revoke a closure order would remove blight without having to wait for the closure order to expire. We took the view that this option was outweighed by the permissive nature of a closure order combined with the public interest test for making a closure order. This led us to conclude that revocation should not be possible. We do not think it appropriate for the national authority to decide that closure or replacement of a level crossing is no longer in the public interest without carrying out a full decision-making process, including consultation. A closure order will only blight the land for three years, or at most four. Any revocation procedure would be time-consuming and expensive. If the applicant no longer wishes to carry out the order, the applicant may simply leave it to expire.⁸⁰

Recommendation

- 3.180 **We recommend that the appropriate national authority should have the power to make non-material amendments to a closure order.**
- 3.181 This recommendation is given effect by clause 24 of and paragraph 12 of the Schedule to the draft Level Crossings Bill.

COMPULSORY PURCHASE AND COMPENSATION

- 3.182 In this section we make recommendations about the compulsory extinguishment of rights under a closure order, where there is no compulsory acquisition of land. We also make recommendations about the compulsory acquisition of land. In each case we have made appropriate provision for compensation. We have replaced the time limit for carrying out a compulsory purchase with our own three year time limit, described below.⁸¹
- 3.183 The Law Commission conducted a project entitled *Towards a Compulsory Purchase Code* and reported on compensation in 2003 and on procedure in 2004 recommending reform but the recommendations were not taken forward.⁸² The Scottish Law Commission is currently undertaking a project to review the law of compulsory purchase in Scotland.⁸³ However, the scheme we recommend for level crossing closure, is based on compulsory purchase law as it currently

⁷⁹ Roots, Humphries, Fookes and Pereira, *The Law of Compulsory Purchase* (2nd ed 2011), Part B, para 1187.

⁸⁰ For a discussion on the duration of closure orders, see below.

⁸¹ See below under the heading “Duration of closure orders”.

⁸² *Towards a Compulsory Purchase Code: (1) Compensation* (2003) Law Com No 286; *Towards a Compulsory Purchase Code: (2) Procedure* (2004) Law Com No 291.

⁸³ See <http://www.scotlawcom.gov.uk/law-reform-projects/compulsory-purchase> (last visited 1 September 2013)

stands.

Consultation

- 3.184 We did not ask any questions in the consultation paper specifically about compulsory purchase, but did include it in our provisional proposal to create a new closure procedure.⁸⁴
- 3.185 The Department for Transport said in consultation that compulsory purchase powers “are potentially a key tool” in closing level crossings. It warned, however, that the compensation rates and criteria to be considered in determining whether to order compulsory purchase in the context of level crossings would have to be consistent with standard compulsory purchase rules. It also noted that in England and Wales if a highway was stopped up and diverted under section 116 of the Highways Act 1980, the compulsory purchase powers in that Act could be used to acquire land required for the diversion. It explained that it would be hard to justify a less rigorous procedure for compulsory purchase in the context of level crossing closure in light of this existing procedure in the Highways Act 1980 in England and Wales.⁸⁵

Discussion

- 3.186 We examined the various compulsory purchase regimes available. We concluded that it is simpler to create a tailor-made process for the extinguishment and creation of rights affected by a closure order, but to tie the compulsory acquisition of land authorised by a closure order into existing procedures.⁸⁶ We recommend bespoke provisions for compensation for the extinguishment and creation of rights effected by a closure order. We have followed the conventional principles and processes of compensation for compulsory acquisition in England and Wales and in Scotland. The scheme is designed to be proportionate to the scale of the projects and to balance the public interest in the scheme against the interference with the landowner’s property rights.

Acquiring authorities

- 3.187 Neither Network Rail nor any of the heritage railway operators have general compulsory purchase powers granted by statute. Such a power was granted to the British Railways Board in the Transport Act 1962,⁸⁷ but was not transferred to Network Rail when it took over responsibility for the railway infrastructure from Railtrack. The only private companies with general statutory powers of compulsory purchase are the utility companies, which also held such powers prior to their privatisation.⁸⁸
- 3.188 Network Rail has often been granted powers of compulsory purchase for certain

⁸⁴ Joint Consultation Paper, para 8.86 to 8.87.

⁸⁵ Consultation Analysis, para 8.178.

⁸⁶ We propose to treat a closure order which authorises compulsory purchase of land as a confirmed compulsory purchase order.

⁸⁷ Along with the British Waterways Board, the Docks Board and (for a short period) the London Transport Board: Transport Act 1962, s 14(1)(c).

⁸⁸ Gas Act 1986, sch 3, para 1; Electricity Act 1989, s 10(1) and sch 3, para 1; Water Industry Act 1991, ss 6(1) and 155.

schemes or undertakings.⁸⁹ Other private railway companies have been granted powers of compulsory purchase in orders under the Transport and Works Act 1992.⁹⁰

- 3.189 Most compulsory purchase powers are set out in public general Acts. In rare cases, public general Acts allow an authority to acquire land without any subsequent authorisation. More commonly, though, a two-stage procedure is adopted. The Act will provide for general powers of compulsory purchase that can then be exercised with reference to land specified in a subsequent compulsory purchase order and confirmed by Ministers.⁹¹ In the Highways Act 1980, for example, section 239 authorises a highway authority in England and Wales to acquire compulsorily land needed for the construction and improvement of highways. To use this power, the authority must submit a draft compulsory purchase order to the relevant Ministers for confirmation under the Acquisition of Land Act 1981.⁹²
- 3.190 The Transport and Works Act 1992 created a different system of compulsory purchase for England and Wales, introducing a combined consent procedure. Under this system, the Secretary of State can authorise major projects that would previously have required parliamentary approval under the Private Bill procedure. The Secretary of State “may make an order relating to, or to matters ancillary to, the construction or operation of a transport system” including a railway.⁹³ Scottish Ministers have similar powers under the Transport and Works (Scotland) Act 2007.⁹⁴
- 3.191 An order under the 1992 Act can provide for the compulsory acquisition of land in relation to the construction or operation of a transport system.⁹⁵ The order has the effect of: granting consent to construct or operate a transport system; approving compulsory purchase of land required; and granting planning permission under the Town and Country Planning Act 1990.⁹⁶ The test for the compulsory purchase aspect of the order is the same as in an ordinary compulsory purchase order, namely, whether there is a compelling case in the

⁸⁹ For example, Network Rail has been granted powers of compulsory purchase in orders made pursuant to the Transport and Works Act 1992 and the Transport and Works (Scotland) Act 2007, and in development consent orders under the Planning Act 2008. Network Rail has on occasion been granted powers of compulsory purchase under an Act authorising a particular scheme or undertaking, such as the Airdrie-Bathgate Railway and Linked Improvements Act 2007. See ss 17 and 58(1).

⁹⁰ Examples include the Docklands Light Railway (see Docklands Light Railway (Capacity Enhancement and 2012 Games Preparation) Order SI 2007 No 2297, reg 20) and the heritage railway operator, Festiniog Railway Company, which operates the Welsh Highland Railway (Welsh Highland Railway Order SI 1999 No 2129, reg 14).

⁹¹ Halsbury's Laws of England, vol 18 (5th ed, 2009), para 503.

⁹² Highways Act 1980, s 247.

⁹³ Transport and Works Act 1992, s 1(1).

⁹⁴ Transport and Works (Scotland) Act 2007, s 1(1).

⁹⁵ Transport and Works Act 1992, ss 1 and 5 and sch 1, para 3. Similar provision is made in relation to Scotland in the Transport and Works (Scotland) Act 2007, ss 1 and 2 and sch 1, para 3.

⁹⁶ By virtue of the Transport and Works Act 1992, s 16(1), inserting subsection 2A into the Town and Country Planning Act 1990, s 90. The order does not cover listed building consent or conservation areas consent.

public interest.

- 3.192 For Scotland, an order under the Transport and Works (Scotland) Act 2007 can provide for the compulsory acquisition of land in relation to the construction or operation of a transport system.⁹⁷ Before including provision in an order conferring powers in relation to the compulsory acquisition of land, the Scottish Ministers will wish to be satisfied that there is a compelling case in the public interest for taking away a person's land or rights in land, and that all the land in question is required for the scheme.⁹⁸ If the order includes provision for development which would require planning permission,⁹⁹ the Scottish Ministers can direct that planning permission¹⁰⁰ is deemed to be granted.¹⁰¹ The Transport and Works (Scotland) Act 2007 (Consents under Enactments) Regulations 2007¹⁰² also allow the Scottish Ministers to assimilate the procedures for the determination of applications for any listed buildings, conservation area and scheduled monument consents in relation to applications or proposals for orders under the Transport and Works (Scotland) Act 2007 with the procedures for determining the application or proposal for the order.
- 3.193 Compulsory purchase powers also arise under the Planning Act 2008 in England and Wales. The 2008 Act provides that a development consent order can be granted to facilitate nationally significant infrastructure projects. Under section 122 of the Act, a development consent order can include powers of compulsory purchase. This only applies where the land is required for completion of the project and there is a compelling case for compulsory purchase of the land in the public interest. Again, it is a combined procedure approach. The exercise of powers of compulsory purchase is governed by Part 1 of the Compulsory Purchase Act 1965.¹⁰³
- 3.194 In the absence of any precedent for a general power granting Network Rail or any other private company compulsory purchase powers, we decided to follow a similar approach to that under the Transport and Works Acts. The draft Level Crossings Bill allows for closure orders to include powers to acquire land compulsorily that is required for the construction of a replacement bridge, underpass or new level crossing. Each individual closure order would then

⁹⁷ Transport and Works (Scotland) Act 2007, ss 1(1)(a)(i) and 2(1) and sch 1, para 3.

⁹⁸ Scottish Government, *Technical Guide to Transport and Works (Scotland) Act* (27 December 2007), para 1.40, <http://www.scotland.gov.uk/Publications/2007/12/24105458/0> (last visited 1 September 2013).

⁹⁹ Or hazardous substances consent: Transport and Works (Scotland) Act 2007 (Consents under Enactments) Regulations 2007, reg 4, SSI 2007 No 569.

¹⁰⁰ And deemed hazardous substances consent.

¹⁰¹ Transport and Works (Scotland) Act 2007, s 15(1).

¹⁰² SSI 2007 No 569.

¹⁰³ This part of the Planning Act 2008 applies to Scotland only to the extent that it is needed for the construction (other than by a gas transporter) of an oil or gas cross-country pipeline one end of which is in England or Wales and the other end of which is in Scotland: Planning Act 2008, s 240(3) and (4). Where a compulsory purchase is authorised under the 2008 Act, the compulsory acquisition is governed by the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 and the enactments it applies: Planning Act 2008, s 125(4) and (5).

designate the acquiring authority, either Network Rail, a heritage railway or a local highway or local roads authority, and specify the land in question.

Recommendation

3.195 **We recommend that local highway authorities, local roads authorities or railway operators be permitted to purchase compulsorily, land which is required for the replacement of a level crossing where granted the power to do so by a closure order.**

3.196 This recommendation is given effect by clauses 11 and 12(1)(b) of the draft Level Crossings Bill.

Compulsory extinguishment of rights

3.197 Compulsory extinguishment powers will be necessary where a closure order is made to close a private level crossing against the will of the beneficiary of the right of way, or where a highway or road is to be diverted over privately owned land. Compulsory extinguishment powers will also be used to stop up or divert highways or roads.

3.198 As discussed above, a closure order may:

- (1) extinguish public or private rights of way across the railway at a level crossing;
- (2) extinguish any other rights of way over the level crossing, or any path beyond the crossing needed to close or replace the crossing; and
- (3) create new rights over the railway track or other land to replace or upgrade a level crossing; rights which compete with the new rights can be restricted or extinguished by the closure order.

3.199 Closure orders may authorise the compulsory acquisition of land to replace the closed level crossing or upgrade another crossing. If land is to be compulsorily acquired for these purposes, competing rights over the land, such as access rights or rights of statutory undertakers to maintain apparatus on the land, can be extinguished.

3.200 Where a public right of way at a level crossing is extinguished, the closure order can also extinguish all other underlying rights of way or passage over the railway. For example, in England and Wales where a public highway has been dedicated, pre-existing private rights of way or other rights allowing passage over the track may subsist. When the public right of way is extinguished, these pre-existing rights might spring back to life. The closure order will be able to extinguish such rights.

3.201 Where land is compulsorily purchased or a right of way is created by a closure order, we want to be certain that competing rights over the land are extinguished. Under the current law for England and Wales, unless the Act authorising the compulsory purchase provides otherwise, adverse rights such as easements or restrictive covenants over compulsorily acquired land cannot be enforced against the acquiring authority acting in pursuance of its statutory powers. The rights are converted into a claim for compensation under section 10 of the Compulsory

Purchase Act 1965.¹⁰⁴ These adverse rights are not usually extinguished, however, and will revive when the land is sold by the acquiring authority, unless there is express statutory provision extinguishing them.¹⁰⁵

- 3.202 The position under Scots law is slightly different. By virtue of section 106 of the Title Conditions (Scotland) Act 2003, servitudes and real burdens are extinguished when the land is compulsorily acquired unless the compulsory purchase order or the conveyance provides otherwise. Interference with a real burden or servitude entitles the proprietor of the benefited property to claim compensation for injurious affection.¹⁰⁶
- 3.203 We apply section 106 of the Title Conditions (Scotland) Act 2003 to the compulsory purchase of land in Scotland authorised by a closure order. In England and Wales, we apply the provision which we think has the closest effect to section 106, namely section 236 of the Town and Country Planning Act 1990. Section 236 automatically removes some rights over land but, unlike the provision for Scotland, it does not remove all easements and restrictive covenants. For example, we do not think that it would remove a right of turbary, that is, the right to cut turf, from the compulsorily acquired land.
- 3.204 Neither section 106 nor section 236 would extinguish the rights of statutory undertakers, which are usually extinguished and compensated under Part 11 of the Town and Country Planning Act 1990 and Part 10 of the Town and Country Planning (Scotland) Act 1997.¹⁰⁷
- 3.205 We have provided in the draft Level Crossings Bill for the appropriate national authority to be able to make alternative provision in a closure order for the extinguishment or restriction of rights over or under land which is compulsorily acquired. We anticipate that this power will not usually be used where the automatic extinguishment powers would take effect. These powers might be used to extinguish rights outside the scope of automatic extinguishment, such as the rights of statutory undertakers.¹⁰⁸ We have not sought to replicate the consent requirements set out in other statutes where statutory undertakers' rights are interfered with.¹⁰⁹ Nor have we provided for any special notice or consultation

¹⁰⁴ *Kirby v Harrogate School Board* (1896) 1 Ch 437, as explained in *Thames Water Utilities Ltd v Oxford City Council* (1999) 1 LGLR 291 and *Re 6,8,10 & 12, Elm Avenue New Milton, Ex p New Forest DC* [1984] 1 WLR 1398. For example, in *Roberts v Holyhead UDC* (1962) 14 P&CR 358 where there was a claim for injurious affection for the extinguishment of an easement caused by the diversion of a footpath from land acquired by the council for building houses. In that case the Lands Tribunal held that there was no right to compensation because the damage to the claimant's land was negligible.

¹⁰⁵ Roots, Humphries, Fookes and Pereira, *The Law of Compulsory Purchase* (2nd ed 2011), Part D, paras [1605] to [1607]. The authors give some examples of statutes which expressly provide for extinguishment of adverse interests in or rights over the land, such as the Housing Act 1985, s 295 and the Channel Tunnel Rail Link Act 1996, s 7.

¹⁰⁶ Under the Lands Clauses Consolidation (Scotland) Act 1845, s 61 or the Railways Clauses Consolidation (Scotland) Act 1845, s 6, which are the Scottish equivalents of the Compulsory Purchase Act 1965, ss 7 and 10.

¹⁰⁷ Town and Country Planning Act 1990, ss 271 and 279; Town and Country Planning (Scotland) Act 1997, ss 224 and 232.

¹⁰⁸ Draft Level Crossings Bill, cl 19(5) and (9).

¹⁰⁹ For example, Highways Act 1980, s 121(4).

procedure for statutory undertakers.¹¹⁰ This does not prevent procedural rules from making appropriate provision.

Recommendation

- 3.206 **We recommend that where a closure order authorises the compulsory acquisition of land, automatic extinguishment powers under section 106 of the Title Conditions (Scotland) Act 2003 or section 236 of the Town and Country Planning Act 1990 should apply. In addition, there should be a power to extinguish or restrict rights over that land expressly.**
- 3.207 This recommendation is given effect by clauses 12(1)(b), 19(5) and (9) of the draft Level Crossings Bill.



User-worked crossing on a private road at Bratts House on the freight only Saxmundham to Sizewell line in Suffolk. Note the absence of telephones or other warning devices, so that the user has to judge whether it is safe to cross by looking out for approaching trains. Credit: Rail Accident Investigation Branch.

Compulsory acquisition of land

- 3.208 As explained above, we recommend that a closure order should be able to authorise the applicant to acquire land compulsorily. This might be needed in order to replace the level crossing with an alternative route across the railway, or to create a new right of way, whether public or private.¹¹¹

¹¹⁰ Highways Act 1980, s 121 or Town and Country Planning Act 1990, Part 11.

¹¹¹ Draft Level Crossings Bill, cl 12(1)(a) and (b).

Taking title to the land

- 3.209 There are two methods of compulsorily acquiring land: the notice to treat method and the general vesting declaration method. Under the notice to treat method, title is not transferred to the acquiring authority until compensation is paid; whereas under the general vesting declaration title passes before compensation is paid. There are various safeguards for claimants under both procedures, such as entitlement to interest and advance payments of compensation. The general vesting declaration procedure tends to be more convenient for acquiring authorities.¹¹²
- 3.210 We consider that any applicant should be able to acquire land under a closure order by way of notice to treat, but only those applicants which are public bodies should be entitled to acquire land by way of general vesting declaration. This provides protection for claimants in the event of the applicant's insolvency.¹¹³

Recommendations

- 3.211 **We recommend that any person who has been granted a closure order should be able to acquire land compulsorily in terms of the closure order by way of notice to treat.**
- 3.212 **We recommend that where a closure order is granted in favour of a local highway or local roads authority, the authority should be able to acquire land compulsorily under the closure order by way of general vesting declaration.**
- 3.213 These recommendations are given effect by clauses 19(3), (4), (7) and (8).

Compensation for compulsory purchase

- 3.214 There are three main heads of compensation for compulsory acquisition: market value; disturbance payments and injurious affection.
- (1) Market value is the value of the land taken.
 - (2) Disturbance payments are made for losses caused by losing the land, such as moving business premises or buying new carpets and curtains for a new home.
 - (3) Injurious affection is the loss of value caused to the land retained by the claimant. There are two types of injurious affection:
 - (a) depreciation in the value of the remaining land "held together with" the land taken, that is the loss in value caused by the severance;¹¹⁴ and

¹¹² For an explanation of both methods of implementation of compulsory purchase, see Roots Humphries, Fookes and Pereira, *The Law of Compulsory Purchase* (2nd ed 2011), ch 2.

¹¹³ Draft Level Crossings Bill, cl 19(4) and (8).

¹¹⁴ Lands Clauses Consolidation (Scotland) Act 1845, s 61 for Scotland and the Compulsory Purchase Act 1965, s 7 for England and Wales.

- (b) loss caused by the carrying out of construction works on the acquired land.¹¹⁵

- 3.215 We apply the usual procedure for claiming and assessing compensation for compulsory purchase where compulsory acquisition is authorised by a level crossing closure order, including provision for compensation under all of the headings listed above.¹¹⁶
- 3.216 Rights may be extinguished automatically when the land is compulsorily purchased, or the closure order might expressly extinguish certain rights over compulsorily purchased land. Where rights are extinguished automatically by virtue of section 236 of the Town and Country Planning Act 1990 or section 106 of the Title Conditions (Scotland) Act 2003, the owner is entitled to compensation. Interference with an easement, real burden or servitude entitles the beneficiary or holder to compensation for injurious affection.¹¹⁷
- 3.217 We have provided in the Bill for compensation for the more common examples of rights which might be extinguished or restricted under a closure order. We have not made express provision for every conceivable type of right. For example, statutory undertakers' rights vary in their nature and may be easements, wayleaves or "statutory easements".¹¹⁸ They will not always be rights or interests in land which attract a right to compensation under clause 16 to 19 of the draft Bill. Our intention is that the appropriate national authority should have powers to extinguish such rights and interests as the public interest requires in order to give effect to a closure order and that compensation should be payable. We accept that there may be unusual rights or interests not expressly contemplated in the Bill. We have made clear in the draft Bill that a closure order may not remove or limit any right to compensation under the Bill.¹¹⁹ There would therefore be nothing to prevent a closure order from providing for more generous compensation if that was considered appropriate. This is to ensure that where such an unusual right or interest was interfered with in the public interest, such compensation could be provided for, as required in order to satisfy the requirements of article 1 of Protocol 1 to the European Convention on Human Rights.

Recommendation

- 3.218 **We recommend that Part 1 of the Compulsory Purchase Act 1965 (for England and Wales) and section 1(3) of, and Schedule 2 to, the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 and the provisions incorporated by Schedule 2, should apply to compulsory acquisition authorised by a closure order.**

¹¹⁵ Lands Clauses Consolidation (Scotland) Act 1845, s 6 for Scotland and the Compulsory Purchase Act 1965, s 10 for England and Wales.

¹¹⁶ We apply Part 1 of the Compulsory Purchase Act 1965 and the Land Compensation (Scotland) Act 1963.

¹¹⁷ Compulsory Purchase Act 1965, Part 1; Lands Clauses Consolidation (Scotland) Act 1845, s 61 and the Railways Clauses Consolidation (Scotland) Act 1845, s 6.

¹¹⁸ For a discussion of the various rights of statutory undertakers, see The Electronic Communications Code (2012) Law Commission Consultation Paper, No 205, Appendix A.

¹¹⁹ Draft Level Crossings Bill, cl 12(5).

- 3.219 This recommendation is given effect by clauses 19(3) and 19(7) of the draft Level Crossings Bill.

Compensation for the carrying out of works

- 3.220 We recommend that a closure order should be able to make provision for carrying out works in connection with the closure or replacement of the crossing and, if applicable, the upgrading of other crossings.¹²⁰
- 3.221 We recommend that the closure order should also be able to provide for payment of compensation for damage, nuisance or interference caused by the carrying out of these works. Such compensation would complement the right to compensation for use of the works under Part 1 of the Land Compensation Act 1973 and the Land Compensation (Scotland) Act 1973. However, the compensation provisions in our bespoke regime and the normal compensation provisions for compulsory purchase will provide some compensation for the carrying out of the works. We therefore think that it is only necessary to provide a power to award compensation for the carrying out of works, and would expect the national authority to use the power in such a way that there is no double recovery for the same loss.
- 3.222 Although there is no stand-alone right to compensation for the carrying out of works, a failure to provide for compensation would be susceptible to challenge under the procedure for reviewing a closure order.

Compensation for use of the works

- 3.223 Part 1 of the Land Compensation Act 1973 and Part 1 of the Land Compensation (Scotland) Act 1973 make further provision for compensation. They provide for compensation to be paid in certain circumstances where the value of a person's interest in land falls as a result of physical factors caused by the use of "public works" as defined in the statute.
- 3.224 Under a closure order, it is possible that such loss might result from the use of a bridge, underpass, new level crossing or diverted highway or road.
- 3.225 Claims under Part 1 of the 1973 Acts can only be made if the statute authorising the works provides immunity from other claims. There are also provisions preventing double recovery for the same loss under the 1973 Acts and normal compulsory purchase rules.
- 3.226 We think that compensation under Part 1 of the 1973 Acts should be available for all works carried out under a closure order even where these works might not otherwise qualify as "public works" for the purposes of the 1973 Acts.

Recommendation

- 3.227 **We recommend that Part 1 of the Land Compensation Act 1973 and Part 1 of the Land Compensation (Scotland) Act 1973 should apply to works carried out under a closure order.**

¹²⁰ A list of the works which may be included in a closure order is set out in the draft Level Crossings Bill, cl 13.

3.228 This recommendation is given effect by clause 20 of the draft Level Crossings Bill.

Compensation for interference with land not compulsorily acquired

3.229 In the draft Bill, we have made bespoke provisions for compensation for losses resulting from:

- (1) the extinguishment by the closure order of rights over land, such as easements, restrictive covenants, statutory rights of way, rights of access, servitudes and real burdens so far as these are necessary for the replacement or upgrading of the crossing; and
- (2) the creation of new rights over land.

3.230 As discussed above, we have applied the usual compulsory purchase provisions to the compulsory purchase of land authorised by the closure procedure.¹²¹ This will allow those affected to make the usual claims for:

- (1) the market value of their land;
- (2) disturbance in the enjoyment of their land;
- (3) depreciation in any other land caused by the compulsory acquisition; and
- (4) losses caused to their land by the carrying out of work on the compulsorily acquired land.

3.231 We recommend the creation of bespoke compensation provision for losses suffered by landowners when a closure order restricts or extinguishes rights benefitting their land, or creates rights over their land.¹²²

3.232 We propose that compensation should be paid if the value of a person's land falls or their enjoyment of the land is disturbed as a result of the extinguishment or restriction of any private right over land, or as a result of the creation of any right, whether public or private, over the land.¹²³ The owner of the land should be able to claim for disturbance in the enjoyment of his land.¹²⁴ "Disturbance" is a technical term which means losses caused by losing land. The types of losses normally claimed for disturbance are relocation costs and loss of goodwill for businesses. When assessing compensation under the bespoke system we propose that any replacement rights granted by the applicant or created by the closure order itself should be taken into account. The value of the benefits any such rights provide should be deducted from the final amount of compensation paid to the claimant.¹²⁵

3.233 Disturbance in the person's enjoyment of the land could include loss of amenity

¹²¹ Draft Level Crossings Bill, cl 19.

¹²² Draft Level Crossings Bill, cls 16 to 18.

¹²³ Draft Level Crossings Bill, cls 15(1) and 16.

¹²⁴ Draft Level Crossings Bill, cl 16(2) and (3).

¹²⁵ Draft Level Crossings Bill, cls 17(4)(b) and 18(4)(b).

caused by the creation of public access through previously tranquil ownership as a result of the creation of or diversion of a public footpath. We have considered and modelled our provision on section 28 of the Highways Act 1980. Under section 28, disturbance has been held to include increased congestion in a car park. This arose due to the creation of a public path with a scenic view and there was a detrimental effect on a business as people could now see the attractive view for free, whereas in the past they had to pay the landowner.¹²⁶ Disturbance payments have also been awarded for forestry, game shooting and estate management due to the creation of a footpath across the claimant's land.¹²⁷

3.234 Any order that stops up or diverts a highway will necessarily affect private landowners with access to the highway from their property. In England and Wales, the owner of land adjoining the highway has a right of access from any part of his land onto the highway. This "frontager's right" is a private right separate from the general right of the public to use the highway.¹²⁸ In contrast Scots law appears to be undeveloped on this question.

3.235 Frontagers' rights were considered by the Supreme Court recently in the case of *Cusack v London Borough of Harrow*, where Carnwath JSC confirmed that the right existed at common law, but had been circumscribed by statute.¹²⁹ Article 1 of Protocol 1 to the European Convention in itself does not provide any freestanding right to compensation, but is relevant to an assessment of proportionality. In particular, where a class of potential claimants is excluded from any right to compensation the court was entitled to enquire into the reasons for such exclusion and ask whether it served a legitimate purpose or led to a result which was so anomalous as to render the legislation unacceptable.¹³⁰ The question should be whether the result was so absurd that it undermines the fairness of the 'balance' intended by Parliament and is it necessary to satisfy article 1. Lord Carnwath held

...the issue of proportionality is not hard-edged, but requires a broad judgement as to where the "fair balance" lies.¹³¹

3.236 We decided to provide for compensation under the Level Crossings Bill where a person's lawful access from their property to the highway or road is extinguished. In doing so, we followed the precedents in the Highways Act 1980, where public paths or level crossings are extinguished, and in the Town and Country Planning Act 1990, where the right to use motor vehicles on a highway is extinguished.¹³² Where a claim would have been actionable, but for the defence that the highway had been extinguished by statutory authority, there should be a right to

¹²⁶ *Jenkins v Welsh Assembly Government* [2010] EWCA Civ 1640.

¹²⁷ *Executors of the Estate of the Right Honourable Herbert Robert Cayzer Baron Rotherwick v Oxfordshire County Council* [2000] 2 EGLR 84, Lands Tribunal.

¹²⁸ *Lyon v Fishmongers' Co* (1876) 1 App. Cas. 662; *Berridge v Ward* (1860) 2 F and F 208; *Marshall v Ullswater Steam Navigation Co* (1871) LR 7 QB 166.

¹²⁹ *Cusack v London Borough of Harrow* [2013] UKSC 40.

¹³⁰ *Thomas v Bridgend County Borough Council* [2011] EWCA Civ 862, [2012] QB 512 at 513.

¹³¹ *Cusack v London Borough of Harrow* [2013] UKSC 40 at [4] and [44].

¹³² Highways Act 1980, ss 118A and 119A, read with ss 28 and 121(2); Town and Country Planning Act 1990, s 249, read with s 250.

compensation in England and Wales, and in Scotland.

- 3.237 Lastly, a landowner should be compensated for the creation of any right over his land, whether the new right is a private or a public one.
- 3.238 We consider that the normal rules of valuation for compulsory purchase should be used to assess the depreciation in the value of the interest in the land.¹³³ Therefore, the closure scheme will be disregarded when valuing the land.¹³⁴
- 3.239 The fall in the value of the land should be assessed as at the date when the closure order creates or extinguishes the right of way which affects that land. As explained above, the closure of a level crossing does not take effect until all conditions for the closure have been met.¹³⁵ If a bridge, underpass or new level crossing has to be built or a path diverted or improvements made to another level crossing, these works must be completed before the closure takes place. It may be the case that temporary closure has to take place in order to carry out certain works, but the temporary closure will expire if the works are not completed within the time limit.¹³⁶
- 3.240 The term “interest in land” needs no definition for England and Wales and includes legal and equitable interests. We expect that bare licences to use or occupy land will be excluded from a right to compensation.¹³⁷ It should be noted that the interpretation of “land” in a statute is different to the interpretation of “interest in land”. An “interest in land” is likely to include any property right in land, including any estate, as well as a tenancy falling within section 20 of the Compulsory Purchase Act 1965. It will also include a property right “over” land, such as sporting rights which amount to a profit à prendre. We do not think that an interest in land includes a licence to occupy or a mere licence to graze. An easement or statutory right of way linked to a particular piece of land is an interest in land.
- 3.241 An “interest in land” should also be interpreted in light of clause 16(2)(b) of the draft Bill, which restricts a claim for compensation to one which would be actionable if the change made had not been made as a result of the responsible authority exercising its statutory powers. In Scotland the equivalent of an “interest in land” is a right in land and the draft Bill therefore has a translation provision.¹³⁸
- 3.242 We have decided to restrict the right to compensation to those who have an interest in land affected by the order extinguishing or restricting private rights, or

¹³³ Applying rules 2 to 4 of section 5 of the Land Compensation Act 1961 for England and Wales and rules 2 to 4 of section 12 of the Land Compensation (Scotland) Act 1963; *Waters v Welsh Development Agency* [2004] 1 WLR 1304.

¹³⁴ This is the *Pointe Gourde* or “value to the owner” rule: see *Waters v Welsh Development Agency* [2004] 1 WLR 1304, which interprets rules 2 and 3 of section 5 of the Land Compensation Act 1961. The same rules are applied to the level crossing closure scheme by cl 17(3) of the draft Bill for England and Wales and cl 18(3) for Scotland.

¹³⁵ Draft Level Crossings Bill, cl 15.

¹³⁶ See below under the heading “Duration of closure orders”.

¹³⁷ *Frank Warr & Co v LCC* [1904]; 1 KB 713; Roots, Humphries, Fookes and Pereira, *The Law of Compulsory Purchase*, (2nd ed 2011), Part B, para [446], p 75.

¹³⁸ Draft Level Crossings Bill, cl 16(4).

creating public or private rights over land. We also propose that compensation rights should be restricted to those for whom the extinguishment or restriction of the private right, or creation of the right, would provide the basis for a legal claim, if the closure order had not had statutory authority. This would exclude some claims for compensation. However, as discussed above, an individual closure order may provide for interference with or the extinguishment of a wider range of rights and interests than those expressly mentioned in the draft Bill, and if so, compensation should be provided where the European Convention on Human Rights so requires.

Land subject to a mortgage or heritable security

3.243 If the interest in the land is mortgaged or in Scotland is subject to a heritable security, we have concluded that the lender should be entitled to claim compensation in respect of the loss of the security.

3.244 Where land is subject to a mortgage or heritable security, clauses 16 to 18 of the draft Bill provide for compensation for depreciation in the value of land as a result of the extinguishment of rights over land or the creation of new rights over land. Clauses 16(2) and 17(5) of the Bill for England and Wales, or 16(2) and 18(5) for Scotland should be read together to ensure that there is no double recovery. If any compensation is paid for the interest over which the lender has security, it should be paid to the lender as if he had called up his security and sold the property. Clauses 17(5) and 18(5) are modelled on the Town and Country Planning Act 1990, section 117. Section 117(3) provides:

Where an interest in land is subject to a mortgage –

(a) any compensation to which this section applies, which is payable in respect of depreciation of the value of that interest, shall be assessed as if the interest were not subject to the mortgage;

(b) a claim for any such compensation may be made by any mortgagee of the interest, but without prejudice to the making of a claim by the person entitled to the interest;

(c) no compensation to which this section applies shall be payable in respect of the interest of the mortgagee (as distinct from the interest which is subject to the mortgage); and

(d) any compensation to which this section applies which is payable in respect of the interest which is subject to the mortgage shall be paid to the mortgagee, or, if there is more than one mortgagee, to the first mortgagee, and shall in either case be applied by him as if it were proceeds of sale.

3.245 Section 117 of the 1990 Act sets out the general provisions for assessment of compensation in so far as it relates to the depreciation of the value of an interest in land under part IV of the Town and Country Planning Act. Section 117(3) requires that compensation be paid to the mortgagee as if it were proceeds of sale of the property. The fact that the interest is mortgaged is not to affect its valuation and there is no special allowance made in respect of the existence of the mortgage. It is an uncontroversial model for compensation applying the

ordinary rules for compulsory acquisition of interests in land under the Land Compensation Act 1961. We are unaware of any adverse commentary or case law regarding the provision. It appears to function satisfactorily. Where possible, we have used existing schemes as models rather than creating a new scheme specifically for the level crossing closure procedure. We also thought it important to tie the closure procedure into provisions with which users and the courts will be familiar.

- 3.246 For example, a piece of land is worth £200,000 and is subject to a mortgage security loan of £150,000 which depreciates by £100,000. Without clauses 17(5), and 18(5) the owner would claim £100,000 for the depreciation of the land and the mortgagee would claim £50,000 for the depreciation in the value of the mortgage, as it can no longer realise the full £150,000 loan and falls £50,000 short. This would result in double recovery in respect of £50,000. The effect of clauses 17(5) and 18(5) is that the mortgagee is entitled to claim the £100,000 depreciation in value and must then hold and apply it as if it were the proceeds of sale. The resulting loan would then be £50,000 over land worth £100,000. The owner is compensated by the reduction of the mortgage loan and the mortgagee's position is preserved, although the mortgagee is unable to claim compensation in respect of depreciation of the mortgage due to the application of clause 17(5)(c) and 18(5)(c).
- 3.247 The effect of clauses 17(5)(d) and 18(5)(d) is that compensation for the depreciation in value to the land suffered by the owner goes to the mortgagee. The mortgagee must then hold and apply it as if it were the proceeds of sale. This reduces the outstanding mortgage sum.
- 3.248 To take the example, if the land depreciates in value by £20,000, the owner would hold an interest in the land now worth £180,000. The mortgagee may make a claim for £20,000, in which case the mortgagee must hold and apply the compensation as if it were the proceeds of sale. Therefore, the mortgage is reduced from £150,000 to £130,000. The owner is compensated for the depreciation in the value of the land by the reduced mortgage. The mortgagee receives early repayment of £20,000 and now holds a mortgage security of £130,000 over land worth £180,000.
- 3.249 These clauses are particularly important in a case where the land depreciates to a value lower than the security, such as £100,000 to use the example above. In such a case, the mortgagee would suffer a realised loss of £50,000, representing the amount of the loan that could no longer be recovered from the land. Compensating the mortgagee avoids the realised loss and therefore prevents double recovery of the £50,000 loss by both the owner and mortgagee.
- 3.250 This does not, however, compensate the mortgagee fully. The mortgagee suffers the loss of interest on the £20,000 as a result of its early repayment. This may also impact on the value of the mortgage interest itself in the market.
- 3.251 Where the land depreciates, the mortgagee also suffers loss from a market value perspective even where the full security can still be realised. This is because the value of the mortgage in the financial market, which is an interest in the land, can depreciate as a result of a reduction in the value of the land. A £150,000 loan secured against a £200,000 property is a less risky investment than a £150,000

loan secured against a £180,000 property. This increase in the level of risk can decrease the market value of the security and cause the mortgagee loss. The mortgagee would be unable to claim this loss as a result of clauses 17(5)(c) and 18(5)(c).

- 3.252 The scheme provided by clauses 17(5) and 18(5) as a whole is, however, potentially more efficient. The owner is fully compensated for the depreciation of the value of the land by reducing the mortgage. The mortgagee's risk is reduced by reducing the mortgage sum by holding and applying the compensation as proceeds of sale. A smaller mortgage sum is therefore secured against the depreciated asset.
- 3.253 The effect of paying compensation to the mortgagee is that the resulting risk is lower than the original risk. The trade-off is that the mortgagee's interest payments are reduced. Whether this in fact eliminates the mortgagee's loss will depend on market factors. It is unlikely fully to compensate the mortgagee and the owner is likely to receive a windfall from early repayment reducing his interest payments.

Recommendation

- 3.254 **We recommend the creation of a bespoke compensation scheme for the extinguishment, restriction or creation of rights over land under a level crossing closure order.**
- 3.255 This recommendation is given effect by clauses 16 to 18 of the draft Level Crossings Bill.

PLANNING PERMISSION

- 3.256 Where a bridge or underpass is to be built to replace a level crossing, planning permission will be required. Under the Transport and Works Acts, deemed planning permission may be granted as part of an order.¹³⁹ We are keen for the closure order to include all necessary consents so that the whole project can be considered in the round to make the process streamlined and efficient for all parties. We invited views of consultees on whether planning permission should be deemed to be included in a closure order. The majority of those who provided views were in favour of deemed planning permission being included in a closure order.¹⁴⁰
- 3.257 We therefore recommend that the appropriate national authority should have the power to direct that planning permission for development under a closure order is deemed to have been granted.
- 3.258 The draft Bill includes a provision amending section 90(2A) of the Town and Country Planning Act 1990 and section 57(2A) of the Town and Country Planning (Scotland) Act 1997 both of which make provision for deemed planning permission for development with government authorisation.

¹³⁹ See Transport and Works Act 1992, s 16 and the Transport and Works (Scotland) Act 2007, s 14.

¹⁴⁰ Consultation Analysis, paras 8.282 to 8.294.

- 3.259 The amendment to section 90(2A) of the Town and Country Planning Act 1990 and the amendment to Schedule 13 to the 1990 Act, relating to blighted land, apply certain provisions of that Act but not all. The main provisions of relevance to the level crossing closure procedure are the compensation provisions in Part 4; the purchase notice provisions in chapter 1 of Part 6, the provisions relating to blight in chapter 2 of Part 6 and some of the enforcement provisions in Part 7.
- 3.260 Section 91 of the Town and Country Planning Act 1990 provides that a development for which planning permission is granted must be started before the end of the period of three years (in England) or five years (in Wales) commencing on the date when the permission was granted. Section 58 of the Town and Country Planning (Scotland) Act 1997 provides that a development in Scotland must be started within three years of the date when permission was granted. These provisions are disapplied under the closure procedure as it provides that a closure order will lapse after three years, subject to a power to extend its duration once for one year only in exceptional circumstances.
- 3.261 Section 90(2A) of the 1990 Act and section 57(2A) of the 1997 Act provide that the Secretary of State and the Scottish Ministers respectively may direct that planning permission is deemed to be granted subject to any conditions specified in the direction. We do not wish it to be possible for a direction under these provisions to include a condition reserving some issues for approval at a later stage. For that reason the draft Bill provides that in the case of a closure order any conditions specified in the direction are not to make such a reservation.

Recommendation

- 3.262 **We recommend that the appropriate national authority should have the power to direct that for the purposes of the Town and Country Planning Act 1990 or Town and Country Planning (Scotland) Act 1997, planning permission is deemed to be granted for development under a closure order.**
- 3.263 This recommendation is given effect by clause 21 of the draft Level Crossings Bill.

Blighted land

- 3.264 There is a risk of blight where a closure order is proposed or made. Blight occurs where a landowner is unable to sell land at a price that might reasonably be expected, as a result of the development that might take place. Section 150 of the Town and Country Planning Act 1990 limits the right to issue a blight notice to those with a qualifying interest in the whole or part of a hereditament or agricultural unit. Section 101 of the Town and Country Planning (Scotland) Act 1997 makes similar provision for Scotland. Where land is subject to compulsory purchase, or a draft compulsory purchase order has been made, a blight notice may be issued where reasonable endeavours to sell have not been made. Land subject to compulsory purchase under the level crossings closure procedure should be classified as blighted land.
- 3.265 This is provided for in relation to England and Wales in clause 21(5) of the draft Bill, which applies paragraphs of Schedule 13 to the Town and Country Planning Act 1990 to land subject to an application under the level crossing closure

procedure.¹⁴¹ Clause 21(11) of the draft Bill makes similar provision for Scotland, by inserting a new paragraph 16A into Schedule 14 to the Town and Country Planning (Scotland) Act 1997.

- 3.266 Unless land is subject to compulsory purchase under a closure order, we think it unlikely that a landowner will be unable to sell his entire interest in the land. Closure orders may contain conditions requiring small-scale works to be undertaken in connection with the closure. Such conditions are unlikely to have a significant impact on the whole interest of a landowner.
- 3.267 The draft Bill defines the circumstances when land will be blighted. This is by reference to a specific and defined area as set out in the closure order and without any limits of deviation.¹⁴² We consider that the general compulsory purchase system provides clearer protection to landowners as it relates to land which is precisely described in the compulsory purchase order and the schedule attached thereto.¹⁴³ In contrast, the relevant provisions of the Transport and Works Act 1992 relate to land shown within the limits of deviation on the order plan which accompanies the application.¹⁴⁴ Our intention is that level crossing closure orders will follow the conventional compulsory purchase route, so far as possible, and will not contain any limits of deviation.
- 3.268 The issue of a blight notice requires the appropriate authority to purchase the land, subject to Part 6 of the Town and Country Planning Act 1990, or Part 5 of the Town and Country Planning (Scotland) Act 1997. The applicant for the closure order will be the appropriate authority to buy the land for the purposes of the draft Level Crossings Bill.

Recommendation

- 3.269 **We recommend that land subject to compulsory acquisition or an application for compulsory acquisition under the level crossings closure procedure should be blighted land within the meaning of Schedule 13 to the Town and Country Planning Act 1990 or Schedule 14 to the Town and Country Planning (Scotland) Act 1997, as appropriate.**
- 3.270 This recommendation is given effect by clause 21(5) and (11) of the draft Level Crossings Bill.

Powers required to carry out the works

- 3.271 In order to carry out the works, the applicant will need powers to enter the land, and may need to suspend or divert rights of way or stop up or divert the highway or road. It might be necessary to build or place temporary structures or to remove

¹⁴¹ Only the Town and Country Planning Act 1990, sch 13, paras 21 and 22 are relevant to compulsory purchase under a level crossing closure order.

¹⁴² Limits of deviation are areas around the proposed development which may or may not eventually be affected by the development, but allow it to deviate from the original plans.

¹⁴³ The parcel of land is usually marked on a compulsory purchase order plan in pink.

¹⁴⁴ As regards Scotland, the relevant provisions in the Transport and Works (Scotland) Act 2007 are ss 4 and 6(3) which are referred to in the Town and Country Planning (Scotland) Act 1997, sch 14, para 16. For England and Wales, the Transport and Works Act 1992, ss 6 and 7(3) are referred to in the Town and Country Planning Act 1990, sch 13, para 23.

structures or apparatus while the works are going on. It may be necessary to decide who will be liable for acts or omissions in connection with the works and the extent of liability. We make provision for all necessary powers in the draft Bill.

Recommendation

3.272 **We recommend that the appropriate national authority should have the power to provide in a closure order for powers needed to facilitate the works, including:**

- (1) entering the land for the purposes of carrying out or preparing to carry out the works;**
- (2) temporary stopping up or diversion of highways or roads;**
- (3) suspension of rights of way or any other rights over land;**
- (4) temporary erection, alteration or removal of apparatus on land;**
- (5) imposing or excluding liability for acts or omissions in connection with the powers listed above; and**
- (6) requiring the payment of compensation for damage, nuisance or interference caused by such an act or omission.**

3.273 These recommendations are given effect by clauses 12(1)(c) and 13 of the draft Level Crossings Bill.

Duration of closure orders

3.274 We intend a level crossing closure order to be permissive, so that the applicant is not required to carry out the works authorised by the order if, for example, circumstances have changed since the application was made.

3.275 A closure order may provide that the mandatory changes to give effect to the order, for example the extinguishment of the right of way over the level crossing, do not take effect until such time as conditions set out in the order have been met. Where no conditions are specified in the closure order, it follows that the mandatory changes would take immediate effect on the making of the order. This is likely to occur in the case of a simple closure of a private level crossing, which does not involve any works and does not involve replacement of the crossing or the compulsory acquisition of land.

3.276 Where a level crossing closure order specifies conditions to be met before the closure takes effect, if those conditions have not been met within three years of the making of the order, the order would lapse and the level crossing would remain.

3.277 The standard period within which compulsory purchase powers should be exercised is three years. In the consultation paper, we proposed that the same period should be adopted in relation to a closure order.¹⁴⁵

¹⁴⁵ Joint Consultation Paper, para 8.86.

Consultation

- 3.278 Consultation responses supported a time limit of between three and five years.¹⁴⁶
- 3.279 The Rail Safety and Standards Board supported a five-year time limit, subject to extension by agreement. It explained that the financial case for construction of a replacement bridge would usually only be made on the basis that the bridge was constructed at about the same time or shortly before the existing crossing equipment would require renewal:

Presently the requirement for renewal is predicted some years in advance and it is reasonable to expect that the closure procedure would start at this time. However, sometimes the level crossing equipment does not degrade at the anticipated rate and the renewal date can be postponed for some years. Consequently there may be circumstances when it is attractive to both the replacement scheme and the owner of property for compulsory purchase powers not to be exercised within five years. Extension beyond five years should therefore be permitted subject to the agreement of both parties and an undertaking that the owner could request compulsory purchase at any time.

Discussion

- 3.280 The importance of certainty, minimising blight, and improving the efficiency of the closure system led us provisionally to propose that a three-year time limit would be appropriate.
- 3.281 In order to create a short and streamlined closure procedure that has a predictable timeline and minimal blight, we initially proposed that there should be no power to extend the time limit. If a closure order was not completed within three years of its grant, that order would lapse.
- 3.282 After further consideration, we have concluded that there might be circumstances where an extension of the time limit will be appropriate. For example, work may have commenced on a bridge across the railway, but not be quite complete by the expiry of the three-year time limit. If there is no power to extend, the closure of the level crossing will not be completed and the community will be left with an incomplete bridge. We have therefore concluded that the national authority should have the power to extend the time limit by a period of no more than 12 months. An extension of time can only be granted where the national authority is satisfied that it is necessary in the exceptional circumstances of the case.

Where a closure order expires before completion of the scheme

- 3.283 Where the time limit for the closure order expires before all of the conditions imposed by the order are met, the order will cease to have effect and any permissions granted by the order will lapse. This does not affect the validity of action taken under the order while it was in force.

¹⁴⁶ Consultation responses on time limits for the exercise of compulsory purchase powers are discussed in the Consultation Analysis at paras 8.271 to 8.281 and on time limits for the stopping up of diversion of highways or roads at paras 8.332 to 8.342.

- 3.284 Where the closure order itself creates new rights or extinguishes or restricts rights (other than rights over land which is to be compulsorily acquired), these provisions will not come into effect, unless any conditions precedent have been met.
- 3.285 Compulsory purchase orders are usually operative for three years.¹⁴⁷ Under the closure procedure if the closure order expires before title has passed to the applicant, the question as to whether a compulsory acquisition can proceed will depend on how far that acquisition has progressed at the time of expiry of the closure order. If the acquisition has reached a “critical milestone”, the purchase may proceed. The critical milestones are:
- (1) where the applicant has entered onto and taken possession of the land;
 - (2) where the compensation has been agreed or awarded or paid; or
 - (3) where the issue of compensation has been referred to the relevant Tribunal.
- 3.286 This provision draws on section 5 of the Compulsory Purchase Act 1965 as regards England and Wales and section 78 of the Planning and Compensation Act 1991 as regards Scotland. The same critical milestones provided by those sections will be applied to the level crossing closure scheme. The transaction will complete when a conveyance or deed poll is executed for land in England and Wales, or when a conveyance is registered in Scotland.
- 3.287 Where compulsory purchase proceeds by way of general vesting declaration, there is conflicting case law as to what has to be done in order for an acquisition to proceed after the end of the operative period. The most that is required, however, is execution of the general vesting declaration.¹⁴⁸ Under our closure procedure, completion will occur when a general vesting declaration is executed and the period of notice expires.¹⁴⁹
- 3.288 If a closure order extinguishes or restricts rights over land to be compulsorily acquired, we recommend that the time limits for compulsory acquisition will apply to the extinguishment or restriction as well.
- 3.289 If deemed planning permission to build a bridge or underpass has been granted and the building has only been partially completed, the expiry of the closure order will not affect the validity of the building work which has taken place so far. The planning permission will only be revoked with effect from the time of expiry onwards. Enforcement action under the Town and Country Planning Acts cannot be taken to require completion of the building works after the expiry of the closure

¹⁴⁷ Compulsory Purchase Act 1965, s 4; Lands Clauses Consolidation (Scotland) Act 1845, s 116.

¹⁴⁸ In *Co-operative Insurance Society Ltd v Hastings BC* (1993) 91 LGR 608, the Court held that the general vesting declaration had to be executed. In *Westminster City Council v Quereshi* (1990) 60 P&CR 380, the Court held that notification was sufficient. The Scottish equivalent to the Compulsory Purchase (Vesting Declarations) Act 1981, s 3 is the Town and Country Planning (Scotland) Act 1997, sch 15, para 2.

¹⁴⁹ Compulsory Purchase (Vesting Declarations) Act 1981, s 4(1) and Town and Country Planning (Scotland) Act 1997, sch 15, paras 2 and 7.

order as there is no planning permission to authorise the remaining works.

- 3.290 This does mean that there is a risk that a bridge could be left incomplete, with the level crossing remaining open. The applicant would be under a duty to make any such building works safe, but could not be required to complete them. It is a risk which we regard as theoretical. The applicant for the closure order will have invested time and resources in obtaining and then progressing the requirements of the order. We are confident that the applicant would wish to ensure, therefore, that the works are complete within the requisite timescale. As a result we think that the undesirable prospect of incomplete constructions in the countryside is not realistic. We do accept, though, that this slim risk is a consequence of the permissive nature of the closure scheme.

Recommendations

- 3.291 **We recommend that a closure order should cease to have effect three years after it is made.**
- 3.292 **We recommend that the decision-maker should have the power to extend the duration of a closure order for a maximum of 12 months, providing the national authority is satisfied that it is necessary in the exceptional circumstances of the case and no other extension has been granted in respect of the closure order.**
- 3.293 **We recommend that provision should be made for compulsory purchase to proceed if a critical milestone has been reached at the time a closure order ceases to have effect.**
- 3.294 These recommendations are given effect by clause 15 of the draft Level Crossings Bill.

CHALLENGING DECISIONS ON CLOSURE

- 3.295 Whether a closure order is made or refused, there may be those who wish to challenge the decision. We considered whether a statutory appeal would be appropriate or whether judicial review would be an adequate remedy.
- 3.296 As mentioned earlier, article 6 of the European Convention on Human Rights requires that an administrative decision-making process should be subject to the full supervisory jurisdiction of an independent and impartial tribunal. This may be satisfied by judicial review.¹⁵⁰
- 3.297 In relation to European Union law, the Aarhus Convention¹⁵¹ and the Public Participation Directive¹⁵² require parties to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters, including access to court procedures which are not “prohibitively expensive”.¹⁵³ One of the concerns in relation to the Aarhus

¹⁵⁰ *R (Alconbury) v Secretary of State for the Environment* [2001] UKHL 23, [2003] 2 AC 295.

¹⁵¹ The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998 (the Aarhus Convention).

¹⁵² 2003/35/EC.

¹⁵³ Aarhus Convention, art 9.

Convention has been whether proportionality may be assessed in judicial review. As the closure procedure contains a list of factors for the appropriate national authority to assess, a challenge in relation to the application of those criteria would involve an assessment of proportionality. If amendments are required to the judicial review system overall as a result of the requirements of the Aarhus Convention, consideration would have to be given to statutory reviews on environmental matters within the ambit of the Aarhus Convention.¹⁵⁴ Projects requiring an environmental impact assessment under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 will usually be excluded from the level crossings closure procedure in favour of the Transport and Works Acts procedure.¹⁵⁵ However, as explained above, we think it is possible that a screening process might be required in order to determine whether a project is likely to have a significant effect on the environment. We have, therefore, made provision in the Bill for this in the closure procedure.¹⁵⁶

- 3.298 Under both the Transport and Works Act 1992 and the Town and Country Planning Act 1990 in England and Wales, a statutory review lies to the High Court. Any person aggrieved on the grounds that the action is not within the powers of the Act or that any of the relevant requirements have not been complied with may seek such a review.¹⁵⁷ Similar provision is contained in section 16 of the Transport and Works (Scotland) Act 2007 and sections 238 and 239 of the Town and Country Planning (Scotland) Act 1997, enabling applications for review by the Court of Session.
- 3.299 We have concluded that the draft Bill should make provision for a challenge by way of a statutory judicial review, enabling a person with sufficient standing to appeal against the decision to grant or refuse a closure order. The challenge would lie to the High Court, or in Scotland to the Court of Session.
- 3.300 The interpretation of “sufficient standing” for the purposes of judicial review and “person aggrieved” within planning legislation have differed in the past.¹⁵⁸ Recently, however, the Supreme Court has given a wide interpretation to “person aggrieved”, particularly for the purposes of a planning appeal, in *Walton v Scottish Ministers*.¹⁵⁹ The Court held that a wide interpretation was appropriate, particularly in the context of statutory planning appeals and that the quality of the natural environment was of legitimate concern to everyone. A person would ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and if their

¹⁵⁴ See, for example, *R (Edwards) v Environment Agency (No.2)* [2010] UKSC 57, [2011] 1 WLR 79 on the meaning of ‘prohibitively expensive’ and the reference to the ECJ; *R (Garner) v Elmbridge BC* [2010] EWCA Civ 1006; *R (on the application of Young) v Oxford City Council* [2012] EWCA Civ 46. The Ministry of Justice has published proposals for a cost-capping scheme for cases which fall within the Aarhus Convention: *Cost Protection for Litigants in Environmental Judicial Review Claims* (Ministry of Justice, August 2012).

¹⁵⁵ SI 2011 No 1824.

¹⁵⁶ For example in the draft Level Crossings Bill, sch, paras 10(5) and 10(6).

¹⁵⁷ Town and Country Planning Act 1990, s 288; Transport and Works Act 1992, s 22.

¹⁵⁸ A summary of the principles to be extrapolated from earlier case law may be found in the judgment of Pill LJ in *Ashton v Secretary of State for Communities and Local Government* [2010] EWCA Civ 600.

¹⁵⁹ [2012] UKSC 44, 2012 SLT 1211.

complaint was that the decision was not properly made. Mr Walton, as a local resident who had made representations at earlier stages of the planning process and attended hearings, would also have satisfied the test for sufficient standing for judicial review. We take the view that the right to challenge a closure decision should be available to anyone with sufficient standing.

- 3.301 The appellant should have 42 days beginning with the date on which the decision was published in which to file a claim for judicial review. In line with appeals to the High Court under the Town and Country Planning Act 1990 and appeals against compulsory purchase orders, there should not be any permission stage.¹⁶⁰ This statutory review is not intended to affect the appeal rights under the Acquisition of Land Act 1981 (in England and Wales), which governs appeals against compulsory purchase orders, irrespective of the legislative scheme under which the order was made.¹⁶¹ If the Secretary of State does not confirm a compulsory purchase order, any challenge must be by judicial review. If the order is confirmed, an appeal may be brought by any person aggrieved to the High Court under section 23 of the 1981 Act on the grounds that any relevant requirement has not been complied with in relation to the order. Any such application must be made within six weeks of the order being confirmed.

Recommendation

- 3.302 **We recommend that there should be a power to apply for statutory judicial review of a decision to make or refuse a closure order, with no permission stage.**
- 3.303 This recommendation is given effect by clause 23 of the draft Level Crossings Bill.

Disputes over compensation

- 3.304 The draft Level Crossings Bill provides that any dispute relating to compensation, whether relating to compulsory purchase or the compulsory extinguishment, restriction or creation of a right, will be referred to the Upper Tribunal in England and Wales or, in Scotland, the Lands Tribunal for Scotland.¹⁶²
- 3.305 The Upper Tribunal's decision may be reviewed on the application of a person with a right of appeal under the Tribunals, Courts and Enforcement Act 2007.¹⁶³ Onward appeal is to the Court of Appeal with permission. These rights of appeal would be available to any person subject to a notice to treat under the proposed closure procedure. The right of appeal against the granting or refusal to grant a level crossing closure order is intended to be similar to that provided in section 288 of the Town and Country Planning Act 1990.
- 3.306 Under normal compulsory purchase rules any dispute over compensation under the closure scheme could be referred to the Lands Chamber of the Upper

¹⁶⁰ Draft Level Crossings Bill, cl 23.

¹⁶¹ It should be noted that in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 in relation to compulsory purchase in Scotland, there is no statutory right of appeal.

¹⁶² Draft Level Crossings Bill, cls 17(1) and 18(1).

¹⁶³ Section 10(2).

Tribunal or the Lands Tribunal for Scotland, where a hearing or exchange of written representations could take place.¹⁶⁴ We recommend that any dispute relating to compensation under the level crossing closure scheme be referred to the Upper Tribunal in England and Wales or in Scotland, the Lands Tribunal for Scotland.¹⁶⁵

- 3.307 The Upper Tribunal's decision may be reviewed on the application of a person with a right of appeal under the Tribunals, Courts and Enforcement Act 2007.¹⁶⁶ Onward appeal is to the Court of Appeal with permission. These rights of appeal would be available to any person subject to a notice to treat under the proposed closure procedure.
- 3.308 In Scotland an appeal on a point of law lies to the Court of Session against a decision of the Lands Tribunal for Scotland.¹⁶⁷ Any appeal must be brought within 42 days of the decision.¹⁶⁸ Alternatively, a person dissatisfied with the tribunal's decision may require the Tribunal to state a case for the opinion of the court.¹⁶⁹ An application to the Tribunal to state a case must be made within 14 days of the decision.¹⁷⁰ A decision of the Lands Tribunal for Scotland on valuation is final.¹⁷¹

¹⁶⁴ Compulsory Purchase Act 1965, s 6 for England and Wales, and the Lands Clauses (Consolidation) (Scotland) Act 1845, ss 19 and 20 and the Land Compensation (Scotland) Act 1963, s 8. See also the Compulsory Purchase (Vesting Declarations) Act 1981, s 7 and the Town and Country Planning (Scotland) Act 1997, sch 15, para 6 which place those whose title has vested in the acquiring authority by reason of a general vesting declaration in the same position as those on whom a notice to treat has been served.

¹⁶⁵ Land Compensation Act 1961, s 1; Land Compensation (Scotland) Act 1963, s 8.

¹⁶⁶ Section 10(2).

¹⁶⁷ Tribunal and Inquiries Act 1992, s 11(1), (7)(a) and (b)(ii).

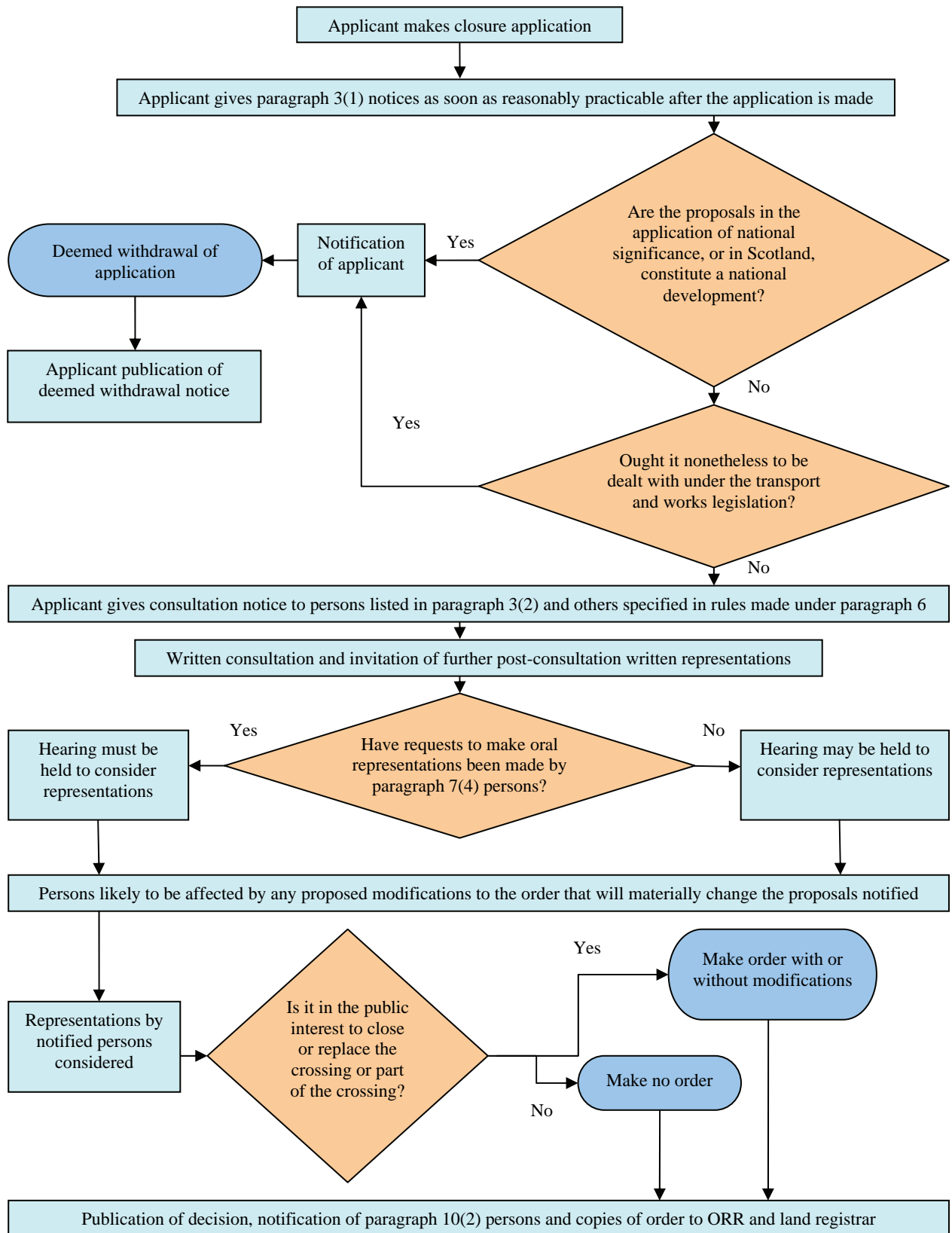
¹⁶⁸ Act of Sederunt (Rules of the Court of Session 1994) 1994, SI 1994 No 1443, r 41.26.

¹⁶⁹ Tribunals and Inquiries Act 1992, s 11(1), (7)(a), and (b)(ii).

¹⁷⁰ Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994 No 1443, r 41.8(3)

¹⁷¹ Tribunal and Inquiries Act 1992, s 11(7)(c).

LEVEL CROSSINGS CLOSURE PROCEDURE



Paragraph references are to the Schedule to the draft Bill