

# THE DRAFT WALES BILL

## Further Submission to the Welsh Affairs Select Committee of Parliament

by

Huw Williams<sup>1</sup>

### INTRODUCTION

1. This paper is supplementary to my previous submission to the Committee. This paper focuses exclusively on the proposed reservation of the compulsory purchase of land and covers in somewhat greater detail the section on CPO in my previous submission. This submission also draws attention to the anomalies surrounding the role of the “appropriate Minister” in relation to compulsory purchases affecting statutory undertakers.

### Reservation of the Compulsory Purchase of Land

2. Compulsory purchase of land<sup>2</sup> is wholly reserved under the Draft Bill. This is a rolling back of the current position where compulsory purchase is a “silent subject” and could be legislated upon under section 108 (5) (b) of the Government of Wales Act 2006, if incidental or consequential to a conferred subject<sup>3</sup>. The proposed reservation, if implemented, will cause unnecessary difficulties across a range of devolved activities which are underpinned by powers of compulsory acquisition of land (or their availability in the background).
3. While CPO was a “silent subject” it appears to have been assumed that the National Assembly certainly has a degree legislative competence when it comes to powers of compulsory purchase. The Welsh Ministers also exercise executive powers to make secondary legislation relating to compulsory purchase, where the Welsh Ministers themselves have CPO

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<sup>1</sup> Lead Partner – Public Law and Vice-chairman of Geldards LLP, a member of the Planning and Environment Law Committee of the Law Society of England and Wales, Chair of Public Law Wales (Wales Public Law and Human Rights Association) and a member of the Welsh Government’s Independent Advisory Group on Planning 2012-13.

<sup>2</sup> New Schedule 7A, section M4 Buildings and development, paragraph 200

<sup>3</sup> For example Schedule 7, Subject 10 (Highways) or Subject 18 (Town and Country Planning).  
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powers or are the confirming authority for CPO's made by other devolved bodies and Welsh local authorities<sup>4</sup>.

4. In addition to highways<sup>5</sup> and planning<sup>6</sup>, there are CPO powers which can be utilised for NHS bodies<sup>7</sup>, for education purposes<sup>8</sup>, housing<sup>9</sup>, for general local government purposes<sup>10</sup> and for economic, social and environmental development<sup>11</sup>. Other, less frequently used, CPO powers cover aerodromes, allotments, caravan sites, cemeteries, animal diseases, fire services, civil defence, markets, parks and recreation grounds, open spaces and slaughterhouses.
5. To fully understand the effect of this reservation, it is necessary to appreciate that the law on compulsory purchase ("CPO") (which is an entirely statutory code) falls into three distinct categories:
  - 5.1 Provisions that confer powers of CPO.
  - 5.2 Legislation that sets out the procedure for making a CPO, making and determining objections, dealing with special categories of land (e.g. open space land) and statutory challenges to the lawfulness of a CPO<sup>12</sup>.
  - 5.3 The rules for vesting title to land, overriding existing rights and determining the compensation to be paid for the compulsory acquisition of land or for the depreciation in the value of land due to the carrying out of public works.<sup>13</sup>
6. The Welsh Ministers' Independent Advisory Group on planning in their report "Towards a Welsh Planning Act: Ensuring the Planning System Delivers" (June 2012)<sup>14</sup> made a number of recommendations in relation to

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<sup>4</sup> See, for example, Compulsory Purchase of Land (Prescribed Forms) (National Assembly for Wales) Regulations 2004/2732

<sup>5</sup> See Highways Act 1980 Part XII.

<sup>6</sup> Principally section 226 of the Town and Country Planning Act 1990

<sup>7</sup> National Health Service (Wales) Act 2006 section 159 and

<sup>8</sup> Education Act 1996 s.530

<sup>9</sup> Housing act 1985 Part II and Part IX

<sup>10</sup> Local Government Act 1972, section 120

<sup>11</sup> Powers of the Welsh Ministers under the Welsh Development Agency Act 1975 ( as successors to the Welsh Development Agency)

<sup>12</sup> The principal statutes here are the Acquisition of Land Act 1981 and the Compulsory Purchase (Vesting Declarations) Act 1981

<sup>13</sup> The principal statutes here are the Land Compensation Act 1961, the Compulsory Purchase Act 1965, the Land Compensation Act 1973, the Planning and Compulsory Purchase Act 2004 and the Land Tribunal Act 1946, although for certain purposes it may be necessary to refer to older statutes as far back as the Lands Clauses Act 1845.

<sup>14</sup> The full report can be found at  
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the exercise of “planning” CPO functions<sup>15</sup>. The IAG argued for maintaining a coherent system throughout England and Wales and also recommended certain reforms in relation to the CPO powers available for the promotion of regeneration projects in Wales with a view to creating a single set of land development and regeneration CPO powers for both local authorities and the Welsh Ministers.

7. When the Environment and Sustainability Committee of the National Assembly conducted a pre-legislative inquiry into the Planning (Wales) Bill, they stated, in their letter to the Minister of 10<sup>th</sup> April 2014 setting out their conclusions<sup>16</sup>:

*3.3 We also ask the Welsh Government to look again at the IAG recommendations about Compulsory Purchase. From the evidence we heard the greatest concern is about retaining coherence with the rules that apply in England, given the common system of land law that applies throughout England and Wales. However bringing together compulsory purchase powers from different legislation into a single set of powers for Welsh Ministers and local planning authorities also seems a sensible proposal that should be taken forward.*

8. It is clear that the National Assembly (presumably advised by their legal services) took the view that such a legislative initiative to bring together CPO powers for development and regeneration was within the legislative competence of the National Assembly.
9. Reserving the whole subject of compulsory purchase of land would risk rolling back (or at least creating uncertainty about) powers over the range of legislative competences already noted above. Reform proposals across all these areas which may require adjustments to land acquisition powers will be likely to run into concerns about whether such powers are “ancillary” and “necessary” with the meaning of the proposed new Schedule 7B Part 1 paragraph 2, the problems around which concepts have been extensively commented upon by others. In practical terms a

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<http://gov.wales/topics/planning/planningresearch/publishedresearch/towardsawelshplanningact/?lang=en>

<sup>15</sup> See recommendation 97 and discussion at paragraphs 6.28 to 6.39

<sup>16</sup> See

<http://www.senedd.assembly.wales/documents/s26347/Letter%20to%20the%20Minister%20for%20Housing%20and%20Regeneration.pdf>

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“chilling” effect on legislative initiative seems inevitable, the more so because of the Human Rights aspect of CPO, which engages the rights in relation to property and (on occasion) family life.<sup>17</sup>

10. It is submitted that the key element of CPO legislation that requires coherence across England and Wales is the part of the legislation relating to land compensation, overriding of rights over land and the compulsory transfer of title through statutory vesting. This sits logically with the reservation of land law under the new Schedule 7B Part 1 paragraph 3(2).
11. However, legislative competence over conferring CPO powers and CPO procedure should be within the legislative competence of the Assembly, without the need to test the ancillary or necessary character of the provision. For example, why shouldn't the Assembly be able to modify the Acquisition of Land Act 1981 so that in Wales it should no longer be necessary to advertise a CPO in the press for two successive weeks<sup>18</sup> and replace it with a single advert and a requirement for electronic posting on a website?
12. It is the view of this submission is that the general reservation of compulsory purchase of land should be replaced with a restricted reservation in respect of the land compensation and the statutory vesting of land, to avoid an undesirable and quite possibly unintended restriction on otherwise devolved competencies.

### **Role of the “Appropriate Minister”**

13. There is a related problem arising from the pre-devolution powers of a Minister of the Crown which affects the operation of the law of compulsory purchase. Keith Bush QC in a paper submitted to the Constitutional and Legislative Affairs Committee<sup>19</sup> has already drawn attention to the difficulties that will continue to arise if new schedule 7B paragraph 8 is enacted in its current form which requires ministerial consent where any residual reserved function is affected, even if it relates to an otherwise devolved subject. The paper contrasts this arrangement unfavourably with

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<sup>17</sup> Article 8: Right to respect of personal and family life and Article 1 of the First Protocol: Protection of property, ECHR.

<sup>18</sup> See section 11(1)

<sup>19</sup> See:

<http://www.senedd.assembly.wales/documents/s46038/DWB%203%20-%20Keith%20Bush%20QC.pdf>

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the provision in section 117 of the Scotland Act 1998 which provides for the pre-devolution powers of Ministers of the Crown to pass automatically to the Scottish Ministers within the devolved competencies.

14. Where a CPO is made that affects a statutory undertaker's land then a CPO may only be confirmed in respect of it where the "appropriate Minister" either gives a certificate that the land may be acquired on being satisfied that there is no serious detriment to the statutory undertaking or replacement land is available<sup>20</sup> or (in certain circumstances) where there is no certificate but the CPO is jointly confirmed by the confirming Minister (or in Wales the Welsh Ministers) and the "appropriate Minister"<sup>21</sup>.
15. Under the Acquisition of Land Act 1981 the "appropriate Minister" is the Secretary of State and any questions as to which Minister is the appropriate Minister is to be determined by the Treasury<sup>22</sup>. Under the National Assembly for Wales (Transfer of Functions Order) 1999<sup>23</sup> the "appropriate Minister" in relation to statutory undertakers remains the Secretary of State except in relation to water and sewerage undertakers (The inclusion of sewerage undertakers here appears anomalous given that the devolution of powers over sewerage is only now being proposed; see the Draft Wales Bill clause 7 and reservation C16 of Schedule 1) and National Trust Land.
16. The draft Wales Bill proposes to devolve executive functions in relation to most Welsh ports (with the temporary exception of "Welsh Trust Ports")<sup>24</sup>. However, it is not clear why in that case the Welsh Ministers are not also being made the "appropriate Minister" in relation CPO's affecting statutory port undertakings<sup>25</sup>. This demonstrates the need to check such matters on a case by case basis would not arise if the position in Wales was the same as that in Scotland in relation to pre-devolution Minister of the Crown powers.

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<sup>20</sup> See the Acquisition of Land Act 1981 section 16 (2).

<sup>21</sup> See *ibid* section 31 (2) which applies in the case of CPO's made for planning or regeneration purposes.

<sup>22</sup> See *ibid* section 8 (3) and (4).

<sup>23</sup> SI 1999/672 Schedule 1

<sup>24</sup> See clauses 13, 14 and 15.

<sup>25</sup> And likewise in relation to the powers under section 260 of the Town and Country Planning Act 1990 (which deals with called in planning applications by statutory undertakers and planning appeals by statutory undertakers) highlighted in Keith Bush QC's paper referenced at footnote 19 above..

17. The “appropriate Minister” position in relation to sewerage undertakers has already been noted. Another example of the erratic distribution of “appropriate Minister” powers is in the Highways Act 1980, section 290 (Supplementary provisions as to powers of entry for the purpose of survey). Subsection (7) allows a statutory undertaker to object to the exercise of certain powers to enter land for survey<sup>26</sup> on the grounds of serious detriment unless the “appropriate Minister”<sup>27</sup> gives approval. However, an examination the National Assembly for Wales (Transfer of Functions Order) 1999<sup>28</sup> in relation to the Highways Act 1980 does not reserve to the function of the “appropriate Minister” to the Minister of Transport or the Secretary of State as the case may be<sup>29</sup>. Accordingly the role of “appropriate Minister” in this case has transferred to the Welsh Ministers, although if the surveys are preliminary to a CPO being made and the Acquisition of Land Act 1981 is engaged then the “appropriate Minister” is the Secretary of State except where there has been a transfer of functions.
18. Any overall logic behind this distribution of functions is accordingly elusive.

## Conclusion

19. The purpose of this paper is to further highlight some practical issues that will arise from the proposed scheme of reserved powers and the failure to address the existing anomalies in relation to compulsory purchase and to advance the view that:

19.1 The reservation of powers in relation to compulsory acquisition should be restricted to the compensation code and the compulsory transfer and vesting of land only as these are the areas that are most closely aligned to the private law of land; and that the present general reservation represents a rolling back of the

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<sup>26</sup> See Highways Act 1980 s.298(3).

<sup>27</sup> Defined in s.290 (10) as “(b) in relation to statutory undertakers carrying on any railway, tramway, road transport, dock, harbour or pier undertaking, the Minister of Transport; and (c) in all other cases, the Secretary of State”.

<sup>28</sup> *Ibid* Schedule 1

<sup>29</sup> The transfer provision in full is:

“Highways Act 1980 (c.66) except–

(a) the Treasury function under section 327(4);

(b) functions exercisable by the Secretary of State in pursuance of section 329(5); and

(c) functions exercisable by the Secretary of State in relation to that part of the M4 Motorway in Wales which comprises “the New Toll Plaza area” and “the New Bridge”, as defined in section 39(1) of the Severn Bridges Act 1992 (c.3).”

powers generally understood to be possessed by the National Assembly at present.

- 19.2 The anomalies in relation to the identity of the “appropriate Minister” in relation to devolved subjects should be addressed by arrangements in relation to the pre-1999 powers of Ministers of the Crown based on section 117 of the Scotland Act 1998.

Huw Williams

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