



# **The Law Commission and The Scottish Law Commission**

(LAW COM No 339)

(SCOT LAW COM No 234)

## **LEVEL CROSSINGS**

*Presented to the Parliament of the United Kingdom by the Lord Chancellor  
and Secretary of State for Justice  
by Command of Her Majesty*

*Laid before the Scottish Parliament by the Scottish Ministers*

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# THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION

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The terms of this report were agreed on 19 September 2013.

The text of this report is available on the Internet at:

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

**LEVEL CROSSINGS**

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# THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION

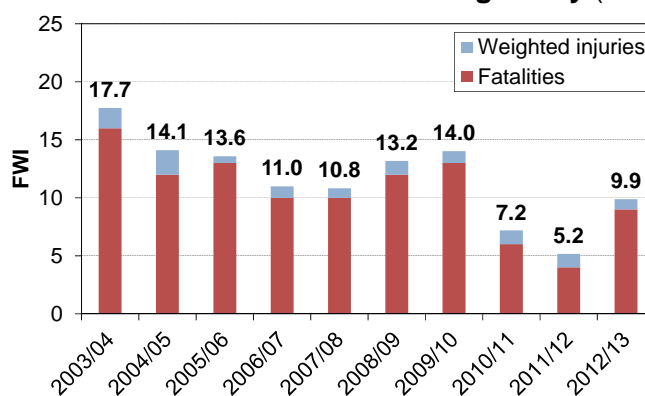
## LEVEL CROSSINGS

*To the Right Honourable Chris Grayling, MP, Lord Chancellor and Secretary of State for Justice, and the Scottish Ministers*

### PART 1 INTRODUCTION

- 1.1 In this report we make recommendations for the reform of the law relating to level crossings in Great Britain.
- 1.2 A level crossing is a place where a railway is crossed by another type of way on the same level. There are about 7,500 to 8,000 level crossings in Great Britain.<sup>1</sup> There is inevitably risk on every level crossing: trains are heavy pieces of machinery, often travelling at high speeds, and usually unable to stop within the distance that the driver can see ahead. Drivers, pedestrians, wheelchair users, cyclists and horse-riders all present risks when crossing the railway. That risk can be managed to reduce the danger to as low as reasonably practicable. However, an average of 12 people died in accidents on level crossings each year over the last ten years.<sup>2</sup>

**Trends in level crossing safety (source RSSB)**

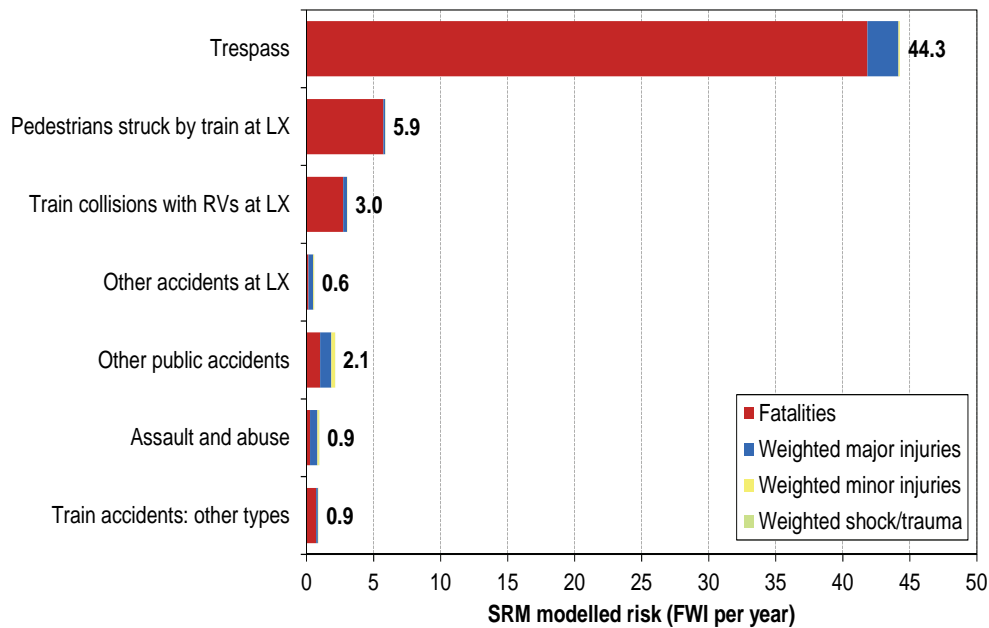


<sup>1</sup> This includes some 1,800 public vehicular crossings and an estimated 1,000 to 1,500 level crossings on heritage railways. This figure was estimated by HM Railway Inspectors.

<sup>2</sup> Rail Safety and Standards Board (RSSB), *Annual Safety Performance Report 2012-2013*, pp 179, 187. Great Britain's railway safety record compares well with other countries in Europe and with other methods of transport. See, for example, Rail Safety and Standards Board, *Annual Safety Performance Report 2012-13: Key Facts and Figures*, p 8, showing lower risk for rail travel than any means of road transport; and p 9, showing that the UK has the lowest number of train fatalities of any of the ten countries with the largest railways: [http://www.rssb.co.uk/SPR/REPORTS/Documents/ASPR\\_2012-13\\_Keyfactsandfigures.pdf](http://www.rssb.co.uk/SPR/REPORTS/Documents/ASPR_2012-13_Keyfactsandfigures.pdf) (last visited 1 September 2013). The meaning of weighted injuries is explained in Appendix 10 to that report at p 233. For fatality statistics over a longer period, see Andrew W Evans, "Fatal accidents at railway level crossings in Great Britain: 1946-2009" (2011) 43 *Accident Analysis and Prevention* 1837-1845.

- 1.3 Level crossings represent a significant source of risk on the railway to members of the public.

**Risk to members of the public by accident type (source RSSB)<sup>3</sup>**



- 1.4 Physically, a level crossing might be no more than a gap in the fencing along the railway or a stile where people can climb the fence to cross the railway, or it might be a vehicular crossing with automatic barriers controlling traffic. Level crossings involve many areas of law, including railways, highways and roads, health and safety, property, planning and criminal law.

- 1.5 In this project we have examined the legal framework for the regulation of level crossings with a view to its modernisation and simplification. We make recommendations in this report to reform the framework so that it is more coherent, accessible and up-to-date, allowing for better regulation and the reduction of risk. Many of our recommendations are given effect in the draft Level Crossings Bill and draft Level Crossing Plans Regulations to be made under section 15 of the Health and Safety at Work etc Act 1974 (HSWA 1974).<sup>4</sup>

**THE PROBLEM**

- 1.6 The legislation governing level crossings is complex and antiquated, much of it dating back to the nineteenth century when the main railways were constructed under individual local Acts, called special Acts. Today, the relevant legislative provisions are contained in a combination of public general Acts, private Acts, bye-laws, and subordinate legislation in the form of Orders and Regulations, many of which have been amended heavily over the years. Some of the Acts have been partially repealed and some of their provisions have become spent or obsolete. It is not always clear which legislative provisions apply and which take

<sup>3</sup> Rail Safety and Standards Board (RSSB), *Annual Safety Performance Report 2012-2013*, p 128. This table excludes fatalities resulting from suicide.

<sup>4</sup> The draft Level Crossings Bill and draft Level Crossing Plans Regulations are contained in Appendices A and B to this report.



precedence.

- 1.7 The procedure for making changes to the protective measures at level crossings is cumbersome and expensive and the relationship between the various safety regulation systems lacks clarity. Poor co-operation between those responsible for level crossings can prevent improvements in efficiency and prevent crossings from being made convenient for all users.
- 1.8 It is difficult to close level crossings. Closure can be the best way to reduce risk and increase the efficiency of both road and rail networks. There is no single procedure designed for the closure of level crossings. The current procedures available for closure only apply in limited circumstances and they can be complicated and time-consuming.
- 1.9 The Department for Transport described the current legislative arrangements as:

... too complex, making it difficult to identify which parts were still relevant and which were redundant. Even when identified as applicable, the actual legislation can be difficult to locate, as well as being outdated and unclear once found. This can make effective management of level crossings (including rights of way and highways) difficult and give rise to safety concerns.<sup>5</sup>

## **BACKGROUND**

- 1.10 The project to review the law relating to level crossings was recommended by the Department for Transport as part of the consultation on the Law Commission's Tenth Programme of Law Reform, following concerns expressed by the Office of Rail Regulation as the safety and economic regulator for the railways. The project commenced in 2008.
- 1.11 The mainline railways run across England, Wales and Scotland, crossing borders between them. Most of the legislation relevant to level crossings applies throughout Great Britain reflecting the fact that the mainline railways form a national network. It was therefore agreed that the project should be undertaken jointly with the Scottish Law Commission. It was also agreed that the project would not extend to Northern Ireland, but that the Northern Ireland Law Commission would be kept informed of developments.

## **CONSULTATION PROCESS**

- 1.12 A joint consultation paper on level crossings was published on 30 July 2010 and consultation ran until 30 November 2010.<sup>6</sup> Consultation meetings continued after the formal close of the period and responses continued to come in into the early months of 2011. A total of 114 consultation responses were received. An analysis of the responses to our consultation paper is published with this report. In addition, Dave Thompson MSP provided us with copies of over 2,000 responses

<sup>5</sup> Law Commission and Scottish Law Commission, *Level Crossings: Consultation Analysis* (2013) para 7.29. Subsequent references to the analysis of consultation responses will be in the format Consultation Analysis para X.

<sup>6</sup> Level Crossings (2010) Law Commission Consultation Paper No 194; Scottish Law Commission Discussion Paper No 143. Subsequent references to the consultation paper in this Part will be in the format Joint Consultation Paper, para X.

to a consultation he conducted in the Scottish Highlands in 2009 on whether open level crossings should be upgraded to include barriers.<sup>7</sup>

### **Relationship with Government**

- 1.13 The project is sponsored by the Department for Transport and the Office of Rail Regulation. Members of the Commissions' teams have met regularly at each stage of the project with Department for Transport officials and staff of the Office of Rail Regulation.
- 1.14 The Law Commission's Protocol with the Lord Chancellor was signed in March 2010, shortly before the consultation period commenced. Although this project does not come within the terms of the Protocol, we have sought to follow its terms, engaging closely with the two sponsoring bodies on specific issues as well as providing updates on the project.
- 1.15 The Scottish Law Commission has kept the Scottish Government informed of developments in relation to the Scottish aspects of the policy and has been in contact regularly with Transport Scotland, the transport agency for Scotland responsible for delivering Scottish Ministers' transport policy including the policy on rail transport.
- 1.16 The Department for Transport, Office of Rail Regulation, Transport Scotland, highway authorities and their trade association, the Association of Transport Co-ordinating Officers (ADEPT), the Highways Agency, and the Health and Safety Executive have all attended our advisory group meetings.

### **Advisory group**

- 1.17 At the beginning of the project we set up an advisory group to assist with practical and technical aspects of the project. The advisory group provided us with technical advice and expertise throughout the project.<sup>8</sup> The advisory group was later expanded to include representatives of a broader spectrum of road, rail, other level crossing users, and countryside interests. In addition to the Department for Transport and the Office of Rail Regulation, the advisory group included Transport Scotland, mainline and heritage railway operators, the Health and Safety Executive, the Rail Safety and Standards Board, highway and roads authorities, road and rail freight operators, the National Farmers' Union and the Country Land and Business Association, rail trade unions, disability groups, representatives of access groups, including ramblers, equestrian and cycling interests, passenger transport groups and heritage organisations.
- 1.18 We had useful meetings with the advisory group throughout the project to discuss our provisional proposals and latterly to consider the proposed recommendations for reform. Various advisory group members have also provided advice and information at other times during the course of the project. The group has identified key issues and has changed our provisional views on a number of important questions. We are very grateful to all members of the advisory group

<sup>7</sup> Network Rail is committed to the installation of mini barriers at open level crossings in the Scottish Highlands where it is appropriate and they have a programme underway for this work.

<sup>8</sup> A list of advisory group members is contained in Appendix E to this report.

for their time and expertise.

### **Consultation meetings**

- 1.19 We attended consultation meetings with a wide range of organisations before, during and after the formal consultation period. Information and views obtained at these meetings have been included in this report where appropriate. The meetings were part of the process of considering proposals and did not constitute formal consultation responses. Some consultees' views changed after, or as a result of these meetings so that their formal responses did not necessarily reflect the views expressed in discussions at meetings. A list of consultation meetings is annexed to the analysis of consultation responses, published in support of this report.

### **Site visits**

- 1.20 In order to gain a better understanding of the issues raised in consultation, we were very grateful to have had the opportunity to take part in site visits: to the West Somerset Railway, a heritage railway; Network Rail level crossings in West Sussex; Stagecoach Supertram in Sheffield; Nottingham Express Transit and London Tramlink in Croydon. We also undertook site visits to a number of public and private level crossings in Scotland. Issues that were difficult to grasp became clear when seen in real life on site visits and discussed at on-site meetings. We are very grateful to our hosts and organisers for their help in arranging these site visits. We discuss examples throughout the report as they arise.

## **DEVOLUTION ISSUES**

- 1.21 We outlined the devolution settlements in Scotland and Wales in Part 2 of the consultation paper.

### **Scotland**

- 1.22 In the consultation paper we set out the matters which are reserved to the United Kingdom Parliament in terms of Schedule 5 to the Scotland Act 1998, which are of potential relevance to level crossings. We outlined the relevant legislation which falls within the scope of specific reservations in the 1998 Act, including legislation covering road transport, health and safety, rail transport and in some respects criminal law and procedure.<sup>9</sup>
- 1.23 We also outlined those areas in relation to which the Scottish Ministers have separate, though broadly similar functions to those of the Secretary of State,<sup>10</sup> and those areas of relevance to level crossings which fall within the legislative competence of the Scottish Parliament, namely planning and roads law.<sup>11</sup>
- 1.24 In the consultation paper we suggested that it might be desirable to give the Scottish Ministers the power to carry out certain functions as regards Scotland without changing the reservations in Schedule 5 to the 1998 Act and therefore without altering the legislative competence of the Scottish Parliament. We

<sup>9</sup> Joint Consultation Paper, paras 2.7 to 2.15.

<sup>10</sup> Joint Consultation Paper, paras 2.25 to 2.27.

<sup>11</sup> Joint Consultation Paper, paras 2.17 to 2.22.

explained that the transfer of such functions could be achieved by means of primary legislation or an Order in Council under section 63 of the 1998 Act.

- 1.25 In formulating our policy for the draft Bill, we concluded that certain key decisions should be taken at national level (rather than by local authorities). This reflected consultees' responses to our proposals. For example, decisions about the closure of level crossings, including the making of rules about the procedures should be taken at national level. Similarly, we think that Ministers should have the power to issue directions in connection with the safety and convenience of level crossings. As regards Scotland these powers and duties should rest with the Scottish Ministers, rather than the Secretary of State, on the basis that the Scottish Ministers are more likely to be concerned with matters relevant to level crossings in Scotland.
- 1.26 Where functions rest with the Secretary of State under current devolution arrangements, we take the view that rather than recommending an order under section 63 of the 1998 Act, the simplest way of achieving our policy intention is for the draft Bill to impose certain duties and give certain powers to the Scottish Ministers directly.
- 1.27 The recommendations in Part 5 of this report which relate to rights of way and access issues in Scotland, cover matters that are within the legislative competence of the Scottish Parliament. The draft Bill has been prepared on the basis that it would be enacted by the United Kingdom Parliament. It would therefore be necessary to obtain a legislative consent motion of the Scottish Parliament to the inclusion in the Bill of provisions which fall within the legislative competence of that Parliament.

### **Wales**

- 1.28 The devolution settlement in Wales has now moved on from the system set out in Part 2 of the consultation paper. With the commencement of Part 4 of the Government of Wales Act 2006 in 2011, the legislative competence of the National Assembly for Wales has been significantly enlarged. The Assembly now has general competence to legislate in relation to highways and transport. Railway services, however, are excluded from this responsibility, except the provision of financial assistance in certain circumstances. Responsibility for traffic signs is also excluded.<sup>12</sup>
- 1.29 As with Scotland, where we think it appropriate, the draft Bill imposes duties and grants powers to Welsh Ministers.<sup>13</sup>

### **DEFINITIONS**

- 1.30 There are a number of terms relating to level crossings which require explanation.
- 1.31 A taxonomy of level crossings and the various rights of way across the railway may be found in Part 1 of the consultation paper, including the categorisation of

<sup>12</sup> Government of Wales Act 2006, sch 7, para 10.

<sup>13</sup> A legislative consent motion will be required under Standing Orders 29 and 30 of the National Assembly for Wales.

private level crossings as “accommodation” crossings and “occupation” crossings.<sup>14</sup> We concluded in the consultation paper, that for the purposes of this project, we would divide level crossings into two main types.

- 1.32 Public level crossings: these are level crossing over which there is a public right of way. In England and Wales this means places where the railway is crossed by a highway and, in Scotland by a road, on the same level. This includes public bridleways and footpaths.
- 1.33 Private level crossings: these are level crossings over which there is only a private right of way, namely an easement in England and Wales, a servitude in Scotland, or statutory private rights of way in both jurisdictions.

### **What is a railway?**

- 1.34 There are several statutory definitions of a railway. In the consultation paper we took as a starting point the definition in the Transport and Works Act 1992 and Transport and Works (Scotland) Act 2007:

“Railway” means a system of transport employing parallel rails which-

(a) provide support and guidance for vehicles carried on flanged wheels; and

(b) form a track which either is of a gauge of at least 350 millimetres or crosses a carriageway (whether or not on the same level),

but does not include a tramway.<sup>15</sup>

- 1.35 We went on to propose a definition for the purposes of this project that relied on the physical or functional aspects of a railway and was not restricted to existing statutory definitions. We proposed that the definition of a “railway” should be limited to:

A system of transport, running on flanged wheels where:

(a) the gauge of the track is at least 350 millimetres; and

(b) the tracks are segregated from other traffic.

- 1.36 In consultation, the Office of Rail Regulation and two railway professionals pointed out that the Office of Rail Regulation is responsible for regulating safety on all railways with a gauge of 350 millimetres and over and also on any railway with a gauge narrower than 350 millimetres where the railway is crossed by a carriageway.<sup>16</sup> This is in line with the definition in the Transport and Works Acts, mentioned above. In the consultation paper, we proposed that the project should be limited to railways where the gauge is over the statutory minimum of 350 millimetres, in order to exclude what are essentially large-scale model railways

<sup>14</sup> Joint Consultation Paper, paras 1.62 to 1.66.

<sup>15</sup> 1992 Act, s 67(1) and 2007 Act s, 23 respectively.

<sup>16</sup> Consultation Analysis, para 1.28.

from its remit.<sup>17</sup> On reflection we have decided that the definition of “railway” should include a railway where the gauge is less than 350 millimetres providing the railway is crossed by a carriageway. This is in line with the extent of the Office of Rail Regulation’s responsibilities.

### **Railway operators**

- 1.37 The railway operator is the body which owns, operates and is responsible for maintaining the railway and its associated infrastructure.
- 1.38 The mainline railway network in Great Britain is operated by Network Rail. It is responsible for and owns the infrastructure (track, signals, bridges and major stations) for the mainline network in Great Britain. Its purpose is to provide a safe, reliable and efficient railway. It is funded by way of a network grant from the Department for Transport and Transport Scotland and access charges paid to it by train and freight operating companies.<sup>18</sup>
- 1.39 In addition to the mainline network, there are numerous heritage railways in Great Britain, operating train lines mainly intended for tourists.<sup>19</sup> In many cases these are run by volunteers. Trains on heritage railways are typically slower than those on the mainline network.

### **Disused railways**

- 1.40 Railway operators are subject to stringent safety requirements in relation to the operation of the railway. It would not be appropriate to apply our recommended safety regime to a footpath which was once a railway line but where the tracks have long since been taken up and the former railway line is now used mainly by ramblers. Equally, we do not wish to give railway operators greater powers as landowners where there is no railway in operation. We want to ensure that our recommended provisions apply only to those railways which are still systems of transport.
- 1.41 There is no statutory definition of “disused railway”, nor do we recommend one. If a railway ceases to operate as part of a system of transport, it is no longer a railway within the definition of “railway” set out in the draft Bill. We do not propose to specify at what point a railway ceases to operate as part of a transport system, but leave that to be determined as a matter of fact.

### **Tramways**

- 1.42 Tramway systems generally fall into three categories: first, older tramways as exemplified by the Blackpool tramway; second, modern tram systems such as those operating in Sheffield, Nottingham, and Croydon; and third, metro or light rail systems such as the Newcastle Tyne-and-Wear metro and the Docklands Light Railway. We are concerned with the first two categories above – old and

<sup>17</sup> Joint Consultation Paper, para 1.43.

<sup>18</sup> The East Coast mainline rail franchise is currently operated by Directly Operated Railways under public ownership in pursuance of the duty to maintain railway services where a franchise agreement ends: Railways Act 1993, s 30.

<sup>19</sup> There are approximately 200 heritage railways in the United Kingdom (see <http://www.bbc.co.uk/news/uk-england-birmingham-22687093>) (last visited 1 September 2013).

modern trams – and not with the metro or light rail systems.<sup>20</sup>

1.43 We recognised that the definition of “railway” proposed in the consultation paper would mean that parts of some tram systems would fall within the definition of “railway” and parts would fall outside the definition. Several tram operators asked whether this was our intention and pointed out that the key difference between tramways and railways was not the segregation of the track, but the fact that tramways operate entirely on a line-of-sight basis.<sup>21</sup> We realised that we needed to investigate further and wrote to all tramway operators to ask for their views on our proposed definition of “railway”. We received responses from five tram operators, all of whom expressed the view that it was not appropriate to include their tram systems within the definition of “railway” or within our proposals for safety at level crossings.<sup>22</sup> They pointed out that tramways differ from railways in that:

- (1) Trams operate on a line-of-sight basis. This means that a tram is driven at a permitted maximum speed that enables the driver to stop within the distance that can be seen to be clear ahead. The speed at which a tram is driven will depend not only on the permitted speed limit, but also the conditions and hazards ahead, such as the nature of the highway or road, weather and traffic conditions. Trams are designed to be able to stop unexpectedly: the driver decides whether it is necessary to stop and when it is safe to go according to what can be seen ahead.<sup>23</sup>
- (2) Tramway signals are largely governed by road traffic rules, such as the Traffic Signs Regulations and General Directions 2002.<sup>24</sup>
- (3) Tram operators adopt a very different approach to crossings for members of the public to that of railway operators. Tram operators are keen for members of the public to be able to access the tram system in as many places as possible and for the tram system not to interfere with the free flow of traffic, be it vehicular, pedestrian or otherwise. They are keen to facilitate the creation of new crossings in places where this assists regeneration of urban areas, for example. In many locations, there is open access over the tram line, without the requirement to cross at a particular place. In contrast, railway crossings are strictly regulated and it has long been the policy of Network Rail and the Office of Rail Regulation not to create new level crossings unless exceptional circumstances make it necessary.
- (4) Highway authorities in England and Wales work closely with tram operators. In many cases, the same local authority has been responsible

<sup>20</sup> In Scotland there are currently no operational trams, although a tram line is in the course of construction in Edinburgh and is scheduled for completion in 2014.

<sup>21</sup> See para (1) below for an explanation of “line-of-sight”.

<sup>22</sup> Consultation Analysis, paras 1.10 to 1.19.

<sup>23</sup> This explanation was provided in correspondence with several consultees, including Nottingham City Council, Nottingham Express Transit, Croydon Tramlink, the Confederation of Passenger Transport UK, Sheffield Supertram and Edinburgh Trams Limited.

<sup>24</sup> SI 2002 No 3113.

for the commissioning and construction of the tram system as for the highways. The relationships were, therefore, quite different to those at level crossings.



Pedestrian and highway crossings on the tramway in Sheffield, shown from the perspective of the tram driver. Note the tramway signals and ordinary traffic lights.

- 1.44 Some consultees suggested that the definition of “tramway” found in the Railways and Other Guided Transport Systems (Safety) Regulations 2006 provided a more useful basis for distinguishing between a tramway and a railway.<sup>25</sup>
- 1.45 It became clear that the distinction to be made between tramways and railways was based not on whether the track was segregated, but on whether the system ran on a line-of-sight basis. With the help of tramway operators, we looked at the various types of tramway and crossings on the tram network.
- 1.46 We saw tramways that ran partly on segregated and partly on non-segregated tracks. The trams ran without difficulty from the segregated to the non-segregated parts, controlled by tram signals, which gave the trams priority over road traffic. We witnessed the tram driver controlling the traffic signals, so that the traffic lights turned red to stop traffic from crossing the tramway to allow the tram to pass. We also witnessed the fact that more than one tram can enter the same section, so that the driver must be ready to stop on a line-of-sight basis to avoid colliding with a tram in front.
- 1.47 In some cases tramways run partly along old railway lines and sometimes, as on parts of the Manchester system, along lines no longer used by trains. In other places, as on parts of the Nottingham system, tramways share the lines with trains, though on separate tracks. In Nottingham, at David Lane, there is a level crossing on the railway, used by trains and governed by railway signals, located next to a tram crossing governed by tram and highway signals. The tram-train

<sup>25</sup> SI 2006 No 599, reg 2(1).



concept is ever-evolving and will involve trams running along the same tracks as railway trains in some places. Tram-train systems might run on a line-of-sight basis or when using railway tracks might be controlled by railway signalling.

1.48 The evidence from consultation responses, the site visit and the meeting strongly supported a definition of tramways based on the fact that they operated primarily on a line-of-sight basis. The evidence also supported a definition that excluded tramways from our project. In particular, tram crossings should not be caught by our safety provisions, which are designed for signalled crossings, or by the recommended system for closure, based on a quite different set of often conflicting concerns at level crossings which were not in evidence at tram crossings.

1.49 This left three issues:

- (1) Tramways do not always operate on a line-of-sight basis. There are signalled crossings on some tramways and others are in the process of being converted from railway to highway signalling systems.
- (2) As tram-trains are developed, they will operate on railway tracks, which are currently signalled and, in some cases, could share the railway track with trains. Any definition of "railway" must allow for either, and for any future change from line-of-sight to signalled operation or vice versa.
- (3) Some junctions between tramways, railways and roads do not sit easily within any existing definition. At David Lane in Nottingham, for example, the tram junction sits adjacent to a level crossing and road traffic moves across both the tram crossing and the level crossing so that the two need to be integrated. At Britannia Bridge on the Welsh Highland Railway, the heritage railway line runs along the length of the road bridge and is not segregated from the road traffic. In both cases railway signalling and safety systems are needed. There may, now or in the future, be other crossings which are difficult to define as fitting within a railway or tramway system.

1.50 The definition of "tramway" in the Railways and Other Guided Transport Systems (Safety) Regulations 2006 refers to a system of transport used wholly or mainly for the carriage of passengers-

(a) which employs parallel rails which-

(i) provide support and guidance for vehicles carried on flanged wheels;

(ii) are laid wholly or partly along a road or in any other place to which the public has access (including a place to which the public has access only on making a payment); and

(b) on any part of which the permitted maximum speed is such as to enable the driver to stop a vehicle in the distance he can see to be clear ahead.<sup>26</sup>

- 1.51 We think that where a tramway system operates using railway signalling at any crossing, the same issues arise as in relation to other railway level crossings and therefore such crossings should be covered by the draft Bill. We think that “tramway” should be defined in the draft Bill as a transport system which predominantly operates on a line-of-sight basis. This allows some flexibility.
- 1.52 We recommend that for the purposes of all of the recommendations, the definition of “railway” as read with the definition of “tramway” should exclude tramways employing only vehicles which run on a line-of-sight basis.
- 1.53 We would, however, make subject to the safety regime, and other aspects of our recommendations, tram-train lines or other systems where the tram runs along railway tracks and is therefore subject to the railway signalling system. Where the tram system shares a crossing with the railway system, as at Bulwell Forest in Nottingham, any decision to close the level crossing would have to take into account the existence of the tramway. Similarly, any arrangement for the safety or convenience of the level crossing on the railway, such as a level crossing plan, would have to take into account the existence of the tramway.

#### **Docks and industrial sites**

- 1.54 A level crossing is a place where a railway is crossed by another right of way on the same level. There will be no right of way across the railway where both the railway and the way crossing it are in the same ownership. This often occurs in private industrial sites and docks which are entirely contained on fenced private land to which the public has no access. Safety at such crossings is already governed by the HSWA 1974 regime because the industrial sites and docks are workplaces. An owner wishing to close such a crossing would have the right to do so without consultation.
- 1.55 In the consultation paper we proposed that level crossings on all railways should be included in our project, including privately owned railways entirely constructed on the private land of a dock or industrial site. In response to the consultation paper, dock owners questioned whether it was appropriate to include them within the project.
- 1.56 Stakeholders expressed concern that inclusion within the proposed safety regime might make the safety management of some major industrial sites or dock estates with extensive private road and rail networks more complex or onerous, by extending the legal framework for level crossings to those not currently regulated by level crossing orders under the Level Crossings Act 1983. This might, in turn, act as a disincentive to the retention of on-site rail facilities and to the use of rail freight. As docks and industrial sites already operate under a HSWA 1974-based safety regime because the docks and industrial sites are workplaces, they are closely regulated and accustomed to applying the necessary tests under that regime. The stakeholders argued that on these sites, crossings of the track appear merely as another form of hazard on the site, where

<sup>26</sup> SI 2006 No 599, reg 2, definition of “tramway”.

safety is considered on a global basis. They would in principle fall to be governed by any industry-specific regulations made under HSWA 1974.

- 1.57 Stakeholders also expressed concern that it would not always be clear whether a level crossing existed in legal terms. Railways and other ways are often moved around to meet the changing needs of the industrial site and vehicles might be driven across areas which are not clearly defined roads. Stakeholders did not always know the legal status of a road or railway in an industrial site and this could cause difficulties.
- 1.58 On balance, we have concluded that the recommendations contained in this report and the provisions of the draft Level Crossings Bill and Plans Regulations should apply to level crossings in docks and industrial sites. The draft Bill and Regulations will apply to such crossings where they satisfy the definition of “level crossing”, namely where the railway is crossed by a right of way on the same level.

### **Recommendations**

- 1.59 **We recommend that for the purposes of the recommendations contained in this report and in the draft Level Crossings Bill and draft Level Crossing Plans Regulations “railway” should be defined as a system of transport employing parallel rails which (a) provide support for vehicles running on flanged wheels and (b) form a track of a gauge of at least 350 millimetres or a track of a gauge less than 350 millimetres where the track is crossed on the same level by a carriageway, but does not include a tramway.**
- 1.60 **We recommend that any tramway using vehicles running predominantly at speeds enabling the driver to stop within the distance that can be seen to be clear ahead, should be excluded from the definition of “railway”. Where the track is used both as a railway and a tramway, it should be treated as a railway.**
- 1.61 These recommendations are given effect by clause 50 of the draft Level Crossings Bill and regulation 2 of the draft Level Crossing Plans Regulations.

### **Highway, roads and traffic authorities**

- 1.62 Highway authorities or, in Scotland, roads authorities, and traffic authorities have responsibilities in relation to public highways and roads.<sup>27</sup> They are the main stakeholders with whom railway operators need to co-operate in the management of level crossings, both in terms of safety and convenience and when seeking to close a public level crossing.
- 1.63 The local highway or roads authority and local traffic authority will invariably be the same public body, namely the local authority responsible for that area. The Secretary of State, the Scottish or Welsh Ministers or, in London, Transport for London or the Common Council for the City of London can also be the highway, roads or traffic authority. Highway, roads and traffic authorities’ powers and

<sup>27</sup> “Highway authority” is defined in the Highways Act 1980, s 1. “Traffic authority” is defined in the Road Traffic Regulation Act 1984, s 121A. “Roads authority” is defined in the Roads (Scotland) Act 1984, s 151(1).

duties, however, will be derived from different pieces of legislation, which operate independently. The role of the Secretary of State as traffic authority is contingent on being the highway authority for that highway under the Highways Act 1980. Similarly in Scotland, the role of the Scottish Ministers as the traffic authority only relates to roads for which they are the roads authority under the Roads (Scotland) Act 1984.<sup>28</sup>

- 1.64 In practice there are circumstances where the functions of a highway authority and traffic authority for a particular highway are exercised by different bodies. This can occur when a highway authority provides by agreement that its functions as a highway authority will be exercised by another body, or where a highway authority delegates functions to a local highway authority or concessionaire, who is not the traffic authority for the highway in question.<sup>29</sup>
- 1.65 In the consultation paper, we provisionally concluded that highway and roads authorities are subject to the duty under section 3 of HSWA 1974 to conduct their undertaking so as to ensure, so far as reasonably practicable, the safety of persons other than their employees.<sup>30</sup> In our view, the obligations of highway and roads authorities under HSWA 1974 correspond with the extent of their other duties, such as the duty to maintain the highway.<sup>31</sup>
- 1.66 In addition to the general duty to maintain highways,<sup>32</sup> highway authorities have more specific duties, such as an obligation to provide a proper and sufficient footway, where necessary or desirable for the safety or accommodation of pedestrians. They also have a duty to assert and protect the rights of the public to use and enjoy the highway. Where a council is the highway authority, it also has the duty to prevent, as far as possible, the stopping up or obstruction of the highway.<sup>33</sup> In Scotland, the Roads (Scotland) Act 1984 contains provisions prohibiting the obstruction of roads apart from in cases where works are being carried out.<sup>34</sup>
- 1.67 The powers of traffic authorities are more limited than those of highway or roads authorities, and are concerned with the management and regulation of traffic using the road, rather than the physical characteristics of the road itself. However, there are several important powers, which are relevant to level

<sup>28</sup> Road Traffic Regulation Act 1984, s 121A(1AA).

<sup>29</sup> Highways Act 1980, ss 4, 6 and 8 provide for functions exercisable by a highway authority to be exercised by another by agreement. The New Roads and Street Works Act 1991, s 2 provides for more limited delegation of functions. In Scotland, the Roads (Scotland) Act 1984, s 4 provides that the Scottish Ministers may enter into agreement with a local authority for certain functions of the Scottish Ministers in relation to roads to be carried out by the local authority.

<sup>30</sup> This is dealt with in para 5.46 of the Joint Consultation Paper.

<sup>31</sup> Highways Act 1980, s 41(1).

<sup>32</sup> Highways Act 1980, s 41(1).

<sup>33</sup> Highways Act 1980, s 130(3).

<sup>34</sup> Roads (Scotland) Act 1984, ss 85 to 92. The Land Reform (Scotland) Act 2003, s 13 imposes a duty on local authorities to “assert, protect and keep open and free from obstruction or encroachment any route, waterway or other means by which access rights may reasonably be exercised.”

crossings, such as the power to place road signs.<sup>35</sup> Under section 1(2)(a) of the Level Crossings Act 1983, local traffic authorities may be required by a level crossing order “to provide at or near the crossing any protective equipment specified in the order and to maintain and operate that equipment in accordance with the order.”

1.68 Under section 1 of the Road Traffic Regulation Act 1984, the traffic authority for a road outside Greater London has the power to make a “traffic regulation order” in respect of the road where it appears to the authority expedient to make it:

- (a) for avoiding danger to persons or other traffic using the road or any other road, or for preventing the likelihood of any such danger arising, or
- (b) for preventing damage to the road or to any building on or near the road, or
- (c) for facilitating the passage on the road or any other road of any class of traffic (including pedestrians),
- (d) for preventing the use of the road by vehicular traffic of a kind which, or its use by vehicular traffic in a manner which, is unsuitable having regard to the existing character of the road or adjoining property, or
- (e) (without prejudice to the generality of paragraph (d) above, for preserving the character of the road in a case where it is specially suitable for use by persons on horseback or on foot, or
- (f) for preserving or improving the amenities of the area through which the road runs.
- (g) For any purpose specified in paragraph (a) to (c) of subsection (1) of the Environment Act 1995 (air quality).

1.69 Local authorities and Transport for London also have separate but related duties under the Road Traffic Act 1988. Section 39(2) of the 1988 Act provides that local authorities must prepare and carry out a programme of measures designed to promote road safety.

1.70 In this report, we make recommendations, which require co-operation between railway operators and those responsible for the safety and convenience of highways and roads. We also impose duties on these bodies to consider the convenience of all users of level crossings. Our intention is that these duties should be imposed on highway, roads and traffic authorities where they are responsible for the highway or road either at or near a level crossing.

<sup>35</sup> Road Traffic Regulation Act 1984, s 65(1). The 1984 Act applies to England and Wales and Scotland. In addition a highway authority will also be a “street authority” as defined by the New Roads and Street Works Act 1991, s 49, where the street is a maintainable highway.

## **Types of level crossing**

- 1.71 In the consultation paper, we discussed the difference between public and private rights of way which are crossed by the railway.<sup>36</sup>

### ***Public level crossings***

- 1.72 A public level crossing is a place where a public right of way crosses a railway on the same level. The public right of way may have existed before the railway was built or may have been created more recently. The right of way may be a right to pass on foot (a footpath), on horseback (a bridleway) or with vehicles (carriageways).<sup>37</sup>

- 1.73 In England and Wales a highway is a public right of way which may be created by statutory provision<sup>38</sup> or by the common law doctrine of dedication of a public right of way by a landowner across his land and acceptance by the public. There is no single source or definition of a highway. In his textbook on *Highway Law*, Stephen Sauvain QC has identified four characteristics:

- (1) The way must be open to the public at large.
- (2) The public use must be as of right.
- (3) The public right must be primarily for passage.
- (4) The public right of passage must follow a defined route.<sup>39</sup>

- 1.74 In Scotland, under section 151(1) of the Roads (Scotland) Act 1984 a “road” is “any way ... over which there is a public right of passage (by whatever means and whether subject to a toll or not) and includes the road’s verge, and any bridge (whether permanent or temporary) over which, or tunnel through which, the road passes; and any reference to a road includes a part thereof...”.<sup>40</sup> Section 151(2) of the 1984 Act provides that -

...where over a road the public right of passage referred to in the definition of “road” in subsection (1) above—

(a) is by foot only, the road is—

(i) where it is associated with a carriageway, a “footway”; and

(ii) where it is not so associated, a “footpath”;

<sup>36</sup> Joint Consultation Paper, paras 1.61 to 1.70.

<sup>37</sup> See the definitions of “carriageway” in the Highways Act 1980, s 329(1) and the Roads (Scotland) Act 1984, s 151(2)(c).

<sup>38</sup> The statutory provisions for the creation of highways are set out in the Highways Act 1980, Part 3.

<sup>39</sup> S Sauvain QC, *Highway Law* (4th ed 2009) para 1-02. Joint Consultation Paper, paras 11.71 to 11.80.

<sup>40</sup> The leading case is *Hamilton v Dumfries and Galloway Council* 2009 SC 277. Discussed in K G C Reid and G L Gretton, *Conveyancing 2009* (2010) pp 156 to 163.

(b) is by pedal cycle only, or by pedal cycle and foot only, the road is a “cycle track”;

(c) includes such right by vehicle, other than a right by pedal cycle only, the road is a “carriageway”.

1.75 The Land Reform (Scotland) Act 2003 provides for a system of core paths.<sup>41</sup> A core path is a route contained in a core path plan adopted under the 2003 Act. Each local authority is required to maintain a plan of the routes in its area which have been designated as core paths. Although section 5(6) of the Act provides that core paths do not constitute a public right of passage for the purposes of the definition of a “road”, some routes will have been public rights of way prior to the creation of core paths, and remain so. In the consultation paper, we concluded that currently under Scottish law, access rights would not ordinarily exist over a private level crossing, but would exist where a way over a private level crossing had been designated as a core path.<sup>42</sup>

### **Private level crossings**

1.76 In England and Wales, private rights of way are generally easements. In Scotland, they are generally servitudes. An easement gives one landowner the right to do something on another’s land. An easement is always attached to a freehold or leasehold; it cannot be held or transferred by itself, but always goes along with ownership of land.<sup>43</sup> In the consultation paper, we described two main types of private level crossing.

(1) Easement and servitude crossings: the conveyance of land to the railway company contained an express reservation of a right of way across a level crossing to the landowner, creating an easement or servitude. The railway company was obliged to carry out accommodation works to allow the landowner to gain access to their land, which was severed by the railway.

(2) Statutory rights of way crossings: where there was no specific reservation in the conveyance, the railway company was required by statute to carry out accommodation works to allow landowners to gain access to their land severed by the railway.<sup>44</sup> The resulting rights of way had to be inferred from the statute. These are not easements or servitudes, but are akin to them. In the consultation paper, we discussed the case law, which is inconclusive on the nature of these rights.<sup>45</sup> The courts do not seem to have clearly distinguished between cases where the railway company granted an easement or servitude in the

<sup>41</sup> Land Reform (Scotland) Act 2003, ss 17 to 20.

<sup>42</sup> The explanation for this is set out in brief in the Joint Consultation Paper at paras 6.28 to 6.34 and discussed more fully at paras 12.82 to 12.110.

<sup>43</sup> *Re Ellenborough Park* [1956] Ch 131 at [163]. In Scotland, servitudes have similar features. See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) ch 1.

<sup>44</sup> The Railways Clauses Consolidation Act 1845 provides that model clauses be automatically included in special Acts establishing the railway line. Section 68 provides for accommodation works. Equivalent provision is made in relation to Scotland in section 60 of the Railways Clauses Consolidation (Scotland) Act 1845.

<sup>45</sup> For example, *British Railways Board v Glass* [1965] Ch 538.

conveyance and those where the right of way had to be inferred from the statutory provisions.

### **Roads to which the public has access**

- 1.77 The Level Crossings Act 1983 defines a level crossing as “any place where a railway crosses a road on the level”.<sup>46</sup> “Road” is defined in relation to England and Wales as “any highway or other road to which the public has access”.<sup>47</sup> For Scotland “road” is defined as having the same meaning as in the Roads (Scotland) Act 1984, that is “any way...over which there is a public right of passage (by whatever means) and whether subject to a toll or not and includes the road’s verge, and any bridge (whether permanent or temporary) over which, or tunnel through which, the road passes; and any reference to a road includes a part thereof...”.<sup>48</sup> As a result, the 1983 Act applies mainly to public level crossings but does apply to some private crossings in England and Wales.
- 1.78 In England and Wales, a “road to which the public has access” includes those where the public, as a matter of fact, has lawful access by permission or tolerance.<sup>49</sup> There must be evidence that the road is accessible to and used by members of the public as such and not merely as invitees of a landowner.<sup>50</sup>
- 1.79 The Level Crossings Act 1983 therefore provides as regards England and Wales for level crossing orders to be made not only in respect of public level crossings where the railway crosses a public right of way, but also in respect of private level crossings to which the public has lawful access. In Scotland, on the other hand, level crossing orders can only be made in respect of “roads” over which there is a public right of passage. The 1983 Act therefore applies more narrowly in Scotland.
- 1.80 It is possible that there are places where there is no right of way across the railway, but a level crossing order under the 1983 Act is in place. Such crossings are not within the definition of “level crossing” in the draft Level Crossings Bill as that definition depends on the existence of a right of way across the railway track.
- 1.81 In Part 2 of this report, we recommend the repeal of the Level Crossings Act 1983. We do not propose any replacement for the protection of “roads to which the public has access”. Private level crossings involving a private right of way to which the public has lawful access will be covered by the provisions of the Bill because of the existence of the private right of way. Those level crossings involving roads where there is no right of way across the railway will not be covered by the provisions of the Bill. Such crossings may be closed by the railway operator without using the closure procedure that we recommend, as there is no right of way to extinguish. A level crossing plan under our recommended provisions may not be made in respect of a road where there is no right of way, but the railway operator and others will continue to have obligations

<sup>46</sup> Level Crossings Act 1983, s 1(1).

<sup>47</sup> Level Crossings Act 1983, s 1(11).

<sup>48</sup> Roads (Scotland) Act 1984, s 151(1).

<sup>49</sup> *Clark v General Accident Fire and Life Assurance Corporation plc* [1998] 1 WLR 1647. See also S Sauvain QC, *Highway Law* (4th ed 2009) paras 1-32 to 1-37.

<sup>50</sup> S Sauvain QC, *Highway Law* (4th ed 2009) para 1-33.



under HSWA 1974.

## **DISABILITY AND ACCESSIBILITY**

- 1.82 Accessibility is an important issue in relation to the safety, convenience and closure of level crossings. When we speak of accessibility, we intend a wide meaning that includes not only the needs of people with disabilities within the meaning of the Equality Act 2010, but also cyclists, pedestrians with pushchairs, and people using walking aids amongst others.
- 1.83 The Equality Act 2010 builds on the foundation of the Disability Discrimination Act 1995 to create a new, unified equality duty on service providers and public authorities. While Network Rail is a service provider, it may not constitute a public authority. There is little authority on this question, but in recent cases, Network Rail has not been treated as a public authority in the context of other legislative schemes, such as the Human Rights Act 1998<sup>51</sup> and the Freedom of Information Act 2000.<sup>52</sup>
- 1.84 People with disabilities and mobility problems face significant difficulties in using and accessing level crossings. Consultation responses and the views of disability representatives and other consultees expressed during meetings over the consultation period have confirmed this situation. However, we have not seen any evidence of a gap in the law. Rather, problems might arise when the duties under the Equality Act 2010 to make reasonable adjustments to accommodate people with disabilities are not carried out or enforced.
- 1.85 In 2011 the Rail Safety and Standards Board published a report “Improving safety and accessibility at level crossings for disabled pedestrians”.<sup>53</sup> Reports such as these should help to address the practical problems in providing equal access for users of level crossings. While we address specific issues relating to disability and accessibility as they arise throughout this report, we do not make any recommendations to change the law with regard to accessibility as we consider the current legal framework to be sufficient.

## **SUMMARY OF RECOMMENDATIONS**

- 1.86 The aims of this project are to modernise and clarify the safety regime governing level crossings, to make it easier to close level crossings where necessary and preserve rights of way where appropriate.

### **Part 2: Safety and convenience**

- 1.87 We consider the laws currently governing safety at level crossings to be

<sup>51</sup> *Cameron and others v Network Rail Infrastructure Ltd (formerly Railtrack plc)* [2006] EWHC 1133 (QB), [2007] 1 WLR 163.

<sup>52</sup> *Network Rail Limited v IC & Network Rail Infrastructure Limited, Friends of the Earth and others* [2007] UKIT 0061 (EA), unreported; see also *Smartsources Drainage & Water Reports Limited v Information Commissioner* [2010] UKUT 415 (AAC) for a similar decision involving a water utility company.

<sup>53</sup> Rail Safety and Standards Board, *Improving safety and accessibility at level crossings for disabled pedestrians* (2011), [http://www.rssb.co.uk/sitecollectiondocuments/pdf/reports/research/T650\\_rpt\\_final.pdf](http://www.rssb.co.uk/sitecollectiondocuments/pdf/reports/research/T650_rpt_final.pdf) (last visited 1 September 2013).

confusing and outdated and recommend that safety should be regulated entirely by HSWA 1974, supported by Regulations under section 15 of HSWA 1974, and approved codes of practice and guidance. We recommend that the Office of Rail Regulation be given the power to issue approved codes of practice on matters relating to level crossings. We recommend that modern safety regulation should take precedence over safety provisions in special Acts. We also recommend the repeal of the Level Crossings Act 1983. In place of level crossing orders under the 1983 Act, we recommend that regulations make provision for level crossing plans which may be entered into voluntarily in respect of public and private level crossings if the parties wish to create such an arrangement. Where a requirement in a level crossing plan is inconsistent with a requirement in a special Act, the level crossing plan should take precedence.<sup>54</sup>

- 1.88 We recommend the creation of duties on railway operators and traffic authorities to co-operate with each other in managing and making decisions that affect level crossings. We also recommend the creation of a duty on these bodies to consider the convenience of all users when making decisions about level crossings.
- 1.89 We recommend clarification of the boundaries between the enforcement responsibilities of the Office of Rail Regulation and those of the Health and Safety Executive, so as to ensure that there are no gaps in relation to enforcement.
- 1.90 We recommend the disapplication of obsolete statutory provisions relating to the regulation of safety at level crossings and some which they have been superseded by more modern provisions.

### **Part 3: Closure of level crossings**

- 1.91 From a safety perspective, every level crossing poses a risk and the closure of level crossings reduces risk. Under the current system, permanent closure can be difficult.
- 1.92 We recommend the creation of a new statutory procedure for closing any level crossing, whether public or private, and providing for its replacement, where appropriate. The procedure will include temporary stopping up of highways and roads for the purposes of carrying out works in connection with closure; extinguishment of private rights of way; planning permission; powers to acquire land compulsorily; compensation and the apportionment of costs. We recommend that this new procedure should sit alongside the existing methods available for closing level crossings.
- 1.93 In the consultation paper we proposed that the normal rules on compulsory purchase should apply to the closure procedure. The law on compulsory purchase is complex, and different in each of the jurisdictions. As part of our detailed consideration of the drafting of the draft Bill, we made various choices as to *how* the existing law should apply to the procedure. In doing so, we were guided by the objective of providing a simple, streamlined and ideally uniform procedure. Nonetheless, we have not had the benefit of consultation on these detailed choices. Further refinement of this part of the draft Bill may be

<sup>54</sup> See Draft Level Crossing Plans Regulations, reg 13(4).

necessary.<sup>55</sup>

- 1.94 Our recommendations concern the permanent closure of level crossings with or without replacement, though in many circumstances replacement is likely. It would be difficult to make a strong case for the closure of a level crossing under an economic model such as the Alternative to Level Crossings Assessment Tool (or AXIAT) developed by the Rail Safety and Standards Board, without an alternative means of crossing the railway.<sup>56</sup>

#### **Part 4: Rights of way – England and Wales**

- 1.95 We recommend that in future it should not be possible to create a public or private right of way across the railway impliedly, by prescription or implied dedication. We also recommend that it should be made clear in legislation that agreements to release private rights of way created across the railway by special Acts should operate in the same way as agreements to release those which are easements.

#### **Part 5: Rights of way and access rights – Scotland**

- 1.96 We make similar recommendations for Scotland as for England and Wales to prevent the creation of public or private rights of way across the railway by prescription and to make statutory provision to the effect that a private statutory right of way created under section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 or similar provisions in special Acts, may be extinguished by discharge agreement. We also recommend that continuous non-use of such a right of way over a period of 20 years should result in its extinguishment. We further recommend the extension of the jurisdiction of the Lands Tribunal for Scotland so that it may vary or discharge such a right of way. Finally, we recommend, for the avoidance of doubt, a statutory provision to the effect that it is competent to grant a public or private right of way across the railway.
- 1.97 We recommend an amendment to the Land Reform (Scotland) Act 2003 to make clear that access rights under Part 1 of that Act are not exercisable across the railway. We also recommend that for the purposes of facilitating the exercise of access rights the Scottish Ministers should have power to order (a) the creation of new non-vehicular level crossings and (b) that access rights may be exercised over an existing private level crossing.

#### **Part 6: Other issues**

- 1.98 In the final Part of this report, we discuss three topics raised in the Joint Consultation Paper: criminal offences, signs and the Highway Code, and planning law. We recommend that the Secretary of State consider carrying out a review of railway offences, and particularly the offence of criminal trespass on the railway under section 55 of the British Transport Commission Act 1949.
- 1.99 We also discuss a number of issues raised during the consultation process that

<sup>55</sup> The Scottish Law Commission has recently commenced a review of compulsory purchase law in Scotland. See <http://www.scotlawcom.gov.uk/law-reform-projects/compulsory-purchase> (last visited 1 September 2013).

<sup>56</sup> The AXIAT model is discussed in the Joint Consultation Paper, paras 7.38 to 7.45.

are beyond the scope of this project, namely barrow crossings, open crossings, and level crossing design. While these concerns warrant further discussion, we do not make any recommendations.

### **Draft Bill and Regulations**

- 1.100 Most of our recommendations for reform of the law are given effect in the draft Level Crossings Bill and draft Level Crossing Plans Regulations annexed to this report.

### **Scope**

- 1.101 The recommendations in this report are limited to level crossings. It became clear to us that consideration should be given to extending some of the proposed reforms to the whole of the railway. Such extension of the application of the reforms is beyond the scope of this project. For example, we recommend that the Office of Rail Regulation be given the power to issue approved codes of practice. It seems odd to limit this to level crossings. Some of the reforms we recommend would have to apply across the whole of the railway in order to be effective, so we have not included provision for these in the draft Level Crossings Bill. For example, if duties under HSWA 1974 were to be imposed in respect of volunteers working on voluntarily operated railways, they could not be restricted to level crossings. Where we indicate that reform should be considered across the whole of the railway, we invite the Secretary of State to do so.

## PART 2

# SAFETY AND CONVENIENCE



The automatic open (ungated) locally monitored level crossing (AOCL) at Garve Station on the Inverness to Kyle of Lochalsh line seen from the hillside. Credit: John Furnevel.

### INTRODUCTION

- 2.1 Safety is the most important issue in regulating and managing level crossings. It includes the safety of rail users, passengers and drivers of trains, and of non-rail users of level crossings, drivers of cars and other vehicles, cyclists, pedestrians, wheelchair users and horse riders. In deciding how best to reduce risk to those using level crossings, different interests need to be balanced, including the convenience of rail and non-rail users of level crossings.
- 2.2 In the consultation paper, we proposed that the regulatory regime for level crossings should aim to reduce risk at level crossings and promote the efficient operation of railways, highways and roads. It should take account of the need to strike a balance between the interests of rail, road and other users.<sup>1</sup> We maintain this view.
- 2.3 In this Part, we recommend that safety at level crossings should be regulated entirely under the Health and Safety at Work etc. Act 1974 (HSWA 1974). We discuss the strengths and weaknesses of the current system of level crossing orders and options for their replacement. We look at the current law and how a purely HSWA 1974-based system would affect the duties of the rail operators and highway and roads authorities. We go on to recommend a duty to consider the

<sup>1</sup> Level Crossings (2010) Law Commission Consultation Paper No 194; Scottish Law Commission Discussion Paper No 143, para 7.3. We also proposed that the regulatory regime should aim to allocate duties and responsibilities appropriately amongst the various actors and provide appropriate means to define rights of way at level crossings in so far as feasible, and to extinguish them where necessary. Subsequent references to the consultation paper will be in the format Joint Consultation Paper, para X.

convenience of all users of level crossings. We also recommend Regulations to enable the making of level crossing plans dealing with safety and convenience at level crossings and a duty for relevant bodies to co-operate in connection with arrangements at level crossings. Later in this Part we recommend a power for Ministers to issue directions to facilitate co-operation and encourage arrangements to be made for the safety and convenience of level crossing users. We also recommend that the Secretary of State, in consultation with the Scottish Ministers and Welsh Ministers, be enabled to issue a statement of policy on the exercise of their power to issue directions, and that the Office of Rail Regulation be given the power to issue approved codes of practice. Finally we recommend the disapplication of a number of obsolete statutory provisions relating to level crossings.

## **SAFETY AT LEVEL CROSSINGS UNDER THE HEALTH AND SAFETY AT WORK ETC ACT 1974**

### **The current safety regime**

- 2.4 Safety at level crossings is governed by three main sources of regulatory control.
- (1) The original private special Act authorising the construction of the railway and laying down specific requirements such as the installation of gates, operated by gatekeepers.
  - (2) Level crossing orders made by the Secretary of State under the Level Crossings Act 1983. Such orders can only be made where there is a “highway or other road to which the public has access” or, in Scotland, a road within the meaning of the Roads (Scotland) Act 1984. There are some 2,000 level crossing orders in place and some 7,500 to 8,000 level crossings.
  - (3) HSWA 1974 and subordinate regulations, such as the Railways and Other Guided Transport Systems (Safety) Regulations 2006.<sup>2</sup> The 2006 Regulations apply to employers and business users of public and private level crossings in the conduct of their undertaking, but not to non-business users of private level crossings, save for volunteers engaging in safety critical work.
- 2.5 The current provisions are scattered in public general Acts, private special Acts, secondary legislation and level crossing orders, leading to a lack of clarity, certainty and accessibility.
- 2.6 The different sources of safety regulation also create uncertainty as to which provisions prevail in the case of a conflict. Where a level crossing order is in force, section 1(3)(b) of the Level Crossings Act 1983 disapplies “any provision made by or under any enactment as to the crossing”. This does not mean that a level crossing order takes precedence over HSWA 1974. This is because section 1(4A) of the 1983 Act provides that nothing in section 1(3)(b) affects any

<sup>2</sup> SI 2006 No 599, which implemented the European Railway Safety Directive (2004/49/EC). SI 2011 No 1860 amended the Railways and Other Guided Transport Systems (Safety) Regulations 2006 to include voluntary work as “work” for the purposes of Part 4 of the 2006 Regulations which concerns safety critical work.

provision made by or under Part 1 of HSWA 1974.<sup>3</sup> But neither is it clear from section 1(4A) whether in the event of a *conflict* between HSWA 1974 and a level crossing order, provisions in HSWA 1974 take precedence over the level crossing order.<sup>4</sup>

- 2.7 Even less clear is whether provisions in special Acts prevail where they conflict with HSWA 1974. In the consultation paper, we discussed the rule that later legislation prevails over earlier legislation, and the conflicting effect of the principle that the general provisions of HSWA 1974 do not derogate from the specific provisions in special Acts.<sup>5</sup>
- 2.8 In the consultation paper, we provisionally proposed that the regulation of safety at level crossings should be governed entirely by HSWA 1974.<sup>6</sup> Consultation responses differed significantly on this proposal and on the question of whether to retain the system of bespoke level crossing orders.

### **Consultation**

- 2.9 Consultees broadly supported a move to a HSWA 1974-based safety regime, as a simple, modern approach to safety regulation that would provide greater clarity and flexibility. The Health and Safety Executive (HSE) described the current safety regime as “disjointed and piecemeal”.<sup>7</sup> The Office of Rail Regulation described the process for making changes to protective measures at level crossings as effective but “bureaucratic, protracted and time-consuming”.<sup>8</sup>
- 2.10 The Royal Society for the Prevention of Accidents, amongst others, said that the HSWA 1974 scheme could improve clarity and therefore safety at level crossings.<sup>9</sup> Others commented that it was not always easy for railway operators to know which provisions applied in a given situation. Improved clarity would also reduce the likelihood of duplicating work.
- 2.11 The Office of Rail Regulation explained that it already applies a HSWA 1974-based approach to the assessment of risk at level crossings as required under Part 3 of the Railways and Other Guided Transport (Safety) Regulations 2006.<sup>10</sup> Inspectors “instinctively go through a HSWA-based thought process” when making a level crossing order, applying the test of reducing risk so far as is reasonably practicable. Passenger Focus, a transport advisory body, pointed out that an extensive body of guidance and good practice has built up to assist operators in interpreting and applying the “so far as is reasonably practicable” test which underpins HSWA 1974.<sup>11</sup>

<sup>3</sup> Inserted by the Level Crossings Regulations 1997, SI 1997 No 487.

<sup>4</sup> Joint Consultation Paper, para 5.57.

<sup>5</sup> Joint Consultation Paper, paras 5.58 to 5.62.

<sup>6</sup> Joint Consultation Paper, para 8.11.

<sup>7</sup> Consultation Analysis, para 8.4.

<sup>8</sup> Consultation Analysis, para 8.7.

<sup>9</sup> Consultation Analysis, para 8.8.

<sup>10</sup> SI 2006 No 599.

<sup>11</sup> Consultation Analysis, para 8.9.

- 2.12 Some consultees, including the Heritage Railway Association and two former railway inspectors, expressed concern that a move to a HSWA-based system of safety regulation would create uncertainty. They expressed concern that the application of HSWA 1974 regulations and approved codes of practice could vary, creating different standards of safety around the country. The Railway Industry Association cautioned that it might be more difficult to assess whether the risks at a particular crossing had been reduced so far as reasonably practicable following an assessment under HSWA 1974, than when an assessment had been recorded in a level crossing order.
- 2.13 Professor Andrew Evans of Imperial College expressed concern that a move to a HSWA 1974-based regime would lead to duty-holders under HSWA 1974 implementing safety measures for which the costs involved exceeded the benefits.<sup>12</sup> HSWA 1974 requires that duty-holders, including employers and self-employed persons, reduce risks to their employees and the general public, so far as reasonably practicable. *Edwards v National Coal Board* remains the leading case on the meaning of “so far as is reasonably practicable” which is not defined in the Act. Lord Justice Asquith held, in the Court of Appeal:

“Reasonably practicable” is a narrower term than “physically possible” and it seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.<sup>13</sup>

- 2.14 Professor Evans took the view that the “gross disproportion” test would lead to an increase in the standard of safety applied, beyond what was necessary and resulting in scarce resources being diverted away from road safety and into level crossing safety despite the higher number of accidents on the roads. The Confederation of Passenger Transport also warned of a risk of “safety creep”, whereby “features which are not entirely essential are nevertheless installed”. Passenger Focus said that it was necessary to ensure that HSWA 1974 was applied equally to the regulation of road and rail safety.<sup>14</sup>
- 2.15 The Department for Transport described the current legislative provisions as complex, difficult to locate, outdated and unclear, making the management of level crossings difficult and “giving rise to safety concerns”.<sup>15</sup>

### **Discussion**

- 2.16 HSWA 1974 regulates health and safety at work throughout industry in Great Britain and already applies to the railways. Removing other sources of regulation for level crossings would bring the regulation of safety at level crossings into the same scheme, making it easier to understand, apply and monitor safety

<sup>12</sup> Consultation Analysis, para 8.13.

<sup>13</sup> *Edwards v National Coal Board* [1949] 1 All ER 743, 747.

<sup>14</sup> Consultation Analysis, paras 8.10 to 8.15.

<sup>15</sup> Consultation Analysis, para 7.28.



standards.

- 2.17 The number of accidents at level crossings in Great Britain is low by comparison with other industrialised countries<sup>16</sup> and high standards of safety are maintained. Thus, the reason for moving to an entirely HSWA-1974 based regime is not for fear that the current standard of safety is inadequate. Rather, the concern is that the safety regime is unclear and there are too many sources of regulation.
- 2.18 The proposed scheme would have the benefit of a single overarching source of primary legislation with all other regulation flowing from that one source. HSWA 1974 is also expressed in reasonably modern terms and regulations under section 15 would apply so that the whole regime would be based upon the same standard of reducing risk so far as reasonably practicable.
- 2.19 Consultees expressed differing views on the potential impact of a move to a HSWA-based system of safety regulation. Some were concerned that safety standards would have to increase; others thought they might decrease, while a few consultees suggested that there could be regional differences in safety standards. There is no evidence that a proper application of the test in HSWA 1974 would lead to a significantly higher standard of safety being applied around the country. The consultation responses from the Office of Rail Regulation and Network Rail<sup>17</sup> show clearly that they are already applying the test set out in HSWA 1974 in their regular, day-to-day regulation and operation of the railways. The Office of Rail Regulation applies the tests in HSWA 1974 when drawing up level crossing orders and Network Rail's level crossing risk assessment toolkit also applies the same tests.
- 2.20 Moreover, quite apart from the issue of general practice, Network Rail and most heritage railway operators are already subject to, and required to comply with, the general duties on employers in HSWA 1974. Our recommendations would not impose any additional HSWA 1974 duties on those organisations.<sup>18</sup>
- 2.21 We do not accept that the HSWA 1974 test would lead to greater regional variation than the application of the current requirements under the various regulatory regimes in force. In determining whether risk had been reduced so far as reasonably practicable, a modern approach to proportionality might suggest the carrying out of a balancing act between the risk and the benefit of a particular course of action.<sup>19</sup> As several consultees pointed out, accidents on the roads far outstrip those on the railways (including level crossings) and level crossings in the United Kingdom are the safest in Europe.<sup>20</sup>

<sup>16</sup> Rail Safety and Standards Board, *Road-Rail Interface Special Topic Report 2010*, <http://www.rssb.co.uk/SPR/REPORTS/Pages/SPRPublishedDocuments.aspx> (last visited 1 September 2013).

<sup>17</sup> Consultation response No 67 – Network Rail.

<sup>18</sup> The position of railway operators with no employees is discussed below.

<sup>19</sup> The modern approach to proportionality was discussed by Lord Bingham in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] AC 532.

<sup>20</sup> Rail Safety and Standards Board, *Road-Rail Interface Special Topic Report 2010*, <http://www.rssb.co.uk/SPR/REPORTS/Pages/SPRPublishedDocuments.aspx> p 43 (last visited 1 September 2013).

- 2.22 A single modern safety regime would be clearer and more accessible, would remove the potential for conflicting requirements and would sit more comfortably with the health and safety regulation across the railway, road and other industries.
- 2.23 We intend to create a regulatory structure that can withstand future adaptation of the current institutional arrangements, such as changes to the railway operator or the railway safety regulator. The modern approach to regulation suggests a system based on widely drawn provisions, allowing generic changes to be made, supported by more detailed regulations and approved codes of practice. The industry can be empowered and obliged to decide how best to discharge duties effectively so as to keep risk as low as reasonably practicable.

### **The new safety regime**

- 2.24 The HSWA 1974 regime already applies to the railways in general and to level crossings in particular. The Office of Rail Regulation pointed out in its consultation response that it applies the tests set out in HSWA 1974 when drawing up a level crossing order under the Level Crossings Act 1983.<sup>21</sup> When inspecting a level crossing, Network Rail assesses whether risk is as low as reasonably practicable (commonly known as “ALARP”) in accordance with HSWA 1974.<sup>22</sup>
- 2.25 We recommend a move to a modern system of safety regulation for level crossings based solely on HSWA 1974. The new system will involve four levels of regulation.
- 2.26 First, the primary obligations will continue to be the general duties under Part 1 of HSWA 1974. These will include the duty under section 3 of HSWA 1974 on every employer and self-employed person to ensure, so far as reasonably practicable, that persons not in their employment are not exposed to risks to their health or safety. Duty-holders, including railway operators, will be obliged to carry out risk assessments at each level crossing and make arrangements to reduce risk so far as reasonably practicable.
- 2.27 Second, these general duties will continue to be supported by regulations, including the Railways and Other Guided Transport Systems (Safety) Regulations 2006.<sup>23</sup> The Regulations provide more detailed requirements as to how to manage risk on the railways in general, and how various duty-holders should co-operate in discharging their respective duties. Regulations relating to level crossings could be made under section 15 of HSWA 1974, for example when generic changes need to be made to safety equipment at level crossings. The Office of Rail Regulation should be empowered to issue approved codes of practice, under section 16. Clauses 9 and 10 of the draft Bill make provision for the making of regulations and approved codes of practice.
- 2.28 Third, if railway operators, beneficiaries of private rights of way over level crossings, and highway, roads or traffic authorities wish to do so, they may agree

<sup>21</sup> Consultation Analysis, para 8.9.

<sup>22</sup> Consultation response No 67 - Network Rail.

<sup>23</sup> SI 2006 No 599, as amended.

a set of arrangements for the safety and convenience of all users of the crossing in a level crossing plan. In the case of a private level crossing, the beneficiary of the private right of way over the level crossing might want to enter into a level crossing plan with the railway operator.<sup>24</sup> We have drafted Level Crossing Plans Regulations to be made under section 15 of HSWA 1974, providing for the making of level crossing plans.<sup>25</sup> We do not think that level crossing plans need to be created for all level crossings or even for all level crossings which are currently governed by a level crossing order. There is no need to create a level crossing plan in order to satisfy HSWA 1974 obligations, but it provides a structure for agreement and a record of what has been agreed between the parties.

- 2.29 Lastly, we think that there may be circumstances when the Secretary of State, Scottish or Welsh Ministers would think it necessary to issue a direction in relation to safety and convenience at a level crossing. Such a direction could impose a particular set of arrangements or impose requirements which are intended to facilitate or encourage the parties to agree on the terms of a level crossing plan. A direction could not, however, impose the terms of a level crossing plan: a plan must be entered into voluntarily. A direction given to a railway operator could include requirements which relate to the operation of the railway, for example, specifying the maximum period in any hour when a level crossing may be closed.<sup>26</sup>
- 2.30 We would expect the power to issue directions to be used only as a last resort or in exceptional circumstances. Indeed, it might not be necessary in practice to issue a direction because the availability of the power to do so might be sufficient to encourage the parties to reach a sensible agreement.
- 2.31 The Office of Rail Regulation would be responsible for enforcement of any breach of HSWA 1974 obligations or of requirements in a level crossing plan<sup>27</sup> or of a direction. Where the Office of Rail Regulation thinks it appropriate, an improvement notice or a prohibition notice under HSWA 1974 could be issued. Prosecution could be brought for breach of a prohibition notice, or directly for a breach of HSWA 1974 duties.<sup>28</sup> In Scotland, any criminal prosecution would be brought by the Procurator Fiscal. In addition, as mentioned later in this Part, the Office of Rail Regulation has the power to enforce licence conditions, under the Railways Act 1993, against operators of railway assets, including Network Rail and other railway operators.<sup>29</sup>

<sup>24</sup> In Scotland, the equivalent term is “holder” of a private right of way. But the draft Level Crossings Bill uses the term “beneficiary” to apply in Scotland as well as in England and Wales.

<sup>25</sup> The draft Regulations are contained in Appendix C to this report.

<sup>26</sup> Draft Level Crossings Bill, cls 4 to 8 make provision for the proposed directions.

<sup>27</sup> A level crossing plan would not be actionable in civil law.

<sup>28</sup> Under HSWA 1974, s 33 it is an offence to fail to discharge any duty to which a person is subject by virtue of ss 2 to 7 of that Act, or to contravene any health and safety regulations, or any requirement or prohibition imposed under such regulations, including licence conditions.

<sup>29</sup> See the discussion later in this Part, under the heading “Enforcement of the duty to consider convenience”..

## **Recommendation**

- 2.32 **We recommend that safety at level crossings should be governed entirely by the Health and Safety at Work etc. Act 1974, supported by regulations and codes of practice thereunder.**
- 2.33 This recommendation is given effect by Part 1 of the draft Level Crossings Bill and by the draft Level Crossing Plans Regulations.

## **TWO GAPS IN THE HSWA 1974 REGIME**

### **Non-business users of private level crossings**

- 2.34 Some private level crossings are not used by the beneficiary of the private right of way for any business use, but are solely used for ordinary day-to-day and social access to their property. Under the HSWA 1974-based system of regulation, most railway operators will be subject to the duties under HSWA 1974, including any regulations, but such beneficiaries of a private right of way will not be covered.
- 2.35 Most private level crossings were created by or under a special Act and it is possible that specific provision might have been made to impose duties on the beneficiary of a right of way across the railway for the protection of users.
- 2.36 In the consultation paper, we suggested that the HSWA 1974-based system might leave a gap in the regulation of private level crossings in England and Wales which involve a road to which the public has access. This might arise in cases where the beneficiary of a private right of way over a level crossing was not subject to any enforceable requirements under HSWA 1974.<sup>30</sup>
- 2.37 We suggested that one solution might be to apply the provisions of HSWA 1974 in such situations. We expressed the view that such an amendment would be contrary to the general approach of HSWA 1974 which is intended to impose duties in relation to safety on employers and self-employed persons who are conducting their undertaking. Alternatively, we suggested that existing criminal sanctions might provide adequate enforcement options in the case of misuse of private level crossings by non-business users.<sup>31</sup> We invited consultees to comment on this issue, but did not propose any law reform.

### **Consultation**

- 2.38 Several consultees, including Network Rail, the Association of Train Operating Companies, a County Council and a Local Access Forum, proposed that the duties under HSWA 1974 should be extended to include non-business users of level crossings. It was suggested that the exclusion of non-business users was an anomaly. The National Farmers' Union and the Country Land and Business Association opposed the extension of HSWA 1974 duties and the Cyclists' Touring Club cautioned that any such extension should not be made without wide and careful consultation with all user groups. The Highways Agency suggested that new primary legislation should be passed to deal with this problem. Some consultees pointed out that non-business users were likely to owe a common law

<sup>30</sup> Joint Consultation Paper, paras 8.40 to 8.44.

<sup>31</sup> Joint Consultation Paper, para 8.42.

duty of care, which could be enforced in tort or delict if breached.<sup>32</sup>

- 2.39 Most consultees who commented on this issue took the same view as the Department for Transport, which said that the HSWA 1974-based regime would leave an enforcement gap in relation to non-business users of private crossings, but that other measures were in place to protect safety. The Department pointed out that in addition to criminal sanctions, the railway operator retained responsibility for the infrastructure of private crossings under HSWA 1974. Also, where appropriate, the railway operator could seek to close the crossing by agreement with the beneficiary.<sup>33</sup> It was also noted that any level crossing that met current safety requirements under Office of Rail Regulation guidance was likely to meet the requirements of a regime based entirely on HSWA 1974.<sup>34</sup>

### ***Discussion***

- 2.40 Non-business users of private level crossings are not covered by the current safety provisions and would continue not to be covered by HSWA 1974. Misuse occurring at such crossings would continue to be subject to the ordinary criminal law.<sup>35</sup>
- 2.41 HSWA 1974 was intended to regulate the health and safety of persons at work and protect the health and safety of members of the public from risks arising from the activities of those at work.<sup>36</sup> We take the view that it would not be in the public interest to extend HSWA 1974 provisions to regulate those who are not employers or self-employed persons in relation to their private rights of way. We think that existing criminal sanctions and the duties of the railway operator in respect of the infrastructure are sufficient.
- 2.42 Beneficiaries of private rights of way over the railway might, however, wish to be parties to level crossing plans, whether or not they have HSWA 1974 duties. A plan would be agreed with the railway operator, setting out the arrangements to be made at the level crossing. Such a plan could purport to impose requirements on the beneficiary of the private right of way, but those requirements could only be enforced when the beneficiary is conducting an undertaking and so is subject to general duties under sections 2 to 4 of HSWA 1974. The railway operator might find it helpful to have a plan, to which the beneficiary of the private right of way had agreed. The plan would still be enforceable against the railway operator.<sup>37</sup>
- 2.43 Similarly, a direction could only impose enforceable requirements on a

<sup>32</sup> Consultation Analysis, paras 8.96 to 8.104.

<sup>33</sup> In Parts 4 and 5 of this report, we discuss the extinguishment of private rights of way by agreement in a deed of release (in England and Wales) or discharge agreement (in Scotland).

<sup>34</sup> Consultation Analysis, para 8.100.

<sup>35</sup> Criminal offences in relation to level crossings are discussed in Part 6 of this report and more fully in Part 13 of the Joint Consultation Paper.

<sup>36</sup> HSWA 1974, s 1.

<sup>37</sup> Level crossing plans are discussed below.

beneficiary of a private right of way who is subject to HSWA duties.<sup>38</sup>

### **Recommendation**

- 2.44 **Duties under the Health and Safety at Work etc. Act 1974 should not be extended to cover beneficiaries of private rights of way over level crossings who are not employers or self-employed persons.**

### **Railways run entirely by volunteers**

- 2.45 During the consultation process, the Heritage Railway Association alerted us to the fact that some heritage railways are run on an entirely voluntary basis, with no employees or self-employed persons working on the railway. The Association expressed concern that HSWA 1974 would not apply to the operators of such railways, either to protect the volunteers in the course of their duties or to protect members of the public from the actions of the volunteers. It was suggested that regulations made under section 15 of HSWA 1974 could not apply to such railways.<sup>39</sup>
- 2.46 The comments from the Heritage Railway Association have led us to consider the extent to which voluntarily run railways might currently be covered by HSWA 1974.
- 2.47 Section 2 of HSWA 1974 imposes duties on employers to ensure the health and safety at work of their employees. Subsections (1) and (2) of section 3 of HSWA 1974 impose duties on every employer and self-employed person respectively as follows:
- (1) to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.
  - (2) to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety.
- 2.48 Where a railway operator employs any staff, it has duties as an “employer” under section 3 that extend to the protection of the general public, regardless of whether the work of the undertaking is being carried out by volunteers. The duty to protect “persons not in his employment” includes the protection of volunteers. However, a railway operator which is not an employer is not subject to duties under sections 2 or 3 of HSWA 1974.
- 2.49 It is arguable that volunteers working on a railway which is run on an entirely voluntary basis are covered by section 4 of HSWA 1974. Section 4 imposes a duty on persons who are in control of premises, such as railway operators, to take such measures as are reasonably practicable to ensure that the premises and any access thereto are safe and without risks to health. Whether this section

<sup>38</sup> Directions are also discussed below.

<sup>39</sup> Consultation Analysis, para 8.19.

would apply to equipment at level crossings could be argued either way. However, even if technically section 4 imposed a duty on a purely voluntarily run railway, we do not think it provides a secure basis for the application of health and safety legislation to level crossings.

- 2.50 Later in this Part we recommend the repeal of the Level Crossings Act 1983. The repeal of the 1983 Act will remove the protection afforded by level crossing orders in relation to voluntarily run railways. Under that Act, an order may make provision for the safety and convenience of those using a level crossing.<sup>40</sup> This includes level crossings on voluntarily run railways.<sup>41</sup>
- 2.51 We considered whether the safety regime should be extended to protect volunteers acting in the course of their voluntary work as if they were at work, or whether the protection should be limited to protecting volunteers as members of the public from risks arising from the conduct of the undertaking.<sup>42</sup>
- 2.52 We concluded that it would not be appropriate to extend the general duties under Part 1 of HSWA 1974 to cover volunteers on voluntarily run railways in respect of level crossings as if they were “at work”. HSWA 1974 was intended to protect workers and self-employed persons in the course of their work and the general public from the conduct of business undertakings. It would be a significant shift in the purposes of the health and safety regime to protect volunteers as if they were employees or self-employed persons “at work”. This could also have unintended consequences for other voluntary organisations.
- 2.53 We have concluded that it is preferable to rely on the wide regulation-making power under section 15 of HSWA 1974. Under section 15, the Secretary of State may make regulations for the general purposes of Part 1 of the Act. The general purposes as defined in section 1 of HSWA 1974 include the protection of the public from risks associated with the operation of the railway as a result of a deeming provision in section 117(2) of the Railways Act 1993:

(2) If to any extent they would not do so apart from this subsection, the general purposes of Part I of the 1974 Act shall include—

(a) securing the proper construction and safe operation of transport systems to which this section applies, and of any locomotives, rolling stock or other vehicles used, or to be used, on those systems; and

(b) protecting the public (whether passengers or not) from personal injury and other risks arising from the construction and operation of transport systems to which this section applies.

- 2.54 This is clearly sufficiently broad to protect volunteers and members of the public on railways run entirely by volunteers.

<sup>40</sup> As mentioned earlier, the Level Crossings Act 1983 only applies to highways and “roads to which the public has access” in England and Wales and to “roads” as defined in the Roads (Scotland) Act 1984 in Scotland.

<sup>41</sup> The Level Crossings Act 1983 does not define “railway”. Section 1 provides that the Act applies “where a railway crosses a road on a level”.

<sup>42</sup> Regulations may be made under HSWA 1974, s 52(2) to extend the meaning of “work” and “at work” for the purposes of Part 1 of the 1974 Act. See for example SI 2011 No 1860.

- 2.55 Any regulations made under section 15 of HSWA 1974 may be enforced under the 1974 Act by criminal prosecution.<sup>43</sup> Later in this Part, we recommend that regulations be made under section 15 to enable railway operators, including voluntarily run railways, and other parties to agree level crossing plans, setting out the arrangements for particular level crossings, including requirements for safety and convenience.
- 2.56 This still leaves a possible gap where a level crossing order under the 1983 Act could have imposed arrangements to make the level crossing safe for the public, but the railway operator and others do not make a level crossing plan in respect of the crossing. As mentioned above, purely voluntarily-run railways are not covered by section 3 of HSWA 1974.
- 2.57 We therefore recommend that the Secretary of State make regulations under section 15 of HSWA 1974 to impose an obligation equivalent to that contained in section 3 of HSWA 1974 in respect of level crossings on purely voluntarily run railways. The effect would be to close the lacuna that would otherwise exist with the removal of level crossings orders in relation to such crossings.
- 2.58 It would be beyond the scope of the level crossings project to make recommendations for reform in relation to the whole of the railway network. However, we recommend that the Secretary of State consider whether provision should be made both to protect members of the public and the volunteers themselves on purely voluntary railways in a way that parallels the general duties contained in HSWA 1974.

### **Recommendations**

- 2.59 **We recommend that the Secretary of State make regulations under section 15 of HSWA 1974 to impose a duty similar to that in section 3 of HSWA 1974 in relation to level crossings on railways operated on an entirely voluntary basis with no employees.**
- 2.60 **We recommend that the Department for Transport should consider whether provision should be made to impose duties similar to those in Part 1 of HSWA 1974 on heritage railways with no employees.**

### **DUTY TO CONSIDER CONVENIENCE**

- 2.61 The balance of convenience between road and rail users, the balance between safety and convenience, and the respective weight they should carry are all important issues in the regulation and management of level crossings.
- 2.62 Under the Level Crossings Act 1983 a level crossing order may make such provision as the Secretary of State considers necessary or expedient for the safety or convenience of those using the crossing. Although the overriding purpose of a level crossing order is to provide for the protection of users, an order may provide for convenience as well as safety. Under HSWA 1974 there is no express duty to make provision for convenience. In the consultation paper we asked whether a “convenience gap” might occur in practice if there was a move

<sup>43</sup> HSWA 1974, s 33 provides that it is an offence to contravene any health and safety regulations or any requirement or prohibition imposed under such regulations.



to a HSWA 1974-based system of regulation of level crossings and all level crossing orders were revoked.<sup>44</sup>

2.63 In the consultation paper we suggested that in practice there is no sharp distinction between safety and convenience, as safety incorporates an element of convenience.<sup>45</sup> This is particularly so given the requirement under HSWA 1974 to reduce risk “so far as is reasonably practicable”. We gave two examples where convenience might be compromised: action by the railway operator for the convenience of highway or road users not covered by the Disability Discrimination Act 1995<sup>46</sup> and action by the highway, roads or traffic authority for the convenience of rail users, enhancing the efficiency of the railway.

2.64 We asked consultees whether a legal instrument should be introduced to:

- (1) require rail operators to take safety-neutral steps to enhance the convenience of the users of the highway/road at a level crossing; and/or
- (2) require highway/roads authorities to take safety-neutral steps to enhance the convenience of rail users, by enhancing the efficiency of the level crossing for rail use.<sup>47</sup>

2.65 If so, we asked whether it would be preferable to:

- (1) extend the power under section 15 of HSWA 1974 to make regulations to include considerations of convenience; or
- (2) create a new power to make separate convenience-related orders for particular crossings.<sup>48</sup>

### **Consultation**

2.66 Responses on this issue were not limited to the narrow issue of a “convenience gap” left by the repeal of the Level Crossings Act 1983, but to the much wider balance of convenience between the interests of road/highway and rail users.<sup>49</sup>

2.67 The Department for Transport, which has responsibilities in relation to both road and rail networks, said:

Convenience at level crossings (mainly for road users) is an issue that is growing in importance. Many already take the view that convenience is not accorded sufficient prominence within the current system so the Department wishes to ensure that explicit reference to convenience is established within a new regime.<sup>50</sup>

<sup>44</sup> Joint Consultation Paper, paras 8.45 to 8.57.

<sup>45</sup> Joint Consultation Paper, paras 5.36 and 8.46.

<sup>46</sup> Or by the Equality Act 2010.

<sup>47</sup> Joint Consultation Paper, para 8.52.

<sup>48</sup> Joint Consultation Paper, para 8.57.

<sup>49</sup> Consultation Analysis, paras 8.116 to 8.135.

<sup>50</sup> Consultation response No 109 – Department for Transport.

- 2.68 The Department went on to support the creation of a provision to recognise convenience at level crossings under HSWA 1974 “and a tool that allows action to increase convenience in a safety neutral manner”, but to caution that the appropriate apportionment of costs would need to be considered.<sup>51</sup> This could be achieved either by extending section 15 of HSWA 1974 to include considerations of convenience or by way of “incidental” and “supplemental” provisions under section 15, if consultation suggested that this would be adequate.
- 2.69 The Office of Rail Regulation took the view that assessing how to reduce risk “so far as is reasonably practicable” under HSWA 1974, naturally included consideration of convenience. If significant inconvenience was created for users of level crossings, it became more likely that risks would be taken, thereby undermining safety. Similar points were made by Northumberland County Council and the Automobile Association. Although the Office of Rail Regulation believed that convenience could be considered adequately within a HSWA 1974 regime, it supported the proposals for convenience to be “explicitly addressed by any primary legislation arising from the Commissions’ work”.<sup>52</sup>
- 2.70 During the consultation period we were made aware of examples of inconvenience to road users at some crossings.
- 2.71 At Tallington in Lincolnshire, local residents have pressed for many years to have a level crossing closed and replaced by a bridge or underpass, as the crossing is closed for 45 minutes in each hour at the busiest times of day with no alternative route available for road users. Mr Otter, of Tallington, wrote that both road and rail traffic have increased significantly.<sup>53</sup> Similarly, in the centre of Chichester, a crossing close to the station is closed for 45 minutes in the hour at busy times of day. Numerous other examples were given.
- 2.72 At our site visit to the West Somerset Railway, we saw a busy public footpath crossing at Goviers Lane, Watchet with a difficult winding slope approach. Due to the high volume of use, the heritage railway operator had erected gates at the crossing. Gates had been broken or left open and had been replaced by self-closing gates in order to meet the need for safety. These gates were very difficult to open while wheeling a pushchair or wheelchair, particularly while operating an electric wheelchair.<sup>54</sup>
- 2.73 Some consultees thought that level crossing orders, either in their current form or as a second level of safety regulation, should be retained because they allowed

<sup>51</sup> Consultation Analysis, para 8.147.

<sup>52</sup> Consultation Analysis, para 8.125 to 8.129.

<sup>53</sup> Consultation response No 78 – Ken Otter. Since the end of the consultation period, Network Rail has carried out public consultation on plans for a bridge to replace the level crossing at Tallington. No final decisions have been made at the time of writing.

<sup>54</sup> The visit took place on 29 October 2010. Subsequently there was a fatal accident involving the user of a motorised scooter on the approach to the level crossing. Following the accident, the heritage railway operator, West Somerset Council, Watchet Town Council and Somerset County Council all co-operated and jointly funded a new chicane system, improving both the safety and the convenience of this public footpath level crossing.

convenience to be taken into consideration.<sup>55</sup> Those consultees included the Local Government Association, ADEPT, and the Association of Transport Coordinating Officers. The Office of Rail Regulation and the Department for Transport both took the view that explicit reference to convenience should be made in any provisions relating to the new system of safety regulation. Passenger Focus, the Highways Agency and at least one County Council supported the creation of a new power to make separate convenience-related orders for particular level crossings. Northumberland County Council suggested the creation of an enhanced duty on railway operators to ensure a speedy response where a level crossing fails to operate. Network Rail did not support the creation of a separate power relating to convenience.<sup>56</sup>

- 2.74 Network Rail, the Department for Transport and Transport Scotland all raised the question of funding, asking who would pay for convenience-related measures.<sup>57</sup> The Department for Transport said:

It would be useful to see recommendations that acknowledge the importance of convenience at level crossings and a tool that allows action to increase convenience in a safety neutral manner. However, apportionment of costs will be a key output of such a tool.

- 2.75 Consultees who supported the creation of a legal duty to consider convenience thought that the duty should apply to both highway/roads authorities and rail operators.<sup>58</sup>
- 2.76 Consultees also expressed the view that convenience issues would be improved by better consultation and co-operation between road and rail interests. Network Rail expressed the view that a statutory duty on railway operators to co-operate with highway and roads authorities, would help to address the balance of convenience without imposing additional burdens on railway operators and ensure that they were “always mindful of the priority of safety issues”.<sup>59</sup>

## **Discussion**

- 2.77 The balance between the convenience of road and rail and the safety of road and rail has been a feature of level crossing regulation since the railways were first built. Railway companies were required by special Acts to erect and maintain good and sufficient gates across the road at each side of the railway wherever the railway crossed any public road. Railway companies had to employ fit and proper persons to open and close the gates, keeping them closed to road traffic until there was traffic waiting to cross. Section 9 of the Railway Regulation Act 1842 first gave railway companies the option to keep the gates open to road

<sup>55</sup> The Level Crossings Act 1983, s 1(2) provides that “An order under this section may make such provision as the Secretary of State considers necessary or expedient for the safety or convenience of those using the crossing;”

<sup>56</sup> Consultation Analysis, paras 8.128 to 8.134.

<sup>57</sup> Consultation Analysis, para 8.147.

<sup>58</sup> Consultation Analysis, paras 8.141 to 8.143.

<sup>59</sup> Consultation Analysis, paras 8.138 to 8.140.

traffic and only close them to allow trains to pass.<sup>60</sup> As both road and rail usage increased dramatically, it became clear that convenience as well as safety had to be taken into account. The British Transport Commission Act 1957 attempted to resolve the problems by using technological advances. The 1957 Act permitted automatic lifting barriers to be installed at level crossings, so as to reduce the amount of time for which the barriers would be closed. Over the years, as road traffic has increased, many automatic half-barrier crossings have been replaced by full barriers. This indicates a general shift away from convenience to road users in favour of improved safety at level crossings.

- 2.78 There may be circumstances in which the public interest is best served by the convenience of the railway taking priority. Equally, the economy as a whole may benefit from drivers spending less time with their engines idling, waiting at level crossings.<sup>61</sup> The convenience of rail users might be enhanced by an increase in the number of trains or line speeds, but the convenience of highway or road users might be reduced by longer waiting times at level crossings.
- 2.79 We are persuaded by consultees that there is a much wider issue concerning convenience than a “convenience gap” arising from a move to a HSWA 1974-based system of safety regulation. We now take the view that there would be benefit in creating a duty to consider the convenience of all users of a level crossing when taking a decision likely to affect that crossing.
- 2.80 We recommend the introduction of a statutory duty to consider the convenience of all users of a level crossing. In addition, arrangements may be made at a level crossing, whether in the form of a level crossing plan or otherwise, for the purposes of convenience, so long as the arrangements continue to satisfy the duty to reduce risk so far as reasonably practicable.
- 2.81 The duty will be imposed on a number of bodies.
- (1) The railway operator for the level crossing concerned.
  - (2) The traffic authority for the level crossing, when making decisions in the course of carrying out functions conferred on it as a traffic authority or highway or roads authority. A traffic authority carrying out other functions would not be subject to this statutory duty to consider the convenience of level crossing users, although they would be subject to the general public law duty to take relevant matters into account.
  - (3) The Secretary of State, the Scottish Ministers and Welsh Ministers, when making decisions relating to level crossing directions.<sup>62</sup>

<sup>60</sup> These provisions were later consolidated in the Railways Clauses Consolidation Act 1845, s 47 and in the Railways Clauses Consolidation (Scotland) Act 1845, s 40. A brief description of this history in relation to England and Wales may be found in S Sauvain QC, *Highway Law* (4th ed 2009).

<sup>61</sup> Rail Safety and Standards Board, *Research Brief: Trialling the national roll out of the level crossing cost model* (December 2010), [http://www.rssb.co.uk/sitecollectiondocuments/pdf/reports/research/T738\\_rb\\_final.pdf](http://www.rssb.co.uk/sitecollectiondocuments/pdf/reports/research/T738_rb_final.pdf) (last visited 1 September 2013).

<sup>62</sup> Level crossing directions are discussed below.

- (4) The Secretary of State, the Scottish Ministers and Welsh Ministers, when making decisions in the course of carrying out statutory functions in relation to railways or roads, other than those mentioned above.
- 2.82 The duty should apply in a broad range of circumstances, namely whenever a decision is being made which has any effect on the safety or convenience of a level crossing. Where the decision is not aimed at safety or convenience, but would be likely to have an impact on a level crossing, it will still be necessary to consider the convenience of all users. The duty relates not to the outcome, but to the decision-making process.
- 2.83 The duty on the Secretary of State, the Scottish Ministers and Welsh Ministers, other than when acting as highway, roads or traffic authority, will be limited to circumstances where they are performing statutory functions conferred by any Act or subordinate legislation.<sup>63</sup> The duty will be important in relation to the high level output specification (HLOS) and statement of funds available (SoFA) for the next funding period.<sup>64</sup> The relevant parties involved in those negotiations should consider the convenience of all users of level crossings.
- 2.84 The duty will be limited to reasonable and practicable considerations of convenience and will not override any other duty to be performed. The duty to consider convenience only applies insofar as it does not prevent any other duty from being discharged and cannot be relied upon to justify a failure to perform any other duty. In relation to safety, the duty to consider convenience must not interfere with the duty under HSWA 1974 to keep risk as low as reasonably practicable.

#### **Enforcement of the duty to consider convenience**

- 2.85 In order for the duty to consider convenience to be effective, it must be enforceable. Traffic authorities are obliged to carry out any statutory duty imposed upon them as statutory bodies.<sup>65</sup> It is not clear that Network Rail or heritage railway operators would be subject to public law enforcement at least insofar as English law is concerned.
- 2.86 Scots law does not have the same rigid public/private distinction in its law of judicial review as that in England and Wales. In Scotland, the test for whether judicial review is available is that set out by Lord Hope in *West v Secretary of State for Scotland*.<sup>66</sup> It is usually described as the “tripartite test” and, as that name suggests, involves identification of three parties – the decision-maker, the person affected and the body which conferred the decision-making power. The approach is described by Lord Hope:

<sup>63</sup> Draft Level Crossings Bill, cl 2(2)(d) and (5).

<sup>64</sup> Railways Act 1993, sch 4A requires the Secretary of State in relation to England and Wales, and the Scottish Ministers in relation to Scotland, to produce an HLOS and also a Statement of Funds Available (SoFA) in order to determine the objectives for the railways and the funding required to meet those objectives.

<sup>65</sup> For a discussion of local government in England and Wales and the extent of its susceptibility to judicial review, see S Bailey, “The Structure, Powers and Accountability of Local Government”, in D Feldman (ed), *English Public Law* (2004), ch 4.

<sup>66</sup> 1992 SC 385.

(a) The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.

(b) The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.

(c) The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review under Rule of Court 260B as a public law remedy.<sup>67</sup>

2.87 This continues to be the approach in Scotland as may be seen from such recent references as the *AXA* case<sup>68</sup> and *Ruddy v Chief Constable of Strathclyde*<sup>69</sup> “the distinction between public and private law has never been regarded as determining the scope of the supervisory jurisdiction of the Court of Session.” Moreover, judicial review in Scotland is also the means by which a petitioner may seek an order for specific performance of a statutory duty, under section 45(b) of the Court of Session Act 1988.<sup>70</sup>

2.88 In English law where a statutory duty is imposed, there is an obligation upon all to whom the duty applies to comply with it. Although the statute will often provide for a sanction in the case of breach, this will not be required where the duty is imposed upon a public body, as its actions will be susceptible to the supervisory jurisdiction of the courts by way of judicial review.<sup>71</sup> The Administrative Court may order a public body to take or refrain from taking certain action and may award damages where appropriate.<sup>72</sup> The court will start from the assumption that “if the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review”.<sup>73</sup>

2.89 Before the development of modern judicial review, the High Court in England and Wales was occasionally prepared to exercise its equitable jurisdiction to compel

<sup>67</sup> *West v Secretary of State for Scotland* 1992 SC 385, 412-413.

<sup>68</sup> *AXA General Insurance Limited v Lord Advocate* 2011 SLT 1061; [2012] 1 AC 868.

<sup>69</sup> 2013 SC (UKSC) 126, Lord Hope at para 18.

<sup>70</sup> See Act of Sederunt (Rules of the Court of Session 1994) 1994 SI 1994 No 1443, r 58.3(1).

<sup>71</sup> *R v Horseferry Road Justices, ex p Independent Broadcasting Authority* [1987] QB 54, Lloyd LJ at 65.

<sup>72</sup> The Senior Courts Act 1981, s 29(1A) provides: “The High Court shall have jurisdiction to make mandatory, prohibiting and quashing orders in those classes of case in which, immediately before 1st May 2004, it had jurisdiction to make orders of mandamus, prohibition and certiorari respectively”.

<sup>73</sup> *R v Panel on Take-overs and Mergers Ex p Datafin Plc* [1987] QB 815, Lloyd LJ at 847.

the performance of a statutory duty, or prevent a breach,<sup>74</sup> but such use of these powers is unlikely today.

2.90 If judicial review is not available, a private law right of action might be provided in the statute, but breach of a statutory duty will only be actionable as a tort, or in Scotland, delict where it appears from the statute that the legislature intended to create a private right of action for breach.<sup>75</sup> Criminal sanctions will only be available where explicitly provided in the legislation.

2.91 Craies on Legislation says:

In cases where the nature of the statutory duty and the persons on whom it is imposed does not imply obvious and sufficient methods of enforcement (whether by way of judicial review, internal disciplinary sanctions or otherwise) the absence of a clear sanction would be a significant defect in legislation.<sup>76</sup>

2.92 Network Rail takes the view that it is not a public authority for the purposes of section 6 of the Human Rights Act 1998 and the duty to act in a way that is compatible with the European Convention on Human Rights. The appeal courts have had limited opportunity to rule on Network Rail's status. Two cases have been considered: a striking out application before the Queen's Bench Division and an appeal to the Information Tribunal under the Environmental Information Regulations 2004.<sup>77</sup>

2.93 In *Cameron v Network Rail*, the High Court held that at the time of the Potters Bar rail accident, Railtrack was not acting as a public authority with regard to the safety of the rail network.<sup>78</sup> Although Railtrack had been established by statute and had originally had functions of a public nature, the Railways (Safety Case) Regulations 2000 had removed its duty to establish and maintain group railway standards or to monitor and control the safety cases of others who used the railway infrastructure.<sup>79</sup> There are no decisions of higher courts on the wider question of whether Network Rail acts as a public authority in carrying out any of its other statutory functions. At the very least, Network Rail is a public interest

<sup>74</sup> *Stevens v Chown* [1901] 1 Ch 894, Farwell J at 904, as cited in D Greenberg (ed), *Craies on Legislation*, (9th ed 2008) p 528, para 12.6.5.

<sup>75</sup> D Greenberg (ed), *Craies on Legislation*, (9th ed 2008) p 534, para 12.6.11.

<sup>76</sup> D Greenberg (ed), *Craies on Legislation*, (9th ed 2008) p 517, para 12.5.1, citing observations made by the Joint Committee on Statutory Instruments where no such sanction was provided.

<sup>77</sup> SI 2004 No 3391, implementing Council Directive 2003/4/EC on public access to environmental information, 28 January 2003.

<sup>78</sup> *Cameron v Network Rail Infrastructure Ltd (formerly Railtrack Plc)* [2006] EWHC 1133 (QB), [2007] 1 WLR 163. Railtrack was Network Rail's predecessor as owner and operator of the railway.

<sup>79</sup> SI 2000 No 2688.

company; a private sector organisation which provides public services.<sup>80</sup>

- 2.94 The Information Tribunal considered whether Network Rail was a public authority within the meaning of regulation 2(2) of the Environmental Information Regulations 2004. The Tribunal held that if Network Rail was a body which carried out public functions, it was not a body which carried out public administrative functions as required by the 2004 Regulations. The Tribunal went on, in non-binding comments, to note that Network Rail's functions were not public functions.<sup>81</sup>
- 2.95 The question arises as to how the duty to consider convenience would be enforced against Network Rail or a heritage railway operator. Network Rail has not been found by the courts to be a public authority and is a private company limited by guarantee. Heritage railway operators are also in many cases private companies. It is far from clear that any duty to consider convenience would be enforceable against railway operators by way of judicial review, at least in England and Wales.<sup>82</sup>
- 2.96 We take the view that it is necessary to provide for the enforcement of the duty to consider convenience, in the absence of clarity as to the susceptibility of railway operators to public law.
- 2.97 We think it will be rare that enforcement action will be necessary. The intention is that the duty to consider convenience will lead railway operators and traffic authorities to include matters relating to convenience in their guidance and management procedures as a relevant criterion for consideration, so that enforcement will take place through internal mechanisms where necessary. However, we think it necessary to provide for relief in similar circumstances to those where judicial review would be available against a public body.
- 2.98 We have included provision for declaratory relief in clause 24 of the draft Level Crossings Bill. If a railway operator failed to consider convenience as required, we think it would be sufficient for action to be taken in the courts to seek a declaration (or in Scotland, declarator) that the duty-holder has failed to comply with the duty. The decision-making process would be unlawful as a consequence. This is intended to be in addition to the availability of judicial review against any

<sup>80</sup> The Meaning of Public Authority under the Human Rights Act, Report of the Parliamentary Joint Committee on Human Rights (2003-04) HC 382, para 53. See also paras 18 to 20 and para 49 as read with footnote 54, where the Office of Rail Regulation is quoted as accepting that Railtrack may have positive obligations under Article 2 of the ECHR in the discharge of its function to secure a safe rail network. The Office of Rail Regulation goes on to say: "We shall be reviewing our processes in regard to the inclusion of human rights, particularly in terms of our licensing conditions and in the application of the Competition Act 1998."

<sup>81</sup> *Network Rail Limited v Information Commissioner and others* (EA/2006/0061), Information Tribunal, 17 July 2007.

<sup>82</sup> There may be exceptions where railways are brought under Government ownership and control as "directly operated railways" in pursuance of the duty under s 30 of the Railways Act 1993 (as amended by the Transport Act 2000 and Railways Act 2005) to secure the provision of passenger services where "a franchise agreement in respect of the services is terminated or otherwise comes to an end but no further franchise agreement has been entered into in respect of the services". At the time of writing, the East Coast Main Line is a directly operated railway.



body acting as a public authority, and does not replace or oust judicial review.<sup>83</sup> As previously indicated, judicial review, including the obtaining of an order for specific performance of a statutory duty, is more likely to be available as a means of enforcement in Scotland.

- 2.99 The draft Level Crossings Bill includes a time limit for seeking declaratory relief. Proceedings must be brought within one year of the date on which the act or omission occurred.<sup>84</sup> We have not applied section 31 of the Senior Courts Act 1981, including the right to apply the rules of court; the basis on which a declaration is made; the requirement for leave; the effect of undue delay or the limitation period for judicial review. Appropriate provisions could be added.
- 2.100 Another option would have been to create an enforcement power similar to that in section 54(3) of the Transport and Works Act 1992 which provides for the enforcement of a statutory direction to place a sign or barrier at a level crossing, in circumstances where the person subject to the direction is not a public body.<sup>85</sup> The 1992 Act provides that a direction may be enforceable on the application of the Secretary of State by an order of mandamus. We could have created a similar power to enforce by mandatory order. However, this would not be the most effective remedy to ensure the consideration of the convenience of all users of level crossings.
- 2.101 As an alternative to the declaratory relief, the duty could be enforced through the regulatory system. There are two ways in which this might be achieved.
- 2.102 The statutory duty to consider convenience could be enforceable as if it were a licence condition. Indeed, the duty to consider convenience could be introduced into railway operators' licences as they come up for renewal. The Office of Rail Regulation, the Secretary of State or, in some cases, Scottish Ministers, have powers to take enforcement action, including fines or other action to secure compliance where they are satisfied that a railway operator either is contravening or is likely to contravene a licence condition, term of a franchise agreement or a duty relating to closure restrictions.<sup>86</sup>
- 2.103 Alternatively, a statutory obligation could be imposed upon the Office of Rail Regulation to ensure that the railway operator considers the convenience of all users when making decisions affecting a level crossing. This would involve amendment of the rail regulator's functions under the Railways Acts 1993 and 2005.
- 2.104 We pose these as options for the Department for Transport to consider in more detail.

<sup>83</sup> Draft Level Crossings Bill cl 3(3) makes it clear that the right to seek declaratory relief under this clause does not affect the right to take any other proceedings, such as judicial review, or any other action.

<sup>84</sup> Draft Level Crossings Bill, cl 3(2).

<sup>85</sup> Transport and Works Act 1992 Act, s 54(3)(b) makes provision for Scotland in relation to enforcement of a direction under s 52(2) of the Act.

<sup>86</sup> Railways Act 1993, ss 55 and 56. For examples of provisional and final orders made, see [www.rail-reg.gov.uk](http://www.rail-reg.gov.uk), where a table of "enforcement action taken" is published.

## Recommendations

- 2.105 **We recommend that a duty should be imposed on the Secretary of State, the Scottish Ministers and Welsh Ministers, railway operators and traffic authorities to consider the convenience of all users of level crossings when making any decision in the course of carrying out their functions affecting a level crossing.**
- 2.106 **We recommend a power to seek a declaration in the High Court, or a declarator in the Court of Session, where the railway operator has failed to satisfy the duty to consider convenience.**
- 2.107 These recommendations are given effect by clauses 2 and 3 of the draft Level Crossings Bill.

## "Downtime" at level crossings

- 2.108 "Downtime" is the term used in the railway industry for the amount of time for which a level crossing is closed to non-rail traffic. There is a disadvantage to road users arising from increased downtime at crossings, where barriers are closed to road traffic to allow trains to pass. With increased train traffic and line speeds, the length of time that level crossing barriers are closed is a source of much frustration to road users. Many consultees commented that the convenience and safety of the railway is often given precedence over the convenience of road users. This is especially likely to occur at a small number of level crossings where both road and rail traffic are very heavy and there is inadequate time for all the road traffic to clear the crossing each time the barriers open. There does not appear to be any clear limit to the amount of time for which the barriers may remain closed, provided they are not permanently closed so as to stop up the highway, or in Scotland the road.<sup>87</sup>
- 2.109 In England and Wales if the gates were to remain permanently closed at a public level crossing, it would amount to the unlawful stopping up of a highway. Section 130 of the Highways Act 1980 imposes a duty upon the highway authority to keep the highway open and free from obstruction. It is a criminal offence under section 137 of the Highways Act 1980 to willfully obstruct free passage along the highway without lawful authority or excuse.<sup>88</sup>
- 2.110 It may be that the public interest is best served by reducing the amount of time for which the barriers are closed to road traffic. The barriers might be closed for too long each time they shut; they might close too many times in each hour; or they might not open for long enough in between each closure. The effect of long "downtimes" on road traffic should be considered, including the economic impact of delays to both road and rail users as part of the duty to consider convenience.

<sup>87</sup> In *Boyd v Great Northern Railway Co of Ireland* (1895) 2 IR 555, the court held that the railway operator had obstructed passage across the road "for a longer period than is reasonably necessary for their own authorised purposes, and the protection of the public using the highway." In *Wyatt v Great Western Railway Co* (1865) 34 LJQB 204, the court held that there was no authority for the proposition that a person finding level crossing gates closed across a public carriage road, with no one available to open them could open them himself. See also *R v Strange* (1889) 16 Cox C C 562.

<sup>88</sup> In Scotland, the Roads (Scotland) Act 1984 prohibits the obstruction of roads except where works which are permitted under statute are being carried out. See 1984 Act, ss 85 to 92.

Taking all of these matters into account, we recommend later on in this Part, that the Secretary of State should have the power to issue directions.

- 2.111 The Secretary of State might, in extreme circumstances, decide to issue a direction restricting the amount of time in each hour during which barriers may be closed to road traffic at particular level crossings. The Secretary of State can already take steps to address the problem of long waiting times by means of the specifications of service in the franchising process with train operating companies and in the high level output specification setting out what the Secretary of State wants to be achieved by railway activities during railway control periods. However, the direction-making power discussed below may help to integrate consideration of level crossing matters into these processes.
- 2.112 The Secretary of State currently has the power by means of a level crossing order under section 1(2) of the Level Crossings Act 1983 to limit the period for which the barriers are closed. Section 1(2) provides that an order may “make such provision as the Secretary of State considers necessary or expedient for the safety and convenience of those using the crossing; and in particular ....may impose on the operator requirements as to the operation of the railway at or near that crossing”. Under the proposed system of level crossing plans, the railway operator could agree to limit the downtime at a level crossing. In extreme circumstances, the Secretary of State will have the power to impose a maximum period of downtime per hour in a direction. We discuss this below.

#### **LEVEL CROSSING ORDERS**

- 2.113 The Level Crossings Act 1983 authorises the Secretary of State to make individual level crossing orders “to provide for the protection of those using the level crossing”. The orders may make such provision as is “necessary or expedient for the safety or convenience of those using the crossing”. Each level crossing order makes specific provision in relation to an individual level crossing. There are some 2,000 level crossing orders in force. Most level crossings on public vehicular highways and roads are subject to a level crossing order.<sup>89</sup> A level crossing order may only be made in England and Wales in respect of a highway or other road to which the public has access and in Scotland in respect of a road.<sup>90</sup> A level crossing order may be made by the Secretary of State with or without a request by the railway operator (in most cases Network Rail). The Office of Rail Regulation may give written notice requiring the railway operator to request an order and, if the operator fails to act, the Office of Rail Regulation may advise the Secretary of State to make an order in any event, or may issue an improvement or prohibition notice under HSWA 1974
- 2.114 In the consultation paper, we provisionally proposed the abolition of bespoke level crossing orders in favour of a general safety regime under HSWA 1974, supported by regulations and approved codes of practice made under the Act.<sup>91</sup>

<sup>89</sup> There are no level crossings on dual carriageways and motorways.

<sup>90</sup> “Road” is defined in the Roads (Scotland) Act 1984, s 151(1).

<sup>91</sup> Joint Consultation Paper, para 8.11.

## **Consultation**

- 2.115 Comments from consultees on the proposal to abolish level crossing orders were by no means consistent, with some in favour of abolishing them and some supporting their retention.<sup>92</sup>

### ***Disadvantages of level crossing orders***

- 2.116 Consultees pointed out the following disadvantages of the current system of level crossing orders.
- 2.117 The Office of Rail Regulation and railway professionals described the process for creating level crossing orders as long and cumbersome. The Office of Rail Regulation said that the process can be “bureaucratic, protracted and time-consuming”.<sup>93</sup>
- 2.118 Railway professionals commented in consultation meetings that the refusal of highway or roads authorities to agree the terms of a draft order prevented the order from being made in practice. They said that the effectiveness of level crossing orders, as well as the efficiency of level crossings in general, was very much dependent upon the working relationship between the railway operator and the highway or roads authority in a given area.
- 2.119 Although notice must be given to the local highway or roads authority, wider consultation is not required, so that others with a legitimate interest in the requirements of a level crossing order do not have an opportunity to make representations.
- 2.120 If amendment is required, a new order must be requested and the process followed from the beginning. This is bureaucratic and militates against making small but useful improvements to level crossings where an order is in force.
- 2.121 At present it is not easy to make generic changes to level crossing orders. If an improvement in technology develops, in most cases a new level crossing order will be made for each and every crossing at which the improvement is to be implemented. While the Level Crossings Act 1983 does not prevent generic changes from being made, it is impossible to do so while retaining the site-specific nature of the order in a single document. The Office of Rail Regulation expressed the view that the absence in the 1983 Act of a specific power to make generic changes by a single order can act as a disincentive to innovation and improvement at level crossings.
- 2.122 Consultees told us that the difficulty in making generic changes to level crossing orders at times leads to a failure to follow the correct procedure in practice and results in the Office of Rail Regulation agreeing not to take enforcement action if any minor changes are in fact introduced. As an example, the Railway Industry Association pointed to improvements in light bulb technology. Many level crossing orders stipulated that bulbs of a particular wattage had to be used at crossings. With the advent of low wattage light-emitting diode (LED) lamps, a

<sup>92</sup> Consultation Analysis, Part 8.

<sup>93</sup> Consultation Analysis, para 8.7.

<sup>95</sup> Level Crossings Act 1983, s 1(1).

lower wattage of light was needed to achieve the same level of brightness as a conventional filament bulb. However, converting to an LED light would constitute an infringement of the level crossing orders concerned. The Office of Rail Regulation agreed not to take enforcement action against Network Rail for breaching level crossing orders by replacing old bulbs with the new lower watt bulbs. This practice was followed as an alternative to amending each level crossing order individually.

2.123 Consultees also said that the inflexibility of level crossing orders meant that safety measures at level crossings were not always adapted when necessary to reflect changed circumstances at crossings. In consultation meetings with railway professionals, we were shown examples of level crossings where the order required full barriers to be maintained. In three examples the vehicular road had been either stopped up or reduced to a footpath but the barriers still had to be maintained in accordance with the order. The Railway Industry Association and Network Rail engineers informed us that in practice no request would be made for a new order to downgrade the crossing until the safety equipment needed to be replaced due to age. This occurred approximately every 25 years. While this is a practical, rather than legal problem, the framework for agreeing a level crossing order and the absence of an effective duty to co-operate hinder the development of an efficient process.

2.124 Level crossing orders can only be made in relation to “any place where a railway crosses a road on the level”.<sup>95</sup> The power to make level crossing orders in respect of a particular crossing is thus dependent on the definition of “road”. As mentioned above, in relation to England and Wales the Level Crossings Act 1983 defines “road” as “any highway or other road to which the public has access.” In relation to Scotland “road” is defined as “any road within the meaning of the Roads (Scotland) Act 1984”, namely “any way ...over which there is a public right of passage (by whatever means)...”. In England and Wales the existence of an “other road” is a matter of fact and may, include roads where there is no public right of way. In Scotland, there must be a right of passage, which must be an enforceable right, as we explained in the consultation paper.<sup>96</sup> Level crossing orders are in effect restricted to public rights of way in Scotland and cannot be made in respect of private level crossings.

2.125 Consultees commented that the effective management of level crossing orders appeared to be affected significantly by the working relationship between the local representatives of the railway operator and the highway or roads authority. We saw an exemplary road-rail partnership between Network Rail and one County Council, as well as examples of poor working relationships between road and rail operators and poor management of level crossings in other areas of the United Kingdom.

<sup>96</sup> Joint Consultation Paper, paras 5.11 to 5.12. See Roads (Scotland) Act 1984, s 151(1) and *Hamilton v Dumfries and Galloway Council* [2009] CSIH 13, 2009 SC 277. The effect of the decision in that case is that in relation to Scotland, and unlike the position in England and Wales, where the railway crosses a way over which the public has lawful access but does not have an enforceable right of way, the level crossing concerned is *not* covered by the Level Crossings Act 1983.

### ***Advantages of level crossing orders***

2.126 Consultees put forward a number of arguments in support of the retention of level crossing orders.

- (1) Level crossing orders provide clarity and certainty at individual crossings. All parties know precisely what safety provision must be made.
- (2) As the safety requirements are set out clearly, there is little room for dispute as to whether they have been met. Some consultees were concerned that there was much more scope for uncertainty and therefore dispute when considering whether risk had been reduced “so far as is reasonably practicable” under HSWA 1974.
- (3) A level crossing order provides an accurate record of agreement reached between the railway operator and highway/roads authority of the safety measures required at the particular level crossing.
- (4) If the requirements of a level crossing order are not satisfied, enforcement action may be taken by the Office of Rail Regulation as the safety regulator. An improvement notice or prohibition notice may be issued by the Office of Rail Regulation under HSWA 1974 which applies in relation to enforcement of level crossing orders under the Level Crossings Act 1983. In the absence of a level crossing order, disputes might arise as to whether the safety arrangements in place at a level crossing met the required test that they reduced risk “so far as is reasonably practicable”.
- (5) A ground plan is often described by consultees as being “annexed” to each level crossing order, setting out the safety requirements and the layout of the crossing.<sup>97</sup> This helps the engineers carrying out the work and, later, the Office of Rail Regulation’s inspectors to know precisely what is required.
- (6) The process for drawing up a level crossing order produces a design for the crossing as a result of the ground plan showing the positioning of safety measures, such as barriers.
- (7) Orders can impose obligations on the highway/roads authority at or near a level crossing, such as erecting signs or painting markings on the road.<sup>98</sup>
- (8) The ability to impose obligations on a highway/roads authority in a level crossing order creates an incentive for the relevant bodies to co-operate.
- (9) A level crossing order is bespoke and therefore capable of meeting the

<sup>97</sup> The production of a ground plan precedes the drafting of a level crossing order, and is not formally annexed to the order. The Level Crossings Act 1983 does not require the production of a ground plan, nor does the production of a ground plan create any requirement to produce subsequently a level crossing order.

<sup>98</sup> This power was created by an amendment to the Level Crossings Act 1983 introduced by the Road Safety Act 2006.

requirements of even the most unusual level crossing. In the absence of a level crossing order some crossings might be difficult to define. The Heritage Railway Association gave the example of Britannia Bridge, a crossing on the newly rebuilt Welsh Highland Railway, which runs along the length of a bridge and is integrated into the road.<sup>99</sup>

- (10) A level crossing order is not restricted to making provision for safety. Under the Level Crossings Act 1983, an order can include provisions which the Office of Rail Regulation considers expedient for “the convenience of those using the crossing”.<sup>100</sup>

2.127 Consultation responses confirmed what we were told at meetings with members of the railway industry that, in practice at least, level crossing orders take precedence over special Act provisions, failing which HSWA 1974 is applied. Consultees did not generally address the more difficult question of how in practice members of the industry resolve any disparity between HSWA 1974 and level crossing orders. Consultation responses also showed that when developing level crossing orders, the HSWA 1974 test of reducing risk “so far as is reasonably practicable” is applied.

### **Discussion**

2.128 In meetings, at site visits and in written consultation responses, there was strong support for the clarity and certainty provided by bespoke level crossing orders, as well as their enforceability and the power to impose requirements upon highway and roads authorities. Despite the fact that level crossing orders can be highly restrictive and make it difficult to introduce any generic improvements in line with safety or technological developments, they enjoy significant popularity with those directly concerned with the maintenance of level crossings, in particular Network Rail and the Heritage Railway Association.

2.129 As mentioned above, under the Level Crossings Act 1983, level crossing orders may impose requirements in the interest of the convenience of those using a crossing. This feature should not be overstated. The objective of the power to make level crossing orders is “to provide for the protection” of level crossing users. This is supplemented by the much more frequently quoted provision allowing an order to “make such provision as the Secretary of State considers necessary or expedient for the safety or convenience of those using the crossing”.<sup>101</sup> While the Secretary of State (in practice the Office of Rail Regulation) can therefore ensure that convenience is taken into account in the course of preparing a level crossing order, the broad aim of an order must nevertheless be safety provision.

2.130 The Office of Rail Regulation and the Railway Industry Association took the view that the general provisions of HSWA 1974, along with regulations and approved codes of practice, would adequately regulate safety at level crossings. However, a small but significant number of consultees noted in their consultation responses

<sup>99</sup> We observe that Britannia Bridge is a uniquely complicated and difficult crossing, and therefore not necessarily an “example” of a wider problem.

<sup>100</sup> Consultation Analysis, paras 8.10 to 8.15.

<sup>101</sup> Level Crossings Act 1983, s 1(2).

that they wanted to retain at least some of the features of level crossing orders.

- 2.131 Alternatives to level crossing orders were suggested in consultation. The Rail Safety and Standards Board proposed a system of compulsory “safety interface agreements” similar to those used in some Australian states.<sup>102</sup> Network Rail suggested that level crossing orders could be converted into level crossing arrangements, maintaining a balance between safety and convenience while allowing generic amendments to be made. Each arrangement would be level-crossing specific and would be created by calling up details from a requirements database, which would allow a single update to effect a change to all relevant arrangements.<sup>103</sup>
- 2.132 Level crossing orders currently provide an opportunity for co-operation and consultation. The importance of effective co-operation was clear from consultation responses. In order to manage risk effectively, to balance convenience and to ensure that the most appropriate arrangements are made at the right time and with minimal delay, the railway operator must co-operate with other statutory bodies, particularly the local highway or roads authority.
- 2.133 We have concluded that there is merit in retaining a system in which a single legal document can be relied on to provide site-specific information about an individual level crossing. The information in such a document – a “level crossing plan” – will serve to supplement the generic, technical provisions contained in regulations made under HSWA 1974 and the guidance in approved codes of practice under the Act. A level crossing plan will be capable of incorporating the general requirements of the HSWA 1974 regulations, which will themselves be amenable to wholesale change to reflect technological improvements and other industry-wide changes. A level crossing plan will also be capable of identifying any additional, site-specific safety requirements that apply to an individual level crossing. Level crossing plans will also be capable of imposing enforceable duties and obligations on non-railway actors. Overall, level crossing plans will provide an important part of the scheme for regulating safety and convenience at level crossings, subject always to the over-arching requirements of HSWA 1974 general duties, regulations, and codes of practice.

### **Recommendation**

- 2.134 **We recommend that level crossing orders should be abolished.**
- 2.135 This recommendation is given effect by regulation 15 of the draft Level Crossing Plans Regulations which provides for the repeal of the Level Crossings Act 1983.<sup>104</sup>

<sup>102</sup> Consultation response No 100 – Rail Safety and Standards Board.

<sup>103</sup> Consultation Analysis, paras 8.10 to 8.15 and paras 8.21 to 8.23.

<sup>104</sup> Later in this Part we recommend the repeal of the Level Crossings Act 1983. The effect of repeal would be that no further level crossing orders could be made and existing level crossing orders would cease to have effect.





Lower Pratts private road level crossing in West Sussex. This crossing was previously controlled by a telephone to the signal box, but has been upgraded to use remote-controlled gates and miniature warning lights, controlled from the signal box. Locally monitored CCTV has also been fitted. Credit: Ashleigh Keall.

## LEVEL CROSSING PLANS

- 2.136 Under a HSWA 1974-based regime, the railway operator, highway or roads authority and anyone else subject to duties under HSWA 1974, will be required to carry out appropriate risk assessments and take all necessary steps to reduce risk so far as reasonably practicable. We do not wish to create any system that detracts from that primary obligation.
- 2.137 We recommend that in place of the power under the Level Crossings Act 1983 for the Secretary of State to make level crossing orders, a power should be given to the railway operator and certain other parties to enter into a voluntary agreements relating to level crossings. Such agreements will be called level crossing plans. The power to make a level crossing plan and rules governing the creation and operation of plans should be contained in Regulations made under section 15 of HSWA 1974. Section 15 empowers the Secretary of State to make Regulations for any of the general purposes of Part 1 of HSWA 1974.<sup>105</sup> It is an important part of our recommendations and the primacy of HSWA 1974 in regulating safety at level crossings that level crossing plans and the rules governing them should be subject to HSWA 1974.
- 2.138 As mentioned above, level crossing plans would be entered into entirely voluntarily. There is no need for a duty-holder to enter into a level crossing plan in order to discharge their duties under HSWA 1974. The railway operator may carry out a risk assessment, consider the convenience of all users and cooperate with the traffic authority or private beneficiary of a level crossing in

<sup>105</sup> The subject matter of the Health and Safety at Work etc. Act 1974 is reserved to the United Kingdom Parliament in terms the Scotland Act 1998, sch 5. The reservation falls within the general head of employment in the Scotland Act 1998, sch 5. For that reason the power to make regulations under s 15 of the 1974 Act would lie with the Secretary of State.

creating suitable protection at the level crossing. All of this can be done without the creation of a level crossing plan. There may, however, be circumstances where it is helpful to record the arrangements agreed between the various interested parties, to carry out consultation and to create a plan. The scheme we recommend provides this option.

- 2.139 As these Regulations are a key part of our recommendations and reflect the conclusions we have reached following consultation, we have taken the unusual step of annexing draft Regulations for the Secretary of State to consider taking forward.
- 2.140 A level crossing plan will be an agreement that may be made in respect of any individual level crossing, whether public or private. It will be a matter for the parties to decide whether to create a level crossing plan and there would be no obligation to do so. If parties are unable to reach agreement, each duty-holder will continue to be obliged to take whatever action is required to ensure that their HSWA 1974 obligations are met.<sup>106</sup> As mentioned above, the duties imposed on parties to level crossing plan would not be actionable in civil law but would be enforceable by the Office of Rail Regulation under HSWA 1974.
- 2.141 Having decided that it should be possible to create a level crossing plan for any level crossing, we were left with the problem of how to deal with those level crossings which involve “roads to which the public has access” which in England and Wales come within the terms of the Level Crossings Act 1983.

#### **Roads to which the public has access**

- 2.142 The Level Crossings Act 1983 enables level crossing orders to be made in respect of a place where a railway crosses a road on the level. “Road” is defined in the Act in relation to England and Wales as “a highway, or other road to which the public has access”.<sup>107</sup>
- 2.143 This definition covers all highways, including non-vehicular ones. The term “road to which the public has access” extends the definition to cover ways that can properly be described as “roads” (as a matter of fact) where the public has lawful access by permission or tolerance.<sup>108</sup> Level crossings involving such roads occur where there is a private right of way across the railway and public access has been tolerated or permitted, but no public right of way has developed as a matter of law.<sup>109</sup>
- 2.144 We explained in the consultation paper that we think it unlikely that there will be many private level crossings which involve roads to which the public has

<sup>106</sup> Alternatively, if they think it necessary or expedient, the appropriate national authority may issue a direction. Directions are discussed below.

<sup>107</sup> Level Crossings Act 1983, s 1(11). The definition of “road” is the same definition as is used in road traffic legislation: see, for instance, Road Traffic Act 1988, s 192(1) and Road Traffic Offenders Act 1988, s 98. The definition of “road” in relation to Scotland (unlike in England and Wales) does not include roads to which the public has access.

<sup>108</sup> *Clark v General Accident Fire and Life Assurance Corporation plc* [1998] 1 WLR 1647.

<sup>109</sup> For a discussion of the creation of public rights of way by long user, see Part 4.

access.<sup>110</sup> It is not enough that the public has access to a private level crossing as a matter of fact. The owner must permit the public to use the right of way. It is not sufficient for permission to extend to the landowner's employees or other specific licensees. Alternatively, the public use, while not permitted, must not be unlawful in the sense that it would negate the acquisition of a right of way by prescription.

2.145 As mentioned above, currently level crossing orders can be made in respect of roads to which the public has access. Such orders can impose duties on traffic authorities to place signs "on or near a road" in connection with a level crossing. In relation to England and Wales, "road" means a highway or road to which the public has access. As regards Scotland "road" means a road as defined by the Roads (Scotland) Act 1984. But as mentioned above, that definition does not include roads to which the public has access. The 1983 Act also provides that any signs so placed are treated as if they had been placed in accordance with the Road Traffic Regulation Act 1984. This provision has the effect of ensuring that the enforcement provisions of the 1984 Act apply to any sign placed in accordance with the terms of a level crossing order under the 1983 Act. This means that any person who contravenes such signs can be prosecuted under the 1984 Act.

2.146 It was clear from consultation responses, from our advisory group and from information gathered at site visits that one of the most useful elements of a level crossing order is the power to place enforceable obligations upon a traffic authority. Section 1(2)(a) of the Level Crossings Act 1983 provides that a level crossing order:

may require the operator of the crossing or the local traffic authority (or both) to provide at or near the crossing any protective equipment specified in the order and to maintain and operate that equipment in accordance with the order.<sup>111</sup>

2.147 We have not included "roads to which the public has access" in the definition of level crossing in the draft Bill. Although we do not wish to include such roads in the definition of level crossing, we do want to ensure that a traffic authority which is party to a level crossing plan may be required to erect signs. In addition, we wish to replicate the provision of the 1983 Act so that any signs placed under a level crossing plan are treated as if they had been placed in accordance with the Road Traffic Regulation Act 1984, so as to attract the enforcement provisions in the 1984 Act. The draft Level Crossing Plans Regulations under section 15 of HSWA include similar provision to that in the 1983 Act.<sup>112</sup>

### **The parties to a level crossing plan**

2.148 The purpose of a level crossing plan is to reflect an agreement between certain parties with a direct interest in the level crossing as to what arrangements will be

<sup>110</sup> Joint Consultation Paper, paras 5.10 to 5.11.

<sup>111</sup> This provision was substituted by the Road Safety Act 2006, s 50(2).

<sup>112</sup> See draft Level Crossing Plans Regulations, reg 16. It is to be noted that s 1(4) of the 1983 Act refers to "section 54(4)" of the Road Traffic Regulation Act 1984. The reference to s 54(4) appears to be incorrect as the appropriate provision is s 64(4) of the 1984 Act.

made for the safety and convenience of all users. A party does not necessarily have to be subject to any duty under HSWA 1974 or obliged to take action under a level crossing plan.<sup>113</sup>

### ***Parties to a public level crossing plan***

- 2.149 The draft Level Crossing Plans Regulations provide that the railway operator must always be a party to a level crossing plan for a public level crossing, because any arrangement at a level crossing will affect the railway operator who has duties under HSWA 1974 in respect of the level crossing and the railway as a whole. Although the terms of a level crossing plan would be a matter for the parties to agree, we would expect a plan to contain requirements in relation to action at or near the crossing, including the provision, maintenance or operation of any signs or protective equipment, including gates. Plans could also include requirements in relation to the road-surfacing or fencing near the crossing. Plans may contain requirements relating to the operation of the railway.
- 2.150 Where a level crossing plan is agreed for a public level crossing, the railway operator and traffic authority must both be parties to the plan. The traffic authority may be a local traffic authority, or it may be the Secretary of State, or the Scottish Ministers as traffic authority. The plan should encourage effective co-operation between these two bodies, which have significant obligations in respect of public level crossings, and should reflect the outcome of that co-operation.<sup>114</sup>
- 2.151 Any person who is eligible to be a party to a level crossing plan, may join a level crossing plan with the consent of all the parties to the plan.<sup>115</sup>

### ***Parties to a private level crossing plan***

- 2.152 The beneficiary of a private right of way who is not a business user may wish to agree a level crossing plan with the railway operator in order, for example, to create a record of a binding agreement that the railway operator will make certain improvements at the crossing for the sake of convenience or safety. The railway operator might have agreed to put in mini warning lights, closed-circuit television, or a remote controlled button to open the gates at a private road crossing.<sup>116</sup> While the plan would not be enforceable against such a beneficiary, it would be enforceable against the railway operator. Such a plan would benefit the railway operator in that they would have a record of the beneficiary's agreement to a set of arrangements.
- 2.153 The draft Regulations provide that the railway operator must be a party to any level crossing plan for a private level crossing as the primary duty-holder under HSWA 1974 in respect of the level crossing and the railway as a whole. As with public level crossings, the terms of a plan would be a matter for agreement between the parties. We would expect a plan to impose obligations upon the railway operator in relation to action at or near the crossing for the purposes of

<sup>113</sup> Draft Level Crossing Plans Regulations, reg 5 makes provision as regards the parties a level crossing plan.

<sup>114</sup> Draft Level Crossings Bill, cl 1 provides for a duty to co-operate.

<sup>115</sup> Draft Level Crossing Plans Regulations, reg 5.

safety and convenience, even if it is simply to maintain a particular type of stile, place certain types of walkway to enable safe passage across the rails, or put up certain warning signs.

- 2.154 We considered who is responsible for the management of safety at a private level crossing and found that a number of people may owe concurrent duties, particularly under section 3(1) of HSWA 1974, towards the public at large. The crossing itself would belong to the railway operator, but ownership of the crossing is not determinant of who owes duties under HSWA. The question is whether the activity is part of the conduct of the duty-holder's undertaking.<sup>117</sup>
- 2.155 The duty under section 3(1) of HSWA 1974 extends to the whole of the right of way, not merely to any land on either side of the railway that the beneficiary owns. If a farmer gains access to his farm via a level crossing, then he will be using it in the course of his work, even if he does not own fields on both sides of the crossing. Every time a feed merchant uses the level crossing to deliver feed, or a member of staff goes off site to take cattle to market, the crossing is being used for business purposes and the beneficiary of the right of way will be subject to duties under Part 1 of HSWA.
- 2.156 Where a public level crossing also involves a private right of way over the railway, the local traffic authority will be eligible to be a party to a level crossing plan for the crossing. The plan in respect of a private level crossing may include provision for the placing of signs or road markings on a highway or road near the level crossing to which the plan relates. It is unlikely however, that a road close to a private level crossing would be one for which the Secretary of State or the Scottish Ministers would be the traffic authority.<sup>118</sup>
- 2.157 Local authorities other than the highway/roads or traffic authority, and in England and Wales, district councils, town councils, and parish councils, might co-operate with the railway operator to agree and even fund appropriate arrangements at a private level crossing. They could be parties to level crossing plans for private level crossings.
- 2.158 If a level crossing plan for a private level crossing imposes obligations on the beneficiary of the private right of way, those obligations are personal to that beneficiary. The intention is that any such obligations should not run with the land and a successor in title should not be bound by them. For that reason the draft Regulations provide that when a person ceases to be the beneficiary of a private right of way over a level crossing, the person will no longer be a party to a level crossing plan for that crossing.<sup>119</sup> New beneficiaries of the private right of way could agree a new level crossing plan if they wished. A plan should, however, bind the railway operator, or traffic authority concerned.

<sup>116</sup> Such an arrangement was seen at Lower Pratts level crossing on a site visit to the mainline network in West Sussex in 2011.

<sup>117</sup> The leading case on the meaning of "conducting an undertaking" is *R v Associated Octel Co Ltd*, see [1996] 1 WLR 1543, Lord Hoffmann at 1548 where the House of Lords held that "whether the activity which has caused the risk amounts to part of the conduct by the employer of his undertaking must in each case be a question of fact."

<sup>118</sup> See Road Traffic Regulation Act 1984, ss 121A and 142.



Sewage Works Lane level crossing, a user-worked, private level crossing near Sudbury, Suffolk. Credit: Rail Accident Investigation Branch

### **Content of a level crossing plan**

- 2.159 A level crossing plan should reflect the outcome of a risk assessment carried out by all those with duties under HSWA 1974 or any other safety obligations, such as those imposed by the Highways Act 1980 in England and Wales. A plan should also reflect the agreed arrangements to be made to satisfy those risk assessments as well as the convenience of all users of the level crossing, both rail and non-rail users.<sup>120</sup>
- 2.160 Any requirement imposed by a level crossing plan must relate to action at or near a level crossing.<sup>121</sup> This does not prevent the impact of a level crossing plan from being felt more widely along the railway or road network. A plan might include an agreement in relation to the operation of the railway.
- 2.161 In consultation we were given examples of level crossings that are closed to non-rail users for 40 minutes in the hour or more at certain busy times of day.<sup>122</sup> As we explained above, in the discussion on convenience, there is no statutory maximum period for which a level crossing may be closed to non-rail users. Long periods of downtime are inconvenient to non-rail users and there is a close relationship between convenience and safety, in that road users might decide to take risks and cross when not permitted if made to wait for longer than they think

<sup>119</sup> Draft Level Crossing Plans Regulations, reg 10.

<sup>120</sup> Draft Level Crossing Plans Regulations, reg 4 which covers the requirements that we recommend may be imposed by level crossing plans.

<sup>121</sup> Draft Level Crossing Plans Regulations, reg 4(1)(b).

<sup>122</sup> Examples include level crossings in Chichester and at Tallington in Lincolnshire.

reasonable.<sup>123</sup> A level crossing plan could contain provisions relating to the operation of the railway, including, in extreme circumstances, an agreed maximum downtime per hour for the crossing.<sup>124</sup>

- 2.162 A plan could also include anything the duty-holders have the power to do at or near the level crossing. This includes, but is not limited to the provision, maintenance or operation of any signs or protective equipment. A plan could include positive requirements and negative prohibitions.
- 2.163 The requirements which may be contained in a plan would be limited by the extent of the powers of the duty-holders. They could only agree to do things that they had the power to do. The level crossing plan would be entered into voluntarily by the parties and could not impose any requirements on persons who were not parties to the plan.
- 2.164 Only one level crossing plan may be in force at any one time in respect of a level crossing.<sup>125</sup> Several plans could be made in the same or similar terms in relation to level crossings on any railway line, in order to introduce a particular set of agreed arrangements. Effective co-operation would be the key to this process and we envisage that level crossing plans would provide a useful tool to aid co-operation.

#### **The relationship between level crossing specific rules and HSWA 1974**

- 2.165 In the consultation paper we discussed the relationship between the original special Acts under which the railways were built, level crossing orders and HSWA 1974.<sup>126</sup>
- 2.166 As discussed above, there is a lack of clarity in the hierarchy of special Acts, level crossing orders and HSWA 1974 under the current safety regime.
- 2.167 Consultation and site visits confirmed our impression that in practice, the railway industry tends to operate on the assumption that the provisions of a level crossing order take precedence over special Act provisions, failing which HSWA 1974 applies. This is not a matter of law, but the practical understanding is worth noting.
- 2.168 We recommend that the regulation of safety of level crossings be brought fully under the umbrella of HSWA 1974. The power to make level crossing plans will be contained in Regulations made under section 15 of HSWA. Where there is a direct conflict, obligations under and requirements of HSWA 1974 would take precedence over any provision in a level crossing plan.<sup>127</sup>

<sup>123</sup> As explained above, “downtime” is the term used in the railway industry to refer to the period for which a level crossing is closed to non-rail users.

<sup>124</sup> Draft Level Crossing Plans Regulations, reg 4(2)(b).

<sup>125</sup> Draft Level Crossing Plans Regulations, reg 3(6).

<sup>126</sup> Joint Consultation Paper, paras 5.55 to 5.62.

<sup>127</sup> Draft Level Crossing Plans Regulations, reg 14 provides that it is a defence to enforcement proceedings for breach of a provision in a level crossing plan for the accused to prove that compliance with the plan would have given rise to a breach of duties under Part 1 of HSWA 1974.

- 2.169 A level crossing plan would not only be drawn up in order to make safety improvements. The parties may wish to create a plan for the purposes of improving the convenience of a particular group of users. Whatever the motivation for agreeing a plan, the arrangements at the level crossing must remain HSWA 1974-compliant at all times.
- 2.170 We considered what would happen if an arrangement was agreed in a level crossing plan which was HSWA-compliant at the time, but circumstances changed so that the agreed arrangements no longer satisfied the HSWA 1974 test. This could occur where the line speed increased, or the frequency of train services on the line increased, or where engineering developments meant that a different wattage of bulb would be safer and no less practicable for use in signals. Duty holders would be expected to carry out a new risk assessment before introducing such a material change, and would wish to create a new level crossing plan to reflect the new arrangements. In the meantime, the railway operator, and any other duty-holder, must discharge their primary obligations under HSWA 1974. If a level crossing plan is in conflict with the requirements of HSWA 1974, the duty-holder must disregard the plan so far as is necessary to comply with their primary duties under Part 1 of HSWA 1974.<sup>128</sup>
- 2.171 We also considered what would happen if the terms of a level crossing plan required arrangements that were not HSWA-compliant. We think this unlikely, particularly as the Office of Rail Regulation would be a statutory consultee before a level crossing plan is made. However, if a plan was not HSWA-compliant, the duty-holders would be liable to enforcement action under HSWA 1974. We discuss enforcement further below.

#### **Procedure for creating a level crossing plan**

- 2.172 While the draft Regulations make provision for some of the procedures in connection with level crossing plans, the Department for Transport may wish to add more detailed procedural requirements.
- 2.173 Consultation responses indicated that it might be appropriate to create a standard form for level crossing plans, together with a list of required supporting documents, including a ground plan, showing the location of the level crossing and the agreed arrangements, including engineering specifications. This would provide similar information to that currently required to be annexed to a level crossing order.
- 2.174 Initially, the parties themselves should agree a proposed level crossing plan. In the case of public level crossings, once the parties have agreed proposed terms, the railway operator must carry out consultation, inviting the public and interested organisations to make representations on the proposed contents of the level crossing plan.<sup>129</sup> In order to manage risk effectively, improve the convenience of level crossings for all users and the efficiency of the rail network, co-operation in the management of level crossings must be improved. Level crossing plans should aid effective co-operation. One of the ways to do this is to undertake public consultation on the contents of a proposed level crossing plan. The

<sup>128</sup> We discuss enforcement and defences below.

<sup>129</sup> Draft Level Crossing Plans Regulations, reg 6.



Department for Transport will wish to consider what consultation period is appropriate, in line with Cabinet Office guidance.<sup>130</sup>

- 2.175 We recommend public consultation before a level crossing plan is put into place for a public level crossing, so as to enable any interested party to make representations. This could include not only the traffic, or highway or roads authority, and any beneficiary of a private right of way, but also particular user groups and local or national organisations with particular interests in, and knowledge of, issues relating to accessibility. For example, a national disability organisation might be able to provide helpful evidence, based on experience in other areas of the country. There may also be circumstances where public consultation is appropriate for a proposed level crossing plan relating to a private level crossing, for example, where a level crossing provides access to a private road to which the public has access. The railway operator and traffic authority have the power to consult whenever they think it appropriate, but we recommend imposing a *duty* to carry out public consultation on level crossing plans for public level crossings. In addition, the parties must consult the Office of Rail Regulation before a level crossing plan for a public or private level crossing is finally agreed.<sup>131</sup>

#### **Parties joining or withdrawing from a level crossing plan**

- 2.176 A person who is eligible may become a party to a level crossing plan after it has been made, subject to the agreement of all existing parties.<sup>132</sup>
- 2.177 A level crossing plan will be a voluntary agreement, binding on parties to it in so far as they are subject to one or more of the general duties under sections 2 to 4 of HSWA 1974. In order for a plan to be effective, it will need to subsist for a reasonable period to allow for the agreed arrangements to be put in place. We concluded that parties should not be able to withdraw from a level crossing plan for the first three years after the plan comes into force unless the plan lapses.<sup>133</sup>
- 2.178 We considered whether parties should be prevented from withdrawing from a plan altogether. However, it seems to us that the voluntary nature of a plan is an important element of its strength. If parties do not think they will be able to withdraw in the future, they may be reluctant to agree a plan.
- 2.179 We concluded that a level crossing plan will serve little purpose unless the railway operator is a party. Similarly we concluded that the railway operator and the traffic authority should be mandatory parties to a level crossing plan for a public level crossing. Any other party should be able to withdraw from a level crossing plan. Withdrawal will be conditional on prior notice of the intention to withdraw being given to all other parties and to the Office of Rail Regulation. The

<sup>130</sup> Cabinet Office Guidance on Consultation was issued on 17 July 2012, in pursuance of the Civil Service Reform Plan. The Cabinet Office Guidance advises Government Departments to follow a range of timescales for consultation, rather than applying a default period of 12 weeks. Cabinet Office, *Consultation Principles* (2012), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60937/Consultation-Principles.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60937/Consultation-Principles.pdf) (last visited 1 September 2013).

<sup>131</sup> Draft Level Crossing Plans Regulations, reg 6(7).

<sup>132</sup> Draft Level Crossing Plans Regulations, reg 5(5).

<sup>133</sup> Draft Level Crossing Plans Regulations, reg 9.

notice period is to be six months before the proposed date of withdrawal. The withdrawal will not be effective until the expiry of the notice period.<sup>134</sup>

- 2.180 A level crossing plan will only be binding on a party while that party is subject to any one or more of the duties under sections 2 to 4 of HSWA 1974 or until the plan lapses or that party withdraws. But withdrawal from a plan will not enable a party to evade enforcement action. Any party to a level crossing plan will be liable to enforcement action under the terms of the plan for any act or failure to act that occurred prior to their withdrawal. The relevant date for enforcement will be the date of the breach of the plan, not the date the enforcement action was taken.
- 2.181 If a person ceases to be the beneficiary of a private right of way across the railway, that person will also cease to be a party to any plan in relation to that level crossing.<sup>135</sup> A level crossing plan will not bind any successors in title to a private right of way across the railway.

### **Variation, lapse and revocation of a level crossing plan**

#### ***Variation***<sup>136</sup>

- 2.182 The parties will have the power to vary the terms of a level crossing plan by agreement. Any party will be able to propose a variation, but all the parties must agree in order for it to take effect. The variation will have to be recorded in writing as part of the level crossing plan. It will be possible to remove, add or amend existing requirements.
- 2.183 The terms of a plan may not be varied by a direction from the Secretary of State, Scottish or Welsh Ministers, but a direction may revoke or suspend the terms of a plan.<sup>137</sup>
- 2.184 Where parties propose to vary an existing level crossing plan, they should consult the Office of Rail Regulation before agreeing to the variation.

#### ***Lapse***<sup>138</sup>

- 2.185 A level crossing plan will lapse where:
- (1) a new plan for the crossing comes into force;
  - (2) as a result of changes to the parties to the plan there is only one party left;
  - (3) any mandatory party ceases to be a party;
  - (4) the plan provides for its own lapse in certain circumstances and those circumstances occur (for example, this might be that specified works are

<sup>134</sup> Draft Level Crossing Plans Regulations, reg 9(3).

<sup>135</sup> Draft Level Crossing Plans Regulations, reg 10.

<sup>136</sup> Draft Level Crossing Plans Regulations, reg 8.

<sup>137</sup> Draft Level Crossings Bill, cl 4(7)(b). Directions are discussed below under the heading "Power to issue directions".

<sup>138</sup> Draft Level Crossing Plans Regulations, reg 11.

completed); or

(5) the level crossing ceases to exist.

2.186 If a plan lapses, the railway operator must give notice to the Office of Rail Regulation.

2.187 Circumstances may change over time so that the arrangements required by a level crossing plan no longer comply with the duties under HSWA 1974. Parties will be obliged to satisfy their obligations under HSWA 1974 in preference to complying with the terms of the level crossing plan. In these circumstances the question arises as to whether the plan should remain in force at all. We do not think that a plan should lapse automatically in such circumstances. The parties may agree to revoke the plan, with or without replacement. Alternatively the parties could decide to amend the plan to make it compliant with HSWA 1974.

### **Revocation**<sup>139</sup>

2.188 A plan may be revoked by:

(1) agreement between all the parties in writing;

(2) a direction issued by the Secretary of State, the Scottish or Welsh Ministers.<sup>140</sup>

### **Review of a level crossing plan**<sup>141</sup>

2.189 One of the criticisms of level crossing orders is that they tend to remain in place, without a full review of the requirements at the crossing, for the lifetime of the equipment, which may be up to 30 years. We think it is important that level crossing plans be reviewed and kept up to date. The draft Regulations provide that the parties must keep a level crossing plan under review. This includes an obligation to carry out a public consultation at intervals of no more than five years, in respect of plans relating to public level crossings. The review and consultation will have to consider whether the plan remains suitable for that level crossing and what changes, if any, may be required.

### **Enforcement of level crossing plans**<sup>142</sup>

2.190 Parties to a plan will be under a duty to comply with every requirement specifically imposed on them by the plan, providing that they have HSWA duties. Although a level crossing plan is entered into voluntarily by the parties, it is not a contract. Therefore, level crossing plans would not be actionable in civil law. Rather enforcement of the requirements of a plan would be for the Office of Rail Regulations under HSWA 1974. Each party's duty to comply with the terms of a plan will not be conditional upon the compliance of the others.

2.191 Level crossing plans will be subject to the enforcement regime under HSWA

<sup>139</sup> Draft Level Crossing Plans Regulations, reg 8.

<sup>140</sup> Draft Level Crossings Bill, cl 4(7)(b).

<sup>141</sup> Draft Level Crossing Plans Regulations, reg 12.

<sup>142</sup> Draft Level Crossing Plans Regulations, reg 13.

1974. This is because plans will be made under the Level Crossing Plans Regulations, which in turn will be made under section 15 of HSWA 1974. In terms of section 15(1) of HSWA 1974, any regulations made under that provision are "health and safety regulations". Section 53 of the Act provides that any "health and safety regulations" are "relevant statutory provisions". It is the "relevant statutory provisions" which are enforced under the Act.

- 2.192 The Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006<sup>143</sup> make the Office of Rail Regulation responsible for the enforcement of "relevant statutory provisions" under HSWA 1974 to the extent that they relate to the operation of a railway. Therefore the draft Level Crossing Plans Regulations, made under section 15 of HSWA 1974, and level crossing plans made under the Regulations will be enforceable by the Office of Rail Regulation.
- 2.193 The Office of Rail Regulation will be able to serve an improvement notice under section 21 of HSWA 1974. If a party fails to comply, a prohibition notice may be issued under section 22 of HSWA 1974. If the party persists in its failure to comply, the Office of Rail Regulation or, in Scotland, the Procurator Fiscal, will decide whether to prosecute under HSWA 1974.
- 2.194 Any person subject to HSWA 1974 is under an obligation to comply with the duties under Part 1 of that Act. If at any time a level crossing plan requires action which is not compliant with HSWA 1974, or requires action which leads to a breach of HSWA, the duty under the 1974 Act will take precedence over the requirements of the level crossing plan.
- 2.195 The relevant date for enforcement purposes would be the date of the breach of HSWA 1974. As mentioned above, a party would not be able to avoid prosecution by withdrawing from a plan. It will be more difficult to take enforcement action aimed at compliance after a party has withdrawn from a plan. This is one of the reasons that we have chosen to prevent withdrawal from a plan for the first three years and introduced a notice period.
- 2.196 We considered whether it should be possible to enforce the terms of a level crossing plan against the beneficiary of a private right of way who is not a business user and is not otherwise subject to HSWA 1974 duties. As level crossing plans are to be entered into voluntarily, it could be argued that all parties should be bound by the terms they have agreed and should be subject to enforcement action if they fail to carry out their obligations. However, HSWA 1974 is aimed at protecting those at work. Hence it imposes duties on employers and the self-employed, in the conduct of their undertaking. The 1974 Act was never intended to impose obligations on private individuals who are not employers or self-employed persons. We do not think we can justify an extension of this regime to impose enforceable obligations on private individuals in respect of level crossings, when Parliament has not done so in other contexts. Enforcement action can only be taken against those who are subject to any one or more of the general duties under sections 2 to 4 of HSWA 1974.

<sup>143</sup> SI 2006 No 557.

### **Record of level crossing plans**

- 2.197 We considered obliging the Office of Rail Regulation to keep a register of plans, so as to ensure that parties and members of the public could see what arrangements were in force at any given time, but decided that this was not necessary.
- 2.198 The parties themselves would wish to keep a copy of any plan. In addition, the parties to a plan would be required to send a copy of each plan to the Office of Rail Regulation, as safety regulator for the railways and as the body with powers under HSWA 1974 to enforce the obligations under level crossing plans.<sup>144</sup> The Office of Rail Regulation would therefore have a copy of each plan, but would not be required to maintain a formal register of level crossing plans.
- 2.199 These arrangements should be sufficient to ensure that the parties know what terms are in force at any given time and that the Office of Rail Regulation as the enforcing body is aware of the terms of the plan. If a member of the public wishes to find out what has been agreed at a particular level crossing, they may ask the railway operator or another party.<sup>145</sup>

### **Recommendation**

- 2.200 **We recommend that Regulations under section 15 of HSWA 1974 make provision for parties to agree a level crossing plan in respect of any individual level crossing, whether public or private.**
- 2.201 This recommendation is given effect by the draft Level Crossing Plans Regulations.

### **Repeal of the Level Crossings Act 1983, commencement and transitional provisions**

- 2.202 Regulation 15 of the draft Level Crossing Plans Regulations repeals the Level Crossings Act 1983. As explained above, section 117(3)(a) of the Railways Act 1993 provides that regulations under section 15 may repeal or modify any "existing statutory provisions". The Level Crossings Act 1983 is included in the list of "existing statutory provisions".
- 2.203 As part of the transitional arrangements and in order to allow sufficient time for parties to agree on the terms of level crossing plans, the Regulations provide that the repeal of the 1983 Act should come into force three years after the coming into force of the Regulations as a whole.<sup>146</sup> The repeal of the 1983 Act and coming into force of the Level Crossing Plans Regulations will not change the requirement to carry out risk assessments. However, we recognise that railway operators and others subject to HSWA 1974 duties may wish to carry out risk assessments and decide whether or not to agree a level crossing plan before any

<sup>144</sup> Draft Level Crossing Plans Regulations, reg 7(b).

<sup>145</sup> These provisions are without prejudice to the Office of Rail Regulation's obligations under the Freedom of Information Act 2000.

<sup>146</sup> Draft Level Crossing Plans Regulations, reg 15(2) as read with reg 15(1).

level crossing order under the 1983 Act ceases to have effect.<sup>147</sup>

- 2.204 We considered whether to recommend detailed transitional provisions and whether to recommend that existing level crossing orders should be deemed to become level crossing plans. However, we have concluded that level crossing orders should not be deemed to be level crossing plans. Instead, railway operators may either prepare level crossing plans for those crossings where an agreement is needed, or may simply take the necessary action to ensure that the crossing provides adequate protection to meet the requirements of HSWA 1974, taking into account the duty to consider convenience.
- 2.205 Some members of our advisory group were concerned that heritage railway operators would have to review the safety arrangements at all level crossings on their networks in order to implement the new regime and this would involve a great deal of time and expense. We do not think this should cause a problem as most railway operators are already subject to duties under HSWA 1974, including the need to carry out effective risk assessments and take whatever action is needed to comply with HSWA 1974.<sup>148</sup> The new scheme would not change this. We do not think that the repeal of the 1983 Act and the fact that existing level crossing orders will thereby cease to have effect, would require railway operators to carry out additional risk assessments.

#### **APPROVED CODES OF PRACTICE**

- 2.206 There is currently no body authorised to issue approved codes of practice under section 16 of HSWA 1974 in relation to railway safety. When responsibility for safety regulation passed from the Health and Safety Commission and Health and Safety Executive to the Office of Rail Regulation, it was not accompanied by the power to make approved codes of practice.<sup>149</sup> We provisionally proposed in the consultation paper that the Office of Rail Regulation be given the power to issue approved codes of practice in relation to level crossings.<sup>150</sup>

#### **Consultation**

- 2.207 Our provisional proposal was widely supported by consultees. In its response, the Department for Transport stated that “the current rail safety regime is sufficiently mature to enable the Office of Rail Regulation to be empowered to produce approved codes of practice”. The Department went on to emphasise the need for the Office of Rail Regulation to have access to expertise on highway design and to engage in full consultation with highway and road interests in drawing up appropriate codes of practice.
- 2.208 The Office of Rail Regulation commented that if it was given the power under section 16 of HSWA 1974, it would consult widely in producing relevant guidance for the management of level crossing risk, liaising closely with highway and road authorities as well as enforcing authorities:

<sup>147</sup> Level crossing orders under the 1983 Act would cease to have effect when the repeal of the Act comes into force.

<sup>148</sup> As discussed above, there are some railways run on an entirely voluntary basis which may not be subject to Part 1 of HSWA 1974.

<sup>149</sup> Responsibility passed in terms of the Railways Act 2005.

Our aim would be to achieve the right balance between setting out appropriate approaches to managing risk whilst allowing sufficient flexibility to allow for adaptation to technological advancements and any changes in industry structure or duty holder.

- 2.209 The Office of Rail Regulation pointed out that good guidance would help duty-holders to understand their responsibilities and the application of the “so far as is reasonably practicable” test under HSWA 1974 in the context of level crossings. It stated that a successful move to a HSWA 1974-based system would depend upon “well-crafted regulations and supporting guidance”.<sup>151</sup>

### Discussion

- 2.210 As the Rail Safety and Standards Board pointed out in its response, a move to a HSWA-based system of regulation “would need to be accompanied by very clear guidance as to how a risk-based regime should be interpreted”.<sup>152</sup> The Board agreed therefore that the Office of Rail Regulation should be given the power to issue approved codes of practice.

- 2.211 We understood from the level crossings advisory group and other meetings attended during the consultation period that great weight was placed on the *Railway Safety Principles and Guidance Part 2E on level crossings*, issued by the Office of Rail Regulation. That guidance has now been replaced by *Level Crossings: A Guide for managers, designers and operators: Railway Safety Publication 7*, which could form the basis for an approved code of practice.<sup>153</sup>

- 2.212 The Railway Industry Association supported the introduction of a power for the Office of Rail Regulation to issue approved codes of practice. In summary they thought that the proposed regulations along with approved codes of practice should aim to:

- (1) provide a clear, efficient process for reaching agreement on the type of level crossing, which should lead to a documented record of the arrangements agreed;
- (2) create a duty of co-operation between rail and road authorities to be built into the supporting regulations;
- (3) avoid the incorporation of engineering detail which might prove an obstacle to design improvements at a later date;
- (4) provide certainty that the arrangements at a specific location are acceptably safe under HSWA 1974; and
- (5) support the use of standardised arrangements in a consistent way

<sup>150</sup> Joint Consultation Paper, para 8.19.

<sup>151</sup> Consultation Analysis, para 8.22.

<sup>152</sup> Consultation Analysis, para 8.23.

<sup>153</sup> Office of Rail Regulation, *Level Crossings: A guide for managers, designers and operators: Railway Safety Publication 7* (Dec 2011).

without the limitations of a bespoke approach.<sup>154</sup>

- 2.213 We agree with these aims, with the exception that we seek to achieve the first and last aims by providing for the creation of level crossing plans under HSWA regulations.
- 2.214 We therefore recommend that the Office of Rail Regulation should be given the power to issue approved codes of practice under HSWA 1974. Such codes of practice would support the regulations to be made under section 15 of HSWA 1974. We make no recommendations as to the contents of any codes of practice as we take the view that this would be a matter for the Office of Rail Regulation.
- 2.215 We are limited by the scope of the level crossings project to recommending that the Office of Rail Regulation be given the power to issue approved codes of practice in respect of level crossings only. But we recommend that the Secretary of State should consider extending the effect of the provision in the draft Level Crossings Bill, to enable the Office of Rail Regulation to issue approved codes of practice which apply to the whole of the railway network and to tramways.<sup>155</sup>

#### **Recommendations**

- 2.216 **We recommend that Schedule 3 to the Railways Act 2005 should be amended so as to extend the Office of Rail Regulation's functions to include the function of making approved codes of practice under section 16 of HSWA 1974.**
- 2.217 **We recommend that the Secretary of State consider extending the power for the Office of Rail Regulation to issue approved codes of practice so that the power applies in respect of the whole of the railway network, including heritage railways and tramways.**
- 2.218 The first of these recommendations is given effect by clause 10 of the draft Level Crossings Bill.

#### **POWER TO ISSUE DIRECTIONS**

- 2.219 As explained above, under the HSWA-1974 safety regime, the primary responsibility rests with duty-holders to make risk assessments and decide how best to manage risk at level crossings. The draft Bill imposes a duty on the railway operator and the traffic authority to co-operate with each other and to take into account the convenience of all users of public level crossings.<sup>156</sup> In order to assist the duty-holders they may agree level crossing plans, setting out the arrangements for safety and convenience at a particular level crossing. We considered how adequate arrangements would be provided if the parties do not reach agreement as to how best to manage risk at a particular crossing, or if the railway operator introduces an arrangement that fails to balance the interests of all users adequately.
- 2.220 There may be circumstances where in the interests of safety or convenience

<sup>154</sup> Consultation Analysis, para 8.54.

<sup>155</sup> Draft Level Crossings Bill, cl 10.

<sup>156</sup> Draft Level Crossings Bill, cl 1.



intervention by the Secretary of State, Welsh Ministers or the Scottish Ministers (the "appropriate national authority") is required to ensure adequate arrangements at a particular level crossing. We have concluded that a power to issue directions should be given to the "appropriate national authority" for the following reasons.

- 2.221 The subject matter of Part 1 of HSWA 1974 and "the provision and regulation of railway services" are matters which are reserved to the United Kingdom Parliament in terms of Schedule 5 to the Scotland Act 1998. Neither is devolved to the National Assembly for Wales or Welsh Ministers. However, road transport is largely within the legislative competence of the Scottish Parliament and the National Assembly for Wales now has the power to legislate in respect of most transport matters, excluding railways.<sup>157</sup>
- 2.222 A direction will relate to an individual level crossing in a local area and the needs of that crossing, reflecting a combination of local and regional issues. It seemed inappropriate for the Secretary of State to have the power to issue such directions in respect of individual level crossings in Scotland or in Wales, where local knowledge of the crossing would help to determine the need for a direction. We therefore concluded that the power to issue a direction should be given to the "appropriate national authority", namely the Secretary of State in respect of crossings in England, Welsh Ministers in respect of crossings in Wales and the Scottish Ministers in respect of crossings in Scotland.
- 2.223 Where the appropriate national authority considers it necessary or expedient, they will have the power to issue a direction, requiring appropriate action to be taken or not to be taken. A direction may be issued to one or more of the railway operator, the local traffic authority, and beneficiary of a private right of way over the railway, providing the beneficiary is likely to be or is likely to become subject to one or more of the general duties under sections 2 to 4 of HSWA 1974. A direction may only be given to a *local* traffic authority. This is because in some cases the Secretary of State, Welsh Ministers and the Scottish Ministers are the traffic authority and it would not be appropriate for them to issue a direction to themselves.
- 2.224 We discussed above the position of business users of level crossings acting in the conduct of their undertaking, and therefore subject to HSWA 1974 duties.<sup>158</sup> The beneficiary of a private right of way over a level crossing who is subject to HSWA 1974 duties could be issued with a direction. But we do not propose to extend HSWA 1974 duties to private individuals who are not employers or self-employed persons acting in the course of their work. A direction may not be given to a beneficiary of a private right of way over the railway who is not, or is not likely to become subject to any of the general duties under sections 2 to 4 of HSWA 1974.<sup>159</sup>
- 2.225 The power to issue directions will enable the appropriate national authority to ensure that the balance of convenience does not swing too far in favour of the railway at the expense of other users of level crossings. The power could also be

<sup>158</sup> See above under the heading "Non-business users of private level crossings".

<sup>159</sup> See cl 4(2)(c) and the definition of "relevant beneficiary" in cl 8.

used to impose requirements relating to action to be taken at or near the crossing, for example the provision of protective equipment.

- 2.226 As explained above, the lack of convenience to non-rail users can be a significant problem in the appropriate management and regulation of level crossings. In some cases, inconvenience has led to the misuse of level crossings and therefore an increase in the risk of accidents. In others, the level crossings remain safe but inconvenient to the non-rail user.
- 2.227 We have recommended a duty to consider convenience.<sup>160</sup> Where convenience has been severely compromised, the appropriate national authority will have the power to step in and issue a direction in order to deal with any issues relating to convenience of users of a level crossing.
- 2.228 We have considered carefully how much discretion to allow the appropriate national authority in deciding when to issue a direction. We do not anticipate the appropriate national authority using the power lightly. We expect the appropriate national authority to exercise these powers where alternatives have failed or are unlikely to succeed. However, we do not want to limit the circumstances in which the appropriate national authority might wish to exercise the power. We have decided that the test to be applied by the appropriate national authority in deciding whether or not to issue a direction will be that a direction was “necessary or expedient”. However, it should be clearly understood that this power is intended to be used sparingly. It is hoped that it will be very rare indeed that a direction will have to be issued. Knowledge that a direction might be issued if certain steps are not taken should be sufficient to ensure appropriate action by those concerned with safety and convenience at level crossings.

#### **Statement of policy<sup>161</sup>**

- 2.229 Although the power to issue directions will be exercisable by the Secretary of State in relation to England, Welsh Ministers in relation to Wales and the Scottish Ministers in relation to Scotland, we think it appropriate for there to be a single statement of policy as to how the power is to be exercised. A single statement of policy will help to ensure that there is consistency of approach as between England, Wales and Scotland, as to how and when the power is to be exercised. Such a statement will have to be made publicly available. We therefore recommend that the Secretary of State should have the power to prepare and publish a statement of policy with respect to the exercise of the power to give directions. The Secretary of State should be required to consult the Scottish Ministers and Welsh Ministers in preparing such a statement.

#### **Content of a direction<sup>162</sup>**

- 2.230 A requirement imposed by a direction may be for the purposes of the safety or convenience of users of the level crossing.
- 2.231 A direction might be issued for the purposes of facilitating or encouraging the

<sup>160</sup> See above under the heading “Duty to consider convenience”.

<sup>161</sup> Draft Level Crossings Bill, cl 7.

<sup>162</sup> Draft Level Crossings Bill, cl 4(3) to (7).

parties to reach an agreement as to the appropriate arrangements to be made at a level crossing. The parties cannot be directed to agree a level crossing plan, but they may be directed to take certain steps to facilitate co-operation, either in pursuance of agreeing a level crossing plan or otherwise.

- 2.232 A direction might require action to be taken at a level crossing, near to the crossing or otherwise in relation to that crossing. A direction given to a railway operator might include requirements which relate to the operation of the railway at or near the crossing concerned. As discussed above, in extreme circumstances, a direction might limit the maximum “downtime” of a level crossing: the period in any hour for which the crossing may be closed to road users. A direction might include requirements relating to the provision, maintenance or operation of protective equipment or signs. It might extend to actions to be taken by the beneficiary of a private level crossing if the beneficiary has duties under HSWA 1974.

### **Relationship between directions and level crossing plans**

- 2.233 If the appropriate national authority takes the view that, despite a level crossing plan having been agreed, it is necessary or expedient to impose requirements in relation to a level crossing, it may issue a direction imposing suitable arrangements for the safety or convenience of all users of the level crossing.
- 2.234 The draft Level Crossings Bill imposes a duty to comply with the requirements of a level crossing direction.<sup>163</sup> That duty binds the subject notwithstanding any arrangements agreed by that person, including a level crossing plan.<sup>164</sup> A direction will, therefore, take precedence over any level crossing plan.
- 2.235 A direction may require parties to take steps to reach an agreement, or may impose a particular type of protection at a level crossing, but it may not specify the terms of a level crossing plan. A plan reflects an agreement between the parties, voluntarily entered into.

### **Duration of a direction**

- 2.236 A direction will lapse if the ownership of land which the level crossing benefits is transferred to another person.
- 2.237 Where a direction is given to the railway operator or the local traffic authority for a crossing, the duty to comply with any requirements would apply to the person who is for the time being the railway operator or the local traffic authority. Similarly where a direction is given to a person who is the beneficiary of a private right of way over a crossing who is subject to one or more of the general duties under section 2 to 4 of HSWA 1974, the duty to comply with any requirements would apply to that beneficiary so long as that person is subject to HSWA duties. If the beneficiary of a private right of way over a crossing sells the land to which the right of way relates, any direction would lapse.<sup>165</sup> The direction would not run with the land.

<sup>163</sup> Draft Level Crossings Bill, cl 6(1).

<sup>164</sup> Draft Level Crossings Bill, cl 6(5)(a).

<sup>165</sup> Draft Level Crossings Bill, cl 6(4).

- 2.238 A direction may make provision limiting the period for which any requirement in the direction are to have effect or might provide for its lapse upon the occurrence of a particular event.<sup>166</sup> For example, a direction might require the parties to take certain steps towards co-operating to agree a level crossing plan. Once those steps have been taken, the requirement in the direction would cease to have effect.
- 2.239 A direction may replace an earlier direction.<sup>167</sup> The national authority would be able to withdraw a direction, of its own volition, by making a new direction. Any person may request the withdrawal of a direction, although this is not set out explicitly in the draft Regulations.

#### **Procedure for making a direction**

- 2.240 Before a direction is issued, the national authority would be required to consult with the Office of Rail Regulation, as the railway safety regulator.<sup>168</sup> This would not mean that the Office of Rail Regulation endorses any direction that is made. The national authority would also be required to have regard to any published statement of policy on the issuing of directions.
- 2.241 The national authority should be required to publish any direction in such manner as it considers appropriate and send a copy of the direction to the Office of Rail Regulation.<sup>169</sup> There would be no requirement for a direction to be formally served on those to whom it is given.
- 2.242 The Office of Rail Regulation should be under a duty to maintain a list of directions which have been issued and make copies of the list and the directions available to the public, free of charge. Requirements in a direction will be enforceable under HSWA 1974.<sup>170</sup> In the case of level crossing plans we have not recommended that a list of plans be kept by the Office of Rail Regulation. But directions will be different from plans in that those issued with a direction will not voluntarily adopt the requirements, nor will there be any formal requirement to consult them. In these circumstances we think that the Office of Rail Regulation as the railway safety regulator should maintain a list of all directions issued.

#### **Challenge to and enforcement of directions**

- 2.243 A direction would be susceptible to challenge by way of judicial review.
- 2.244 A person to whom a direction is given would have a duty to comply with any requirements imposed on them. That duty would be enforceable as if it was one of the "relevant statutory provisions" for the purposes of Part 1 of HSWA 1974. The 1974 Act provides for the enforcement of the "relevant statutory provisions". Therefore if a person failed to comply with any requirements in a direction, enforcement action could be taken under the HSWA 1974 enforcement regime. In the case of a beneficiary of a private right of way, the draft Bill provides that

<sup>166</sup> Draft Level Crossings Bill, cl 4(7)(a).

<sup>167</sup> Draft Level Crossings Bill, cl 4(8).

<sup>168</sup> Draft Level Crossings Bill, cl 5(1).

<sup>169</sup> Draft Level Crossings Bill, cl 5(5).

<sup>170</sup> Draft Level Crossings Bill, cl 6(1) and (2).

enforcement of the duty against the beneficiary depends on the beneficiary being subject to the general duties under Part 1 of HSWA 1974.

- 2.245 The Office of Rail Regulation is responsible for the enforcement of "relevant statutory provisions" to the extent that they relate to the operation of a railway.<sup>171</sup> In the event of breach of a requirement in a direction, the Office of Rail Regulation could issue an improvement notice, followed if necessary by a prohibition notice under HSWA 1974. Contravention of any requirement or prohibition imposed by an improvement notice or a prohibition notice would be an offence under section 33 of HSWA 1974, liable to prosecution by the Office of Rail Regulation, or in Scotland, by the Procurator Fiscal.

### **Recommendation**

- 2.246 **The Secretary of State as regards crossings in England, the Scottish Ministers as regards crossings in Scotland and Welsh Ministers as regards crossings in Wales, should be given the power to issue directions in respect of level crossings. Directions may impose such requirements as the Secretary of State, Welsh Ministers or Scottish Ministers (as appropriate) consider necessary or expedient for the purposes of the safety or convenience of users.**
- 2.247 This recommendation is given effect by clauses 4 to 8 of the draft Bill.

### **THE APPLICATION OF HSWA 1974 DUTIES TO HIGHWAY AND ROADS AUTHORITIES**

- 2.248 The Level Crossings Act 1983 gives the Secretary of State the power to place requirements on highways and roads authorities in relation to protective equipment "at or near" a level crossing. We consider that this is an important power that should be replicated under the new system of level crossing regulation based on HSWA 1974.<sup>172</sup> This led us to raise in the consultation paper the question of the relationship between highway/roads authorities' exercise of their statutory functions and the requirements of HSWA 1974.
- 2.249 In the consultation paper, we took the view that the key duty was that in section 3 of the 1974 Act. This section imposes a duty on an employer:
- to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.
- 2.250 There is no authority on whether or how section 3 applies to highway and roads authorities' functions, and authority on the application of the general duties to statutory bodies' exercise of their functions in general is sparse.
- 2.251 We argued in the consultation paper that a statutory body's section 3 duty is to be

<sup>171</sup> Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006, reg 3, SI 2006 No 557.

<sup>172</sup> This power was added to the Level Crossings Act 1983 in an amendment made by the Road Safety Act 2006.

determined by applying public law principles. It is not necessary to look to the law of negligence, because the presence or absence of civil liability does not determine the scope of a statutory body's public law duties. Rather, a public authority's exercise of a statutory function amounts to the conduct of its undertaking. This led us to the conclusion that the ambit of the duty under section 3 was co-terminous with the statutory functions of the authority. Thus the section 3 duty was engaged if the highway or roads authority breached a duty imposed on it, but was only engaged by a failure to exercise a power if that failure would also be found to be unlawful in the public law sense on an application for judicial review.<sup>173</sup>

2.252 Consultation responses from local authorities and the Department for Transport indicated that this issue had implications far wider than our narrow concern with the ability to impose level crossing order-type requirements on highway or roads authorities. We therefore considered whether it was necessary for us to come to a final view on the question, and concluded that it was not. What matters is whether the power in section 15 of HSWA 1974 is wide enough to allow the Secretary of State to make regulations imposing the relevant requirements, and we conclude that it is.

2.253 Section 15 provides that "the Secretary of State shall have power to make regulations under this section for any of the general purposes of this Part". Such regulations may include "incidental, supplemental and transitional provisions".<sup>174</sup> The general purposes of Part 1 of HSWA 1974 are securing the health, safety and welfare of persons at work, and protecting persons other than persons at work against risks arising out of the activities of those at work. As explained above, the Railways Act 1993 provides that if to any extent they would not do so apart from this subsection, the general purposes of Part 1 of the Health and Safety at Work etc. Act 1974 include securing the proper construction and safe operation of any railway, and protecting the public from risks arising from the construction and operation of any railway.<sup>175</sup>

2.254 There is an argument that a requirement for a highway or roads authority to erect a sign or paint a stop line at a certain distance from the barrier of a level crossing would be for the purpose of "protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work".<sup>176</sup> Alternatively, such a requirement would be for the purpose of "protecting the public (whether passengers or not) from personal injury ... arising from the ... operation of [any railway]".<sup>177</sup>

### **Recommendation**

2.255 **We recommend that the Secretary of State should make regulations under section 15 of HSWA 1974 imposing obligations on highway, traffic and roads authorities for the purposes of reducing risk so far as reasonably**

<sup>173</sup> Joint Consultation Paper, paras 5.37 to 5.47 and 8.30 to 8.32.

<sup>174</sup> HSWA 1974, s 82.

<sup>175</sup> See Railways Act 1993, s 117(2) as read with s 117(6).

<sup>176</sup> HSWA 1974, s 1(1)(b).

<sup>177</sup> Railways Act 1993, s 117(2)(b).

practicable at level crossings. These might include obligations to:<sup>178</sup>

- (1) provide, maintain and operate specified protective equipment at or near a level crossing where appropriate; and/or
- (2) erect signs and/or paint road markings in the vicinity of a level crossing where required.

2.256 This recommendation is for separate regulations to be made, in addition to the draft Level Crossing Plans Regulations.



Llanbadarn automatic half-barrier level crossing (locally monitored), near Aberystwyth, seen from the train driver's perspective. Credit: Rail Accident Investigation Branch.

## **DUTY TO CO-OPERATE**

2.257 In the consultation paper, we considered how best to improve inter-agency working between road and rail interests and asked consultees for their views on the existing model of road-rail partnership groups.

2.258 We have considered whether it would be helpful for there to be a more formal mechanism to bring together those responsible for level crossings and others with an interest. The railway operator and the traffic authorities will always have obligations in relation to public level crossings. There will usually be others with an interest, such as the planning authority, other representatives of the local community, developers and voluntary organisations representing interests of those such as walkers and horse riders.

<sup>178</sup> This recommendation is for separate regulations to be made, in addition to the draft Level Crossing Plans Regulations.

- 2.259 We considered whether there would be benefit in providing for new “level crossing panels” which would afford an opportunity for interested parties to come together to discuss relevant matters concerning level crossings. However, a possible disadvantage of this might be that creating new panels would impose undue administrative and financial burdens on those with an interest in level crossings, particularly on voluntary organisations. We think that it would be better not to create a new system of panels but rather to expand on the existing road-rail partnerships. A report of the Traffic Research Laboratory in 2008 indicated that the establishment of more road-rail partnership groups in appropriate areas would be beneficial.<sup>179</sup>
- 2.260 During the consultation process we heard about good and bad examples of co-operation between agencies. Engineers provided examples of routes in England and Wales where all the level crossings had been upgraded by effective agreement with the highway authority and local landowners, enabling upgrading of the line and a highly efficient railway service. We also saw examples of level crossings in England where the highway authority had stopped up or reduced a vehicular road to a footpath yet the full-barrier level crossing still had to be maintained under the level crossing order in force. Due to a lack of agreement between the highway authority and the railway operator, no amendments had been made to the level crossing order. Railway engineers expressed the view that over time a poor working relationship had led to the dilapidation of level crossings on some lines, inappropriate level crossing orders and the inability to close level crossings where appropriate and, as a result, slower line speeds.
- 2.261 In West Sussex, we saw an example of a highly effective road-rail partnership between the highway authority and Network Rail, which had enabled a decision to be reached to replace a dangerous and inconvenient level crossing by a footbridge at Fishbourne. Every effort was also being made to divert a footpath to prevent misuse of a level crossing at Nutbourne station. We also saw good examples of road improvements made voluntarily by the local highway authority, to enhance safety at the traditional gated crossing at Blue Anchor station on the West Somerset Railway.
- 2.262 Road-rail partnership groups vary in their effectiveness and consultees did not suggest that placing these on a statutory footing would lead to improvements. Consultees did, however, support the creation of a statutory duty to co-operate, both on issues of safety and closure, along similar lines to the duty created in the Railways and Other Guided Transport Systems (Safety) Regulations 2006.<sup>180</sup>
- 2.263 The 2006 Regulations require railway operators to maintain a safety management system, certified by the Office of Rail Regulation, to carry out risk assessments and to ensure that railway operators co-operate to ensure that the transport system is run safely. The duty to co-operate is widely drafted so that duty-holders must “co-operate as far as is necessary with a transport operator to enable him to comply with the provisions” of the Regulations. The duty applies to “any transport operator whose operations may affect or may be affected by operations carried out by the duty holder” and “an employer of persons or a self-

<sup>179</sup> E Delmonte and S Tong, Traffic Research Laboratory Report No PPR377, *Investigation into Traffic Delays at Level Crossings* (December 2008).

<sup>180</sup> SI 2006 No 599.



employed person carrying out work on or in relation to premises or plant owned or controlled by the duty holder”.<sup>181</sup>

- 2.264 We also recommend that wide duties to consult be imposed on the parties when agreeing level crossing plans and on the appropriate national authority when considering closure. These duties should include public consultation over a reasonable period, allowing a wide range of interested parties to submit their views. Local landowners and other businesses, local users of the crossing and particular interest groups should all have an opportunity to engage in consultation. Public law imposes the following requirements on consultation: consultation must be undertaken when the proposals are still in a formative stage; adequate information must be given to enable consultees properly to respond; adequate time must be provided in which to respond; and the decision-maker must give conscientious consideration to consultation responses.<sup>182</sup>
- 2.265 The aim of improving co-operation and consultation among the relevant parties can be met in a number of ways. We discuss consultation and the publication of proposals elsewhere in this report.<sup>183</sup> Here we recommend that a duty to co-operate be imposed on the railway operator and traffic authorities in relation to public level crossings only.<sup>184</sup> The duty would require on-going co-operation in relation to level crossings.
- 2.266 The type of involvement that is appropriate in co-operating with each other would differ depending on the characteristics of the area and the circumstances surrounding the change proposed to the particular level crossing. The details would need to be agreed between the parties at a local level before negotiations begin. In some areas, an existing road-rail partnership group might operate as the appropriate forum for co-operation. In others, a separate forum will be required. Guidance on statutory duties to co-operate in other areas emphasises the importance of consultation, wide publication of proposals and a duty to consider responses.<sup>185</sup>
- 2.267 Co-operation should be a continuous process of planned engagement rather than a single event. Relevant bodies should continue to be involved or even lead in determining the implementation arrangements for some changes to the safety arrangements affecting level crossings.
- 2.268 A duty to co-operate may be supported by a duty to consult. The duty to consult

<sup>181</sup> SI 2006 No 599, reg 22.

<sup>182</sup> 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.

<sup>183</sup> Consultation is required before a level crossing plan may be made for a public level crossing, and may take place before a level crossing plan is made for a private crossing; consultation is also required before a direction is issued; and consultation is required before a decision may be made in respect of an application for a level crossing closure order.

<sup>184</sup> Draft Level Crossings Bill, cl 1.

<sup>185</sup> See, for example, Communities and Local Government, *Creating Strong, Safe and Prosperous Communities: Statutory Guidance* (July 2008), <http://webarchive.nationalarchives.gov.uk/20120919132719/http://www.communities.gov.uk/documents/localgovernment/pdf/885397.pdf> (last visited 1 September 2013).

includes direct notification of proposals to statutory consultees as well as a duty to consult with the public at large, so that those who are not statutory consultees but who wish to participate in the process of determining changes affecting a level crossing may do so.<sup>186</sup>

- 2.269 In our advisory group meetings we heard from national disability groups who pointed out the importance of national as well as local groups being consulted so that the national impact of local decisions may be properly taken into consideration. They gave examples of changes in relation to the accessibility of a level crossing in one area then being used as a precedent elsewhere. It is not always easy for the railway operator or the Office of Rail Regulation to be aware of all those groups and individuals with an interest in a particular level crossing. In order to carry out full and effective consultation where changes to a level crossing are proposed and to ensure that the needs of both local residents and regional or national bodies are met, a duty to publish proposals could be imposed on the body proposing the changes.

### **Recommendation**

- 2.270 **We recommend that a duty should be imposed on railway operators and traffic authorities to enter into and maintain ongoing arrangements to co-operate with one another for the purposes of performing their functions in respect of public level crossings.**
- 2.271 This recommendation is given effect by clause 1 of the draft Level Crossings Bill.

### **Enforcement of the duty to co-operate**

- 2.272 Similar issues arise in respect of taking action against the railway operator to enforce the duty to co-operate as arise in respect of taking action to enforce the duty to consider convenience.<sup>187</sup>
- 2.273 The Railways and Other Guided Transport Systems (Safety) Regulations 2006 could be amended to extend the existing duty on railway operators to co-operate with highway and roads authorities to enable the railway operator to fulfil its duties under these Regulations. This would create a duty on railway operators, enforceable under HSWA 1974. But it would not be appropriate to impose duties under the 2006 Regulations on highway and roads authorities because the Regulations relate to railways.<sup>188</sup>
- 2.274 We propose a similar power to seek a declaration (or in Scotland, a declarator by the Court of Session) in respect of a failure by the parties to co-operate as for the duty to consider convenience. Here, the failure could be on the part of the railway operator, the traffic authority or both of them.

### **Recommendations**

- 2.275 **We recommend a power to seek declaratory relief where the parties have**

<sup>186</sup> *R v North and East Devon Health Authority, ex parte Coughlan* [1999] EWCA Civ 1891.

<sup>187</sup> See above under the heading "Duty to consider convenience".

<sup>188</sup> See above under the heading "Enforcement of the duty to consider convenience" in connection with judicial review in Scotland. The same process would apply here.

**failed to comply with the duty to co-operate. This power should be without prejudice to any remedy available in public law.**

2.276 This recommendations is given effect by clause 3 of the draft Level Crossings Bill.

2.277 **We recommend that the Railways and Other Guided Transport Systems (Safety) Regulations 2006 should be amended so as to impose a duty on railway operators and traffic authorities to co-operate with highway and roads authorities in pursuance of their duties under those Regulations.**

## **ENFORCEMENT RESPONSIBILITIES**

2.278 As we explained in the consultation paper, there was some doubt historically about the extent to which the general purposes of HSWA 1974 applied to railway safety matters. This doubt was resolved by section 117(2) of the Railways Act 1993 which provided that “if to any extent they would not do so apart from this subsection”, the general purposes of HSWA 1974 include a broad set of railway safety purposes. The Health and Safety Executive is generally responsible for the enforcement of duties under HSWA 1974. Under section 117 of the Railways Act 1993, its duties were extended to include the monitoring and enforcement of railway-specific legislation under HSWA 1974.<sup>189</sup>

2.279 Following a series of catastrophic rail accidents at Ladbroke Grove, Hatfield, Potters Bar and Southall, the Railway and Transport Safety Act 2003 established the Rail Accident Investigation Branch. The 2003 Act also abolished the role of the Rail Regulator, transferring its functions to the newly established Office of Rail Regulation. The functions initially transferred to the Office of Rail Regulation did not include the regulation of railway safety. These functions, including responsibility for safety at level crossings, were transferred to the Office of Rail Regulation by the Railways Act 2005 read together with the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 (the “Enforcing Authority Regulations 2006”).<sup>190</sup>

2.280 The Enforcing Authority Regulations 2006 Regulations provide that the Office of Rail Regulation is responsible for enforcement action in relation to breaches of HSWA 1974 to the extent that they “relate to...the operation of a railway”. These Regulations rely on a non-exhaustive list of activities to define the operation of a railway.<sup>191</sup> The Health and Safety Executive is responsible for the enforcement of the “relevant statutory provisions” as defined in section 53 of HSWA 1974, but excluding provisions made for “railway safety purposes”.<sup>192</sup>

<sup>189</sup> The Office of the Rail Regulation was created by the Railways Act 1993, at the time of the privatisation of British Rail. It was given a wide range of powers, including safety regulation on the railways.

<sup>190</sup> SI 2006 No 557, made under powers in the Health and Safety at Work etc. Act 1974 among other statutory powers.

<sup>191</sup> SI 2006 No 557, reg 3.

<sup>192</sup> Health and Safety at Work etc. Act 1974, s 11. The “relevant statutory provisions” were extended by the Railways Act 1993, s 117 to include statutes relating to the safety of railways and other guided transport systems.

## Consultation

- 2.281 In the consultation paper, we asked consultees whether it would be desirable to provide expressly that a breach of section 3 of HSWA 1974 at a level crossing should be subject to enforcement by the Office of Rail Regulation rather than the Health and Safety Executive.<sup>193</sup>
- 2.282 We also asked whether the Office of Rail Regulation and the Health and Safety Executive should have concurrent jurisdiction in relation to enforcement action for breaches of HSWA 1974 occurring partly at a level crossing.<sup>194</sup> We wanted to ensure that any enforcement scheme we proposed did not leave open the possibility of neither organisation exercising jurisdiction over enforcement in the event of a breach. We also wanted to avoid a situation in which the Office of Rail Regulation and the Health and Safety Executive were responsible for enforcing different elements of a single incident, leading to the possibility of two prosecutions for one event.<sup>195</sup>
- 2.283 Consultees generally agreed that the Office of Rail Regulation should be responsible for enforcing breaches of HSWA 1974 at level crossings. Many stressed the importance of having a single enforcement body rather than shared or concurrent jurisdiction and believed that the Office of Rail Regulation's particular expertise and experience lent itself to this role. For example, the Rail Safety and Standards Board commented that the Health and Safety Executive "no longer has the specialist knowledge in this area and the involvement of the two bodies would create confusion and, probably, additional costs".<sup>196</sup>
- 2.284 Notably, the Health and Safety Executive agreed that the Office of Rail Regulation should have this responsibility. It suggested that we "take this opportunity to make the jurisdiction as clear as possible". The Department for Transport and Transport Scotland also emphasised the need to reduce the existing uncertainty in the legislation and to state clearly which body is responsible for enforcement of HSWA 1974 breaches at level crossings.
- 2.285 The Office of Rail Regulation did not wholly endorse the proposal to designate explicitly the Office of Rail Regulation as the authority responsible for enforcing breaches of section 3 of HSWA 1974 at level crossings. It took the view that the present arrangement was adequate, and that to produce a set of rules particular to level crossings would undermine the project's aim of simplifying the law. It added, however, that the legislation does not allow the Health and Safety Executive and the Office of Rail Regulation to "mutually agree allocation of enforcement responsibility between them where it is unclear who the enforcing authority is", and suggested that such a power might be useful.
- 2.286 A large majority of the consultees who addressed the proposal to introduce concurrent jurisdiction over breaches of HSWA 1974 that occur partly at a level crossing were opposed to it. Many consultees noted the potential for concurrent jurisdiction to create uncertainty and confusion, and preferred that the Office of

<sup>193</sup> Joint Consultation Paper, para 8.72.

<sup>194</sup> Joint Consultation Paper, para 8.84.

<sup>195</sup> Joint Consultation Paper, paras 8.85 to 8.86.

<sup>196</sup> Consultation Analysis, paras 8.84 to 8.93.

Rail Regulation be given sole jurisdiction over enforcement in this area.

## Discussion

2.287 Our view is that responsibility for enforcement should be allocated according to the location of the source of the risk. If the source of the risk was on the highway or road, the Health and Safety Executive should be responsible, even if the effect was felt on the railway. If the risk arose on the railway, the Office of Rail Regulation should be responsible, even if the effect was felt on the highway or road. In our view, the Enforcing Authority Regulations 2006 should be amended to reflect this aim and to clarify who should be responsible for enforcement where risk arises from both railway and non-railway sources.

2.288 The Memorandum of Understanding entered into between the Health and Safety Executive and the Office of Rail Regulation in April 2006 focuses on the nature of the activity which creates the risk.<sup>197</sup> It sets out the following principles for the allocation of enforcement responsibility in ambiguous situations:

The EA [enforcing authority] should be determined by the nature of the activity which is being carried out, and should take account of the relevant expertise available to both HSE and ORR. In other words, the enforcing authority is established on the basis of the operation that creates the risk, not on where the effects of the risk may be felt. ORR will be the enforcing authority where a risk is part of a railway operation, even where an incident then causes effects outside the railway (for example an incident with a train results in damages to non-railway premises). Equally, operations enforced by HSE will remain within HSE's enforcement even if the risks affect the railway (for example where masonry from an HSE enforced construction site could fall on the railway line).<sup>198</sup>

2.289 We concluded that the Office of Rail Regulation should retain overall responsibility for enforcing safety regulation at level crossings, including the enforcement of breaches of level crossing plans.

2.290 Although we think it important that the parties know who has legal responsibility for enforcement in any given case, we agree with the Office of Rail Regulation's suggestion that they and the Health and Safety Executive should be given an ancillary power to delegate enforcement to the other by agreement, where appropriate. This would prevent the possibility of a gap in enforcement where neither the Office of Rail Regulation nor the Health and Safety Executive exercised their enforcement powers in the event of a breach.

2.291 There is a final issue concerning enforcement by the Office of Rail Regulation that falls to be considered here, namely whether the Office of Rail Regulation can

<sup>197</sup> *Memorandum of understanding between Health and Safety Executive and Office of Rail Regulation* (1 April 2006)  
<http://www.hse.gov.uk/aboutus/howwework/framework/mou/orrmou.pdf> (last visited 1 September 2013).

<sup>198</sup> *Memorandum of understanding between Health and Safety Executive and Office of Rail Regulation* (1 April 2006), Appendix A, pp 15-16  
<http://www.hse.gov.uk/aboutus/howwework/framework/mou/orrmou.pdf> (last visited 1 September 2013).

take enforcement action for breaches of provisions relating to the convenience of users of a level crossing.

- 2.292 The Office of Rail Regulation's general duty under the Railways Act 2005 is to "do such things and make such arrangements as it considers appropriate for the railway safety purposes".<sup>199</sup> The Enforcing Authority Regulations 2006 provide that the Office of Rail Regulation is responsible for enforcement in cases of breaches of HSWA 1974 to the extent that they "relate to...the operation of a railway". We considered whether matters "relating to the operation of the railway" could extend to matters of convenience. We considered whether it was necessary to make explicit provision for the Office of Rail Regulation to enforce all aspects of level crossing regulations made under section 15 of HSWA 1974 and level crossing plans, not only those parts that relate clearly to safety. Although we are confident that the ambit of section 15 is sufficiently wide to allow regulations to be made which include convenience-related provisions, we have made express provision in clause 28 of the draft Bill.
- 2.293 The draft Bill does not include provision amending the Enforcing Authority Regulations 2006 to clarify the respective enforcement responsibilities of the Office of Rail Regulation and Health and Safety Executive. In our view it would be outside the scope of the Bill to make any such amendment as it would have to apply to the whole of the railway rather than to level crossings alone.

#### **Recommendations**

- 2.294 **We recommend that the Office of Rail Regulation should continue to be the body with responsibility for enforcement of safety regulation at level crossings.**
- 2.295 **To clarify the boundary of the Office of Rail Regulation's responsibility for safety at level crossings, we recommend that the Secretary of State should amend the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 to provide that the Office of Rail Regulation is responsible for enforcement in cases of breaches of HSWA 1974 where the source of the risk arises on the railway, leaving the Health and Safety Executive to enforce where the source of the risk does not arise on the railway.**
- 2.296 **We recommend that the Office of Rail Regulation and Health and Safety Executive be given the power to delegate the power to take enforcement action in particular incidents at level crossings to one another in accordance with an agreed memorandum of understanding. We recommend that the Secretary of State considers whether to extend this power to apply in respect of the whole of the railway.**

#### **DISAPPLICATION OF STATUTORY PROVISIONS RELATING TO LEVEL CROSSINGS**

- 2.297 We have looked at certain provisions in 19th and early 20th century statutes relating to railways and identified those provisions which relate to level crossings and which are no longer of practical use and which, in any event, would be

<sup>199</sup> Railways Act 2005, sch 3, para 2(1)(a).

superseded by the new safety regime under the draft Bill and draft Regulations. As some of the provisions extend to Northern Ireland, we have decided that they should merely be *disapplied* in relation to level crossings on railways in Great Britain.

- 2.298 We have consulted with relevant stakeholders, including Network Rail, the Office of Rail Regulation and the Heritage Railway Association. They have confirmed that they have no objection to the proposed disapplication because the provisions are no longer in use.

### **Recommendation**

- 2.299 **We recommend that the following provisions should be disapplied in relation to level crossings on railways in Great Britain:**

- (1) section 1 of the Highway (Railway Crossings) Act 1839;**
- (2) section 9 of the Railway Regulation Act 1842;**
- (3) section 5 of the Railways Clauses Act 1863; and**
- (4) section 42 of the Road and Rail Traffic Act 1933.**

- 2.300 This recommendation is given effect by clause 49 of the draft Level Crossings Bill.

- 2.301 In the consultation paper, we considered how best to deal with outdated safety provisions in special Acts, which tended to confuse those with safety obligations in relation to level crossings.<sup>200</sup>

- 2.302 The best estimate we could obtain was that there might be some 10,000 special Acts relating to railways. After the enactment of the Railways Clauses Consolidation Acts of 1845, most special Acts contained standard clauses, imported from the 1845 Acts. Prior to that, each special Act was separately drafted, so that the wording and provision for safety might be different in each and every special Act. Even after 1845, a draftsman could choose to exclude model clauses by express provision to that effect. As discussed in the consultation paper, it would not be feasible to attempt to find each and every special Act in order to repeal the provisions relating to safety regulation. In addition, it would be extremely difficult to disentangle the provisions relating wholly to safety on level crossings from those provisions which provide for other relevant functions. Likewise, a generic repeal provision would be unacceptable as it could have unexpected consequences in relation to provisions in a special Act.

- 2.303 In the consultation paper we proposed that the provisions in special Acts should be disapplied in so far as they deal with safety at level crossings to the extent that HSWA 1974 applies.<sup>201</sup> The proposal was intended to avoid any potential conflict between these earlier provisions and HSWA 1974. Those consultees who commented on this proposal largely supported it on the basis that disapplication of the old safety provisions would serve to improve the clarity and accessibility of

<sup>200</sup> Joint Consultation Paper, paras 8.138 to 8.141.

<sup>201</sup> Joint Consultation Paper, para 8.142.

the safety regulation system. The Office of Rail Regulation said that disapplication was a neat, clear solution to the problem of reconciling special Acts with HSWA 1974, and suggested that the “early availability of regulations and supporting guidance” would assist in the transition to a new regime.

- 2.304 A small number of consultees argued that the opposite result would arise from the disapplication of safety provisions in special Acts. The Heritage Railway Association and Network Rail both expressed concern that disapplication would create uncertainty and a lack of clarity in the safety regime.<sup>202</sup>
- 2.305 Following consultation we considered how best to provide for a general disapplication of the safety provisions in special Acts. We have concluded that the most useful approach would be to provide that, to the extent that HSWA 1974, the draft Level Crossings Bill or Regulations apply to any part of a special Act, these later pieces of legislation take precedence over any provision in a special Act where a conflict is identified.

### **Recommendations**

- 2.306 **We recommend that a level crossing direction should take precedence over any conflicting provision in a special Act relating to safety or convenience at that level crossing.**
- 2.307 This recommendation is given effect by clause 6(5)(b) of the draft Level Crossings Bill.
- 2.308 **We recommend that health and safety regulations made under HSWA 1974 should be able to disapply a special Act to the extent that it conflicts with any duty imposed by those regulations.**
- 2.309 This recommendation is given effect by clause 9(2)(b) of the draft Level Crossings Bill.
- 2.310 **We recommend that where a level crossing plan is in place, any conflicting provision in a special Act relating to safety or convenience at that level crossing should not apply.**
- 2.311 This recommendation is given effect by regulation 13(4) of the draft Level Crossing Plans Regulations.

### **POWER TO MAKE CONSEQUENTIAL AMENDMENTS AND REPEALS**

- 2.312 We have concluded that a power should be conferred on the Secretary of State and the Scottish Ministers to make orders providing for any amendments, repeals or revocations of primary and secondary legislation, as a consequence of the provisions of the draft Bill. The power would among other things enable the Secretary of State or Scottish Ministers to repeal or modify individual provisions in special Acts, for example provisions relating to safety.
- 2.313 While we do not envisage that this power would be widely used, as mentioned in the consultation paper, it would nevertheless be available in circumstances

<sup>202</sup> Consultation Analysis, paras 8.428 to 8.438.



where, for example, consideration had to be given to the terms of a special Act by the Department for Transport, the Office of Rail Regulation or the railway operator, for some other reason.

#### **Recommendation**

2.314 **The Secretary of State and the Scottish Ministers should be given the power to make orders providing for amendments, repeals and revocations in consequence of the provisions of the draft Level Crossings Bill.**

2.315 This recommendation is given effect in relation to England and Wales by clause 51 and in relation to Scotland by clause 52 of the draft Level Crossings Bill.

## 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.<sup>1</sup> 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.<sup>2</sup>
- (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.<sup>3</sup> 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.<sup>4</sup>
- (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

<sup>1</sup> Joint Consultation Paper, Part 6.

<sup>2</sup> 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".

<sup>3</sup> Title Conditions (Scotland) Act 2003, s 122(1).

<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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

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

<sup>6</sup> The power in s 7 applies to Scotland as well as to England and Wales.

<sup>7</sup> Joint Consultation Paper, Part 6 and paras 7.28 to 7.30.

<sup>8</sup> 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).

<sup>9</sup> 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.<sup>10</sup>

- 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

<sup>10</sup> 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.<sup>11</sup> 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.

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>
- 3.25 States are given a margin of appreciation in applying Convention rights. The

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> *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.<sup>15</sup>

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.<sup>16</sup>

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.

<sup>15</sup> *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.

<sup>16</sup> *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.<sup>17</sup>
- 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.<sup>18</sup> 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.<sup>19</sup> 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”.

<sup>17</sup> Joint Consultation Paper, paras 8.58 to 8.119.

<sup>18</sup> Joint Consultation Paper, paras 8.81 and 8.82.

<sup>19</sup> 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.<sup>20</sup> 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

<sup>20</sup> 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.<sup>21</sup>

3.48 If an individual or group wants a level crossing to be closed, the appropriate

<sup>21</sup> 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.<sup>22</sup> 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

<sup>22</sup> "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.<sup>23</sup>

- 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.<sup>24</sup> 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,<sup>25</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> Draft Level Crossings Bill, sch, para 5.

<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> We propose to follow this policy.<sup>28</sup>

<sup>26</sup> 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.

<sup>27</sup> 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.<sup>29</sup> 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.<sup>30</sup>

***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.<sup>31</sup> 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.<sup>32</sup>

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 1992<sup>33</sup> and the Transport and Works (Scotland) Act 2007<sup>34</sup> 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

<sup>28</sup> Draft Level Crossings Bill, cl 12(3)(a).

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

<sup>30</sup> Draft Level Crossings Bill, cl 12(3)(b).

<sup>31</sup> 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.

<sup>32</sup> 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.

<sup>33</sup> Transport and Works Act 1992, s 11.

<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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

<sup>35</sup> 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.

<sup>36</sup> 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;<sup>37</sup> this includes persons with easements, servitudes, restrictive covenants, real burdens to be extinguished as well as, in England and Wales, mortgagees;<sup>38</sup>
- (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.

<sup>37</sup> 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.

<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>
- 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.**

<sup>39</sup> 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).

<sup>40</sup> 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.<sup>41</sup>

### ***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

<sup>41</sup> Joint Consultation Paper, paras 8.100 to 8.104.

amongst the objectors.<sup>42</sup>

### **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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

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;<sup>46</sup>
- (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

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> *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].

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

<sup>46</sup> 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.<sup>47</sup>
- 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.<sup>48</sup> 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.**

<sup>47</sup> Draft Level Crossings Bill, sch, para 8(2).

<sup>48</sup> 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.<sup>49</sup>

#### **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.<sup>50</sup>

<sup>49</sup> Joint Consultation Paper, para 8.67.

<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

- 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.<sup>53</sup>
- 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.<sup>54</sup> 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

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

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

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

<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

#### **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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>
- 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

<sup>55</sup> Draft Level Crossings Bill, sch, para 9(3).

<sup>56</sup> Draft Level Crossings Bill, sch, para 9(4).

<sup>57</sup> See para 17 of ODPM Circular 06/2004 on Compulsory Purchase and the Cichel 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].

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

<sup>59</sup> 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.<sup>60</sup>

#### **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.<sup>61</sup> 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.<sup>62</sup>
- 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.**

<sup>60</sup> 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.

<sup>61</sup> Joint Consultation Paper, para 8.111.

<sup>62</sup> 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.<sup>63</sup>

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.<sup>64</sup>

#### **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.<sup>65</sup>

#### **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;

<sup>63</sup> Joint Consultation Paper, paras 8.94 to 8.102.

<sup>64</sup> Consultation Analysis, paras 8.311 to 8.342.

<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> 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.

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

<sup>67</sup> Draft Level Crossings Bill, cl 15(1).

<sup>68</sup> The duration of closure orders is dealt with later in this Part.

<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup>

- 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.<sup>72</sup>
- 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.<sup>73</sup> 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

<sup>70</sup> 85/337/EEC.

<sup>71</sup> 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).

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

<sup>73</sup> 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.<sup>74</sup>
- 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.<sup>75</sup>

#### **Apportionment of costs of works under a closure order**

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

<sup>74</sup> 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.

<sup>75</sup> 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.<sup>76</sup>

- 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.<sup>77</sup>
- 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 person<sup>78</sup> 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

<sup>76</sup> Joint Consultation Paper, paras 8.88 to 8.93.

<sup>77</sup> Consultation Analysis, paras 8.295 to 8.310.

<sup>78</sup> "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.”<sup>79</sup>

- 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.<sup>80</sup>

#### **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.<sup>81</sup>
- 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.<sup>82</sup> The Scottish Law Commission is currently undertaking a project to review the law of compulsory purchase in Scotland.<sup>83</sup> However, the scheme we recommend for level crossing closure, is based on compulsory purchase law as it currently

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

<sup>80</sup> For a discussion on the duration of closure orders, see below.

<sup>81</sup> See below under the heading “Duration of closure orders”.

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

<sup>83</sup> 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.<sup>84</sup>
- 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.<sup>85</sup>

### **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.<sup>86</sup> 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,<sup>87</sup> 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.<sup>88</sup>
- 3.188 Network Rail has often been granted powers of compulsory purchase for certain

<sup>84</sup> Joint Consultation Paper, para 8.86 to 8.87.

<sup>85</sup> Consultation Analysis, para 8.178.

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

<sup>87</sup> 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).

<sup>88</sup> 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.<sup>89</sup> Other private railway companies have been granted powers of compulsory purchase in orders under the Transport and Works Act 1992.<sup>90</sup>

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.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> Scottish Ministers have similar powers under the Transport and Works (Scotland) Act 2007.<sup>94</sup>

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.<sup>95</sup> 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.<sup>96</sup> 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

<sup>89</sup> 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).

<sup>90</sup> 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).

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

<sup>92</sup> Highways Act 1980, s 247.

<sup>93</sup> Transport and Works Act 1992, s 1(1).

<sup>94</sup> Transport and Works (Scotland) Act 2007, s 1(1).

<sup>95</sup> 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.

<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> If the order includes provision for development which would require planning permission,<sup>99</sup> the Scottish Ministers can direct that planning permission<sup>100</sup> is deemed to be granted.<sup>101</sup> The Transport and Works (Scotland) Act 2007 (Consents under Enactments) Regulations 2007<sup>102</sup> 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.<sup>103</sup>
- 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

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

<sup>98</sup> 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).

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

<sup>100</sup> And deemed hazardous substances consent.

<sup>101</sup> Transport and Works (Scotland) Act 2007, s 15(1).

<sup>102</sup> SSI 2007 No 569.

<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

- 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.<sup>106</sup>
- 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.<sup>107</sup>
- 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.<sup>108</sup> We have not sought to replicate the consent requirements set out in other statutes where statutory undertakers' rights are interfered with.<sup>109</sup> Nor have we provided for any special notice or consultation

<sup>104</sup> *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.

<sup>105</sup> 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.

<sup>106</sup> 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.

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

<sup>108</sup> Draft Level Crossings Bill, cl 19(5) and (9).

<sup>109</sup> For example, Highways Act 1980, s 121(4).



procedure for statutory undertakers.<sup>110</sup> 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.<sup>111</sup>

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

<sup>111</sup> 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.<sup>112</sup>
- 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.<sup>113</sup>

### **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;<sup>114</sup> and

<sup>112</sup> 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.

<sup>113</sup> Draft Level Crossings Bill, cl 19(4) and (8).

<sup>114</sup> 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.<sup>115</sup>

- 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.<sup>116</sup>
- 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.<sup>117</sup>
- 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".<sup>118</sup> 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.<sup>119</sup> 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.**

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

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

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

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

<sup>119</sup> 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.<sup>120</sup>
- 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.**

<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup>

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.<sup>123</sup> The owner of the land should be able to claim for disturbance in the enjoyment of his land.<sup>124</sup> "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.<sup>125</sup>

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

<sup>121</sup> Draft Level Crossings Bill, cl 19.

<sup>122</sup> Draft Level Crossings Bill, cls 16 to 18.

<sup>123</sup> Draft Level Crossings Bill, cls 15(1) and 16.

<sup>124</sup> Draft Level Crossings Bill, cl 16(2) and (3).

<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup>

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.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup>

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.<sup>132</sup> 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

<sup>126</sup> *Jenkins v Welsh Assembly Government* [2010] EWCA Civ 1640.

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

<sup>128</sup> *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.

<sup>129</sup> *Cusack v London Borough of Harrow* [2013] UKSC 40.

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

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

<sup>132</sup> 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.<sup>133</sup> Therefore, the closure scheme will be disregarded when valuing the land.<sup>134</sup>
- 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.<sup>135</sup> 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.<sup>136</sup>
- 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.<sup>137</sup> 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.<sup>138</sup>
- 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

<sup>133</sup> 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.

<sup>134</sup> 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.

<sup>135</sup> Draft Level Crossings Bill, cl 15.

<sup>136</sup> See below under the heading “Duration of closure orders”.

<sup>137</sup> *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.

<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup>

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.

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

<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup> 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

<sup>141</sup> 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.

<sup>142</sup> 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.

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

<sup>144</sup> 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.<sup>145</sup>

<sup>145</sup> Joint Consultation Paper, para 8.86.

### **Consultation**

- 3.278 Consultation responses supported a time limit of between three and five years.<sup>146</sup>
- 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.

<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup> Under our closure procedure, completion will occur when a general vesting declaration is executed and the period of notice expires.<sup>149</sup>
- 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

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

<sup>148</sup> 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.

<sup>149</sup> 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.<sup>150</sup>
- 3.297 In relation to European Union law, the Aarhus Convention<sup>151</sup> and the Public Participation Directive<sup>152</sup> 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”.<sup>153</sup> One of the concerns in relation to the Aarhus

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

<sup>151</sup> 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).

<sup>152</sup> 2003/35/EC.

<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup>

- 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.<sup>157</sup> 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.<sup>158</sup> 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*.<sup>159</sup> 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

<sup>154</sup> 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).

<sup>155</sup> SI 2011 No 1824.

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

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

<sup>158</sup> 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.

<sup>159</sup> [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.<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup>
- 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.<sup>163</sup> 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

<sup>160</sup> Draft Level Crossings Bill, cl 23.

<sup>161</sup> 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.

<sup>162</sup> Draft Level Crossings Bill, cls 17(1) and 18(1).

<sup>163</sup> Section 10(2).

Tribunal or the Lands Tribunal for Scotland, where a hearing or exchange of written representations could take place.<sup>164</sup> 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.<sup>165</sup>

- 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.<sup>166</sup> 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.<sup>167</sup> Any appeal must be brought within 42 days of the decision.<sup>168</sup> Alternatively, a person dissatisfied with the tribunal's decision may require the Tribunal to state a case for the opinion of the court.<sup>169</sup> An application to the Tribunal to state a case must be made within 14 days of the decision.<sup>170</sup> A decision of the Lands Tribunal for Scotland on valuation is final.<sup>171</sup>

<sup>164</sup> 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.

<sup>165</sup> Land Compensation Act 1961, s 1; Land Compensation (Scotland) Act 1963, s 8.

<sup>166</sup> Section 10(2).

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

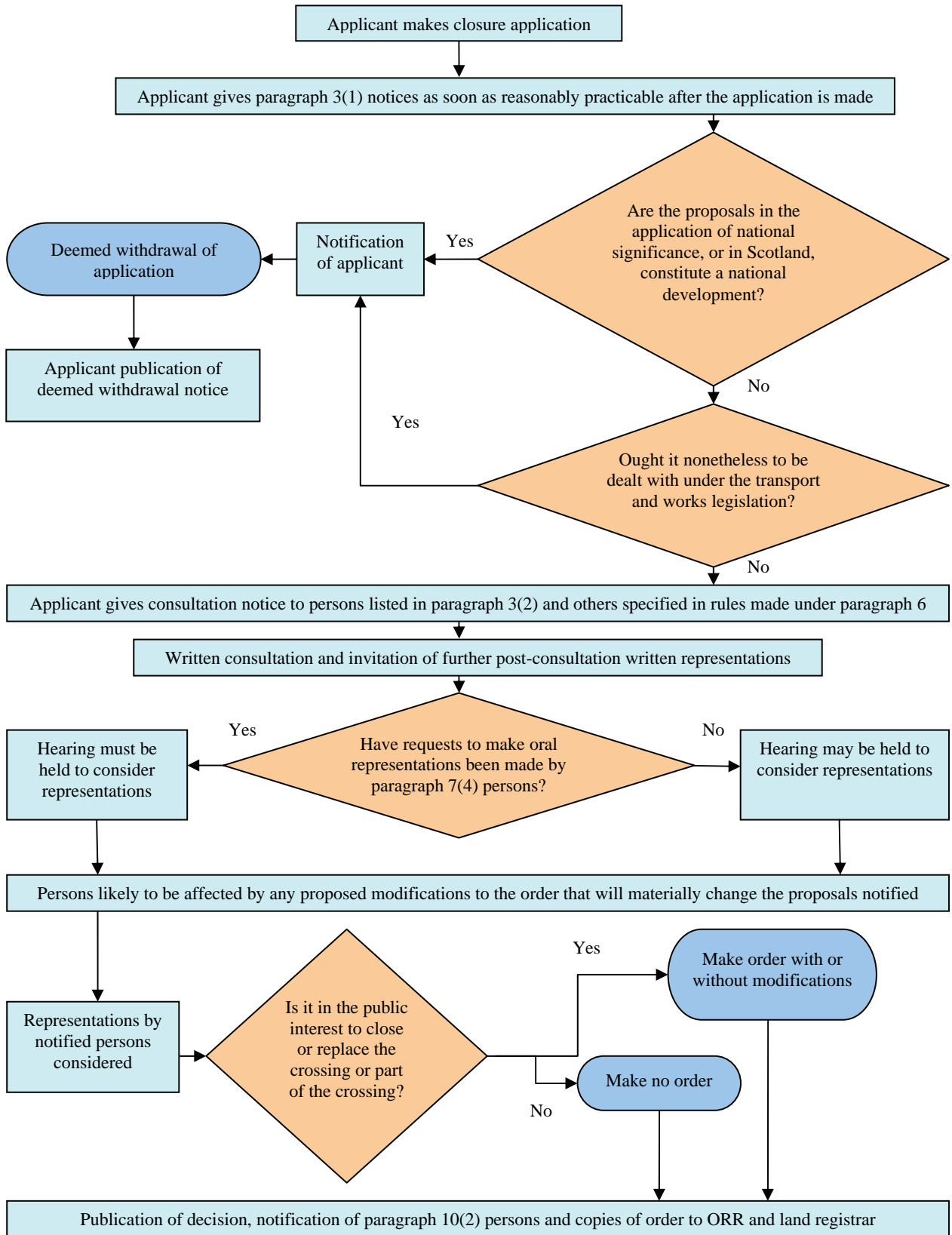
<sup>168</sup> Act of Sederunt (Rules of the Court of Session 1994) 1994, SI 1994 No 1443, r 41.26.

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

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

<sup>171</sup> Tribunal and Inquiries Act 1992, s 11(7)(c).

## LEVEL CROSSINGS CLOSURE PROCEDURE



Paragraph references are to the Schedule to the draft Bill

## **PART 4**

# **RIGHTS OF WAY: ENGLAND AND WALES**



Gipsy Lane level crossing, Needham Market, Suffolk. The private road crossing has been closed by agreement between Network Rail and the beneficiary. The public footpath crossing remains in use. Credit: Rail Accident Investigation Branch.

### **INTRODUCTION**

- 4.1 The law of level crossings raises difficult questions of land law which can create problems in practice. The level crossings project is an opportunity to clarify the law in these areas and, where necessary, make changes to improve its operation.
- 4.2 We deal with this topic separately for England and Wales, in this Part, and for Scotland in Part 5, mainly because the law relating to public and private rights of way and to access rights<sup>1</sup> is different.

### **PRIVATE RIGHTS OF WAY OVER THE RAILWAY**

- 4.3 Private rights of way in the law of England and Wales are generally examples of easements. Easements give one landowner the right, rather than merely a permission, to do something on another's land. Easements can arise either by grant, from one landowner to another, or through long use, known as prescription. Private level crossings may be easements that existed before the construction of the railway, or easements reserved in the conveyance of the land to the railway operator when the railway was created.
- 4.4 In Part 11 of the consultation paper, we described in some detail the law relating

to rights of way over the railway.<sup>2</sup> What follows here is a brief summary.

- 4.5 Many level crossings are statutory rights of way, where the right to cross has to be implied from the special Act under which the railway was constructed. Special Acts include the model clauses set out in section 68 of the Railways Clauses Consolidation Act 1845, unless specifically excluded.<sup>3</sup> These clauses require the railway operator to make and maintain works to accommodate the owners and occupiers of land adjoining the railway. The works must make good any interruptions of the enjoyment of the land caused by the railway, but not obstruct the working or use of the railway.
- 4.6 The extent of an easement is specified in the conveyance and the courts tend to be generous in their construction of the right, so long as it does not obstruct the proper working of the railway.<sup>4</sup> The extent of a statutory right of way over a level crossing is a question of statutory construction, taking into account the use made of the land at the time when the railway was created.<sup>5</sup>

#### **Acquisition by prescription**

- 4.7 In the consultation paper we considered whether permitted use of a level crossing could change over time.<sup>6</sup> There are two ways this could happen.
- 4.8 First, the original express grant could include a wider range of uses or greater use than occurred at the time of the grant. For example, a private carriageway across the railway for access to properties could be used for cattle to cross the railway into a pen.<sup>7</sup> The change in use would not be permissible if it substantially increased the burden on the railway, as a matter of fact.
- 4.9 Second, a user may have acquired additional rights over the level crossing by prescription. It is settled law that a non-railway user of a level crossing cannot gain a right by prescription which the railway operator does not have the power to grant. Subject to this limitation, we took the view in the consultation paper that an easement could be extended by prescription to include a different use. The railway operator can always prevent the acquisition of an easement by prescription, either by prohibiting use within the 20-year prescriptive period or by allowing the use by express permission. We provisionally proposed a statutory prohibition on the future acquisition of private rights of way over the railway by

<sup>1</sup> This is the term used by the Land Reform (Scotland) Act 2003.

<sup>2</sup> Level Crossings (2010) Law Commission Consultation Paper No 194; Scottish Law Commission Discussion Paper No 143, Part 11. Subsequent references to the consultation paper in this Part will be in the format Joint Consultation Paper, para X.

<sup>3</sup> Railways Clauses Consolidation Act 1845, s 1.

<sup>4</sup> *British Railways Board v Glass* [1965] Ch 538, Lord Denning MR at 554; *TRH Sampson Associates Ltd v British Railways Board* [1983] 1 WLR 170. Joint Consultation Paper, paras 11.14 to 11.19.

<sup>5</sup> In *TRH Sampson Associates Ltd v British Railways Board* [1983] 1 WLR 170 at 181, the court pointed out that a statutory right of way over a level crossing is not, however, a prescriptive right.

<sup>6</sup> Joint Consultation Paper, paras 11.29 and 11.30.

<sup>7</sup> *Finch v Great Western Railway Company* (1879) 5 Ex D 254, cited in *Gale on Easements*, (19th ed 2012) paras 9-64 to 9-84 where numerous other examples may be found.

prescription.<sup>8</sup>

- 4.10 We also took the view that a statutory right of way might be extended over time, subject to the limits of the railway operator's power to grant a right. Any extension of a statutory right of way would be determined by reference to the use to which the land was put at the time the railway was constructed.
- 4.11 This leaves a lack of clarity as to when private rights across the railway might be extended.

### ***Illegality***

- 4.12 Further uncertainty is created by the question of illegality. In our consultation paper we raised the question of whether it is possible to imply dedication of a highway<sup>9</sup> when the activity amounts to criminal trespass on the railway.<sup>10</sup> This question applies equally to the acquisition of easements by prescription.
- 4.13 All use of a way which could lead to its implied dedication as a right of way, or the acquisition of an easement by prescription, is civil trespass. This is how such rights are acquired, and clearly such civil trespass does not preclude presumptive dedication of a right of way, or prescriptive acquisition of an easement. However, does *criminal* trespass preclude dedication of a public right of way? It does amount to criminal trespass if a person is on the railway and notices prohibiting access to the railway are displayed at the nearest station.<sup>11</sup> This question applies equally to the situation of acquisition of rights of way across the railway by prescription: does the fact that the long user constitutes *criminal* trespass preclude acquisition of an easement by prescription?
- 4.14 The general rule under the common law is that implied dedication of a highway or prescriptive acquisition of an easement cannot be presumed from conduct which is criminally illegal.<sup>12</sup> However, the case of *Bakewell Management Limited v Brandwood* made an exception for cases where the owner of the dominant tenement could, by that party's own actions, make the conduct legal.<sup>13</sup> In relation to level crossings, the railway operator can render the trespass lawful by granting permission to cross. By failing to erect signs prohibiting access, the railway operator can render the use lawful in the same way as the commons owner did in the case of *Brandwood*.
- 4.15 The *Brandwood* decision turned on particular circumstances in relation to commons, where there are public policy reasons in favour of allowing easements to be acquired to facilitate access. The case might be distinguished in relation to level crossings, where public policy would be more likely to point against the creation of new easements across the railway.

<sup>8</sup> Joint Consultation Paper, para 11.39.

<sup>9</sup> Under the Highways Act 1980, s 31(1). Implied dedication is discussed below.

<sup>10</sup> Joint Consultation Paper, from para 11.85.

<sup>11</sup> British Transport Commission Act 1949, s 55. The section does not specifically create an offence, but imposes a penalty for trespass on the railway.

<sup>12</sup> *Cargill v Gotts* [1981] 1 WLR 441.

<sup>13</sup> [2004] UKHL 14, [2004] 2 AC 519.

- 4.16 It is in the interests of rail users of level crossings that the permitted use is clear and balances the interests of the railway and non-railway user, in terms of both safety and convenience. In the case of easement crossings, which cannot be extended beyond the terms of the original grant, use leading to a right by prescription might simply be excessive use and therefore unlawful and liable to enforcement action. The position should be the same for easements and for statutory level crossings.
- 4.17 There is ambiguity as to whether new private rights of way across the railway can be created by prescription and we think the law should be made clear. We recommend a statutory prohibition on the future acquisition of private rights of way over the railway by prescription. This of course does not affect the duty of railway operators to take enforcement action where they have the power to do so to prevent trespass on the railway and to ensure that risk is kept “as low as reasonably practicable”, as required by the Health and Safety at Work etc. Act 1974.
- 4.18 In its report *Making Land Work: Easements, Covenants and Profits à Prendre*,<sup>14</sup> the Law Commission recommended a new statutory scheme for the prescriptive acquisition of easements. Our recommendation should stand regardless of whether the recommendations in the *Easements, Covenants and Profits à Prendre* report are accepted and enacted by Parliament.

#### **Recommendation**

- 4.19 **We recommend a statutory prohibition on the acquisition of rights of way across the railway by prescription. This provision should not apply where there is no longer a “railway” within our recommended definition.**
- 4.20 This recommendation is given effect by clause 41 of the draft Level Crossings Bill.<sup>15</sup>

#### ***Easements and excessive use***

- 4.21 The only limitation on the extent of an easement granted by the railway operator seems to be its capacity to do so and the railway operator may not grant an easement that prevents or obstructs the use of the railway. The only way to vary an easement is by agreement.<sup>16</sup> A right of way may be granted for a limited purpose, or it may be in general terms and for all purposes.
- 4.22 There is no clear definition of, or guidance on what constitutes, excessive use of an easement level crossing. It is a matter of fact to be determined in each case.
- 4.23 In the consultation paper, we provisionally proposed the creation of a statutory list of factors to be taken into account by the courts when deciding whether changed or increased use of a level crossing amounts to excessive use. We thought it may be useful for both rights-holders and railway operators to have a clearer understanding of what constitutes excessive – and therefore tortious – use in

<sup>14</sup> *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com No 327.

<sup>15</sup> We make similar provision in respect of Scotland in Part 5.

<sup>16</sup> *Railways Clauses Consolidation Act 1845*, s 68.



relation to private level crossings, even though this must remain a question of fact in each case.<sup>17</sup>

4.24 We invited consultees to comment on the creation of a list in principle and on the criteria we proposed for inclusion, which were:

- (1) the impact on safety of the railway and crossing users;
- (2) the operational requirements of the railway, including how heavily used the railway is;
- (3) whether the use is of a substantially different character to the original use;
- (4) the frequency of use compared to the original frequency of use; and
- (5) whether the use will have such an impact on the railway as to require expenditure on the part of the railway operator.<sup>18</sup>

4.25 The National Farmers' Union opposed the creation of a statutory list of factors for construing the extent of a general right of way on the grounds that the nature of an easement acquired by express conveyance would turn on its own facts and the court would have to interpret the individual deed or conveyance. It also expressed concern that too much emphasis might be placed on the deemed "excessive use" of a crossing by users,

with little or no consideration of the rail industry as a whole and the fact that the industry is making even greater use of railways with bigger, faster and more frequent trains travelling along routes.<sup>19</sup>

4.26 We are not aware of any cases of railway operators taking enforcement action against the owners of easements on the grounds of excessive use.

4.27 Although Network Rail and some other consultees supported the creation of a list of criteria, their responses did not suggest that the lack of enforcement action was a result of any confusion as to the nature of excessive use.<sup>20</sup> In the absence of any evidence that the current law creates any difficulties in taking enforcement action against excessive users, we do not recommend the creation of a list of factors to be taken into account and no such provision is included in the draft Bill.

## **CLOSURE OF PRIVATE LEVEL CROSSINGS**

### **Express release by agreement**

4.28 As we have explained, the only method by which a private level crossing can be compulsorily closed against the wishes of the owner of the right of way in England and Wales is by way of an order made under the Transport and Works Act 1992.

<sup>17</sup> Joint Consultation Paper, Part 11.

<sup>18</sup> Joint Consultation Paper, paras 11.49 and 11.50.

<sup>19</sup> Consultation Analysis, paras 11.14 to 11.15.

<sup>20</sup> Consultation Analysis, paras 11.19 to 11.30.

- 4.29 A private level crossing where the right of way over the railway is an easement can be closed by agreement between the railway operator and the beneficiary of the right of way. This should be possible for those level crossings where the right of way is a right akin to an easement (where the crossing has been created by statute), just as it is possible for easements.<sup>21</sup>
- 4.30 In practice, the law of easements in England and Wales has been applied in relation to crossings over which there is a statutory right of way. If the railway operator reaches an agreement with the party that has the benefit of the statutory right of way to the effect that the crossing should be closed, the benefited party signs a deed of release. In our consultation paper, we proposed that the law should expressly state that private rights over a level crossing can be extinguished by agreement between the rights holder(s) and the railway operator.<sup>22</sup>

### **Consultation**

- 4.31 Several consultees, including the Office of Rail Regulation and the Department for Transport, suggested that the proposal would be helpful and would provide clarity. The National Farmers' Union agreed that it would be beneficial to enshrine in legislation the rights holder's ability "to freely negotiate and agree any extinguishment or release of rights of way over a level crossing with the railway operator". Network Rail pointed out that there was no need to create a statutory provision as it was clear that rights could be extinguished by agreement.<sup>23</sup>
- 4.32 The Land Registry submitted a response in which it explained its current practice.<sup>24</sup> In the course of registering land, the Land Registry has to consider deeds of release of easements. It is not always possible to establish that all the beneficiaries of the easement have participated in the release so as to make it effective. In these circumstances, the Land Registry does not treat the easement as released. Instead it makes an entry in respect of the easement, or leaves an existing entry on the Register, and makes a further entry relating to the purported release. This makes the purported release apparent on the face of the Register, but does not guarantee its effect.
- 4.33 In addition, the Land Registry explained the position where the dominant land is registered with the benefit of the easement. If no application is made to the Land Registry to remove the benefit from the registered title following its release, then the benefit of the right of way could be vested in the new proprietor on registration of a transfer of the dominant land.<sup>25</sup> The Land Registry expressed concern that this could lead to a claim for an error in registration. The Registry suggested that a solution might be to make a deed of release a registrable disposition under section 27 of the Land Registration Act 2002. This would have the effect that it would only operate at law once the relevant registration requirements had been met.

<sup>21</sup> It was considered so in *Midland Railway Company v Gribble* [1895] 2 Ch 827.

<sup>22</sup> Joint Consultation Paper, para 11.59.

<sup>23</sup> Consultation Analysis, paras 11.38 and 11.39.

<sup>24</sup> Consultation Analysis, paras 11.40 to 11.44.

<sup>25</sup> Land Registration Act 2002, s 58.

### **Discussion**

- 4.34 As some consultees pointed out, there is no doubt that private rights may be extinguished by agreement. Since 2009 Network Rail has run a successful level crossing closure campaign. By October 2012, it had closed 600 crossings,<sup>26</sup> including a significant number of private, user-worked level crossings closed by agreement.
- 4.35 The purpose of our proposal was to make clear that it is possible to release a statutory right of way over the railway by agreement, despite the statutory nature of that right. The problems identified by the Land Registry in England and Wales apply to deeds of release relating to any easement and are not specific to level crossings. The proposed reform will not place deeds of release relating to level crossings in any better or worse position than deeds of release extinguishing any other rights of way.
- 4.36 We take the view that there should be such a provision, in order to place the validity of deeds of release in respect of statutory crossings beyond doubt.

### **Recommendation**

- 4.37 **We recommend a statutory provision to the effect that a statutory private right of way over a level crossing can be extinguished by means of a deed of release or other method available for the extinguishment of an easement across the railway.**
- 4.38 This recommendation is given effect by clause 43 of the draft Level Crossings Bill.

### **Implied release: abandonment**

- 4.39 As explained above, special Acts provided for the creation of level crossings where the railway bisected a landowner's land, either by easement in the conveyance of the land, or by implication from the statute. Where the land on one side of the crossing is transferred to a different owner, the right of way over the railway may be abandoned unless the right of way is reserved or expressly granted to the new owner.
- 4.40 We explained in the consultation paper that in England and Wales a level crossing has long been treated as being abandoned in these circumstances, following the decision of the Court of Appeal in *Midland Railway Company v Gribble*.<sup>27</sup> In *Gribble*, a crossing had been built where a farm had been severed by the railway. The right had originally been granted to Y. Y later sold the field on one side of the railway to X without reserving to himself that right or granting X that right in the conveyance. The question subsequently arose as to whether the right had been abandoned and therefore extinguished.
- 4.41 The courts will be slow to infer an intention to abandon,<sup>28</sup> but in *Gribble*, the court held that the landowner had severed his land in such a way as to show

<sup>26</sup> See Network Rail statement at <http://www.networkrail.co.uk/news/2012/october/600th-level-crossing-closed-in-safety-programme/> (last visited 1 September 2013).

<sup>27</sup> [1895] 2 Ch 827. Joint Consultation Paper, paras 11.60 to 11.68.

“conclusively that he never intended to use it thereafter”. Lord Justice Lindley described this as a “clear and distinct abandonment of his right over the railway”.<sup>29</sup>

- 4.42 This approach was criticised and not followed by the Sheriff Court in Scotland in *Robertson v Network Rail Infrastructure Limited*.<sup>30</sup>
- 4.43 No clear distinction has been made by the courts between easements and statutory rights of way and it appears that the decision in *Gribble* is equally applicable to both. In the Scottish case of *Monkland and Kirkintulloch Railway Company v Dixon*<sup>31</sup> the House of Lords considered a statutory right of way and held that the extent and use to be made of that right was a matter of statutory interpretation. Similarly, in the Sheriff Court decision in *Robertson* the court emphasised that it was dealing with a statutory creation, not a servitude, and that Parliament alone could extinguish the rights that statute had created.
- 4.44 We asked consultees whether the law should be as stated in *Gribble* and, if so, whether it should be placed on a statutory footing.<sup>32</sup>

### **Consultation**

- 4.45 The Department for Transport, Office for Rail Regulation and Network Rail supported placing the law as stated in *Gribble* on a statutory footing. Others, including the Heritage Railway Association, agreed that the law was correctly stated in *Gribble* but thought that there was no need to place this on a statutory footing.<sup>33</sup>
- 4.46 Some consultees warned that a statutory provision enacting this rule of implied abandonment could lead to a deprivation of property rights under article 1 of Protocol 1 to the European Convention on Human Rights. Professor Roderick Paisley of the University of Aberdeen noted that the decision in *Gribble* long predated the drafting of the Convention. The Department for Transport said that it would be necessary to ensure that there was an appeal mechanism and scope for adequate public consultation, to ensure that the rule did not disadvantage landowners.
- 4.47 The National Farmers’ Union and the Country Land and Business Association stressed that it would depend very much on the facts of a particular case whether the sale of land on one side of the railway indicated that access by the original landowner was no longer necessary. An interest in use of the crossing might continue, for example, in order to exercise shooting rights on the other side of the railway. The Land Registry also pointed out that “cases of abandonment turn so much upon the very specific facts”.

<sup>28</sup> See, for example, *CDC2020 Plc v Ferreira* [2005] EWCA Civ 611, [2005] 3 EGLR 15.

<sup>29</sup> [1895] 2 Ch 827, 831.

<sup>30</sup> Inverness Sheriff Court, 28 May 2007 (unreported). See below in Part 5 under the heading “The *Gribble* and *Robertson* issue”.

<sup>31</sup> *Monkland and Kirkintulloch Railway Company v Dixon* (1842) 1 Bell App 347.

<sup>32</sup> Joint Consultation Paper, para 11.68.

<sup>33</sup> See Consultation Analysis, paras 11.49 to 11.60.

- 4.48 The Land Registry explained that statutory provision would present it with a practical problem. The beneficial entry would be on the whole title initially. If the easement was abandoned by the rule in *Gribble*, there would be no mention of it in the conveyance. How would the Land Registry identify the abandonment of the easement, so as to take steps to remove the entry from the transferor's title?

### **Discussion**

- 4.49 We confirm the view set out in the consultation paper that in England and Wales *Gribble* represents the current law so that a private right of way is abandoned if ownership of the land is severed.
- 4.50 The circumstances in which abandonment could be inferred turn very much on the individual facts of the case, the precise terms of the conveyance and the use to which the land is put. Where abandonment is to be inferred, it would not be appropriate for the Land Registry to be responsible for recording on the title that the right of way is extinguished.
- 4.51 We accept the views of consultees who suggested that it is not appropriate to place the rule in *Gribble* on a statutory footing. We therefore do not recommend a provision to this effect in the draft Bill.

### **CREATION OF PUBLIC LEVEL CROSSINGS BY IMPLIED DEDICATION**

- 4.52 A highway has been described as “essentially a public right to pass over a defined route”;<sup>34</sup> “essentially” because a highway is also a physical feature of the landscape.
- 4.53 A highway can be created by statute, by agreement under statute or by dedication and acceptance at common law.<sup>35</sup>
- 4.54 The owner of the land upon which a railway was constructed is usually the railway operator. The highway authority may not, therefore, dedicate such land as a highway. However, where the railway operator (as owner of the land) agrees to dedicate a highway over the railway line, the process is uncontroversial.
- 4.55 Under common law, the following are amongst the conditions required for the dedication of a way.
- (1) The dedication must be to the public at large and not to a particular class of person, for example those using the road as invitees or licensees, like postmen, meter readers or tradesmen.<sup>36</sup>
  - (2) Dedication may be express or may be implied by public user.
  - (3) Mere use is not sufficient. The use must be as of right; of sufficient length (depending on all the circumstances) and must not be rebutted by conduct on the part of the landowner. Rebuttal might take the form of

<sup>34</sup> S Sauvain QC, *Highway Law* (4th ed 2009) para 1-01.

<sup>35</sup> The methods of creating a highway are discussed in S Sauvain QC, *Highway Law* (4th ed 2009) ch 2.

<sup>36</sup> A Sydenham, *Public Rights of Way and Access to Land* (3rd ed, 2007) para 3.5.3.

notices or gates.<sup>37</sup>

- (4) The grantor must have the capacity to dedicate.
  - (5) A highway must be dedicated in perpetuity for “once a highway always a highway”.<sup>38</sup>
  - (6) Dedication must be proved by the claimant.
- 4.56 Proving the requirements for dedication and acceptance has been made somewhat easier by section 31 of the Highways Act 1980. That section simplifies the proof of implied dedication by long use. A right of way can be established if there has been 20 years use of the way over land by the public as of right, without interruption, unless the landowner can show that during that period there was no intention to dedicate. Unlike common law dedication, the burden of proof under section 31 of the Highways Act 1980 is on the landowner to rebut the presumption.<sup>39</sup>
- 4.57 In order to dedicate a highway, no matter what the method of dedication, the landowner dedicating it must have the capacity to do so. This will depend upon the original grant of land to the person or body in question. Where land is vested in a body for a particular purpose, that body may not dedicate a highway if to do so would be incompatible with the statutory purposes for which the land was vested. Therefore, a railway company will only have the capacity to dedicate if doing so would not be incompatible with the purposes for which it was granted the land, namely the building and running of the railway.<sup>40</sup>
- 4.58 It was only following *British Transport Commission v Westmorland County Council*<sup>41</sup> that railway operators were considered to have the capacity to dedicate a public right of way over the railway. Prior to the *Westmorland* case no court would have said that a railway company could dedicate such a way. It would have been considered as outside the capacity of the railway operator to do so because such a way would be thought to interfere with the running of the railway. At present, therefore, it appears that a railway company does have the capacity to dedicate a public right of way over a level crossing, both expressly and impliedly.
- 4.59 The question of whether implied dedication is prevented by illegality, as described in relation to prescriptive acquisition of easements across the railway above, also applies to implied dedication of highways across the railway. The use required to establish implied dedication of a highway could, as in the case of prescription, constitute criminal trespass under section 55 of the British Transport Commission Act 1949.

<sup>37</sup> A Sydenham, *Public Rights of Way and Access to Land* (3rd ed, 2007) para 3.5.7(4).

<sup>38</sup> *Suffolk CC v Mason* [1979] AC 705, Lord Diplock at 710.

<sup>39</sup> In *Bakewell Management Limited v Brandwood* [2004] UKHL 14 and [2004] 2 AC 519, it was held that the ability to acquire rights by long user in relation to the acquisition of private rights rested on the ability lawfully to grant the right. Lord Scott of Foscote at [40] considered that similar principles applied in respect of dedication as to grant.

<sup>40</sup> *R v Inhabitants of Leake* (1833) 5 B & Ad 469, 478.

<sup>41</sup> [1958] AC 126.

- 4.60 There is the same possibility, and consequent uncertainty, that the exception to the illegality principle laid out in *Bakewell Management Limited v Brandwood* will apply to implied dedication of highways across the railway, as well as easements. While the facts in *Brandwood* concerned easements, the trespass involved in acquisition by long use is the same for presumed dedication of a highway as for prescriptive acquisition of an easement and Lord Scott expressly considers implied dedication of highways in his judgment.
- 4.61 Even if such implied dedication is possible, dedication of a highway requires actual or implied intention to dedicate that highway. If such intention is rebutted by conduct on the part of the landowner, for example, the erection of notices or gates, the highway will not be dedicated.<sup>42</sup> Notices are, however, only one possible way of showing that a landowner did not intend to dedicate the way.<sup>43</sup>
- 4.62 In the consultation paper, we were unable to conclude confidently whether implied dedication would be prevented by illegality or whether rebuttal would be inferred from the railway operator putting up notices warning people not to trespass on the railway, or from gates preventing access to the railway. We asked consultees whether there should be a statutory prohibition on the future implied dedication of highways over the railway.<sup>44</sup>

### **Consultation**

- 4.63 Local authorities and access groups opposed a statutory prohibition on the grounds that it was unnecessary as such acquisition was very rare, could be prevented by the railway operator and that existing legislation provided adequate protection.<sup>45</sup> Some also argued that a statutory prohibition would conflict with the provisions for claiming historic rights of way that have not yet been included in the definitive map under the Countryside and Rights of Way Act 2000. The Act provides that such rights of way must be claimed by 1 January 2026.<sup>46</sup>
- 4.64 As consultees pointed out, providing that rail operators are taking necessary precautions to prevent persistent trespass, the integrity of the railway is already protected by existing statute and common law. Network Rail stated that it successfully relies upon the criminal trespass provision in section 55 of the British Transport Commission Act 1949, in arguing that new rights of way over level crossings cannot arise by prescription. It also stated that this provision is relied upon in cases of excessive use.<sup>47</sup> Railway operators are fully aware that dedication by long user may occur in the absence of a clear indication that they do not intend to dedicate a public right of way. Their position is the same as that of any other landowner.
- 4.65 Ramblers expressed concern over the closure of:

<sup>42</sup> Highways Act 1980, s 31(1) and (3).

<sup>43</sup> Highways Act 1980, s 31, provides further examples in subsections (5) and (6).

<sup>44</sup> Joint Consultation Paper, paras 11.91 to 11.99.

<sup>45</sup> Consultation Analysis, para 11.62.

<sup>46</sup> Consultation Analysis, para 11.63.

<sup>47</sup> Consultation Analysis, paras 11.68 to 11.71.

...occupational crossings which have, over time, been used by the public as part of the *de facto* path network. It might prove possible to claim, as public rights of way, the paths leading to the crossing point but if the route of the occupational crossing could not be claimed then there would be cul-de-sac paths on either side and the inherent possibility of trespass.<sup>48</sup>

- 4.66 The Department for Transport supported the proposal on the grounds that “it is not desirable for future rights of way to be imposed upon the railway, as these are potentially burdensome and counter to the policy on new level crossings”. The Office of Rail Regulation did not take a position on it, but asked who would be tasked with enforcing the statutory prohibition.<sup>49</sup>

### Discussion

- 4.67 In our view, the uncertainty illustrated by the decision in *Brandwood* applies to the dedication of a highway, just as it does to the creation of private rights of way by prescription. We believe that the law in this area should be clarified. It is not clear how the *Brandwood* principle will be applied by the courts in future. While the possibility to prevent implied dedication or prescription does exist under current law, the interest in minimising creation of new level crossings and the interest in increasing certainty in the law in this area favour the creation of a statutory prohibition in both cases.

- 4.68 The prohibition on the acquisition of rights of way across the railway is justified on safety grounds. The same arguments do not apply to a disused railway and we do not wish to reform the law relating to disused railways. In the draft Bill, we define a railway as a “system of transport”.<sup>50</sup> A disused railway is no longer a system of transport. Whether a railway still exists would be a question of fact. For example, if the railway track has been permanently removed, there would no longer be a railway and the provisions of the Bill would not apply.

### Recommendation

- 4.69 **We recommend that there should be a statutory prohibition on the implied dedication of highways across the railway. This provision should not apply where there is no longer a “railway” within our recommended definition.**
- 4.70 This recommendation is given effect by clause 42 of the draft Level Crossings Bill.

<sup>48</sup> Consultation Analysis, para 11.65.

<sup>49</sup> Consultation Analysis, para 11.75.

<sup>50</sup> Draft Level Crossings Bill, cl 50.



# PART 5

## RIGHTS OF WAY AND ACCESS ISSUES: SCOTLAND



Level crossing at Corroul Station on Rannoch Moor. Credit: Ramblers Scotland.

### INTRODUCTION

5.1 In this Part we make recommendations in relation to rights over level crossings in Scotland. We consider these under three headings:

- (1) private rights of way;
- (2) public rights of way; and
- (3) access rights under the Land Reform (Scotland) Act 2003.

### PRIVATE RIGHTS OF WAY

5.2 Private rights of way over a railway may be created or arise under the general law or by virtue of the special Act which established the railway. In this section we consider common law servitudes and statutory rights of way crossings under the Railways Clauses Consolidation (Scotland) Act 1845 and other legislation.

#### **Common law rights: servitudes**

##### ***Voluntary grant of servitude rights of way***

5.3 A private right of way at common law will normally be a servitude. Servitudes may

be constituted by a number of methods.<sup>1</sup> The main ones are grant or reservation (expressly by the owner of the property which is to be burdened, or implied from circumstances) and positive prescription, discussed below.<sup>2</sup>

- 5.4 In the consultation paper we noted that whilst the voluntary grant of servitudes of way over the railway has happened in the past, it seems unlikely that it will happen in future.<sup>3</sup> Nevertheless, it would seem useful for it to be made clear that it is competent for the owner of a railway<sup>4</sup> to grant a servitude of way across the track. Under the current law there is an argument that this may be outside the powers of the owner of the railway.<sup>5</sup> While we do not agree with this, we believe that the law should be clarified. We asked consultees for their views. This attracted fairly limited comment. However, the majority of those who did respond, including Network Rail and the Department for Transport, believed that the voluntary grant of a servitude is competent already, but agreed that legislation should make this clear. The power to grant such a servitude should, however, it was argued, be exercisable subject to certain conditions, in particular requiring an assessment of the effect on the safety of the railway. Our view, however, is that it is not necessary to specify the circumstances in which the power may be exercised, because health and safety obligations under the general law would have to be considered before any grant was made.

#### **Recommendation**

- 5.5 **We recommend that there should be statutory provision to the effect that it is competent for the owner of a railway to grant a servitude of way across the railway track.**
- 5.6 This recommendation is given effect by clause 44(1)(a) and (2) of the draft Level Crossings Bill.

#### ***Exclusion of acquisition of servitudes by prescription***

- 5.7 Under the current law it may be possible for the owner of land beside a railway to acquire a servitude of way over the track by means of positive prescription. The leading provision is section 3(2) of the Prescription and Limitation (Scotland) Act 1973. It requires access to be taken openly, peaceably and without judicial interruption, for a continuous period of 20 years. A servitude of way would then arise automatically upon the expiry of that period. The registration of a deed either at the start or the end of the period is unnecessary.

<sup>1</sup> The leading text is D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) chs 5 to 11. For a more concise treatment, see G L Gretton and A J M Steven, *Property, Trusts and Succession* (2nd ed 2013) paras 12.21 to 12.29.

<sup>2</sup> See below, at paras 5.7 to 5.13.

<sup>3</sup> Level Crossings (2010) Law Commission Consultation Paper No 194; Scottish Law Commission Discussion Paper No 143, para 12.5. Subsequent references to the consultation paper in this Part will be in the format Joint Consultation Paper, para x.

<sup>4</sup> Normally the owner of a railway and the railway operator will be the same body as in the case of Network Rail. But there may be cases where a railway is operated on land owned by a different body.

<sup>5</sup> Joint Consultation Paper, para 12.5. There we used the more traditional terminology of whether the grant was *ultra vires* of the owner.

- 5.8 In the consultation paper we acknowledged that the issue of prescriptive creation of a servitude across a railway track will seldom arise in practice.<sup>6</sup> Nevertheless, the law is currently unclear as to whether in fact the general rule in section 3(2) of the 1973 Act can apply to access over a railway. The issues which arise here are almost indistinguishable from those which arise in relation to the creation of a *public* right of way over a railway by prescription. There are two bases on which it may be argued that such a right cannot be created. The first is that the grant of the right would be outside the powers of the owner of the railway and therefore acquisition by prescription is also excluded. The second is that a right cannot arise through prescription because the prescriptive use amounts to criminal trespass. As will be seen below, the provisional conclusion we reach is that despite these arguments a public right of way could be created. On that basis, given the similarity in the issues arising, it seems probable that a servitude of way across a railway track could also be constituted by prescription. The main type of scenario envisaged is one where a statutory right of way crossing is provided for the use of the owner of land adjoining the railway whose land is bisected by the railway. A neighbour of the landowner then uses the crossing for 20 years to reach a public road on the other side. There is an argument that prescriptive acquisition could also operate in any situation where the railway track is continuously crossed at a given point, even if there is no physical level crossing in the sense of signs, barriers, gates or other protective measures.
- 5.9 In the consultation paper we asked whether it should be possible for prescriptive use to create a servitude across a railway track. The majority of consultees who commented on this question were not in favour. Concerns were raised about potential safety implications, together with disruption to the running of the railway. On the other hand, Professor Roderick Paisley of the University of Aberdeen expressed concern about introducing an industry-specific exception to the generality of the 1973 Act. We note, however, that such an exception already exists. Under section 57 of the British Transport Commission Act 1949 no right of way can be created by prescription over any road, footpath, thoroughfare or place forming an access or approach to any station, goods-yard, wharf, garage, depot, dock or harbour which are the premises of the British Transport Commission.<sup>7</sup> Curiously, the railway itself is not mentioned.<sup>8</sup>
- 5.10 We are persuaded for safety reasons to exclude the acquisition of servitudes by prescription over the railway tracks. This is consistent with our policy for England and Wales.<sup>9</sup> However, we would wish to retain the possibility of prescription

<sup>6</sup> See Joint Consultation Paper, para 12.7.

<sup>7</sup> Although, there is an argument that the provision has been impliedly repealed in Scotland by the Prescription and Limitation (Scotland) Act 1973. See the Joint Consultation Paper, para 12.74. The British Transport Commission was the predecessor of the British Railways Board. In 1994 the management of the national railway infrastructure was taken over from the British Railways Board by Railtrack plc. Following the placing of Railtrack plc in railway administration, in October 2002 Railtrack plc was acquired by Network Rail Holdco Ltd, a wholly-owned subsidiary of Network Rail Limited.

<sup>8</sup> In the Joint Consultation Paper, para 11.90 we noted that prior to *British Transport Commission v Westmorland County Council* [1958] AC 126 it was not considered possible for a public right of way over the railway to be acquired by the English equivalent of prescription. Thus when the 1949 Act was drafted it may not have been thought necessary to mention the railway line.

<sup>9</sup> See above in Part 4.

operating to cure a technical defect in relation to a deed which seeks to constitute a servitude.<sup>10</sup> Section 3(1) of the 1973 Act is the relevant provision here.<sup>11</sup> For that reason, we recommend that the exclusion of prescriptive acquisition should relate to the operation of section 3(2) only, and not to section 3(1). Moreover, the exclusion should not affect disused railways, where the compelling safety reasons justifying it do not apply. A disused railway would clearly be one where the track has been uplifted so that trains can no longer run on the line. But it could also include a railway which had not been used for a considerable time with the result that the area surrounding the track has become overgrown. The draft Bill<sup>12</sup> gives effect to this policy by means of the definition of “railway” as a “system of transport”. Disused railways are no longer systems of transport. The exception should also be limited to acquisition of rights of way *across* the track. It should continue to be possible to acquire a servitude along a bridge *over* the track or along a road *under* the track where the railway line is on a bridge.

### **Recommendations**

- 5.11 **We recommend that there should be statutory provision to the effect that no servitude of way may be acquired by prescription across any part of the railway track, other than by operation of section 3(1) of the Prescription and Limitation (Scotland) Act 1973. We recommend that the provision should not apply where there is no longer a “railway” within our recommended definition.**
- 5.12 These recommendations are given effect by clauses 45(a) and (b) and 50(1) of the draft Level Crossings Bill.

### **Statutory private rights of way crossings under the Railways Clauses Consolidation (Scotland) Act 1845 and other legislation**

- 5.13 The Railways Clauses Consolidation (Scotland) Act 1845 was enacted to provide generic provisions which were deemed to be incorporated into special Acts which established railways, unless specifically excluded. Section 60 provides that the railway company:

shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway: ... Such and so many convenient gates, bridges, arches, culverts, and passages, over, under, or by the sides of or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made.

- 5.14 In some cases however, special Acts made specific provision for statutory private rights of way crossings. We have concluded that our recommendations should apply to both rights of way created as a result of the incorporation of section 60 of the 1845 Act into special Acts as well as to those created by provisions in special Acts which have a similar effect to section 60.

<sup>10</sup> That is, a deed with a defect not apparent on its face, such as one signed on behalf of a body by someone who does not actually have authority to sign.

<sup>11</sup> In practice it is rarely relied on.

### ***Excessive use of a statutory private right of way over a level crossing***

5.15 Part 11 of the consultation paper asked for comments on a list of possible factors that the courts in England and Wales would take into account in deciding whether a change or increase in use of a statutory right of way crossing amounts to an increase in the burden on the railway. In Part 12 of the consultation paper we acknowledged that the conceptual approach underlying the notion of excessive use is less suitable for Scotland, given that it is formulated in terms of remedies rather than rights and obligations.<sup>13</sup> However, we set out a list of proposed factors and asked consultees the following questions:

- (1) would it be desirable to clarify the extent of use permitted under the Railways Clauses Consolidation (Scotland) Act 1845?
- (2) If this is the case, would such a proposed list of factors be useful?
- (3) Alternatively, would alignment with the law of servitudes be helpful in determining the permissible extent of use of a statutory right of way crossing?

5.16 Those consultees who responded to the questions, including Network Rail and the Department for Transport, took the view that it would be useful to clarify the extent of use permitted of statutory right of way crossings, and agreed with the list of factors proposed. However, in common with consultees in England and Wales, they did not give any substantive reasons for reaching that view. In particular, they made no mention of any current problems with enforcement arising from confusion as to the nature of excessive use. Against that background, we have decided to follow the same approach as England and Wales in relation to excessive use<sup>14</sup> and not recommend any provision.

### ***Extinguishment of statutory private rights of way***

5.17 In this section we consider extinguishment of statutory private rights of way over level crossings by means of a discharge agreement, the *Gribble* and *Robertson* issue (land on either side of the crossing coming into separate ownership), negative prescription, and discharge of statutory rights of way by the Lands Tribunal for Scotland.

#### **DISCHARGE AGREEMENTS**

5.18 The law in relation to discharge of servitudes is relatively well understood. In particular this can be done by agreement with the benefited proprietor.<sup>15</sup> For statutory private right of way crossings the law, in contrast, is uncertain. In practice the law of servitudes has been applied and the benefited and burdened proprietors sign a “discharge agreement”. The burdened proprietor is the owner of the railway. This in substance is much the same as a deed of discharge of a servitude. There is, however, doubt as to whether the agreement will bind the

<sup>12</sup> See the definition of “railway” in cl 50 of the draft Level Crossings Bill.

<sup>13</sup> Joint Consultation Paper, para 12.22.

<sup>14</sup> See above, Part 4, under the heading “Easements and excessive use”.

<sup>15</sup> D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 17.04.

granter's singular successors.<sup>16</sup> This arises because section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 provides that the track owner “shall make and *at all times thereafter* maintain” (our emphasis) the crossing.

5.19 While the general view is that singular successors are bound by a discharge agreement, we asked consultees whether the position should be made clear. The majority of consultees who responded to this question agreed that it would be useful to make the position clear. In particular Network Rail, which currently enters into discharge agreements with landowners who have the benefit of statutory private rights of way crossings, commented that for reasons of clarity, discharge agreements should be statutorily recognised and be provided to be binding on the owner's successors.<sup>17</sup> They also suggested that deeds of discharge should be registered in the Land Register.<sup>18</sup> We adhere to the view that discharge agreements should be given statutory authority.<sup>19</sup> The discharge agreement will be entered into with the owner of land which benefits from the statutory private right of way. But section 60 also provides that “occupiers” of such land have the statutory right.<sup>20</sup> Thus where there is a lessee or a liferenter that party needs to consent to the discharge to be bound by it. By analogy with the law of servitudes any heritable creditor also has to consent.<sup>21</sup> Thus the draft Bill provides that any person who has a right in land which benefits from a private level crossing requires to consent to a discharge agreement entered into by the owner of the land, otherwise that person will not be affected by it.

5.20 We are not persuaded that there should be a *requirement* for discharge agreements to be registered in the Land Register. This is because statutory private rights of way over level crossings are not normally registered there. We think that it is unnecessary to require registration of the discharge when the right of way itself has probably not been registered. Nevertheless, we believe that it should continue to be *permissible* to register discharge agreements (as it is at present) in order to give notice to third parties.<sup>22</sup> Registration should be possible against the title of the land benefiting from the right of way, the land burdened by it or both. We also think that the Scottish Ministers should have the power to specify the required form of a discharge agreement in order for it to be capable of registration in the Register of Sasines or Land Register.

5.21 An issue raised with us by Scottish Natural Heritage, representatives of Ramblers Scotland and the Scottish Rights of Way and Access Society (Scotways) was that a public right of way may have been established by 20 years of use over what

<sup>16</sup> In essence, subsequent owners of the property. It does not include “universal successors” but can include holders of “subordinate real rights”.

<sup>17</sup> The provision in the draft Bill discharges the right of way for all time and would be binding on singular successors. It is based on the Title Conditions (Scotland) Act 2003, s 78 which makes similar provision in relation to servitudes.

<sup>18</sup> Or in the Register of Sasines depending where the relevant land is registered.

<sup>19</sup> In relation to England and Wales an equivalent recommendation is made in relation to placing deeds of release on a statutory footing. See above in Part 4 under the heading “Express release by agreement”.

<sup>20</sup> It is unclear exactly how widely “occupiers” is to be interpreted.

<sup>21</sup> D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 17.05.

<sup>22</sup> Cf Land Registration etc. (Scotland) Act 2012, s 49(1) (not currently in force).

was originally a private level crossing.<sup>23</sup> If the crossing is removed following a discharge agreement then the public right cannot be safely exercised. We therefore considered whether some form of public notice should be given before a discharge agreement can take effect in order to allow time for a public right to be asserted. Ultimately, we decided against this. The removal of the crossing would not prevent a member of the public seeking declarator that a public right of way had been established and an order for the crossing to be reopened. Further, elsewhere in this Part<sup>24</sup> we recommend that it should be possible for application to be made to the Scottish Ministers for the creation of a new crossing in order to facilitate Land Reform (Scotland) Act 2003 access rights. This procedure could be used in that situation.

### **Recommendation**

5.22 **We recommend that there should be statutory provision to the effect that a statutory private right of way over a level crossing can be extinguished by means of a discharge agreement.**

5.23 This recommendation is given effect by clause 47 of the draft Level Crossings Bill.

### THE GRIBBLE AND ROBERTSON ISSUE

5.24 *Robertson v Network Rail Infrastructure Limited*<sup>25</sup> concerned facts similar to those in the English case of *Midland Railway Company v Gribble*.<sup>26</sup> As explained above,<sup>27</sup> in *Gribble* the owner of a farm had a statutory right to cross the railway in order to access both halves of his piece of land, which was bisected by the railway. The farmer sold the land on one side of the railway to another person, but did not reserve the right to cross the railway to himself nor grant it to the purchaser of the land. The Court of Appeal took the view that, by allowing the right to cross to become impossible to exercise, the farmer had abandoned the right. In *Robertson*, the opposite view was reached. The sheriff dismissed the argument that statutory rights over a level crossing came to an end if division of ownership of a piece of land meant that the rights could no longer be exercised.

5.25 In the consultation paper we asked whether the *Robertson* rule (assuming that it correctly stated the law) should be replaced by the *Gribble* rule. Consultees were divided. A number, including the Heritage Railway Association, the Department for Transport and Network Rail, argued that in Scotland the rule in *Robertson* should be replaced by that in *Gribble*, and that there should be statutory provision to that effect. Others, however, took the view that *Robertson* should continue to be relied upon, given that it seemed to represent a fair approach from the point of view of landowners.

<sup>23</sup> Although there is some doubt as to whether a public right could be created by prescription. See below, under the heading "Exclusion of acquisition of public rights of way by prescription".

<sup>24</sup> See below under the heading "Access rights under the Land Reform (Scotland) Act 2003".

<sup>25</sup> Inverness Sheriff Court, 28 May 2007, unreported.

<sup>26</sup> [1895] 2 Ch 827.

<sup>27</sup> See above in Part 4 under the heading "Implied release: abandonment".

- 5.26 Our view is that a compelling case for change has been not been made out. We think that the question of the effect of division of land on the right to use a level crossing is one which is best left for determination by the courts, considering the detailed facts of each case, rather than by imposing a general statutory solution. Accordingly, we do not recommend any provision in relation to the *Gribble* and *Robertson* issue.

#### NEGATIVE PRESCRIPTION OF STATUTORY PRIVATE RIGHTS OF WAY

- 5.27 The effect of section 8 of the Prescription and Limitation (Scotland) Act 1973 is that where for a period of 20 years a servitude right of way is not exercised or enforced by the person who is entitled to exercise it, the servitude is extinguished by virtue of the non-usage. This is known as negative prescription.<sup>28</sup> This concept does not exist in English law where the only passive route to relinquishment of a right is abandonment.<sup>29</sup>
- 5.28 In the consultation paper we noted that the fact that servitudes may be extinguished by negative prescription gives rise to the question of whether a statutory private right of way over a level crossing may also be so extinguished.<sup>30</sup> On the one hand, section 60 of the Railways Clauses Consolidation (Scotland) Act 1845, mentioned above, imposes an obligation on the railway operator to “make and *at all times thereafter* maintain” (our emphasis) certain specified accommodation works over the railway provided for the benefit of owners and occupiers of land adjoining the railway. The fact that the obligation subsists *at all times thereafter* might tend to suggest that a statutory right of way over a level crossing is imprescriptible. On the other hand, however, there is nothing in the 1973 Act expressly providing that there is any exception to the operation of negative prescription in relation to level crossings over which there is a statutory right of way. It was suggested in consultation that it might already be possible for statutory crossing rights to be extinguished by prescription, relying on section 8(2) of the 1973 Act, which refers to “any right relating to property.” However, this is not beyond doubt.
- 5.29 We asked consultees whether there should be express provision relating to the extinction of statutory private rights of way over level crossings and, if so, what the law should provide. The majority of consultees thought that there should be express provision, and to the effect that extinction of statutory private rights of way by negative prescription does operate. This was seen as important for the purposes of putting the position beyond doubt. We agree that clarification in this area would be helpful. It seems to us that if servitudes of way can negatively prescribe, there is no compelling policy reason why the same rule should not apply to statutory rights of way. We recommend that there should be express provision to the effect that non-use for a continuous period of 20 years of a level crossing over which a statutory private right of way exists should extinguish the

<sup>28</sup> See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 17.33 to 17.37.

<sup>29</sup> See above in Part 4 under the heading “Implied release: abandonment”.

<sup>30</sup> Joint Consultation Paper, para 12.42.



right. This is in line with the approach of other prescription legislation.<sup>31</sup> We recommend that time which has run prior to the commencement of the provision should count, provided that the period of non-use is continuous and ongoing at that date. Two examples make this clearer.

Example 1: assume that the provision comes into force in 2015. Level crossing A has not been used since 2000. In 2020 the statutory right of way would prescribe provided that there had been a continuous period of non-use.

Example 2: assume that the provision comes into force in 2015. Level crossing B was not used for 30 years between 1980 and 2010, but in 2010 it came back into use. The right would not be lost by the 30 years of non-use because that period was not ongoing at the date of commencement.

- 5.30 Allowing time running before commencement to qualify means that this provision is to some extent retrospective. Other prescription legislation addresses the issue of retrospectivity by delaying commencement for a few years after Royal Assent to allow the new rule to be publicised and for rights to be asserted.<sup>32</sup> We are of the view, however, that if the draft Bill made provision for a fixed period linked to Royal Assent, that would be too inflexible in the context of the general implementation of the Bill. But we would expect that the Scottish Ministers would allow an appropriate period to publicise the new rule before the provision concerned is commenced.

### **Recommendations**

- 5.31 **We recommend that non-use for a continuous period of 20 years of a level crossing over which a statutory private right of way exists should extinguish that right of way.**
- 5.32 **We recommend that the continuous period may include time prior to the commencement date of the provision establishing this rule provided that the non-use is ongoing at that date.**
- 5.33 These recommendations are given effect by clause 46 of the draft Level Crossings Bill.

### **DISCHARGE OF STATUTORY PRIVATE RIGHTS OF WAY BY THE LANDS TRIBUNAL FOR SCOTLAND**

- 5.34 We noted in the consultation paper that statutory private rights of way over level crossings are functionally similar to servitude rights of way.<sup>33</sup> On that basis we suggested that the jurisdiction of the Lands Tribunal for Scotland might be extended to enable the Tribunal to discharge statutory rights of way created

<sup>31</sup> See eg Prescription and Limitation (Scotland) Act 1973, s 14(1)(a). See also the draft Prescription and Title to Moveable Property (Scotland) Bill s 4(1), annexed to Scottish Law Commission Report on Prescription and Title to Moveable Property (Scot Law Com No 228, 2012).

<sup>32</sup> For discussion, see Scottish Law Commission, Report on Prescription and Title to Moveable Property (Scot Law Com No 228, 2012) paras 3.48 to 3.49.

<sup>33</sup> Joint Consultation Paper, para 12.45.

under the Railways Clauses Consolidation (Scotland) Act 1845.

- 5.35 Consultees were divided on the question of such extension of jurisdiction. Some took the view that it would be useful. Others, including the Department for Transport and the Heritage Railway Association, took the view that if a new procedure for closure of level crossings was introduced as proposed, there would be no need for an additional procedure via the Tribunal. Moreover, Network Rail expressed doubt as to whether it would be competent for the Tribunal to take safety considerations into account in arriving at decisions. Section 100 of the Title Conditions (Scotland) Act 2003 sets out a list of factors to which the Tribunal must have regard in determining applications for discharge of title conditions. The only head under which safety could fall would be “any other factor which the Lands Tribunal consider to be material.”<sup>34</sup>
- 5.36 On balance we have come to the view that there is benefit in extending the jurisdiction of the Lands Tribunal. This would provide a further option in relation to the closure of private level crossings. We discussed the proposals with Lord McGhie, the President of the Tribunal, John Wright QC, a member of the Tribunal, and the Clerk to the Tribunal. They agreed that statutory rights of way under the 1845 Act are functionally similar to servitude rights of way which the Tribunal can currently vary or discharge and that there would be value in extending its jurisdiction. We think that the new jurisdiction should also apply to provisions in special Acts which have a similar effect to section 60 of the Railways Clauses Consolidation (Scotland) Act 1845.

### **Recommendation**

- 5.37 **We recommend that section 122 of the Title Conditions (Scotland) Act 2003 should be amended to extend the jurisdiction of the Lands Tribunal for Scotland to include variation or discharge of statutory rights of way over level crossings created under section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 and any provision of a special Act which has a similar effect to section 60.**
- 5.38 This recommendation is given effect by clause 48 of the draft Level Crossings Bill.
- 5.39 We have not made a similar recommendation to extend the jurisdiction of the Lands Chamber of the Upper Tribunal in England and Wales, because its position is different. The Lands Chamber cannot vary existing easements (the equivalent of servitudes).

### **PUBLIC RIGHTS OF WAY**

- 5.40 A public right of way is a right enforceable by the general public, to pass over a stretch of land connecting two public places.<sup>35</sup> In this section we consider voluntary grant of public rights of way and the exclusion of acquisition of public rights of way by prescription.

<sup>34</sup> Title Conditions (Scotland) Act 2003, s 100(j).

<sup>35</sup> See generally D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) ch 18.

### **Voluntary grant of public rights of way**

- 5.41 In the consultation paper we acknowledged that the question of whether it is competent for a railway owner voluntarily to grant a public right of way over a level crossing is probably of little more than theoretical significance. As discussed further below, we do not think that the grant of public rights of way by a railway owner is outside their power. Therefore the conclusion we tentatively reached in the consultation paper was that the voluntary grant of a public right of way is competent.<sup>36</sup> We asked consultees whether legislation was needed to clarify the power of a railway owner to make a voluntary grant of a public right of way.
- 5.42 The majority of consultees who responded to this question expressed the view that the power to make a voluntary grant of a public right of way should be provided for in statute, in order to put the position beyond doubt. These consultees included the Department for Transport, the Heritage Railway Association and Scotways. This seems to us a sensible course in the interests of clarity.

### **Recommendation**

- 5.43 **We recommend that there should be statutory provision to the effect that it is competent for the owner of a railway to grant a public right of way across the railway track.**
- 5.44 This recommendation is given effect by clause 44(1)(b) and (2) of the draft Level Crossings Bill.

### **Exclusion of acquisition of public rights of way by prescription**

- 5.45 The effect of section 3(3) of the Prescription and Limitation (Scotland) Act 1973 is that where access over land is taken by the public openly, peaceably and without judicial interruption, for a continuous period of 20 years or more, a public right of way arises automatically by positive prescription on the expiry of the 20-year period. In England and Wales a public right of way may come into being through prescriptive use by means of a process known as implied dedication.<sup>37</sup>
- 5.46 In the consultation paper we identified two conditions which would need to be satisfied in order for a public right of way to arise over a private level crossing by prescriptive use.<sup>38</sup> The first derives from the operation of the general law of prescription, while the second derives from the set of specialities relating to railways.
- 5.47 As to the general law of prescription, the requirement that the usage be “open, peaceable and without judicial interruption” would have to be met.<sup>39</sup> Moreover, the public right of way would have to run from one “public place” to another.<sup>40</sup> As regards railway specialities, the consultation paper noted that there are two main lines of argument against the operation of prescription in this context – the

<sup>36</sup> Joint Consultation Paper, para 12.52.

<sup>37</sup> See above, in Part 4 under the heading “Acquisition by prescription”.

<sup>38</sup> Joint Consultation Paper, paras 12.56 to 12.80.

<sup>39</sup> Prescription and Limitation (Scotland) Act 1973, s 3(3).

<sup>40</sup> See eg *PIK Facilities Ltd v Watson's Ayr Park Ltd* 2005 SLT 1041.

argument that it is outside the powers of the railway owner to grant a right of way, and the criminal trespass argument.<sup>41</sup> The first argument operates on the basis that a railway owner lacks the power to grant a public right of way across the railway, and that there is accordingly no possibility of a right of way being created by prescription. The criminal trespass argument follows the line that given that section 55 of the British Transport Commission Act 1949 effectively criminalises the use of private level crossings by persons other than the authorised user, any usage by the public would not be “peaceable.” The criminal nature of trespass was also highlighted by Lord Justice Clerk Macdonald in *Caledonian Railway Company v Walmsley*.<sup>42</sup> He noted that under legislation then in force railway companies had a power to impose a fine upon any person who trespassed on the railway track. This was the counterpart to the duty imposed upon the companies to provide level crossings or bridges at every location where a road crossed a railway track. However, both the criminal trespass and lack of powers arguments were rejected on balance in the consultation paper, the provisional conclusion being drawn that a public right of way probably could be constituted by prescriptive usage.

- 5.48 We asked consultees whether the public use of a private level crossing *should* be capable of giving rise to a public right of way through the operation of prescription. Consultees were divided. Those who were in favour expressed the view that this simply gave recognition and effect to the reality of what was happening “on the ground” at a number of private level crossings. In other words, the crossings were being used regularly by members of the public, without incident. On the other hand, those consultees who did not support the creation of public rights of way by prescription suggested that this would amount to a significant change in the use of level crossings, bringing with it a considerable increase in safety risk. In particular, Network Rail pointed out that it would not be in a position easily to monitor the creation of new rights of way through operation of prescription. Moreover, changes to the operation of the railway might be needed, including potential changes to line speed restrictions in order to accommodate the new public level crossing.
- 5.49 We have come to the conclusion that the acquisition of public rights of way by prescription should be excluded, based on the safety and operational concerns outlined above. We consider that the exclusion should apply to whole of the railway track in Scotland, except for disused railways.<sup>43</sup> This is consistent with the policy which we set out above for servitudes.<sup>44</sup> In relation to England and Wales we are making a similar recommendation in respect of the implied dedication of highways.<sup>45</sup>

<sup>41</sup> Joint Consultation Paper, paras 12.58 to 12.80. The first of these was referred to as the “*ultra vires* argument”.

<sup>42</sup> 1907 SC 1047.

<sup>43</sup> As mentioned above, disused railways are no longer systems of transport and are therefore not caught by the definition of “railway” for the purposes of the draft Level Crossings Bill.

<sup>44</sup> See above, under the heading “Exclusion of acquisition of servitudes by prescription”.

<sup>45</sup> See above in Part 4 under the heading “Creation of public level crossings by implied dedication”.

## Recommendations

- 5.50 **We recommend that there should be statutory provision to the effect that no public right of way across any part of the railway track may be acquired by prescription. We recommend that this provision should not apply where there is no longer a “railway” within our recommended definition.**
- 5.51 These recommendations are given effect by clause 45(c) and (d) and 50(1) of the draft Level Crossings Bill.

## ACCESS RIGHTS UNDER THE LAND REFORM (SCOTLAND ACT) 2003

- 5.52 In this section we consider access rights under the 2003 Act in relation to railway tracks; provision for the creation of new level crossings; and provision to enable existing private level crossings to be made subject to access rights.

### Access rights: general

- 5.53 Section 1(1) of the Land Reform (Scotland) Act 2003 provides that everyone has the statutory access rights provided by Part 1 of that Act.<sup>46</sup> These access rights exist for the purposes of
- (1) being on land and water for certain recreational, educational and commercial purposes; and
  - (2) crossing land.<sup>47</sup>
- 5.54 Section 6 of the 2003 Act sets out descriptions of land over which access rights are not exercisable.
- 5.55 In the consultation paper we concluded that it is unclear whether the existence of access rights over private level crossings is already excluded by virtue of section 6 of the 2003 Act.<sup>48</sup> Three provisions were identified as possibly already excluding such rights:
- (1) section 6(1)(a)(i) (relating to the exclusion of access rights from land on which there is a building or other structure or works, plant or fixed machinery);
  - (2) section 6(1)(d) (relating to land to which public access is prohibited, excluded or restricted under an enactment other than the 2003 Act); and
  - (3) section 6(1)(g) (relating to land on which building, civil engineering or demolition works, or works by a statutory undertaker for the purposes of its undertaking, are being carried out).
- 5.56 The conclusion drawn in the consultation paper was that the most likely provision to have the effect of excluding access rights over private level crossings was

<sup>46</sup> See further G L Gretton and A J M Steven, *Property, Trusts and Succession* (2nd ed 2013) paras 18.2 to 18.12 and R R M Paisley, *Access Rights and Rights of Way: A Guide to the Law in Scotland* (2006) p 13.

<sup>47</sup> Land Reform (Scotland) Act 2003, s 1(2).

<sup>48</sup> Joint Consultation Paper, paras 12.85 to 12.101.

section 6(1)(d).<sup>49</sup> This was based on the fact that section 55 of the British Transport Commission Act 1949 effectively creates an offence of trespassing on the railway, providing a warning notice against trespass is displayed at the nearest station. Accordingly it was provisionally concluded that, in terms of the current law, access rights do not apply in respect of a private level crossing over the operational railway.

- 5.57 We concluded also that there is an exception for any core paths over the railway. These are routes including cycle tracks and footpaths which form part of the system of core paths in each local authority area, provided for in terms of section 17 of the 2003 Act for the purposes of affording the public reasonable access throughout that area.<sup>50</sup> Section 7 of the 2003 Act provides that section 6 of the Act “does not prevent or restrict the exercise of access rights over any land which is a core path.” In other words, local authorities can designate a core path over any land, including land which falls within section 6 (which would otherwise be excluded from access rights). In that event the land becomes subject to access rights.
- 5.58 In the consultation paper we asked consultees whether the 2003 Act should be amended to clarify whether access rights do or do not extend over private level crossings and, if so, which policy approach should be adopted. The majority of consultees who responded to this question expressed support for clarification. Opinion, however, was divided as to whether that clarification should be to the effect that they do extend or do not. Consultees who supported amendment to clarify that access rights *do* extend across private level crossings made the point that in some locations such crossings provide the only reasonably convenient means of access between one side of the railway track and another, for some considerable distance. Such crossings were used on a regular basis, without incident. Consultees who supported amendment to clarify that access rights *do not* so extend were motivated primarily by safety concerns in relation to potentially increased use of private level crossings. In their response, Perth and Kinross Council drew our attention to section 28 of the 2003 Act which makes provision for judicial determination of the existence and extent of access rights and rights of way. Notwithstanding that provision, we take the view that it is preferable to put matters beyond doubt.
- 5.59 We believe that clarification of the application of access rights under the 2003 Act in relation to railways is needed. On balance, it seems to us that in the interests of enhancement of safety, this should be to the effect that access rights do *not* extend across any private level crossing. However, with safety considerations in mind, it seems somewhat artificial to make provision solely in respect of private level crossings. Accordingly, we recommend an amendment to section 6 of the 2003 Act which applies to the whole of the railway track. The importance of such an amendment seems to be illustrated by an incident reported in the Scottish Highlands in late summer 2012. Two people were injured after being hit by a train

<sup>49</sup> Joint Consultation Paper, paras 12.88 to 12.91.

<sup>50</sup> Joint Consultation Paper, para 12.84. For an appraisal of core path arrangements, see Scottish Government, Overview of Evidence on Land Reform in Scotland (2012) ch 2, available at <http://www.scotland.gov.uk/Resource/0039/00397682.pdf> (last visited 1 September 2013).

whilst crossing a railway track at an unregulated location.<sup>51</sup> This recommendation is also consistent with the Scottish Outdoor Access Code, published by Scottish Natural Heritage under the 2003 Act, which provides that access rights do not apply in “places like...railways.”<sup>52</sup> The amendment would not affect the right to use a public level crossing where there will of course be a public right of way, and separate access rights under the 2003 Act are not required. Also the amendment would not apply where there is a core path over the railway. The policy intention is not to interfere with the important role of the core path scheme under the 2003 Act and so it should remain possible to designate a core path over land including part of a railway line. The amendment would also not apply where the railway is disused, or where the railway track is crossed otherwise than on the level, for example by means of a footbridge.

### **Recommendation**

- 5.60 **We recommend that section 6 of the Land Reform (Scotland) Act 2003 should be amended to confirm that access rights established by Part 1 of the 2003 Act are not exercisable across a railway track at track level (unless the railway is disused or there is a core path over the railway).**
- 5.61 This recommendation is given effect by clauses 39 and 50(1) of the draft Level Crossings Bill.

### **Creation of new level crossings**

- 5.62 In the consultation paper we explained that in many parts of the Scottish countryside, whilst the land on either side of the railway is subject to statutory access rights established by Part 1 of the Land Reform (Scotland) Act 2003, the exercise of those rights is frustrated by the lack of a public level crossing connecting the land on either side of the railway. The distance between crossings available for use by the public (whether crossings on the level, or bridges or underpasses) is often considerable. This may encourage people who are exercising access rights to cross the track where it is convenient for them to do so, even though there is no crossing. We suggested that it was not satisfactory that people should cross the railway track at places which are not regulated, and equally unsatisfactory that there appear to be too few crossings to allow for access rights to be fully exercised.<sup>53</sup>
- 5.63 We asked consultees whether it should be competent for the appropriate public authority (either the Scottish Ministers or the relevant local authority, or both parties acting in tandem) to require the railway operator to install new non-vehicular level crossings in Scotland for public use in order to facilitate the exercise of access rights. We also asked who should be responsible for the cost of any new crossings.
- 5.64 Consultees expressed differing views on the basic question of whether there

<sup>51</sup> See <http://www.bbc.co.uk/news/uk-scotland-tayside-central-19263618> (last visited 1 September 2013).

<sup>52</sup> Scottish Outdoor Access Code, p 6, <http://www.snh.gov.uk/docs/A309336.pdf> (last visited 1 September 2013). See also p 13, which mentions “railway and airfield infrastructure and airports”.

<sup>53</sup> Joint Consultation Paper, para 12.104.

should be a power to require the creation of new level crossings to facilitate the exercise of access rights. The Heritage Railway Association drew attention to possible management and cost issues with this proposal. Network Rail opposed the proposal and commented about the problems associated with pedestrian misuse of level crossings. The Office of Rail Regulation was not in favour of such a power as their stated policy is that, apart from in exceptional circumstances, there should be no new level crossings on the railway.

- 5.65 On the other hand, many of the local access forums who responded were in favour of a provision to this effect. The argument was made that in remote areas of Scotland it would be better to provide a crossing point at a location which affords good visibility rather than leaving the current situation where members of the public cross the track at locations which may be potentially dangerous. They cited examples of locations in the Highlands where there were distances of several miles between level crossings available for use by the public.
- 5.66 On balance we take the view that there should be a power to make orders requiring the relevant railway operator to install new non-vehicular level crossings, available for use by the public, for the purposes of facilitating the exercise of access rights. We have arrived at this conclusion on the basis of a careful weighing up of the likely advantages and disadvantages of such a power. We take the view that safety is more likely to be improved if members of the public are able to use a crossing rather than continuing to cross the track at unprotected locations (and contrary to the statutory prohibition on trespass on the railway).<sup>54</sup> It would be open to the Scottish Ministers to widen the scope of the power we recommend so as to include the possibility of ordering the installation of a new non-vehicular bridge. We do not make a recommendation to that effect as it is outwith the scope of our project, which is limited to level crossings. Clearly, extending the power to enable bridges to be installed would also have more significant resource implications and require compulsory purchase powers.
- 5.67 We have also taken account of the fact that the majority of consultees who commented on the question of who should be the “appropriate public authority” took the view that it should be the Scottish Ministers. We agree that the Scottish Ministers are a more suitable choice than the relevant local authority, because they are likely to be in a stronger position than local authorities as regards applying the factors and forming an overall picture as to the appropriateness or otherwise of installing a new level crossing.
- 5.68 New crossings would be subject to access rights provided for in section 1(2)(b) of the Land Reform (Scotland) Act 2003, once the works needed for their installation had been completed. It would be consistent with the access agenda underpinning the Land Reform (Scotland) Act 2003 that where access rights are exercisable across the land on either side of a railway, they should also be exercisable across the railway track at a designated point. Moreover, the presence of a physical level crossing, available for use by the public, might act as a disincentive to the crossing of a railway track at unregulated locations, with the inherent

<sup>54</sup> In March 2013 a scheme, involving the Scottish Youth Theatre, was launched in Scotland aimed at discouraging children and young people from trespassing on the railways. The awareness-raising campaign was the largest ever mounted by the rail industry in Scotland at that time; see <http://www.bbc.co.uk/news/uk-scotland-21711311> (last visited 1 September 2013).



dangers flowing from that. It is worth emphasising that given section 9(f) of the 2003 Act, the access rights would be non-vehicular in nature. No new vehicular level crossings would be created as a result of this power. This will be subject to an exception only in relation to motorised vehicles adapted for the use of persons with disabilities, in so far as they are being used by such persons.

- 5.69 We recognise the views held by Network Rail and the Office of Rail Regulation about new level crossings. For that reason the power to make an order requiring the installation of a new level crossing would be exercisable only where the Scottish Ministers take the view that it is *necessary* for the enjoyment of access rights under the 2003 Act. We therefore intend the bar to be set high as regards decisions about new level crossings. In reaching a view on the question of necessity, Ministers would require to take account of a number of factors as set out in the draft Bill. The starting point would be the current feasibility of exercising access rights under the Land Reform (Scotland) Act 2003 in the area concerned. Other factors would include considerations of safety and costs. The list of factors would include “any other consideration which the Scottish Ministers consider relevant.” This could extend to consideration of whether the application should be refused because a footbridge would be more appropriate than a new level crossing.
- 5.70 The power would be to make an administrative order rather than an order by statutory instrument. The draft Bill makes provision as to matters concerning the handling of applications for orders for the installation of new level crossings, including requirements regarding the giving of notice of applications to ORR and others, the publicising of applications, consultation requirements, consideration of consultation responses and, in exceptional circumstances, the holding of hearings. It also makes provision as to the contents of an order, including specification of the works to be carried out in connection with the installation and the time limits within which the works should be undertaken. It also makes clear that new crossings would become subject to the access rights provided for in section 1(2)(b) of the 2003 Act, once the works required had been completed. In addition, the draft Bill contains a power for Scottish Ministers to make rules prescribing the form of applications for orders requiring new level crossings.
- 5.71 We take the view that orders should be mandatory in nature. Scottish Ministers should have the power to institute and defend legal proceedings and/or to take any other steps they think necessary for the purposes of securing compliance with the requirements of the order.<sup>55</sup> We also recommend that a list of such orders should be kept by the Scottish Ministers, on an internet website, so that members of the public can find out where any new level crossings have been created to facilitate the exercise of access rights under the 2003 Act.

### **Recommendation**

- 5.72 **We recommend that the Scottish Ministers should have the power on application being made to them to make orders requiring the creation of new level crossings, providing that the Scottish Ministers are satisfied that any such new crossing is necessary for the enjoyment of access rights**

<sup>55</sup> In line with the case of *Comhairle Nan Eilean Siar v Scottish Ministers* [2013] CSIH 45, enforcement in the event of a failure to carry out the works required by an order would be by means of specific implement.

**under the Land Reform (Scotland) Act 2003 in the local area.**

- 5.73 This recommendation is given effect by clauses 35 to 37 of the draft Level Crossings Bill.

**Power to order that private level crossings are subject to access rights**

- 5.74 We suggested in the consultation paper that it may be beneficial to make provision for private level crossings in Scotland to be made subject to access rights, again to prevent the frustration of the exercise of access rights by virtue of the absence of a crossing available for use by the public.<sup>56</sup> The scenario envisaged was again one where access rights were exercisable over the land on either side of a railway track. This would therefore involve the extension of access rights to an existing private level crossing, rather than the physical creation of a new one. Crossings would become subject to the access rights provided for in section 1(2)(b) of the 2003 Act, once any works required for that purpose had been completed.<sup>57</sup>
- 5.75 We asked consultees whether they considered that it should be competent for the appropriate public authority to order that a private level crossing become subject to access rights.<sup>58</sup> A number of consultees who commented on this question, including Scotways and Perth and Kinross Council, expressed support. It was argued that this could help to alleviate difficulties arising from lack of authorised crossing points in rural Scotland, but without necessitating the building of new level crossings. We agree.
- 5.76 As with the power to order the installation of new level crossings to facilitate access rights, the power to order that an existing private level crossing become subject to access rights should be exercisable by the Scottish Ministers on application being made to them, and only where they consider that this would be *necessary* for the enjoyment of statutory access rights. The question of necessity is to be determined by reference to a list of factors similar to those applying in relation to applications for orders requiring the construction of new level crossings. The starting point would again be the current feasibility of exercising access rights in the area concerned. Again the order would be an administrative one. As with the provisions for the installation of new level crossings, there would be provision for specification of works to be carried out, and possible extension of time limits for the carrying out of works. The Bill also makes provision for the giving of notice of applications, publicising applications, consultation requirements and consideration of responses. Scottish Ministers would be required to keep a list on an internet website of level crossings over which access rights may be exercised following the making of an order. This would enable members of the public to find out whether crossings are available for public access.
- 5.77 In the course of preparing the draft Bill we had discussions with Ramblers

<sup>56</sup> Joint Consultation Paper, para 12.109.

<sup>57</sup> We noted in the Joint Consultation Paper, para 12.84 that while it would be possible for an existing private level crossing to become subject to access rights by being included in a core path plan under the 2003 Act, s 17, in practice this has not been done.

<sup>58</sup> Joint Consultation Paper, para 12.110.

Scotland, Scotways and Scottish Natural Heritage about the proposed provision. They suggested an alternative approach. This was that the draft Bill should provide that all private level crossings in Scotland be deemed to be subject to access rights under the 2003 Act. But first there would be a period (perhaps two or three years) during which the railway operator could apply to the Scottish Ministers to exempt particular crossings from the provision, on grounds of safety. Commencement of the provision would be delayed until after the expiry of this period. Such an approach would eliminate the need for a system of application to make private level crossings subject to access rights. But it would require the railway operator to undertake a comprehensive risk assessment of all private level crossings to determine whether there are safety considerations the effect of which would be that certain crossings should *not* be made available for public access. Approximately 70% of level crossings in Scotland are private level crossings. Such a risk assessment would therefore have considerable resource implications and create an added administrative burden for the railway operator.

- 5.78 In our view, the alternative approach would only be viable with considerable public funding to meet the costs of undertaking a comprehensive assessment of existing private crossings. We believe that the appropriateness of this is properly a matter for the Scottish Ministers to decide.

#### **Recommendation**

- 5.79 **We recommend that the Scottish Ministers should have the power on application being made to them to make orders to the effect that private level crossings are subject to the access rights mentioned in section 1(2)(b) of the Land Reform (Scotland) Act 2003, providing that the Scottish Ministers are satisfied that such access rights are necessary for the enjoyment of access rights generally in the local area.**
- 5.80 This recommendation is given effect by clauses 33 and 35 to 37 of the draft Level Crossings Bill.

#### **New level crossings and existing private level crossings: miscellaneous matters**

##### ***Power to make regulations relating to works***

- 5.81 Network Rail raised concerns with us about works which would be required in connection with the construction of new level crossings and where necessary, the upgrading of existing private level crossings so that they can be made available for access rights under the 2003 Act. Their concern related to the effect of works on the operation of the railway and Network Rail's ability to meet their obligations under other railway legislation. We have therefore included a provision in the draft Bill enabling the Scottish Ministers to make regulations as regards any matter incidental to the undertaking of any works.<sup>59</sup>

##### ***Cost of works***

- 5.82 Some consultees suggested that the applicant for an order requiring the creation of a new level crossing, or for an order that an existing private level crossing

<sup>59</sup> Draft Level Crossings Bill, cl 35(11).

should be made subject to access rights under the 2003 Act, should bear the costs of works involved in so far as works are necessary to give effect to any order. We do not recommend a provision to that effect. Rather we think that the Scottish Ministers should have the power to set out in an order who should be responsible for meeting the costs of implementing the order. It may be that public funds would be available to meet some or all of the costs involved in certain circumstances, either from the Scottish Government or from the relevant local authority.

### ***Questioning decisions***

- 5.83 We think that it should be possible for decisions made by the Scottish Ministers to be reviewed in a similar way to closure decisions.<sup>60</sup>

### **Recommendation**

- 5.84 **We recommend that there should be statutory provision enabling judicial review of decisions relating to applications for private level crossings to be made subject to access rights under Part 1 of the Land Reform (Scotland) Act 2003 and applications for orders requiring the creation of new level crossings.**
- 5.85 This recommendation is given effect by clause 38 of the draft Level Crossings Bill.

<sup>60</sup> See above in Part 3 under the heading “Challenging decisions on closure”.

## PART 6 OTHER ISSUES



A traditional level crossing on a heritage railway. Members of the Law Commission team and John Jenkins, WSR Signalling Consultant, inspect the newly re-laid level crossing at Blue Anchor, one of the last crossings of this type in the South West. Credit: Ashleigh Keall.

### INTRODUCTION

- 6.1 In this Part we consider three topics covered in the consultation paper, namely criminal offences, signs and the Highway Code, and planning law. While we make recommendations on two of these issues, the recommendations do not involve provisions in the draft Bill.
- 6.2 In addition, a number of issues were raised during the consultation process that are beyond the scope of this project. Consultees raised these concerns in their written responses, in consultation meetings and at consultation events. These issues relate to: barrow crossings, open crossings, and level crossing design.
- 6.3 We take the view that these concerns are of sufficient importance to warrant some discussion and further consideration here. However, given the limited breadth of our project we do not make any recommendations in these areas.

### CRIMINAL OFFENCES

#### Introduction

- 6.4 In the consultation paper, we proposed the creation of a number of new offences,

specifically relating to level crossings.<sup>1</sup> Following consultation and analysis of consultation responses, we have decided not to recommend any new offences. However, we recommend that the Government should undertake a wide-ranging review of all railway offences, with a view to modernising the offences, clarifying their terms and ensuring their compliance with the European Convention on Human Rights. We recommend in particular that consideration be given as part of the review, to repealing and re-enacting section 55 of the British Transport Commission Act 1949 in a public general Act, using clear and modern language.

- 6.5 The main cause of danger and of actual collisions is the conduct of those crossing the railway. Misuse of level crossings can occur through error, where users are mistaken as to the precautions they should take or how they should comply with warning signs or barriers, or through deliberate flouting of safety measures. The criminal law needs to deter deliberate or negligent misconduct at level crossings.

### **The current criminal law**

- 6.6 In our consultation paper we identified a number of concerns with the current criminal law in relation to level crossings.<sup>2</sup>

- (1) There is a plethora of offences applicable to misuse of level crossings, including road traffic and railway offences, but most of the offences were not specifically intended to meet the unique circumstances found at level crossings.
- (2) Some of the existing offences are out-dated, unclear and difficult to find.
- (3) Detection and the gathering of adequate evidence of level crossing offences are often difficult. There is little police presence at level crossings. Restrictions on funding have limited the use of CCTV at level crossings and ordinary CCTV cameras in any event cannot catch the number plates of cars using those crossings.
- (4) Level crossing misuse is frequently under-charged by police and prosecutors.
- (5) Sentences imposed fail to give adequate weight to the fact that there is greater risk to the lives of rail and non-rail users where offences occur at level crossings.

- 6.7 In the existing criminal law, there are three types of offence which apply to level crossings: trespass offences; offences aimed at protecting the railway and those using it; and road traffic offences.

### ***Trespass offences***

- 6.8 There are three sets of statutory provisions that deal with trespass on the

<sup>1</sup> Level Crossings (2010) Law Commission Consultation Paper No 194; Scottish Law Commission Discussion Paper No 143, para 13.73. Subsequent references to the consultation paper in this Part will be in the format Joint Consultation Paper, para X.

<sup>2</sup> Joint Consultation Paper, paras 13.12 to 13.33.

railways. Trespass consists of unauthorised and unjustifiable presence on land in the possession of another.<sup>3</sup> Two of them, the offences under section 16 of the Railway Regulation Act 1840 and section 23 of the Regulation of Railways Act 1868, depend on specific warnings or requests having been given or made to a person before the offence can be made out.

- 6.9 The provisions of section 55 of the British Transport Commission Act 1949 make it an offence to trespass on a railway where a notice at the nearest station warns against trespass. The offence works by turning the civil wrong of trespass into a criminal offence.
- 6.10 We understand from the British Transport Police that this is the offence which is most frequently charged in cases of suspected trespass on the railways. Network Rail informed us during consultation that it relies on this offence when met with claims that rights of way have been acquired by prescription.<sup>4</sup>
- 6.11 However, the obscurity of the section 55 offence causes concern, as it may breach two articles of the European Convention on Human Rights.
- 6.12 First, under article 7, no one shall be held guilty of any criminal offence on account of an act or omission that did not constitute an offence at the time it was committed. This requires the law to be sufficiently accessible and precise for the individual to know in advance whether his or her conduct is likely to be criminal.
- 6.13 Second, under article 6(3)(a), a person charged with a criminal offence has the right to be informed promptly, and in a language that he or she understands, of the nature and cause of the accusation against him or her.
- 6.14 It might be argued that the antiquated terms of section 55 of the 1949 Act do not satisfy the requirements of articles 6(3)(a) and 7 of the Convention. The 1949 Act is a private Act, which makes it less accessible to the public than a public general Act. In addition, the Act has been heavily amended by subsequent legislation, which makes it difficult to arrive at an accurate and authoritative version of the text. Therefore, we take the view the Government should consider the re-enactment of this provision in a public general Act in modern and accessible language. We make a recommendation to this effect below.

***Offences aimed at protecting the railway and those using it***

- 6.15 In England and Wales, the Offences Against the Person Act 1861 and the Malicious Damage Act 1861 provide a variety of offences which prohibit interference in the safe and proper running of the railways. The 1861 Acts do not apply in Scotland, although certain common law crimes, for example malicious mischief, would be relevant.
- 6.16 Section 35 of the Malicious Damage Act 1861 makes it an offence to obstruct a train with intent and section 36 of the 1861 Act makes it an offence to obstruct a train. These offences are punishable by a maximum term of imprisonment of two

<sup>3</sup> For Scotland, see G L Gretton and A J M Steven, *Property, Trusts and Succession* (2nd ed 2013) para 18.30.

<sup>4</sup> For discussion of the illegality argument see Part 4 above for England and Wales and Part 5 for Scotland.

years.

- 6.17 Section 32 of the Offences Against the Person Act 1861 makes it an offence to interfere with the railway with the intention of endangering safety. Section 33 of the 1861 Act contains an offence of interfering with a train with intent to endanger the safety of the people on-board. Those offences are punishable by a maximum term of life imprisonment. Section 34 of the 1861 Act makes it an offence to endanger the safety of passengers and people being in or upon the railway (such as railway workers). The offence is punishable by a maximum term of 2 years' imprisonment. The Criminal Damage Act 1971 also contains offences that are likely to be used in similar circumstances.
- 6.18 In addition to the 1861 Acts, section 46 of the Railways Act 2005 gives the railway operator the power to make bye-laws relating to the railways in England and Wales and Scotland. Breach of any of the bye-laws is a criminal offence punishable by a fine of up to £1,000 (level 3). Bye-law 12(1), made under the 2005 Act, allows a railway operator to issue reasonable safety instructions by placing a notice on the railway. Failure to comply with such a notice without good reason is an offence.

### ***Road traffic offences***

- 6.19 Road traffic offences have evolved mainly to regulate who has permission to drive vehicles on public roads, the conduct of drivers, and the standard at which those vehicles must be driven. They do not, in general, regulate the conduct of pedestrians. Unlike the general criminal law, the penalties attached to road traffic offences contain two elements: a punitive element in the form of a fine or imprisonment, and a regulatory element such as an endorsement of a driving licence or a disqualification.
- 6.20 In England and Wales driving offences can only be committed on a highway or other road to which the public has access.<sup>5</sup> In Scotland such offences can only be committed on a road within the meaning of section 151 of the Roads (Scotland) Act 1984 and any other way to which the public has access. Therefore, the offence does not apply to private level crossings to which the public does not have access.
- 6.21 As we have said, almost all of the road traffic offences apply exclusively to motorists. It is, however, an offence for a pedestrian to fail to comply with a "red figure" stop sign placed on a level crossing when the sign is illuminated.<sup>6</sup> Section 36 of the Road Traffic Act 1988 makes it an offence for drivers of motor vehicles to fail to comply with an authorised traffic sign.<sup>7</sup> Section 3 of the Road Traffic Act 1988 makes it an offence to drive a motor vehicle on a road or other public place without due care and attention, or without reasonable consideration for other road

<sup>5</sup> Road Traffic Offenders Act 1988, s 98(1).

<sup>6</sup> Road Traffic Offenders Act 1988, s 91 makes it an offence to fail to comply with most Regulations made under the Road Traffic Act 1988 or the Road Traffic Regulation Act 1984. For example, Traffic Signs Regulations and General Directions 2002, reg 52 specifies a "red figure" sign which, when illuminated, requires pedestrians not to use a level crossing.

<sup>7</sup> As authorised by the Secretary of State for Transport, Secretary of State for Scotland and the Secretary of State for Wales acting jointly, under the Road Traffic Act 1988, s 36(5).



users. Section 2B of the 1988 Act makes it an offence to cause death by careless driving, and section 2 makes it an offence to drive a vehicle dangerously. Section 1 of the Act provides for the aggravated offence of causing the death of another person by dangerous driving.

### Consultation

6.22 In the consultation paper, we proposed a new set of offences that would apply to all users and on every type of level crossing. We proposed that the existing offences should remain in force, where they had application other than to level crossings.

6.23 The proposed offences were:

- (1) an offence of failing to comply with an authorised sign on any kind of level crossing, punishable by a fine;
- (2) an offence of dangerous use of any kind of level crossing, where the accused's behaviour had breached an objective standard of conduct (not to behave in such a way as to create a risk of injury or serious damage to property); and the accused was aware his or her conduct risked creating a danger of injury or serious damage to property. This offence would be punishable by a prison term similar to that for dangerous driving; or
- (3) an offence of dangerous use of any kind of level crossing, where the accused's behaviour had breached an objective standard of conduct (with no requirement that the accused was aware of any risk) This offence would be punishable by a prison term similar to that for dangerous driving; and
- (4) an offence of dangerous use of a level crossing, intentionally or recklessly causing death, punishable, as with causing death by dangerous driving, with a maximum prison term of 14 years; or
- (5) An offence of dangerous use of a level crossing, causing death (with no requirement of intention or recklessness). This offence would be punishable by a maximum prison term of 14 years.
- (6) We also asked whether, if our proposed new offences were not introduced, the penalties for *existing* offences relevant to level crossings should be increased.<sup>8</sup>

6.24 Views among consultees were quite mixed. There were a substantial number of consultees who were in favour of leaving the existing road traffic offences to apply at level crossings. However, there was also a substantial number who favoured the introduction of a new set of offences.<sup>9</sup>

6.25 The Office of Rail Regulation thought that a modern set of offences designed specifically to deal with level crossing misuse could be advantageous. On the

<sup>8</sup> Joint Consultation Paper, paras 13.47 and 13.73 to 13.75.

<sup>9</sup> Consultation Analysis, paras 13.13 to 13.21, and 13.25 to 13.26.

other hand, the Glasgow Bar Association, the Highways Agency and the Royal Society for the Prevention of Accidents all took the view that there was insufficient evidence that current problems stemmed from the nature of the offences. On the question of whether new offences should only apply in circumstances where existing offences do not currently apply, the Department for Transport thought that there might be a benefit in avoiding duplication, but that prosecutorial discretion might suffer. Some consultees suggested that there should be a general review of railway offences, rather than a review limited to level crossing offences. Anthony Edwards, a defence solicitor, pointed out that there was no evidence that the creation of new offences would act as a deterrent. Railway professional Michael Haizelden agreed. As Network Rail explained in its response, it was not clear whether people were deterred by the current penalties or even what degree of knowledge they have of such penalties.

- 6.26 On balance, we concluded that we cannot be certain that a new set of level crossing offences would reduce levels of misuse at level crossings.
- 6.27 Many of the statutes providing for the offences have a much wider application than level crossings and therefore could not simply be repealed. There is a risk that we would be adding to the statute book, making it even more difficult for police, legal practitioners and members of the public to understand what the prohibited acts are. In addition the creation of new offences would not necessarily have a deterrent effect.
- 6.28 Various initiatives drawn to our attention during the consultation period strengthened our view that it was not necessary to recommend the creation of new criminal offences specific to level crossings. These initiatives were primarily aimed at improving education, enforcement and prevention of level crossing misuse.
- 6.29 For instance, Network Rail has introduced greater use of cameras at public vehicular crossings to improve enforcement action for offences committed at level crossings. The Department for Transport, the Office of Rail Regulation and British Transport Police are also working with the Sentencing Council in England and Wales to decide how best to highlight level crossings as an aggravating feature, in guidelines to magistrates' courts in respect of existing driving offences.
- 6.30 The British Transport Police drew our attention to its wide-ranging educational and policing initiatives to deter misuse and to improve the detection, processing, and prosecution of offences. It said that these campaigns were proving to be successful in addressing misuse at level crossings and it was of the general view that new offences would not be of additional assistance. Indeed, many consultees emphasised that education is paramount in preventing level crossing misuse and is much more effective than individual prosecution.
- 6.31 Instead, we recommend that the offences relating to the railway should be reviewed and, if necessary, should be re-enacted in modern form so as to ensure that they are compliant with the European Convention on Human Rights. Such a review is not within the scope of this project but we recommend that the Secretary of State take it forward.

## Recommendations

- 6.32 **We recommend that the Secretary of State undertakes a wide-ranging review of all railway offences, including those relating to level crossings, to modernise them and clarify their terms.**
- 6.33 **We recommend that the review should include consideration of section 55 of the British Transport Commission Act 1949.**

## SIGNS AND THE HIGHWAY CODE

- 6.34 In the consultation paper, we explained that there are different sources of regulation of signs at different types of level crossings.<sup>10</sup> Signs for use on public roads are governed by the Traffic Signs Regulations and General Directions 2002.<sup>11</sup> These Regulations are made under the Road Traffic Regulation Act 1984 and the Road Traffic Act 1988. Signs at private level crossings are governed by the Private Crossings (Signs and Barriers) Regulations 1996 made under section 52(1) of the Transport and Works Act 1992.<sup>12</sup>
- 6.35 The Highway Code is made under section 38 of the Road Traffic Act 1988. Rules 291 to 299 relate to level crossings. The aim of the Code is to provide guidance for persons using roads. The Code applies to pedestrians as well as motorists, cyclists and horse riders.

## Consultation

- 6.36 In the consultation paper, we invited views on the adequacy of the *legal structure* providing for signs and warnings at level crossings and of the guidance in the Highway Code.<sup>13</sup>
- 6.37 The Rail Safety and Standards Board conducted a review of signs, which reported after the end of our consultation period.<sup>14</sup> Network Rail did not think that there was any need for a review of signs as the Board's review would be sufficient to this end.
- 6.38 Several consultees commented that drivers did not fully understand level crossing signs.<sup>15</sup> Some said that drivers did not always know that a flashing red "wig-wag" light at a level crossing forbids a driver to cross.
- 6.39 Others thought that improved signs would reduce the incidence of offending. British Transport Police said that some signs at private level crossings appeared

<sup>10</sup> Joint Consultation Paper, Part 14.

<sup>11</sup> SI 2002 No 3113.

<sup>12</sup> SI 1996 No 1786. S 52 of the 1992 Act applies to Scotland, as well as to England and Wales. As a consequence, the Regulations made under s 52 also apply to Scotland.

<sup>13</sup> Joint Consultation Paper, para 14.17.

<sup>14</sup> Rail Safety and Standards Board, *Research Programme – Operations and Management: Research into signs and signals at level crossings* (July 2011), [http://www.rssb.co.uk/sitecollectiondocuments/pdf/reports/research/T756\\_rpt\\_final.pdf](http://www.rssb.co.uk/sitecollectiondocuments/pdf/reports/research/T756_rpt_final.pdf) (last visited 1 September 2013).

<sup>15</sup> Consultation Analysis, paras 14.15 to 14.18.

ambiguous. Some said that signs were badly positioned.<sup>16</sup>

- 6.40 The Department for Transport and others thought that the regulation of signs at private level crossings should be reviewed.<sup>17</sup> The Office of Rail Regulation suggested that the requirements for private crossing signs should be incorporated into the Traffic Signs Regulations and General Directions 2002 so as to allow the signs to be legally placed on footpaths without seeking authority from the Secretary of State. This would also provide a wide choice of signs for use on private crossings.
- 6.41 Network Rail suggested that an obligation be placed on highways and roads authorities to install signs so as to improve the safety of the approach to level crossings, similar to countdown markers before exit roads on motorways.
- 6.42 Disability groups and access groups asked that greater thought be given to accessibility and wider mobility issues in considering the signs and markings at or near level crossings. For example, they suggested that tactile approaches should be applied to the road.

### **Discussion**

- 6.43 A review of signs at level crossings would be outside the scope of this project.
- 6.44 We take the view that the Traffic Signs Regulations and General Directions 2002 should continue to govern road signs generally and that there should be a separate set of regulations governing signs at level crossings. One set of regulations prescribing the signs for level crossings would be simpler and would help to ensure consistency between public and private level crossings.
- 6.45 In a report on an investigation into accidents at user-worked crossings, the Rail Accident Investigation Branch recommended that the Department for Transport in consultation with the Office of Rail Regulation should review the requirements for signs prescribed by law for use at private level crossings. The report also recommended that the requirements should be revised as necessary, taking into account the need to convey information and instructions clearly and unambiguously to all users.<sup>18</sup> We can see the merit in the Rail Accident Investigation Branch's recommendation.<sup>19</sup>
- 6.46 No reform of primary legislation is required to achieve this.
- 6.47 We make no recommendation in relation to the Highway Code, but note that level crossing safety is already included in the Code, as mentioned above.

<sup>16</sup> Consultation Analysis, para 14.15.

<sup>17</sup> Consultation Analysis, paras 14.11 to 14.14.

<sup>18</sup> Rail Accident Investigation Branch, *Investigation into safety at user-worked crossings*, Report 13/2009 (June 2009) p 51.

<sup>19</sup> Rail Accident Investigation Branch, *Fatal Accident at Halkirk Level Crossing, Caithness, 29 September 2009, Report 16/2010* (September 2010) [http://www.raib.gov.uk/publications/investigation\\_reports/reports\\_2010/report162010.cfm](http://www.raib.gov.uk/publications/investigation_reports/reports_2010/report162010.cfm) (last visited 1 September 2013).

## Recommendation

- 6.48 **We recommend that the Government considers whether to make a single set of regulations in relation to signs at public and private level crossings which are not governed by road traffic regulations.**

## PLANNING LAW

- 6.49 In Part 9 of the consultation paper we asked a number of questions concerning the adequacy of the planning law system in relation to level crossings. The discussion covered both the consultation process and the extent to which issues affecting level crossings are taken into account by planning authorities, and legal mechanisms for obtaining developer contributions. Similar questions were asked with respect to law and practice in England and Wales and in Scotland.<sup>20</sup>
- 6.50 Overall, consultees expressed the view that the current process of consultation relating to planning decisions affecting level crossings was inadequate and that the legal requirements for consultation should be modified. Many consultees provided detailed examples of developments approved by planning authorities where insufficient consideration had been given to the impact of the developments on level crossings.<sup>21</sup>
- 6.51 A good example of the problems perceived by the railway industry was provided by both the West Somerset Railway and the Office of Rail Regulation. They pointed to an automatic barrier crossing (locally monitored) in Minehead, West Somerset, which is adjacent to a new commercial development that includes a large supermarket and fast food outlet. As part of the planning process for this development, a roundabout was installed one hundred metres south of the crossing. The railway operator, West Somerset Railway, had been consulted by the planning authority on the development application and had submitted a detailed response outlining its concerns about the impact of the development on the safety of the level crossing. West Somerset Railway was worried, in particular, about the short distance between the roundabout and the crossing, and the possibility of cars backing up over the crossing. The traffic assessment prepared during the planning application process had projected a 25% increase in traffic along the road crossing the railway, but made no reference to the likely impact on the safety of the level crossing.
- 6.52 Planning permission was granted for this development, without conditions. West Somerset Railway continues to oppose these developments and wishes to upgrade the level crossing to a manually controlled, full barrier crossing.
- 6.53 The Office of Rail Regulation noted that the development has changed the nature of the traffic using the crossing, and has led to an increase in pedestrian traffic over the crossing. This has, in turn, affected its safety, as pedestrians are not prevented from crossing the railway even when the barriers are down. As the Office of Rail Regulation explained in its response:

It is unclear how far the local authority took into account the safety

<sup>20</sup> Joint Consultation Paper, Parts 9 (Planning: England and Wales) and 10 (Planning: Scotland).

<sup>21</sup> Consultation Analysis, paras 9.2 to 9.12 and 10.1 to 10.10.

implications for the level crossing in assessing the impacts of the various developments along [the public highway] and the new traffic flows that these would generate over the crossing. This leaves the railway facing the cost of changing the crossing type to full barriered or making significant changes to their operational procedures to respond to the increase in misuse.

- 6.54 In contrast to the responses about the consultation process for planning applications, a majority of consultees who addressed the issue of developer contributions believed that the legal mechanisms for allowing developer contributions toward the closure, upgrade or replacement of level crossings were generally adequate.<sup>22</sup> Most of these consultees were cautiously optimistic regarding the use of agreements under section 106 of the Town and Country Planning Act 1990 in England and Wales. Many warned of the need to ensure that there is sufficient co-operation and consultation between rail and planning authorities to give full effect to these measures.
- 6.55 Our provisional view in the consultation paper was that there are sufficient legal tools available in the planning processes in both England and Wales and Scotland to protect level crossings and the road network from any impact arising from developments.<sup>23</sup> Despite the objections from consultees as to the adequacy of the planning law system, we have not been persuaded that there is any reason to move away from that view. Though there may be problems with the planning process in practice, the legal framework is adequate. Most notably, where a development is likely to result in a material increase in the volume, or a material change in the character, of traffic using a level crossing over a railway, a transport assessment must be prepared and submitted together with the planning application.<sup>24</sup> The railway operator must also be consulted. This requirement should be sufficient to protect the interests at stake when development is likely to affect a level crossing.
- 6.56 We acknowledge that there may be other problems relating to planning law as it relates to level crossings. For example, several consultees brought to our attention the tension that can arise when in England and Wales the highway authority and the planning authority do not form part of the same local authority. When the highway authority is part of the county council and the planning authority is part of the district council, for instance, they may have quite different goals and thereby take conflicting positions on a proposed development. Some consultees also noted that communication and co-operation between highway and planning authorities in England and Wales when they are split between district and county councils could be improved.
- 6.57 Other potential problems include the lack of an appeal mechanism for statutory consultees, although they can challenge any unlawfulness or procedural unfairness of the process. Another issue is the fact that it falls to the developer to

<sup>22</sup> Consultation Analysis, para 9.26 to 9.33.

<sup>23</sup> Joint Consultation Paper, paras 9.38. In relation to Scotland, we asked consultees for their views (see para 10.28).

<sup>24</sup> Similar provision is made in Scotland for submission of a transport assessment as part of the development plan process and preparing a transport assessment is an important part of obtaining planning permission.

decide whether the development is likely to result in a material increase in the volume of use or result in a material change in the nature of use of the crossing, triggering the need to prepare a transport assessment.<sup>25</sup>

- 6.58 However, we do not recommend any changes to the legal framework of the planning system in relation to level crossings only. It would not be sensible to create a special planning regime specifically for level crossings. Most of the shortcomings in the process identified by consultees above apply across planning law in England and Wales generally and cannot be addressed in a project concerning the law relating to level crossings.
- 6.59 It may be appropriate to draw the attention of planning authorities and developers to the need to consider the impact of a proposed development on any nearby level crossings. Planning authorities are required by law to take level crossings into account. It might also be appropriate for existing guidance on planning to be amended to include reference to level crossings.

## **BARROW CROSSINGS AND OTHER CROSSINGS**

### **What is a barrow crossing?**

- 6.60 The term “barrow crossing” typically refers to a pedestrian crossing at a train station that is used by members of staff to cross from one platform to the next. Public use of barrow crossings is generally prohibited, though passengers may use the crossings if escorted by a member of staff.<sup>26</sup> These crossings enable railway personnel to carry out works or conduct their day-to-day operations at the station. There are no data on the exact number of barrow crossings in Great Britain, but the Rail Safety and Standards Board estimates that there are at least one hundred on the national rail network.<sup>27</sup>
- 6.61 Barrow crossings connect two areas of land which are owned by the railway operator and do not in themselves constitute a third party right of way over the railway. They do not, therefore, fall within the meaning of “level crossing” in the draft Bill, which defines level crossings by reference to the existence of a highway or road (namely a public right of way), or a private right of way over the railway.
- 6.62 However, there are some barrow crossings to which the public has lawful access. This could be the case if a barrow crossing coincides with or runs alongside an existing right of way. No consultees have been able to identify any such crossings, but they would be covered by the draft Bill, albeit only because of the

<sup>25</sup> Consultation Analysis, para 9.7.

<sup>26</sup> See the definition of “staff crossing” in Rail Accident Investigation Branch, *Investigation into station pedestrian crossings (including pedestrian gates at highway level crossings)* (2006), para 55, [http://www.raib.gov.uk/publications/investigation\\_reports/reports\\_2006/report232006.cfm](http://www.raib.gov.uk/publications/investigation_reports/reports_2006/report232006.cfm) (last visited 1 September 2013).

<sup>27</sup> Rail Safety and Standards Board, *Understanding the risk at station and barrow crossings* T332 (2005), p 14, [http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332\\_rpt\\_final.pdf](http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332_rpt_final.pdf) (last visited 1 September 2013); see also Rail Accident Investigation Branch, *Investigation into station pedestrian crossings (including pedestrian gates at highway level crossings)* (2006), p 19, [http://www.raib.gov.uk/publications/investigation\\_reports/reports\\_2006/report232006.cfm](http://www.raib.gov.uk/publications/investigation_reports/reports_2006/report232006.cfm) (last visited 1 September 2013).

existence of the *right of way* along the same path as the barrow crossing.

6.63 There are other places where the railway operator expressly permits the public to use a crossing without staff escort as a means of getting between platforms, or simply tolerates its use. There is no public right of way over those crossings and therefore the railway operator is under no legal obligation to provide public access to them. Given that such crossings do not involve a right of way they do not fall within the definition of “level crossing” in the draft Bill.<sup>28</sup>

6.64 These latter crossings are not barrow crossings in the true sense of the word or in the sense commonly used by the railway industry. They are referred to as “station pedestrian crossings” in a 2005 Rail Accident Investigation Branch report. The Rail Accident Investigation Branch defined a station pedestrian crossing as:

A pedestrian level crossing which forms part of a public access route to/from a platform at a railway station that is designed to be used without escort or supervision by railway staff.<sup>29</sup>

6.65 Unlike barrow crossings, station pedestrian crossings are typically equipped with some form of safety mechanism, such as lockable gates, miniature stop lights, or at the very least, warning signs. In its report, the Rail Accident Investigation Branch enumerated risks that are specific to station pedestrian crossings. It made a number of recommendations for safety improvements, including that Network Rail design a risk-based strategy for addressing safety concerns at station pedestrian crossings and undertake a review of the design standards and guidance applicable to these crossings. It also recommended that Network Rail adopt a more consistent and clear system for distinguishing between barrow crossings (or “staff crossings”) and station pedestrian crossings.<sup>30</sup>

6.66 The Rail Safety and Standards Board drew a similar distinction between barrow and station crossings in its 2005 report on safety measures at these crossings, defining them as follows:

Barrow crossings, for railway staff to traverse from platform to platform, usually with wheeled equipment such as parcels trolleys. The public, only if escorted by railway staff, can also legitimately use barrow crossings.

Station crossings, which may be used for access between platforms for staff and the public. The public need not be escorted by railway

<sup>28</sup> Draft Level Crossings Bill, cl 50.

<sup>29</sup> Rail Accident Investigation Branch, *Investigation into station pedestrian crossings (including pedestrian gates at highway level crossings)* (2006), para 59, [http://www.raib.gov.uk/publications/investigation\\_reports/reports\\_2006/report232006.cfm](http://www.raib.gov.uk/publications/investigation_reports/reports_2006/report232006.cfm) (last visited 1 September 2013).

<sup>30</sup> Rail Accident Investigation Branch, *Investigation into station pedestrian crossings (including pedestrian gates at highway level crossings)* (2006), pp 77 to 78, [http://www.raib.gov.uk/publications/investigation\\_reports/reports\\_2006/report232006.cfm](http://www.raib.gov.uk/publications/investigation_reports/reports_2006/report232006.cfm) (last visited 1 September 2013).



staff at these crossings.<sup>31</sup>

- 6.67 The report also recommended that Network Rail undertake a review of the “designation, status and usage of all station and barrow crossings”. It suggested that Network Rail should keep a central database of all such crossings to facilitate policy-making and the generation of better statistics, and to improve the programme of risk assessments.<sup>32</sup>

### **What is the problem?**

- 6.68 At a meeting held during the consultation period, John Cartledge of the transport advisory group Passenger Focus shared his concerns about the number of barrow crossings being closed on the grounds of improving safety at railway stations. He explained that their closure often has the opposite of the desired effect: it makes rail passengers less safe and stations less accessible to members of the public with disabilities, passengers with pushchairs or walking aids, and cyclists. He provided several examples of reductions in safety and accessibility arising from the closure of barrow crossings, where passengers had to take a circuitous route involving stairs, or walk along a busy road to reach the opposite platform, instead of using the much more convenient barrow crossing. This resulted in misuse by passengers to avoid an inconvenient and unsafe alternative. Both the alternative route and use of the prohibited barrow crossings are a source of great risk to railway passengers.
- 6.69 In its report on barrow and station crossings, the Rail Safety and Standards Board reported similar concerns to those expressed by stakeholders. It explained that members of the rail industry tended to view these crossings as safety risks (albeit of a lower priority than other types of level crossings). On the other hand, stakeholders with an interest in accessibility emphasised the need for “better management of the crossings, to ensure that accessibility and convenience were not compromised for supposedly better safety”.<sup>33</sup>
- 6.70 The report confirmed that Network Rail (along with rail trade union RMT and Her Majesty’s Railway Inspectorate, now part of the Office of Rail Regulation) aimed to close barrow and station crossings as part of its efforts to reduce risk on the railway. Indeed, it was reported in 2011 that Network Rail planned to make safety improvements at several hundred level crossings, including the installation of voice warnings at 129 station crossings and the closure of 250 “passive

<sup>31</sup> Rail Safety and Standards Board, *Understanding the risk at station and barrow crossings* T332 (2005), p 6, [http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332\\_rpt\\_final.pdf](http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332_rpt_final.pdf) (last visited 1 September 2013).

<sup>32</sup> Rail Safety and Standards Board, *Understanding the risk at station and barrow crossings* T332 (2005), p 67, [http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332\\_rpt\\_final.pdf](http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332_rpt_final.pdf) (last visited 1 September 2013).

<sup>33</sup> Rail Safety and Standards Board report, *Understanding the risk at station and barrow crossings* T332 (2005), p 47, [http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332\\_rpt\\_final.pdf](http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332_rpt_final.pdf) (last visited 1 September 2013).

crossings”, some of which could be barrow or station crossings.<sup>34</sup>

- 6.71 The Rail Safety and Standards Board explained, however, that it was necessary to balance the railway operators’ desire to close barrow and station crossings for safety reasons, the need to ensure that railway stations are accessible and safe for all users, and the cost implications. It recommended that research be conducted into this area, with the aim of producing “an agreed means of balancing that can be used consistently in all cases”.<sup>35</sup>
- 6.72 Both John Cartledge and the Rail Safety and Standards Board highlighted the related issue of the level of risk associated with barrow or station crossings that the railway operator is prepared to bear. John Cartledge noted that the closure of a barrow crossing in favour of an alternative route over a busy main road was simply an example of the railway operator relegating the risk to another authority – the highway authority. He suggested that the railway operator’s attempts to shift responsibility elsewhere should be replaced with a holistic approach to safety. Likewise, the Rail Safety and Standards Board noted the lack of clarity in terms of responsibility for barrow and station crossings. It recommended that Network Rail and the station facilities owners develop a protocol to set out their respective roles and responsibilities and to designate the appropriate authority to take action. Like John Cartledge, the Rail Safety and Standards Board recommended that a holistic approach to risk assessment at barrow and station crossings be adopted that would include consideration of the safety and convenience of the alternative crossing:

Where alternatives to barrow and station crossings are sought, a risk assessment of the use of the alternative(s) should be carried out. The first step should be defining who has responsibility for this. For example, where risk is transferred to road, the local authority should be approached to determine the risks.<sup>36</sup>

- 6.73 Clearly there are issues concerning the safety and convenience of barrow crossings, but most of the issues are outside the scope of this project.

### **OPEN CROSSINGS**

- 6.74 Some consultees expressed concerns about the safety of passive level crossings,<sup>37</sup> and open crossings in particular. Following a fatal accident at the open crossing in Halkirk, Caithness in September 2009, Dave Thompson MSP conducted a consultation exercise with 13,000 members of his constituency on

<sup>34</sup> The Times, *Families’ anger over failure to act on report that predicted railway tragedy* (11 May 2011), p 3.

<sup>35</sup> Rail Safety and Standards Board, *Understanding the risk at station and barrow crossings* T332 (2005), p 69, [http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332\\_rpt\\_final.pdf](http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332_rpt_final.pdf) (last visited 1 September 2013).

<sup>36</sup> Rail Safety and Standards Board, *Understanding the risk at station and barrow crossings* T332 (2005), p 70, [http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332\\_rpt\\_final.pdf](http://www.rssb.co.uk/SiteCollectionDocuments/pdf/reports/research/T332_rpt_final.pdf) (last visited 1 September 2013).

<sup>37</sup> “Passive” crossings are those at which generally there is no warning of an approaching train and the user must determine if it is safe to cross.

the issue of safety at open crossings.

- 6.75 Open crossings are level crossings without barriers or gates, equipped only with road traffic signs to warn road users of the possibility of an approaching train. Some open crossings are automatic, locally-monitored crossings, which employ audible signals to warn users of an oncoming train. The maximum permitted line speed at such crossings is higher (55 miles per hour) than for simple open crossings without audible warnings (10 miles per hour). These open crossings form one type of “passive” level crossing. Another type is the user-worked crossing, which employs barriers or gates on both sides of the crossing that users must open and then close behind them. Barrow and station crossings are often counted among passive crossings as well.
- 6.76 The consultation exercise resulted in nearly 2,500 responses. Seventy-six per cent of respondents stated that they did not feel safe at open crossings and 85.9% suggested the installation of barriers at level crossings. Over 30% reported that they or someone they knew had a personal experience of an accident or “near miss” at an open crossing in the previous ten years. Based on these results and his concerns about safety, Dave Thompson recommended upgrading open crossings to crossings with barriers or gates.
- 6.77 Following the report on the accident at Halkirk, Network Rail decided to upgrade 23 open crossings in Scotland, introducing barriers to protect users.<sup>38</sup>

#### **LEVEL CROSSING DESIGN**

- 6.78 Some consultees drew our attention to level crossings that showed some evidence of poor design or were otherwise inconvenient or unsafe for users. While many issues raised in these submissions were outside the scope of this project, we have used the examples of these crossings where appropriate to illustrate or highlight the need for law reform.
- 6.79 The joint response from the Guide Dogs for the Blind Association and the Joint Committee for the Mobility of Blind and Partially Sighted People suggested a number of design changes to level crossings to improve their accessibility for disabled users. Overall, they proposed the adoption of a consistent design for level crossings that includes audible, visual and tactile warnings for blind and partially sighted people when approaching and exiting a level crossing.<sup>39</sup> They made a number of specific recommendations for design changes:
- (1) The provision of corduroy warning tactile paving on approaches to level crossings, with contrast in colour and tone against its surroundings to assist partially sighted people.
  - (2) The provision of textured surfaces to guide the path of blind or partially sighted people while crossing the tracks. This would prevent them from veering off to the left or right onto the railway line, or onto a carriageway.
  - (3) The provision of a distinct audible warning that can be heard above other

<sup>38</sup> Rail Accident Investigation Branch, *Fatal Accident at Halkirk Level Crossing, Caithness, 29 September 2009, Report 16/2010*, (September 2010).

<sup>39</sup> Consultation Analysis, para 14.15.

environmental noise.

- (4) The use of full barriers wherever possible to prevent blind or partially sighted people from crossing when unsafe to do so.
- (5) The safe and convenient design of overhead bridges, such that blind or partially sighted people can easily find and access the alternative route.

6.80 As we explained in Part 2 of this report, the Rail Safety and Standards Board has published a report on the types of changes that can be made at level crossings to improve accessibility.<sup>40</sup> We hope that these matters relating to accessibility will be considered by railway operators and the Office of Rail Regulation. But we make no recommendations as regards particular design changes to be made at level crossings as this is outside the scope of this report.

<sup>40</sup> Rail Safety and Standards Board, *Improving safety and accessibility at level crossings for disabled pedestrians* (2011), [http://www.rssb.co.uk/sitecollectiondocuments/pdf/reports/research/T650\\_rpt\\_final.pdf](http://www.rssb.co.uk/sitecollectiondocuments/pdf/reports/research/T650_rpt_final.pdf) (last visited 1 September 2013).

# **PART 7 RECOMMENDATIONS**

7.1 Paragraph numbers in bold refer to paragraphs in this report.

## **PART 1: INTRODUCTION**

7.2 We recommend that for the purposes of the recommendations contained in this report and in the draft Level Crossings Bill and draft Level Crossing Plans Regulations “railway” should be defined as a system of transport employing parallel rails which (a) provide support for vehicles running on flanged wheels and (b) form a track of a gauge of at least 350 millimetres or a track of a gauge less than 350 millimetres where the track is crossed on the same level by a carriageway, but does not include a tramway. **[Paragraph 1.59]**

7.3 We recommend that any tramway using vehicles running predominantly at speeds enabling the driver to stop within the distance that can be seen to be clear ahead, should be excluded from the definition of “railway”. Where the track is used both as a railway and a tramway, it should be treated as a railway. **[Paragraph 1.60]**

7.4 These recommendations are given effect by clause 50 of the draft Level Crossings Bill and regulation 2 of the draft Level Crossing Plans Regulations.

## **PART 2: SAFETY AND CONVENIENCE**

7.5 We recommend that safety at level crossings should be governed entirely by the Health and Safety at Work etc. Act 1974, supported by regulations and codes of practice thereunder. **[Paragraph 2.32]**

7.6 This recommendation is given effect by Part 1 of the draft Level Crossings Bill and by the draft Level Crossing Plans Regulations.

7.7 Duties under the Health and Safety at Work etc. Act 1974 should not be extended to cover beneficiaries of private rights of way over level crossings who are not employers or self-employed persons. **[Paragraph 2.44]**

7.8 We recommend that the Secretary of State make regulations under section 15 of HSWA 1974 to impose a duty similar to that in section 3 of HSWA 1974 in relation to level crossings on railways operated on an entirely voluntary basis with no employees. **[Paragraph 2.59]**

7.9 We recommend that the Department for Transport should consider whether provision should be made to impose duties similar to those in **Part 1** of HSWA 1974 on heritage railways with no employees. **[Paragraph 2.60]**

7.10 We recommend that a duty should be imposed on the Secretary of State, the Scottish Ministers and Welsh Ministers, railway operators and traffic authorities to consider the convenience of all users of level crossings when making any decision in the course of carrying out their functions affecting a level crossing. **[Paragraph 2.105]**

- 7.11 We recommend a power to seek a declaration in the High Court, or a declarator in the Court of Session, where the railway operator has failed to satisfy the duty to consider convenience. **[Paragraph 2.106]**
- 7.12 These recommendations are given effect by clauses 2 and 3 of the draft Level Crossings Bill.
- 7.13 We recommend that level crossing orders should be abolished. **[Paragraph 2.134]**
- 7.14 This recommendation is given effect by regulation 15 of the draft Level Crossing Plans Regulations.
- 7.15 We recommend that Regulations under section 15 of HSWA 1974 make provision for parties to agree a level crossing plan in respect of any individual level crossing, whether public or private. **[Paragraph 2.200]**
- 7.16 This recommendation is given effect by the draft Level Crossing Plans Regulations.
- 7.17 We recommend that Schedule 3 to the Railways Act 2005 should be amended so as to extend the Office of Rail Regulation's functions to include the function of making approved codes of practice under section 16 of HSWA 1974. **[Paragraph 2.216]**
- 7.18 This recommendation is given effect by clause 10 of the draft Level Crossings Bill.
- 7.19 We recommend that the Secretary of State consider extending the power for the Office of Rail Regulation to issue approved codes of practice so that the power applies in respect of the whole of the railway network, including heritage railways and tramways. **[Paragraph 2.217]**
- 7.20 The Secretary of State as regards crossings in England, the Scottish Ministers as regards crossings in Scotland and Welsh Ministers as regards crossings in Wales, should be given the power to issue directions in respect of level crossings. Directions may impose such requirements as the Secretary of State, Welsh Ministers or Scottish Ministers (as appropriate) consider necessary or expedient for the purposes of the safety or convenience of users. **[Paragraph 2.246]**
- 7.21 This recommendation is given effect by clauses 4 to 8 of the draft Level Crossings Bill.
- 7.22 We recommend that the Secretary of State should make regulations under section 15 of HSWA 1974 imposing obligations on highway, traffic and roads authorities for the purposes of reducing risk so far as reasonably practicable at level crossings. These might include obligations to:
- (1) provide, maintain and operate specified protective equipment at or near a level crossing where appropriate; and/or
  - (2) erect signs and/or paint road markings in the vicinity of a level crossing

where required. **[Paragraph 2.255]**

- 7.23 We recommend that a duty should be imposed on railway operators and traffic authorities to enter into and maintain ongoing arrangements to co-operate with one another for the purposes of performing their functions in respect of public level crossings. **[Paragraph 2.270]**
- 7.24 This recommendation is given effect by clause 1 of the draft Level Crossings Bill.
- 7.25 We recommend a power to seek declaratory relief where the parties have failed to comply with the duty to co-operate. This power should be without prejudice to any remedy available in public law. **[Paragraph 2.274]**
- 7.26 This recommendation is given effect by clause 3 of the draft Level Crossings Bill.
- 7.27 We recommend that the Railways and Other Guided Transport Systems (Safety) Regulations 2006 should be amended so as to impose a duty on railway operators and traffic authorities to co-operate with highway and roads authorities in pursuance of their duties under those Regulations. **[Paragraph 2.277]**
- 7.28 We recommend that the Office of Rail Regulation should continue to be the body with responsibility for enforcement of safety regulation at level crossings. **[Paragraph 2.294]**
- 7.29 To clarify the boundary of the Office of Rail Regulation's responsibility for safety at level crossings, we recommend that the Secretary of State should amend the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 to provide that the Office of Rail Regulation is responsible for enforcement in cases of breaches of HSWA 1974 where the source of the risk arises on the railway, leaving the Health and Safety Executive to enforce where the source of the risk does not arise on the railway. **[Paragraph 2.295]**
- 7.30 We recommend that the Office of Rail Regulation and Health and Safety Executive be given the power to delegate the power to take enforcement action in particular incidents at level crossings to one another in accordance with an agreed memorandum of understanding. We recommend that the Secretary of State considers whether to extend this power to apply in respect of the whole of the railway. **[Paragraph 2.296]**
- 7.31 We recommend that the following provisions should be disapplied in relation to level crossings on railways in Great Britain:
- (1) section 1 of the Highway (Railway Crossings) Act 1839;
  - (2) section 9 of the Railway Regulation Act 1842;
  - (3) section 5 of the Railways Clauses Act 1863; and
  - (4) section 42 of the Road and Rail Traffic Act 1933. **[Paragraph 2.299]**
- 7.32 This recommendation is given effect by clause 49 of the draft Level Crossings Bill.

- 7.33 We recommend that a level crossing direction should take precedence over any conflicting provision in a special Act relating to safety or convenience at that level crossing. **[Paragraph 2.306]**
- 7.34 This recommendation is given effect by clause 6(5)(b) of the draft Level Crossings Bill.
- 7.35 We recommend that health and safety regulations made under HSWA 1974 should be able to disapply a special Act to the extent that it conflicts with any duty imposed by those regulations. **[Paragraph 2.308]**
- 7.36 This recommendation is given effect by clause 9(2)(b) of the draft Level Crossings Bill.
- 7.37 We recommend that where a level crossing plan is in place, any conflicting provision in a special Act relating to safety or convenience at that level crossing should not apply. **[Paragraph 2.310]**
- 7.38 This recommendation is given effect by regulation 13(4) of the draft Level Crossing Plans Regulations.
- 7.39 The Secretary of State and the Scottish Ministers should be given the power to make orders providing for amendments, repeals and revocations in consequence of the provisions of the draft Level Crossings Bill. **[Paragraph 2.314]**
- 7.40 This recommendation is given effect in relation to England and Wales by clause 51 and in relation to Scotland by clause 52 of the draft Level Crossings Bill.

### **PART 3: CLOSURE OF LEVEL CROSSINGS**

- 7.41 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. **[Paragraph 3.19]**
- 7.42 This recommendation is given effect by Part 2 of and the Schedule to the draft Level Crossings Bill.
- 7.43 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. **[Paragraph 3.42]**
- 7.44 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. **[Paragraph 3.43]**
- 7.45 These recommendations are given effect by clauses 11 and 31 of the draft Level Crossings Bill.
- 7.46 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. **[Paragraph 3.45]**



- 7.47 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. **[Paragraph 3.64]**
- 7.48 This recommendation is given effect by paragraph 5 of the Schedule to the draft Level Crossings Bill.
- 7.49 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. **[Paragraph 3.74]**
- 7.50 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. **[Paragraph 3.75]**
- 7.51 These recommendations are given effect by clauses 12(3) and 30 of the draft Level Crossings Bill.
- 7.52 The applicant should be required to display notices of the closure application, to publish notices and to give notice to affected persons. **[Paragraph 3.81]**
- 7.53 This recommendation is given effect by paragraph 3 of the Schedule to the draft Bill.
- 7.54 We recommend that the appropriate national authority should be required to carry out public consultation before determining an application for a closure order. **[Paragraph 3.89]**
- 7.55 This recommendation is given effect by paragraph 6 of the Schedule to the draft Bill.
- 7.56 We recommend that the appropriate national authority should be given the power to appoint a person to convene a hearing. **[Paragraph 3.102]**
- 7.57 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. **[Paragraph 3.103]**
- 7.58 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. **[Paragraph 3.104]**
- 7.59 These recommendations are given effect by paragraphs 7 and 8 of the Schedule to the draft Level Crossings Bill.
- 7.60 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. **[Paragraph 3.113]**
- 7.61 We recommend that the statutory list of factors should not be in hierarchical order, nor should the list be exhaustive. **[Paragraph 3.114]**
- 7.62 These recommendations are given effect by clause 14 of the draft Level Crossings Bill.
- 7.63 We recommend that the appropriate national authority should have the power to make a closure order, with or without modification. **[Paragraph 3.124]**
- 7.64 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. **[Paragraph 3.125]**
- 7.65 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.
- 7.66 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. **[Paragraph 3.127]**

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

7.68 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. **[Paragraph 3.133]**

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

7.70 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. **[Paragraph 3.136]**

7.71 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. **[Paragraph 3.137]**

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

7.73 We recommend that closure orders should be administrative orders, not statutory instruments. **[Paragraph 3.143]**

7.74 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. **[Paragraph 3.144]**

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

7.76 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. **[Paragraph 3.155]**

7.77 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. **[Paragraph 3.156]**
- 7.78 These recommendations are given effect by clauses 11, 12 and 13 of the draft Level Crossings Bill.
- 7.79 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. **[Paragraph 3.158]**
- 7.80 This recommendation is given effect by clause 12(1)(e) and (7) of the draft Level Crossings Bill.
- 7.81 We recommend that the appropriate national authority should have the power to make rules about the making of closure applications. **[Paragraph 3.162]**
- 7.82 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. **[Paragraph 3.163]**
- 7.83 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. **[Paragraph 3.164]**
- 7.84 These recommendations are given effect by clause 22 of and paragraph 2(1) and 13 of the Schedule to the draft Level Crossings Bill.
- 7.85 We recommend that the appropriate national authority should have the power to make non-material amendments to a closure order. **[Paragraph 3.180]**
- 7.86 This recommendation is given effect by clause 24 of and paragraph 12 of the Schedule to the draft Level Crossings Bill.
- 7.87 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. **[Paragraph 3.195]**
- 7.88 This recommendation is given effect by clauses 11 and 12(1)(b) of the draft Level Crossings Bill.
- 7.89 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. **[Paragraph 3.206]**

- 7.90 This recommendation is given effect by clauses 12(1)(b), 19(5) and (9) of the draft Level Crossings Bill.
- 7.91 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. **[Paragraph 3.211]**
- 7.92 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. **[Paragraph 3.212]**
- 7.93 These recommendations are given effect by clauses 19(3), (4), (7) and (8).
- 7.94 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. **[Paragraph 3.218]**
- 7.95 This recommendation is given effect by clauses 19(3) and 19(7) of the draft Level Crossings Bill.
- 7.96 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. **[Paragraph 3.227]**
- 7.97 This recommendation is given effect by clause 20 of the draft Level Crossings Bill.
- 7.98 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. **[Paragraph 3.254]**
- 7.99 This recommendation is given effect by clauses 16 to 18 of the draft Level Crossings Bill.
- 7.100 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. **[Paragraph 3.262]**
- 7.101 This recommendation is given effect by clause 21 of the draft Level Crossings Bill.
- 7.102 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. **[Paragraph 3.269]**
- 7.103 This recommendation is given effect by clause 21(5) and (11) of the draft Level Crossings Bill.

- 7.104 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. **[Paragraph 3.272]**
- 7.105 These recommendations are given effect by clauses 12(1)(c) and 13 of the draft Level Crossings Bill.
- 7.106 We recommend that a closure order should cease to have effect three years after it is made. **[Paragraph 3.291]**
- 7.107 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. **[Paragraph 3.292]**
- 7.108 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. **[Paragraph 3.293]**
- 7.109 These recommendations are given effect by clause 15 of the draft Level Crossings Bill.
- 7.110 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. **[Paragraph 3.302]**
- 7.111 This recommendation is given effect by clause 23 of the draft Level Crossings Bill.

#### **PART 4: RIGHTS OF WAY: ENGLAND AND WALES**

- 7.112 We recommend a statutory prohibition on the acquisition of rights of way across the railway by prescription. This provision should not apply where there is no longer a “railway” within our recommended definition. **[Paragraph 4.19]**
- 7.113 This recommendation is given effect by clause 41 of the draft Level Crossings Bill.
- 7.114 We recommend a statutory provision to the effect that a statutory private right of

way over a level crossing can be extinguished by means of a deed of release or other method available for the extinguishment of an easement across the railway. **[Paragraph 4.37]**

7.115 This recommendation is given effect by clause 43 of the draft Level Crossings Bill.

7.116 We recommend that there should be a statutory prohibition on the implied dedication of highways across the railway. This provision should not apply where there is no longer a “railway” within our recommended definition. **[Paragraph 4.69]**

7.117 This recommendation is given effect by clause 42 of the draft Level Crossings Bill.

#### **PART 5: RIGHTS OF WAY AND ACCESS ISSUES: SCOTLAND**

7.118 We recommend that there should be statutory provision to the effect that it is competent for the owner of a railway to grant a servitude of way across the railway track. **[Paragraph 5.5]**

7.119 This recommendation is given effect by clause 44(1)(a) and (2) of the draft Level Crossings Bill.

7.120 We recommend that there should be statutory provision to the effect that no servitude of way may be acquired by prescription across any part of the railway track, other than by operation of section 3(1) of the Prescription and Limitation (Scotland) Act 1973. We recommend that the provision should not apply where there is no longer a “railway” within our recommended definition **[Paragraph 5.11]**

7.121 These recommendations are given effect by clauses 45(a) and (b) and 50(1) of the draft Level Crossings Bill.

7.122 We recommend that there should be statutory provision to the effect that a statutory private right of way over a level crossing can be extinguished by means of a discharge agreement. **[Paragraph 5.22]**

7.123 This recommendation is given effect by clause 47 of the draft Level Crossings Bill.

7.124 We recommend that non-use for a continuous period of 20 years of a level crossing over which a statutory private right of way exists should extinguish that right of way. **[Paragraph 5.31]**

7.125 We recommend that the continuous period may include time prior to the commencement date of the provision establishing this rule provided that the non-use is ongoing at that date. **[Paragraph 5.32]**

7.126 These recommendations are given effect by clause 46 of the draft Level Crossings Bill.

7.127 We recommend that section 122 of the Title Conditions (Scotland) Act 2003 should be amended to extend the jurisdiction of the Lands Tribunal for Scotland

to include variation or discharge of statutory rights of way over level crossings created under section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 and any provision of a special Act which has a similar effect to section 60. **[Paragraph 5.37]**

- 7.128 This recommendation is given effect by clause 48 of the draft Level Crossings Bill.
- 7.129 We recommend that there should be statutory provision to the effect that it is competent for the owner of a railway to grant a public right of way across the railway track. **[Paragraph 5.43]**
- 7.130 This recommendation is given effect by clause 44(1)(b) and (2) of the draft Level Crossings Bill.
- 7.131 We recommend that there should be statutory provision to the effect that no public right of way across any part of the railway track may be acquired by prescription. We recommend that this provision should not apply where there is no longer a “railway” within our recommended definition. **[Paragraph 5.50]**
- 7.132 These recommendations are given effect by clause 45(c) and (d) and 50(1) of the draft Level Crossings Bill.
- 7.133 We recommend that section 6 of the Land Reform (Scotland) Act 2003 should be amended to confirm that access rights established by Part 1 of the 2003 Act are not exercisable across a railway track at track level (unless the railway is disused or there is a core path over the railway). **[Paragraph 5.60]**
- 7.134 This recommendation is given effect by clauses 39 and 50(1) of the draft Level Crossings Bill.
- 7.135 We recommend that the Scottish Ministers should have the power on application being made to them to make orders requiring the creation of new level crossings, providing that the Scottish Ministers are satisfied that any such new crossing is necessary for the enjoyment of access rights under the Land Reform (Scotland) Act 2003 in the local area. **[Paragraph 5.72]**
- 7.136 This recommendation is given effect by clauses 35 to 37 of the draft Level Crossings Bill.
- 7.137 We recommend that the Scottish Ministers should have the power on application being made to them to make orders to the effect that private level crossings are subject to the access rights mentioned in section 1(2)(b) of the Land Reform (Scotland) Act 2003, providing that the Scottish Ministers are satisfied that such access rights are necessary for the enjoyment of access rights generally in the local area. **[Paragraph 5.79]**
- 7.138 This recommendation is given effect by clauses 33 and 35 to 37 of the draft Level Crossings Bill.
- 7.139 We recommend that there should be statutory provision enabling judicial review of decisions relating to applications for private level crossings to be made subject to access rights under Part 1 of the Land Reform (Scotland) Act 2003 and



applications for orders requiring the creation of new level crossings. **[Paragraph 5.84]**

- 7.140 This recommendation is given effect by clause 38 of the draft Level Crossings Bill.

**PART 6: OTHER ISSUES**

- 7.141 We recommend that the Secretary of State undertakes a wide-ranging review of all railway offences, including those relating to level crossings, to modernise them and clarify their terms. **[Paragraph 6.32]**
- 7.142 We recommend that the review should include consideration of section 55 of the British Transport Commission Act 1949. **[Paragraph 6.33]**
- 7.143 We recommend that the Government considers whether to make a single set of regulations in relation to signs at public and private level crossings which are not governed by road traffic regulations. **[Paragraph 6.48]**

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19 September 2013

**APPENDIX A  
DRAFT LEVEL CROSSINGS BILL**

# Level Crossings Bill

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A  
**B I L L**

TO

Make provision in relation to level crossings and rights of way across a railway track; and for connected purposes.

**B**E IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**PART 1**

SAFETY AND CONVENIENCE OF USERS OF LEVEL CROSSINGS

*General duties*

**1 Co-operation between traffic authorities and railway operators**

- (1) The traffic authority and the railway operator for a public level crossing must enter into and maintain such arrangements with each other as they consider appropriate for securing co-operation and the exchange of information between them in connection with the carrying out of their respective functions so far as relating to that level crossing.
- (2) In this section “function” means—
  - (a) in the case of a traffic authority, any power or duty of the authority concerned (whatever the capacity in which the power or duty is conferred or imposed on it); and
  - (b) in the case of a railway operator, any power or duty conferred or imposed on the operator by or under any enactment.
- (3) The carrying out of a function which—
  - (a) has an effect on the safety or convenience of any users of a level crossing, or
  - (b) has any other effect on the level crossing,is to be regarded for the purposes of this section as relating to the level crossing (to the extent it has such an effect).
- (4) The arrangements required by this section may include—

- (a) arrangements as to the carrying out of functions relating to the level crossing concerned and one or more other level crossings;
  - (b) arrangements entered into by the traffic authority and the railway operator with a person –
    - (i) who is entitled to use any private right of way over the level crossing concerned; or
    - (ii) any of whose activities are capable of having an effect referred to in subsection (3)(a) or (b).
- (5) The traffic authority and the railway operator must –
- (a) enter into the arrangements required by this section as soon as practicable after it comes into force; and
  - (b) keep their arrangements under review and revise them whenever they consider it appropriate to do so.

## **2 Duty to consider convenience of all users**

- (1) A person to whom this section applies must consider the convenience of all users of a level crossing when making decisions which –
- (a) relate to a level crossing; and
  - (b) fall within the description specified in subsection (2) for that person.
- (2) This section applies to –
- (a) the railway operator for the level crossing when making decisions as operator of the railway concerned;
  - (b) the traffic authority for the level crossing when making decisions in the course of carrying out functions conferred on it as a traffic authority or as a highway authority (in England and Wales) or roads authority (in Scotland);
  - (c) the appropriate national authority when making decisions under section 4; and
  - (d) the Secretary of State, Scottish Ministers and Welsh Ministers, when making decisions in the course of carrying out statutory functions relating to railways or roads (other than functions mentioned in paragraph (b) or (c)).
- (3) A decision which –
- (a) has any effect on the safety or convenience of any users of a level crossing, or
  - (b) has any other effect on a level crossing,
- is to be regarded for the purposes of this section as a decision relating to the level crossing (to the extent it has such an effect).
- (4) The duty imposed by this section –
- (a) does not apply to the extent that it is unreasonable or impractical for it to do so in view of the nature or purpose of the decision or in the circumstances of the particular case; and
  - (b) does not affect the obligation of a person to whom this section applies to discharge any other duty that person is required to perform.
- (5) In this section “statutory functions” means functions conferred by –
- (a) an Act or subordinate legislation made under an Act;
  - (b) an Act of the Scottish Parliament or subordinate legislation made under such an Act;

and in this subsection “subordinate legislation” has the same meaning as in the Interpretation Act 1978 or, as the case may be, the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

### **3 Declarations etc regarding compliance with sections 1 or 2**

- (1) A person who claims that—
  - (a) the traffic authority and the railway operator for a level crossing (or either of them) have failed to comply with a duty under section 1 relating to that level crossing, or
  - (b) the railway operator for a level crossing has failed to comply with a duty imposed by section 2 when making a decision which relates to the level crossing (within the meaning of that section),may apply to the High Court or the Court of Session to review the acts or omissions of the person or persons concerned and grant a declaration or declarator to that effect.
- (2) Proceedings under this section must be brought before the end of—
  - (a) the period of one year beginning with the date on which the act or omission complained of took place; or
  - (b) such longer period as the court considers equitable having regard to all the circumstances,but that is subject to any rule imposing a stricter time limit in relation to such proceedings.
- (3) The right to take proceedings under this section is in addition to (and does not affect) other proceedings or action (if any) which may be brought or taken in respect of a failure to comply with a duty mentioned in subsection (1).

#### *Directions for the safety or convenience of users*

### **4 Level crossing directions**

- (1) The appropriate national authority may give a level crossing direction to any one or more of the persons mentioned in subsection (2) in relation to a level crossing specified in the direction.
- (2) A level crossing direction may be given to—
  - (a) the railway operator,
  - (b) the authority which is the local traffic authority for the level crossing, and
  - (c) where there is a private right of way over the level crossing, any person who appears to the appropriate national authority—
    - (i) to be a beneficiary of that right of way, and
    - (ii) likely to be, or to become, a relevant beneficiary of that right of way.
- (3) A level crossing direction may impose such requirements of a description mentioned in subsection (4) as the appropriate national authority considers necessary or expedient for the safety or convenience of users of the level crossing.
- (4) The requirements imposed on a person by a level crossing direction must fall within either (or both) of the following descriptions—



- (a) requirements which the appropriate national authority considers are likely to facilitate or encourage –
    - (i) the reaching of agreement between that person and any other person as to any arrangements to be made for the safety or convenience of users of the level crossing; or
    - (ii) co-operation between that person and any other person on matters affecting the safety or convenience of users of the level crossing (whether in pursuance of agreed arrangements or otherwise);
  - (b) requirements relating to action by that person which either takes place at or near to the level crossing or specifically relates to the level crossing or to the persons who use it.
- (5) The requirements which may be imposed by virtue of subsection (4)(b) include (without prejudice to its generality) –
- (a) requirements which relate to the provision, maintenance or operation of any protective equipment or signs; and
  - (b) in the case of a direction given to the railway operator, requirements which relate to the operation of the railway at or near to the level crossing.
- (6) In subsection (5)(a) –
- “protective equipment” includes gates or other barriers, lights and any other object or device which the appropriate national authority considers will contribute to the safety or convenience of any users of the level crossing; and
- “sign” includes anything which is a traffic sign within the meaning of section 64(1) of the Road Traffic Regulation Act 1984.
- (7) A level crossing direction may include supplemental, incidental or consequential provision, including in particular –
- (a) provision limiting the period for which any provisions of the direction are to have effect;
  - (b) provision revoking or suspending, in whole or to any specified extent, any arrangements which have been agreed for the safety or convenience of users of the level crossing concerned.
- (8) A level crossing direction may revoke, in whole or to any specified extent, an earlier level crossing direction (whether or not it also imposes requirements on any person).

## **5 Level crossing directions: supplementary**

- (1) The appropriate national authority must consult the Office of Rail Regulation before giving a level crossing direction.
- (2) The appropriate national authority must, in deciding whether to make a level crossing direction and, if so, what direction to give, have regard to any statement of policy published under section 7 as it has effect when the decision is made.
- (3) A person given a level crossing direction as a beneficiary of a private right of way must be named in or otherwise identified by the direction.
- (4) A copy of a level crossing direction which contains provision revoking an earlier direction to any extent must be given to any person who –

- (a) is not to be subject to any requirement imposed by the new direction; but
  - (b) is subject to any requirement imposed by the earlier direction.
- (5) After giving a level crossing direction the appropriate national authority must—
  - (a) publish the direction in such manner as the authority considers appropriate; and
  - (b) send a copy of the direction to the Office of Rail Regulation.
- (6) The Office of Rail Regulation must—
  - (a) maintain a list of any level crossing directions that have been given; and
  - (b) ensure that the list, and copies of the directions given, are made available to the public free of charge (whether on an internet website or otherwise).
- (7) A traffic sign placed on or near a road in pursuance of a level crossing direction is to be treated for the purposes of section 64(4) of the Road Traffic Regulation Act 1984 as having been placed as provided by that Act.
- (8) In subsection (7) “traffic sign” and “road” have the same meaning as in that Act.

## **6 Level crossing directions: duty to comply and enforcement**

- (1) A person given a level crossing direction must comply with the requirements imposed on that person by the direction.
- (2) That duty is enforceable as if this section were one of the relevant statutory provisions for the purposes of Part 1 of the Health and Safety at Work etc. Act 1974.
- (3) Where the direction is given to the railway operator or the local traffic authority for the level crossing concerned, that duty applies to the person who is for the time being—
  - (a) the railway operator for that crossing, or
  - (b) the local traffic authority for that crossing,as the case may be.
- (4) If the direction is given to a person as a beneficiary of a private right of way over the level crossing concerned, that duty—
  - (a) applies to that person only when that person is a relevant beneficiary of the right of way; and
  - (b) does not apply to any other person.
- (5) That duty binds a person who is subject to it, notwithstanding the terms of—
  - (a) any arrangements for the safety or convenience of users of the level crossing which may have been agreed by that person;
  - (b) any provisions of a special Act which apply to the level crossing concerned;

and, accordingly, any duty imposed on that person by virtue of any such arrangements or provisions does not apply to the extent that it is inconsistent with the duty to comply with the direction.

## **7 Statement of policy as to the use of the power to give level crossing directions**

- (1) The Secretary of State may prepare and publish a statement of policy with respect to the exercise of the power to give directions under section 4.
- (2) The Secretary of State may –
  - (a) publish a notice withdrawing a published statement of policy, or
  - (b) revise a published statement of policy and publish the revised statement.
- (3) Publication of a document under this section must be in such manner as the Secretary of State considers appropriate for the purpose of bringing it to the attention of the public.
- (4) The Secretary of State must ensure that any statement of policy that for the time being has effect is made available to the public free of charge (whether on an internet website or otherwise).
- (5) The Secretary of State must undertake such consultation as the Secretary of State considers appropriate when preparing, withdrawing or revising a statement of policy under this section.
- (6) The consultation referred to in subsection (5) must include consultation with the Scottish Ministers and the Welsh Ministers.

## **8 Level crossing directions: interpretation**

In this section and sections 4 to 7 –

“the appropriate national authority”, in relation to a specific level crossing, means –

- (a) the Secretary of State, if the crossing is in England,
- (b) the Welsh Ministers, if the crossing is in Wales, and
- (c) the Scottish Ministers, if the crossing is in Scotland;

“beneficiary”, in relation to a private right of way over a level crossing, means a person who, by virtue of –

- (a) in England and Wales, holding an interest in land benefited by the right of way,
- (b) in Scotland, owning, or holding a lease or proper liferent in, land benefited by the right of way,

is entitled to use the right of way;

level crossing direction” means a direction under section 4;

“relevant beneficiary” means a beneficiary of a private right of way over a level crossing who is subject to any one or more of the general duties under sections 2 to 4 of the Health and Safety at Work etc. Act 1974 in relation to use of the level crossing for the purposes of an undertaking conducted by that person;

“requirement” includes a prohibition; and

“specified”, in relation to a level crossing direction, means specified in the direction.

*Health and Safety at Work etc. Act 1974*

**9 Health and safety regulations**

- (1) Health and safety regulations made in relation to level crossings generally or to any description of level crossings may make provision for or in connection with—
  - (a) the making of arrangements for identifying requirements suitable to be imposed on prescribed persons for the safety or convenience of users of any particular level crossing;
  - (b) the making of a document (“an agreed document”) which—
    - (i) imposes such requirements in relation to a specific level crossing, and
    - (ii) is agreed by all the prescribed persons to whom any of the requirements apply (whether or not it is also agreed by other persons);
  - (c) the lapse, revocation or variation of, or of provisions of, an agreed document.
- (2) Health and safety regulations which make provision for the making of agreed documents as mentioned in subsection (1)(b) may, in particular, make provision for and in connection with securing—
  - (a) compliance by a prescribed person with any requirement imposed on that person by an agreed document; and
  - (b) that any duty imposed on a prescribed person by or under a special Act does not apply to that person to the extent that it is inconsistent with any obligation under the regulations to comply with a requirement imposed by an agreed document.
- (3) For the purposes of provision made by virtue of this section—
  - (a) “prescribed person” means a person specified or of a description specified in the regulations;
  - (b) a person may be a prescribed person whether or not that person is (or is at any material time) subject to any general duty under section 2, 3 or 4 of the Health and Safety at Work etc. Act 1974 in connection with the safety of any level crossing; and
  - (c) an agreed document may be referred to in the regulations as a plan, agreement or any other suitable term.
- (4) This section has effect without prejudice to the generality of what may be included in health and safety regulations apart from this section; and, for the avoidance of doubt, anything which may be included in health and safety regulations in relation to requirements imposed by the regulations may be included in relation to requirements imposed by an agreed document by virtue of subsection (1)(b).
- (5) In this section “health and safety regulations” means regulations under section 15 of the Health and Safety and Work etc. Act 1974.

**10 Codes of practice**

- (1) Schedule 3 to the Railways Act 2005 (transfer of safety functions) is amended as follows.

- (2) After paragraph 9 (restriction on codes of practice by HSE) insert –

*“Codes of practice under section 16 of the 1974 Act: functions of ORR*

- 9A (1) The Office of Rail Regulation has the same functions in relation to codes of practice relating to provisions of enactments or instruments mentioned in sub-paragraph (2) as the Health and Safety Executive has under section 16 of the 1974 Act in relation to codes of practice relating to provisions of enactments and instruments mentioned in subsection (1A) of that section.
- (2) Those enactments and instruments are –
- (a) the enactments and instruments listed in section 117(4) of the Railways Act 1993 (provisions to be treated as existing statutory provisions for the purposes of Part 1 of the 1974 Act), and
  - (b) health and safety regulations,  
so far as they make provision exclusively in relation to level crossings on a railway.  
For this purpose “level crossings on a railway” includes level crossings as defined in the Level Crossings Act 2013.
- (3) Accordingly, section 16 of the 1974 Act applies in relation to the Office of Rail Regulation as if –
- (a) references to the Executive were references to the Office of Rail Regulation;
  - (b) the reference in subsection (1) to the enactments and instruments mentioned in subsection (1A) was a reference to those mentioned in sub-paragraph (2) above; and
  - (c) subsections (1A) and (7) were omitted.
- (4) References in Part 1 of the 1974 Act to an approved code of practice include a reference to a code approved by the Office of Rail Regulation under section 16 as applied by sub-paragraph (3) above as it has effect for the time being by virtue of any revision of the whole or part of it approved under that section as so applied.”
- (3) In section 17(3)(a) of the Health and Safety at Work etc. Act 1974 (use of approved codes of practice in criminal proceedings), after “Executive” insert “or the Office of Rail Regulation”.

## PART 2

### CLOSURE OF LEVEL CROSSINGS

#### 11 Power to make closure orders

- (1) The appropriate national authority may make a closure order with respect to a level crossing if it thinks it is in the public interest to close or replace the crossing or a part of the crossing.
- (2) “Replace” –
  - (a) means replace with another crossing on the same or a different level at the same or a different spot, and

- (b) includes diverting the line of a path or way that crosses the railway track at the crossing (referred to below as a “relevant” path or way).
- (3) A “closure order” is an order under this section extinguishing –
  - (a) the rights of way across the railway track at the level crossing with respect to which the order is made, or
  - (b) in the case of closure or replacement of part of a level crossing, such of the rights of way across the railway track at the crossing as are specified in the order.
- (4) A closure order may also extinguish –
  - (a) any other right or interest allowing access to or passage over the railway track at the crossing, and
  - (b) rights of way over or of access to so much of the length of a relevant path or way beyond the crossing (in either direction) as is necessary to give effect to the closure or replacement.
- (5) The appropriate national authority may not make a closure order except on the application of –
  - (a) the railway operator, or
  - (b) the road authority for the area in which the crossing is situated.
- (6) The Schedule to this Act makes further provision about the procedure for making and determining applications for closure orders.

## 12 Closure orders: supplementary powers

- (1) A closure order may also –
  - (a) create new rights over land (whether over the railway track itself or any other land) for the purposes of any replacement or upgrade scheme, and restrict or extinguish any existing rights over that land that are considered to be incompatible with those new rights,
  - (b) authorise the compulsory acquisition of land by the applicant if the land is required for the purposes of any replacement or upgrade scheme, and restrict or extinguish any existing rights over that land,
  - (c) provide for the carrying out of works in connection with the closure or with any replacement or upgrade scheme,
  - (d) require some or all of the costs of any such works to be borne by someone other than the applicant, and
  - (e) include ancillary provision to give full effect to the order.
- (2) References in this Part to any “replacement or upgrade scheme” are to any scheme to –
  - (a) replace the crossing or a part of it, or
  - (b) upgrade existing paths or ways across the railway track (at the same or a different spot) to allow them to be used in place of the crossing (or part) that is to be closed.
- (3) A closure order may not include provision of the following kinds –
  - (a) provision, in relation to land in England or Wales, of a kind that would, if it were included in an order under section 1 or 3 of the Transport and Works Act 1992, make the order subject to special parliamentary procedure under section 12 of that Act, or

- (b) provision, in relation to land in Scotland, doing any of the following with respect to land that forms part of a common or open space or is held inalienably by the National Trust for Scotland –
  - (i) creating rights over that land,
  - (ii) authorising the compulsory acquisition of that land, or
  - (iii) extinguishing or restricting rights that benefit that land.
- (4) A closure order may not authorise the compulsory acquisition of land unless the particular land to be acquired is identified in the order.
- (5) A closure order may not include provision the effect of which is to remove or limit any right to compensation to which a person would otherwise be entitled by virtue of any of sections 16, 19 or 20 (but it may include provision the effect of which is to expand such rights or extend them to other persons).
- (6) The persons who may be required under subsection (1)(d) to bear some or all of the costs of works include both public authorities and private entities or private individuals.
- (7) The power in subsection (1)(e) to make ancillary provision includes power to make provision amending, repealing or revoking statutory provisions of local application where it is necessary to make such provision in consequence of or otherwise in connection with the closure order.
- (8) “Statutory provisions” are provisions made by or under any Act (including an Act of the Scottish Parliament).

### 13 Provision for the carrying out of works

- (1) Section 12(1)(c) includes power to make the following kinds of provision –
  - (a) provision authorising people to enter land at any reasonable time for the purposes of carrying out or preparing to carry out the works,
  - (b) provision authorising the temporary stopping-up or diversion of highways or roads for those purposes,
  - (c) provision authorising the suspension of rights of way or any other rights over land for those purposes,
  - (d) provision authorising the temporary erection, alteration or removal of apparatus on land for those purposes,
  - (e) provision imposing or excluding liability for acts or omissions in connection with –
    - (i) preparing for or carrying out the works, or
    - (ii) exercising a power mentioned in this subsection, and
  - (f) provision requiring the payment of compensation for damage, nuisance or interference caused by any such act or omission.
- (2) Provision of a kind mentioned in subsection (1)(f) includes provision requiring disputes about compensation to be referred to the Upper Tribunal or the Lands Tribunal for Scotland.
- (3) Nothing in this section is to be read as limiting the kinds of provision that may be made under section 12(1).

#### **14 Factors to be taken into account**

- (1) Subsection (2) lists some factors to be taken into account in deciding for the purposes of section 11 whether it is in the public interest to close or replace a level crossing (or part of a level crossing).
- (2) The factors are –
  - (a) the safety of the public,
  - (b) the convenience of the public,
  - (c) the efficiency of the transport network,
  - (d) the cost of maintaining the crossing,
  - (e) the need for the crossing and its significance for the local community, and
  - (f) the cost and environmental impact of any works that would be needed for the closure or for any replacement or upgrade scheme.
- (3) References in subsection (2) to “the public” include both the public generally and members of the public in a particular capacity (for example, as rail users, road users or users of a private right of way).
- (4) Nothing in this section limits the factors that may be taken into account in making the decision.

#### **15 Duration of closure orders**

- (1) A closure order may provide that the mandatory changes made by the order do not take effect until conditions specified in the order have been met.
- (2) If the order does so, it must also include provision for establishing whether and when those conditions are met and for notifying interested parties of their progress.
- (3) If the mandatory changes have not taken effect by the end of the permitted period –
  - (a) the order (including any power conferred by it or by a notice given by virtue of it) ceases to have effect at the end of that period,
  - (b) any permission granted by or as a result of the order lapses when the order ceases to have effect, and
  - (c) the applicant must notify any person who, under the Schedule to this Act, was required to be notified of the making of the order.
- (4) “The permitted period” is –
  - (a) the period of 3 years beginning with the date on which the order is made, or
  - (b) such longer period as the appropriate national authority may determine under subsection (5).
- (5) The appropriate national authority may extend the 3-year period mentioned in subsection (4)(a) by a period of no more than 12 months if –
  - (a) the applicant requests an extension,
  - (b) the request is made in writing after the order is made but before expiry of the 3-year period,
  - (c) the appropriate national authority is satisfied that an extension is necessary in the exceptional circumstances of the case, and



- (d) no other extension has already been granted under this subsection in relation to the same closure order.
- (6) An extension under subsection (5) may include provision requiring the applicant to publicise the extension and to keep interested parties informed of progress.
- (7) If a closure order ceases to have effect under this section –
- (a) it does not affect the validity of anything done under or as a result of the order before the time when the order ceased to have effect,
  - (b) in particular, it does not affect the validity of anything done before that time in reliance on a planning permission that was granted or deemed to be granted when the order was made, and
  - (c) any compulsory acquisition authorised by the order that has reached a critical milestone by that time (even if it has not completed) may proceed despite subsection (3).
- (8) For the purposes of subsection (7)(c) –
- (a) “completion” happens when title in the interest in question vests in the applicant, whether by means of a general vesting declaration, a conveyance, a deed poll or otherwise, and
  - (b) a “critical milestone” is reached when –
    - (i) the applicant enters on and takes possession of the land in accordance with the enactments applied by section 19,
    - (ii) the compensation is agreed or awarded or is paid or paid into court or a bank in accordance with those enactments, or
    - (iii) the question of compensation is referred to the relevant Tribunal in accordance with those enactments.
- (9) The following enactments (which provide for compensation where a notice to treat ceases to have effect) are to apply in a case where a notice to treat ceases to have effect by virtue of subsection (3) –
- (a) section 5(2C) to (2E) of the Compulsory Purchase Act 1965 (for land in England or Wales), and
  - (b) section 78(3) to (5) of the Planning and Compensation Act 1991 (for land in Scotland).
- (10) References in this section to the “mandatory changes” made by a closure order are to –
- (a) the extinguishment of rights of way that is effected by the order by virtue of section 11(3),
  - (b) any extinguishment of other rights or interests that is effected by the order by virtue of section 11(4), and
  - (c) any creation of new rights and restriction or extinguishment of existing rights that is effected by the order by virtue of section 12(1)(a).

## 16 Compensation for extinguishment or creation of rights over land etc

- (1) This section and sections 17 and 18 apply in relation to any mandatory change made by a closure order (within the meaning of section 15).
- (2) A person who is the holder of an interest in land in England or Wales or of a right in land in Scotland is entitled to compensation from the applicant if –

- (a) as a result of the mandatory change, the value of the person's interest or right in the land is depreciated or the person suffers damage by being disturbed in the enjoyment of that land, and
  - (b) the mandatory change (or steps having the same effect, such as the stopping-up of a path) would have been actionable at that person's suit or instance if the change had been made (or the steps taken) otherwise than in the exercise of a statutory power.
- (3) The compensation payable under subsection (2) is compensation for the depreciation or damage mentioned in paragraph (a) of that subsection.
- (4) In this section and section 18 a reference to a right in land includes a reference to ownership of land.

### **17 Compensation under section 16: land in England or Wales**

- (1) Any dispute as to the compensation payable under section 16 in relation to an interest in land in England or Wales is to be referred to the Upper Tribunal.
- (2) Section 4 of the Land Compensation Act 1961 is to apply to a reference to the Upper Tribunal under subsection (1) as to a reference under section 1 of that Act.
- (3) On such a reference, any depreciation in the value of the person's interest in the land is to be calculated in accordance with rules 2 to 4 of the rules in section 5 of that Act.
- (4) For the purposes of such a reference –
- (a) the date by reference to which the depreciation is to be assessed is the date when the mandatory change takes effect (see section 15(1) of this Act for the power to require conditions to be met before a mandatory change takes effect),
  - (b) the person's interest in the land must be valued taking account of all the changes made or to be made by or in consequence of the closure order (including, for example, the creation of any new rights that benefit the person's interest in the land), and
  - (c) for references in the Land Compensation Act 1961 to “the acquiring authority” read “the applicant (as defined in Part 2 of the Level Crossings Act 2013)”.
- (5) Where, in relation to any land, an interest in the land is subject to a mortgage –
- (a) any depreciation in the value of that interest is to be assessed as if the interest were not subject to the mortgage,
  - (b) a claim under section 16 for compensation in respect of the interest may be made by any mortgagee of the interest, but without prejudice to the making of any such claim by the holder of that interest,
  - (c) no compensation is payable in respect of the mortgagee's own interest (as distinct from the interest that is the subject of the mortgage),
  - (d) any compensation payable in respect of the interest is payable to the mortgagee (or, if there is more than one, to the one whose interest ranks first) and
  - (e) the mortgagee receiving any such compensation must hold and apply it as if it were proceeds of sale.

**18 Compensation under section 16: land in Scotland**

- (1) Any dispute as to the compensation payable under section 16 in relation to a right in land in Scotland is to be referred to the Lands Tribunal for Scotland.
- (2) Sections 9 and 11 of the Land Compensation (Scotland) Act 1963 are to apply to a reference to the Lands Tribunal for Scotland under subsection (1) as to a reference under section 8 of that Act.
- (3) On such a reference, any depreciation in the value of the person's right in the land is to be calculated in accordance with rules 2 to 4 of the rules in section 12 of that Act.
- (4) For the purposes of such a reference –
  - (a) the date by reference to which the depreciation is to be assessed is the date when the mandatory change takes effect (see section 15(1) of this Act for the power to require conditions to be met before a mandatory change takes effect),
  - (b) the person's right in the land must be valued taking account of all the changes made or to be made by or in consequence of the closure order (including, for example, the creation of any new rights that benefit the person's right in the land), and
  - (c) for references in the Land Compensation (Scotland) Act 1963 to “the acquiring authority” read “the applicant (as defined in Part 2 of the Level Crossings Act 2013)”.
- (5) Where, in relation to any land, a right in the land is subject to a heritable security –
  - (a) any depreciation in the value of that right is to be assessed as if the right were not subject to the security,
  - (b) a claim under section 16 for compensation in respect of the right may be made by any creditor of the security, but without prejudice to the making of a claim by the person entitled to the right,
  - (c) no compensation is payable in respect of the right of the creditor in the security (as distinct from the right that is the subject of the security),
  - (d) any compensation payable in respect of the right is payable to the creditor in the security (or, if there is more than one, to the creditor whose security ranks first) and is to be applied by the creditor so paid as if it were the proceeds of sale by that creditor under powers competent to creditors in heritable securities.

**19 Compulsory acquisition of land**

- (1) This section applies if a closure order includes provision under section 12(1)(b) authorising the compulsory acquisition of land.
- (2) Subsections (3) to (5) apply if the land to be compulsorily acquired is in England or Wales.
- (3) Part 1 of the Compulsory Purchase Act 1965 (procedure for compulsory purchase) applies to the compulsory acquisition –
  - (a) as it applies to a compulsory purchase to which Part 2 of the Acquisition of Land Act 1981 applies,
  - (b) as if the closure order were a compulsory purchase order under that Act, but

- (c) with the omission of section 4 and section 5(2A) and (2B) of the Compulsory Purchase Act 1965 (time limit for exercise of compulsory purchase powers and expiry of notices to treat).
- (4) The closure order is to be treated for the purposes of the Compulsory Purchase (Vesting Declarations) Act 1981 as if it were a compulsory purchase order.
- (5) Unless the closure order provides otherwise, section 236 of the Town and Country Planning Act 1990 (extinguishment of rights over land compulsorily acquired) applies to the compulsory acquisition as it applies to a compulsory acquisition under section 226 of that Act.
- (6) Subsections (7) to (9) apply if the land to be compulsorily acquired is in Scotland.
- (7) Section 1(3) of and Schedule 2 to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 apply to the compulsory acquisition—
  - (a) as they apply to a compulsory purchase by a local authority that has been authorised in accordance with Schedule 1 to that Act, but
  - (b) with the omission of section 116 of the Land Clauses Consolidation (Scotland) Act 1845 as incorporated by virtue of paragraph 1(1) of Schedule 2 to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947.
- (8) The closure order is to be treated for the purposes of section 195 of the Town and Country Planning (Scotland) Act 1997 and Schedule 15 to that Act (general vesting declarations) as if the closure order were a compulsory purchase order.
- (9) Section 106 of the Title Conditions (Scotland) Act 2003 (asp 9) (extinguishment of real burdens and servitudes etc on compulsory acquisition of land) applies to the compulsory acquisition as if the closure order were a compulsory purchase order to which that section applies.

## **20 Compensation for use of works**

- (1) Works carried out pursuant to a closure order that are not “public works” within the meaning of Part 1 of the Land Compensation Act 1973 or (in Scotland) Part 1 of the Land Compensation (Scotland) Act 1973 are to be treated for the purposes of those Acts as if they were public works.
- (2) In the application of those Acts to any works carried out pursuant to a closure order (whether by virtue of subsection (1) or otherwise), the responsible authority is the applicant (and section 1(4) of those Acts is to be read accordingly).

## **21 Planning matters**

- (1) The Town and Country Planning Act 1990 is amended as set out in subsections (2) to (5).
- (2) In section 90 (deemed planning permission for development with government authorisation)—
  - (a) in subsection (2A), after “1992” insert “, or section 11 of the Level Crossings Act 2013,” and

- (b) after that subsection insert –
- “(2B) In the case of an order under section 11 of the Level Crossings Act 2013, the conditions that may be specified in a direction under subsection (2A) do not include conditions that reserve some matters for subsequent approval.”
- (3) In section 91 (general condition limiting duration of planning permission), in subsection (4), after paragraph (d) insert –
- “(da) to any planning permission granted by virtue of a direction given under section 90(2A) on the making of an order under section 11 of the Level Crossings Act 2013;”.
- (4) In section 97 (power to revoke or modify planning permission), after subsection (6) insert –
- “(7) In relation to planning permission granted by virtue of a direction given under section 90(2A) on the making of an order under section 11 of the Level Crossings Act 2013 –
- (a) the power in subsection (1) to revoke the permission does not apply, and
- (b) the power in that subsection to modify the permission applies to the extent only that the local planning authority is satisfied that the modification is not material,
- and section 96A(2) applies in deciding whether a modification is material.”
- (5) In Schedule 13 (blighted land), after paragraph 24 insert –
- “24A Land falls within this paragraph if –
- (a) the compulsory acquisition of the land is authorised by an order under section 11 of the Level Crossings Act 2013, or
- (b) an application made in accordance with that section seeks authority to compulsorily acquire the land.”
- (6) In section 12 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (reference of certain applications to Secretary of State or Welsh Ministers), in subsection (3A), after “1992” insert “or section 11 of the Level Crossings Act 2013”.
- (7) The Town and Country Planning (Scotland) Act 1997 is amended as set out in subsections (8) to (11).
- (8) In section 57 (deemed planning permission for development with government authorisation) –
- (a) in subsection (2A), after “2007” insert “, or section 11 of the Level Crossings Act 2013;”, and
- (b) after that subsection insert –
- “(2AA) In the case of an order under section 11 of the Level Crossings Act 2013, the conditions that may be specified in a direction under subsection (2A) do not include conditions that reserve some matters for subsequent approval.”
- (9) In section 58 (general condition limiting duration of planning permission), in

- subsection (4), after paragraph (d) insert –
- “(da) to any planning permission granted by virtue of a direction under section 57(2A) on the making of an order under section 11 of the Level Crossings Act 2013,”.
- (10) In section 65 (power to revoke or modify planning permission), after subsection (5) insert –
- “(6) In relation to planning permission granted by virtue of a direction given under section 57(2A) on the making of an order under section 11 of the Level Crossings Act 2013 –
- (a) the power in subsection (1) to revoke the permission does not apply, and
- (b) the power in that subsection to modify the permission applies to the extent only that the planning authority is satisfied that the modification is not material.”
- (11) In Schedule 14 (blighted land), after paragraph 16 insert –
- “16A This paragraph applies to land if –
- (a) the compulsory acquisition of the land is authorised by an order under section 11 of the Level Crossings Act 2013, or
- (b) an application made in accordance with that section seeks authority to compulsorily acquire the land.”
- (12) In section 11 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (reference of certain applications to Scottish Ministers), after subsection (3) insert –
- “(3A) An application for listed building consent shall, without any direction by the Scottish Ministers, be referred to the Scottish Ministers instead of being dealt with by the planning authority in any case where the consent is required in consequence of proposals included in an application for an order under section 11 of the Level Crossings Act 2013.”

## 22 Assimilation of procedures

- (1) This section applies to applications for a closure order that include proposals for the purposes of which –
- (a) the giving of a consent, permission or licence is required under any enactment, or
- (b) the making or confirmation of an order is required under any enactment.
- (2) The appropriate national authority may make regulations for securing that, where the requirement would not be removed by the closure order –
- (a) the procedure for obtaining (or otherwise relating to) the consent, permission, licence, order or confirmation, and
- (b) the procedure for making and determining (or otherwise relating to) the application for the closure order,
- are wholly or partly assimilated and, in particular, that proceedings relating to the one may be held concurrently with proceedings relating to the other.
- (3) Regulations under this section may include –

- (a) provision excluding or modifying the application of any enactment, and
  - (b) provision authorising the appropriate national authority to give directions or take such other steps as may be appropriate for the purposes of securing the object mentioned in subsection (2).
- (4) The power to make regulations under this section is exercisable by statutory instrument.
- (5) A statutory instrument containing regulations under this section is subject to annulment in pursuance of a resolution of the relevant legislature.
- (6) “The relevant legislature” is –
- (a) for regulations made by the Secretary of State, either House of Parliament,
  - (b) for regulations made by the Scottish Ministers, the Scottish Parliament, and
  - (c) for regulations made by the Welsh Ministers, the National Assembly for Wales.

### **23 Legal challenges to decisions to make or not make closure orders**

- (1) This section applies to –
- (a) a decision to make a closure order (with or without modifications), or
  - (b) a decision not to make a closure order.
- (2) A court may entertain proceedings for questioning such a decision only if –
- (a) the proceedings are brought by a claim for judicial review or (in Scotland) an application for judicial review, and
  - (b) the claim form is filed or (in Scotland) the application is made during the period of 42 days beginning with the day on which the decision is published in accordance with the Schedule to this Act.

### **24 Non-material amendments**

- (1) The appropriate national authority may amend a closure order after it is made if the appropriate national authority is satisfied that the amendment is not material.
- (2) In deciding whether an amendment is material, it must have regard to the effect of the amendment, together with any previous amendments made under this section, on the closure order as originally made.
- (3) The Schedule to this Act makes further provision about the procedure for making amendments under this section.
- (4) Section 23(2) applies to a decision under this section to make or not make an amendment as it applies to a decision to make or not make a closure order.

### **25 Public rights of way**

- (1) Where a public right of way across a railway track is extinguished by a closure order, any obligation (however imposed) to maintain the crossing (or the part of it that includes that right) for the benefit of the public ceases to have effect.

- (2) In section 36 of the Highways Act 1980 (highways maintainable at public expense), in subsection (2)(e), after “1992” insert “or section 11 of the Level Crossings Act 2013”.

## **26 Powers of entry to survey land**

- (1) A person duly authorised by the appropriate national authority may at any reasonable time enter any land for the purpose of surveying it in connection with an application or proposed application for a closure order.
- (2) “Surveying” also includes –
  - (a) searching and boring in order to ascertain the nature of the subsoil, and
  - (b) taking soil samples.
- (3) In England and Wales, section 325 of the Town and Country Planning Act 1990 (supplementary provisions as to rights of entry) applies to a person authorised under this section as it applies to a person authorised under section 324 of that Act.
- (4) In Scotland, section 270 of the Town and Country Planning (Scotland) Act 1997 (supplementary provisions as to rights of entry) applies to a person authorised under this section as it applies to a person authorised under section 269 of that Act.

## **27 Duty to enter closure orders on ORR register**

In section 72 of the Railways Act 1993 (keeping of register by the Office of Rail Regulation), in subsection (2), after paragraph (da) insert –

- “(db) in relation to level crossings, the provisions of –
- (i) every order sent to it under paragraph 11 of the Schedule to the Level Crossings Act 2013 (closure or replacement of level crossings);
  - (ii) every revised order sent to it under paragraph 12 of that Schedule (non-material amendment of closure orders);
  - (iii) every notice sent to it under section 15 of that Act (expiry of closure orders);”.

## **28 Consequential amendments**

- (1) This section makes amendments in consequence of section 11.
- (2) In section 304A of the Town and Country Planning Act 1990 (grants for advice and assistance), in subsection (2), at the end of paragraph (c) insert “;  
(d) Part 2 of the Level Crossings Act 2013.”
- (3) In Schedule 12 to the Greater London Authority Act 1999 (Transport for London transfer schemes), in paragraph 7(4) –
  - (a) omit “or” at the end of paragraph (a), and
  - (b) at the end of paragraph (b) insert “; or  
(c) an order under section 11 of the Level Crossings Act 2013.”
- (4) In section 70 of the Transport (Scotland) Act 2001 (asp 2) (grants for transport-related purposes), in subsection (1A) –
  - (a) omit “or” at the end of paragraph (a), and



- (b) at the end of paragraph (b) insert “; or
  - (c) any provision contained in an order under section 11 of the Level Crossings Act 2013 (orders to close or replace level crossings) made on an application to the Scottish Ministers in accordance with rules made under the Schedule to that Act.”
- (5) In section 33 of the Planning Act 2008 (effect of requirement for development consent on other consent regimes), in subsection (2), at the end of paragraph (c) insert “;
  - (d) an order under section 11 of the Level Crossings Act 2013 (orders to close or replace level crossings).”
- (6) In section 120 of that Act (matters that may be included in order granting development consent), in subsection (9), at the end of paragraph (c) insert “;
  - (d) an order under section 11 of the Level Crossings Act 2013 (orders to close or replace level crossings).”

## 29 Relationship with other powers

- (1) Nothing in this Part affects or limits any other powers in law to close or replace level crossings.
- (2) The power to make closure orders under this Part is subject to sections 33(2) and 120(9) of the Planning Act 2008 (which remove the power under this Part in cases requiring development consent under that Act).

## 30 Crown land

- (1) This section applies to an interest that—
  - (a) subsists in land in which there is a Crown interest, but
  - (b) is not itself a Crown interest.
- (2) An interest to which this section applies is referred to as a “private interest in Crown land”.
- (3) If the relevant person agrees—
  - (a) a private interest in Crown land may be acquired compulsorily by virtue of a closure order,
  - (b) any provision of this Part or of a closure order (other than a provision by virtue of which land is compulsorily acquired) may apply in relation to a private interest in Crown land, and
  - (c) any provision of section 26 may apply in relation to a private interest in Crown land.
- (4) “Crown interest” means—
  - (a) an interest belonging to Her Majesty in right of the Crown, in right of Her private estates or in right of the Duchy of Lancaster,
  - (b) an interest belonging to the Duchy of Cornwall,
  - (c) an interest belonging to a government department or to an office-holder in the Scottish Administration,
  - (d) an interest held in trust for Her Majesty for the purposes of a government department, or
  - (e) an interest held in trust for Her Majesty for the purposes of the Scottish Administration by an office-holder in the Scottish Administration.

- (5) “The relevant person” is—
- (a) in the case of land belonging to Her Majesty in right of the Crown and forming part of the Crown Estate, the Crown Estate Commissioners,
  - (b) in the case of other land belonging to Her Majesty in right of the Crown, the government department or office-holder in the Scottish Administration having the management of the land,
  - (c) in the case of land belonging to Her Majesty in right of Her private estates, a person appointed by Her Majesty in writing under the Royal Sign Manual or, if no such appointment is made, the Secretary of State or (in Scotland) the Scottish Ministers,
  - (d) in the case of land belonging to Her Majesty in right of the Duchy of Lancaster, the Chancellor of the Duchy,
  - (e) in the case of land belonging to the Duchy of Cornwall, such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints,
  - (f) in the case of land belonging to a government department or held in trust for Her Majesty for the purposes of a government department, that department, and
  - (g) in the case of land belonging to an office-holder in the Scottish Administration or held in trust for Her Majesty for the purposes of the Scottish Administration by such an office-holder, that office-holder.
- (6) References to Her Majesty’s private estates are to be construed in accordance with section 1 of the Crown Private Estates Act 1862.
- (7) References to an office-holder in the Scottish Administration are to be construed in accordance with section 126(7) of the Scotland Act 1998.
- (8) If any question arises as to who is the relevant person in relation to any land, that question is to be determined by—
- (a) the Treasury, for land in England or Wales, and
  - (b) the Scottish Ministers, for land in Scotland.
- (9) A determination under subsection (8) is final.

### **31 Interpretation of Part 2**

- (1) This Part is to be read in accordance with this section.
- (2) “The applicant”, in relation to a closure order, means the person applying for the order.
- (3) “The appropriate national authority” means—
- (a) for closure or replacement of a level crossing in England, the Secretary of State,
  - (b) for closure or replacement of a level crossing in Scotland, the Scottish Ministers, and
  - (c) for closure or replacement of a level crossing in Wales, the Welsh Ministers.
- (4) A reference to “closing” a level crossing also includes stopping up any path or way that crosses the railway track at the crossing.
- (5) “Replace” has the meaning given in section 11.

- (6) “Right of way” means a right of way, however created or subsisting (including a right of way conferred by statute).
- (7) A reference to a right “over” land includes a right to do, or to place or maintain, anything in, on or under land or in the air-space above its surface (and, in Scotland, any such reference does not include a lease, proper liferent or heritable security).
- (8) “The road authority” for an area is –
  - (a) in England and Wales, the local highway authority (within the meaning of the Highways Act 1980) for highways in that area, and
  - (b) in Scotland, the local roads authority (within the meaning of the Roads (Scotland) Act 1984) for roads in that area.
- (9) In the case of Greater London, subsection (8)(a) includes both Transport for London and the relevant council for the area in question.
- (10) “Specified” includes described.
- (11) “Upgrading” includes altering, expanding or improving in any way.

### PART 3

#### ACCESS RIGHTS ETC IN SCOTLAND

#### **32 Meaning of “access rights”**

In this Part references to “access rights” are to such of the rights established by Part 1 of the Land Reform (Scotland) Act 2003 (asp 2) as are mentioned in section 1(2)(b) of that Act.

#### **33 Provision for certain level crossings to become subject to access rights**

- (1) The Scottish Ministers may, on the application of any person as respects a particular private level crossing in Scotland, by order determine that access rights may be exercised across that level crossing.
- (2) The function of the Scottish Ministers under subsection (1) is not to be exercisable by Scottish statutory instrument.
- (3) Any application under subsection (1) must be in such form as is prescribed by rules made by the Scottish Ministers subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (4) On receipt of an application under subsection (1) the Scottish Ministers must give notice of that receipt, together with a copy of the application, to –
  - (a) the Office of Rail Regulation, the railway operator, the local authority within whose area the crossing is situated and Scottish Natural Heritage,
  - (b) an owner of a property which, in relation to the private right of way in question, is a benefited property,
  - (c) a tenant of, or of any part of, any such benefited property, and
  - (d) a holder of a proper liferent in, or in any part of, any such benefited property,

and invite them to comment on, or submit representations as regards, the application.

- (5) Within 14 days after that receipt the Scottish Ministers must publish details of the application –
- (a) by means of a conspicuous notice at or near the crossing,
  - (b) by means of a conspicuous notice at the headquarters of the local authority within whose area the crossing is situated,
  - (c) by means of an advertisement in a newspaper circulating in places near to where the crossing is situated, and
  - (d) by making those details readily available to the public on an internet website,
- and must in the notice, in the advertisement and on the website invite the public to comment on, or submit representations as regards, the application.
- (6) After the expiry of the period of 12 weeks immediately following publication under subsection (5)(d), the Scottish Ministers are to decide the application having regard –
- (a) to such comments and representations as may have been made by virtue of subsection (4) or (5),
  - (b) to the considerations mentioned in subsection (7), and
  - (c) to subsection (10);
- but this subsection is subject to subsection (9).
- (7) The considerations are –
- (a) what effect the lack of the access rights applied for has on the exercise of access rights enjoyed in the local area,
  - (b) the safety of persons who might be expected to exercise access rights across the level crossing by virtue of the order,
  - (c) the accessibility and convenience of the level crossing for those persons,
  - (d) the likely effect of the order on the environment and on local amenity,
  - (e) the likely effect of the order on the local community and the local economy,
  - (f) the likely effect of the order on persons entitled to use the private right of way,
  - (g) the likely costs of undertaking any works which the Scottish Ministers would, by virtue of section 35(2), specify in the order,
  - (h) the likely effect of the order on the day-to-day maintenance costs of the level crossing,
  - (i) the likely effect of the order on the rail network,
  - (j) any other consideration which the Scottish Ministers consider relevant.
- (8) The order in which the considerations are listed in subsection (7) is not significant; they must be balanced as appropriate in each case.
- (9) Before deciding the application the Scottish Ministers may (either or both) –
- (a) promote an exchange of views, in writing, between those who have commented or made representations by virtue of subsection (4) or (5),
  - (b) if the Scottish Ministers consider, in the light of those comments or representations (and as the case may be of that exchange) that the circumstances are exceptional, conduct a hearing in accordance with rules made by them subject to annulment in pursuance of a resolution of the Scottish Parliament.

- (10) The Scottish Ministers are to make the order sought by the applicant only if they are satisfied that the access rights applied for are necessary for the enjoyment of access rights generally in the local area.
- (11) Any invitation under subsection (4) or (5) is to indicate that, to be considered, comments should be made or representations submitted before the expiry of the period of 12 weeks mentioned in subsection (6).
- (12) An order under subsection (1) comes into force on the day on which it is signed by the Scottish Ministers.
- (13) The Scottish Ministers may, by order modify subsection (4) so as to add to, vary or repeal its descriptions of persons.
- (14) An order under subsection (13) is not to be made unless a draft of the instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

### **34 Creation of new level crossing in furtherance of access rights**

- (1) The Scottish Ministers may, on the application of any person, by order –
  - (a) provide for the creation of a new level crossing in Scotland, and
  - (b) determine that access rights may, following its creation, be exercised across it.
- (2) The function of the Scottish Ministers under subsection (1) is not to be exercisable by Scottish statutory instrument.
- (3) Any application under subsection (1) must be in such form as is prescribed by rules made by the Scottish Ministers subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (4) On receipt of an application under subsection (1), the Scottish Ministers must give notice of that receipt, together with a copy of the application, to –
  - (a) the Office of Rail Regulation, the railway operator, the local authority within whose area the crossing is to be situated and Scottish Natural Heritage,
  - (b) an owner of land adjoining the railway at the proposed location of the crossing,
  - (c) a tenant of any such owner if any part of the property let to the tenant adjoins the railway at or near that proposed location, and
  - (d) a holder of a proper liferent in, or in any part of, any such benefited property,
 and invite them to comment on, or submit representations as regards, the application.
- (5) Within 14 days after that receipt the Scottish Ministers must publish details of the application –
  - (a) by means of a conspicuous notice at or near the proposed location of the crossing,
  - (b) by means of a conspicuous notice at the headquarters of the local authority within whose area the crossing is to be situated,
  - (c) by means of an advertisement in a newspaper circulating in places near to where the crossing is to be situated, and
  - (d) by making those details readily available to the public on an internet website,

- and must in the notice, in the advertisement and on the website invite the public to comment on, or submit representations as regards, the application.
- (6) After the expiry of the period of 12 weeks immediately following publication under subsection (5)(d), the Scottish Ministers are to decide the application having regard –
- (a) to such comments and representations as may have been made by virtue of subsection (4) or (5),
  - (b) to the considerations mentioned in subsection (7), and
  - (c) to subsection (10);
- but this subsection is subject to subsection (9).
- (7) The considerations are –
- (a) what effect the lack of a level crossing (or of some other form of crossing) at or near the proposed location of the crossing has on the exercise of access rights enjoyed in the local area,
  - (b) the safety of persons who might be expected to exercise access rights across the proposed level crossing,
  - (c) the accessibility and convenience of the proposed level crossing for those persons,
  - (d) the likely effect of the proposed level crossing on the environment and on local amenity,
  - (e) the likely effect of the proposed level crossing on the local community and the local economy,
  - (f) the likely effect of the proposed level crossing on the owners of land adjoining the railway at the proposed location of that crossing,
  - (g) the likely costs of undertaking any works which the Scottish Ministers would, by virtue of section 35(3), specify in the order and of the day-to-day maintenance of the crossing once it is completed,
  - (h) the likely effect of the proposed level crossing on the rail network,
  - (i) any other consideration which the Scottish Ministers consider relevant.
- (8) The order in which the considerations are listed in subsection (7) is not significant; they must be balanced as appropriate in each case.
- (9) Before deciding the application the Scottish Ministers may (either or both) –
- (a) promote an exchange of views, in writing, between those who have commented or made representations by virtue of subsection (4) or (5),
  - (b) if the Scottish Ministers consider, in the light of those comments or representations (and as the case may be of that exchange) that the circumstances are exceptional, conduct a hearing in accordance with rules made by them subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (10) The Scottish Ministers are to make the order sought by the applicant only if they are satisfied that the new level crossing is necessary for the enjoyment of access rights generally in the local area.
- (11) Any invitation under subsection (4) or (5) is to indicate that, to be considered, comments should be made or representations submitted before the expiry of the period of 12 weeks mentioned in subsection (6).
- (12) An order under subsection (1) comes into force on the day on which it is signed by the Scottish Ministers.

- (13) The Scottish Ministers may, by order modify subsection (4) so as to add to, vary or repeal its descriptions of persons.
- (14) An order under subsection (13) is not to be made unless a draft of the instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.
- (15) The Scottish Ministers may, by order subject to annulment in pursuance of a resolution of the Scottish Parliament, provide that their function under subsection (1) is not exercisable in relation to any such category of railway as is specified in the order.

### **35 Further provision as to orders under sections 33(1) and 34(1)**

- (1) An order under –
  - (a) section 33(1) must, in such manner as is prescribed by rules made by the Scottish Ministers subject to annulment in pursuance of a resolution of the Scottish Parliament, identify and describe the level crossing to which the order relates, or
  - (b) section 34(1) must, in such manner as is so prescribed, identify the place where the new level crossing for which it provides is to be located.
- (2) An order under section 33(1) may specify works which the Scottish Ministers consider must be undertaken –
  - (a) by the railway operator, and
  - (b) by the local roads authority within whose area the level crossing is located,
 in order to facilitate the safe exercise of access rights across the level crossing to which it relates.
- (3) An order under section 34(1) may specify –
  - (a) works which the Scottish Ministers consider must be undertaken by the railway operator, and
  - (b) works which the Scottish Ministers consider must be undertaken by the local roads authority within whose area the new level crossing is to be located,
 in order to create the new level crossing for which it provides and to facilitate the safe exercise of access rights across that crossing once it is completed.
- (4) Works specified by virtue of subsection (2) must be completed within 6 months after the day on which the order comes into force unless the Scottish Ministers, on cause shown, allow a longer period for their completion.
- (5) Works specified by virtue of subsection (3) must be completed within 9 months after the day on which the order comes into force unless the Scottish Ministers, on cause shown, allow a longer period for their completion.
- (6) The access rights provided for in an order under section 33(1) are exercisable –
  - (a) if works are specified by virtue of subsection (2), on the completion of the works, and
  - (b) in any other case, on the expiry of the period of 6 weeks immediately following the coming into force of the order.
- (7) The access rights provided for in an order under section 34(1) are exercisable from the completion of the works specified by virtue of subsection (3).

- (8) On the access rights provided for in an order under section 33(1), or as the case may be 34(1), becoming exercisable the railway operator must, without delay, place a conspicuous notice at or near the level crossing informing the public that access rights may be exercised across it.
- (9) If the railway operator or roads authority fails to complete within the period allowed under or by virtue of subsection (4) or (5) works required of it by the order in question, the Scottish Ministers may take any action they think necessary for the purpose of securing the completion of the works within as short a period as is reasonably practicable.
- (10) Without prejudice to the generality of subsection (9), the Scottish Ministers may by virtue of that subsection institute or defend legal proceedings relating to the works.
- (11) The Scottish Ministers may, by regulations subject to annulment in pursuance of a resolution of the Scottish Parliament, make provision as regards any matter incidental to, or arising out of, the undertaking of any works specified in an order under section 33(1) or 34(1).

### **36 Notification of decision on application under section 33(1) or 34(1)**

Within 14 days after deciding an application under section 33(1) or 34(1), the Scottish Ministers must –

- (a) give notice of the decision to the applicant and to the persons to whom notice of receipt of the application was given under subsection (4) of the section in question, and
- (b) publish the decision in the same manner as, under subsection (5) of the section in question, they published details of the application.

### **37 Lists of level crossings subject to access rights and of new level crossings**

The Scottish Ministers are to keep, on an internet website –

- (a) a list of level crossings across which access rights may be exercised by virtue of an order granted under section 33, and
- (b) a list of level crossings created by virtue of an order granted under section 34.

### **38 Questioning a decision under section 33(1) or 34(1)**

- (1) This section applies to a decision made by the Scottish Ministers under section 33(1) or 34(1).
- (2) A court may entertain proceedings for questioning the decision only if –
  - (a) the proceedings are brought by an application for judicial review, and
  - (b) the application is made during the period of 42 days beginning with the day on which a notice of the decision is first published under section 36.

### **39 Amendment of Land Reform (Scotland) Act 2003**

- (1) The Land Reform (Scotland) Act 2003 (asp 2) is amended as follows.
- (2) In section 6 (which specifies land in respect of which access rights established



by Part 1 of that Act are not exercisable) after subsection (1) insert –

- “(1A) And access rights are not exercisable in respect of a railway track –
- (a) by virtue of paragraph (a) of section 1(2) of this Act, or
  - (b) by virtue of paragraph (b) of that section, unless the exercise consists only of crossing –
    - (i) other than at track level, or
    - (ii) at track level by means of a core path.
- (1B) Subsections (1) and (1A) above are subject to any order under section 33(1) of the Level Crossings Act 2013 (c.00) (provision for certain level crossings to become subject to access rights) or section 34(1) of that Act (creation of new level crossing in furtherance of access rights).
- (1C) In subsection (1A) above, “railway” has the meaning assigned to that expression by that Act.”.
- (3) In section 7(1) (which supplements and qualifies section 6), for the words “Section 6” substitute “Section 6(1)”.

#### **40 Amendment of Town and Country Planning (Scotland) Act 1997**

In section 57 of the Town and Country Planning (Scotland) Act 1997 (deemed planning permission for development with government authorisation), after subsection (2AA) insert –

- “(2AB) On making an order under section 33(1) (provision for certain level crossings to become subject to access rights) or 34(1) (creation of new level crossing in furtherance of access rights) of the Level Crossings Act 2013 which includes provision for development, the Scottish Ministers may direct that planning permission for that development is, subject to such conditions (if any) as may be specified in the direction, deemed to be granted.”.

### **PART 4**

#### **RIGHTS OF WAY**

##### *England and Wales*

#### **41 Easement of way over a railway track not to be acquired by prescription**

- (1) This section modifies the law of prescription in relation to use of a way across a railway track in England and Wales.
- (2) In this section –
 

“the law of prescription” means –

  - (a) the rules of law relating to the acquisition of easements by prescription at common law or under the doctrine of lost modern grant, and
  - (b) the Prescription Act 1832,

so far as relating to easements of way; and

“way across a railway track” means a way on the same level as the track.

- (3) The law of prescription ceases to have effect in relation to any use after this section has come into force of a way over a railway track in England and Wales (and accordingly no easement of way may be acquired by prescription by reference to such use).
- (4) But if, when this section comes into force, a person—
  - (a) is in a position to take advantage of section 2 of the Prescription Act 1832 in relation to use of a way over a railway track, or
  - (b) is within a year of being able to do so,then, for the purposes of enabling that person to take advantage of that section in relation to use of that way, the law of prescription continues in force in relation to use before the first anniversary of the date on which this section comes into force.
- (5) Nothing in this section is to be taken as affecting the question whether an easement of way can be acquired under the law of prescription by virtue of long use of a way across a railway track.

#### **42 Highway over railway track not to be created by presumed dedication**

- (1) This section modifies the law of presumed dedication in relation to the enjoyment or use by the public of a way across a railway track in England and Wales.
- (2) In this section—

“enjoyment” or “use”, in relation to enjoyment or use by the public of a way, means enjoyment or use as of right;

“the law of presumed dedication” means—

  - (a) section 31(1) of the Highways Act 1980 (presumption of dedication of way as a highway by virtue of a period of uninterrupted enjoyment by the public); and
  - (b) any common law rules relating to the presumed dedication of a way as a highway solely by virtue of use by the public;

“way across a railway track” means a way on the same level as the track.
- (3) Dedication of a way across a railway track as a highway is not to be presumed under section 31 of the Highways Act 1980 unless the period of 20 years’ public use that would (apart from this subsection) be relevant to the application of that section ends before this section comes into force.
- (4) Dedication of a way across a railway track is not to be presumed under subsection (1) of section 31 of the Highways Act 1980 unless—
  - (a) the period of 20 years uninterrupted public enjoyment that would (apart from this section) be relevant for the purposes of that subsection ends before this section comes into force; or
  - (b) if that period ends after this section comes into force, the way has actually been enjoyed by the public without interruption for the period beginning 20 years before the coming into force of this section and ending when the right of the public to use the way is brought into question (within the meaning of section 31(2) of that Act);and, accordingly, in a case where paragraph (b) applies references in section 31 to a period of 20 years are to be read as referring to the period described in that paragraph.

- (5) Dedication of a way across a railway track as a highway is not to be presumed at common law unless that is justified by reference to use of the way by the public before this section comes into force.
- (6) Subsection (5) does not affect the operation of those rules in relation to anything which occurs after this section comes into force (such as an act of interruption by the landowner) which is relevant to the question whether dedication as a highway should be presumed by reference to use before that time.
- (7) Nothing in this section is to be taken as affecting the question whether the use by the public of a way across a railway track is capable of creating a highway under the law of presumed dedication.

#### **43 Release of statutory right of way across railway track**

- (1) This section applies to a statutory right of way over a level crossing in England and Wales if the crossing is required to be maintained in place by virtue of –
  - (a) section 68 of the Railways Clauses Consolidation Act 1845 (works for the accommodation of lands adjoining a railway) as incorporated or applied, with or without modifications, in any special Act; or
  - (b) any provision of a special Act which has a similar effect to section 68 (so far as it relates to the provision of level crossings).
- (2) The right of way may be released by an agreement for the release of the right (“a release agreement”) made by deed –
  - (a) between the railway operator and the owner of land benefited by the right of way, or
  - (b) unilaterally by the owner of land benefited by the right of way,in the same way that a right of way conferred by an easement may be released.
- (3) A release agreement made by the owner of land benefited by the right of way binds –
  - (a) the owner’s successors in title to that land; and
  - (b) any persons who –
    - (i) have an estate or interest in, or right over, the whole or any part of that land which is created after the release agreement is made; and
    - (ii) derive title to that estate, interest or right under that owner.
- (4) The provision by virtue of which a right of way to which this section applies subsists is not to be regarded as requiring or authorising any other private right of way over the railway to be created once the right of way is released.
- (5) In this section “owner”, in relation to any land, means the holder of a freehold or leasehold estate in that land.
- (6) Nothing in this section is to be taken as affecting any question as to the validity or effect of any agreement other than a release agreement made after the commencement of this section.

*Scotland*

**44 Grant of servitude of way or public right of way across railway track**

- (1) At any time –
  - (a) a servitude of way, or
  - (b) a public right of way,may be granted across a railway track in Scotland by the owner of the land on which the track is located.
- (2) In this section and sections 45 to 47 “way”, whether in the expression “servitude of way” or in the expression “public right of way”, means a way on the same level as the track in question.

**45 Servitude of way or public right of way across railway track**

After the commencement of this section –

- (a) no servitude of way across a railway track in Scotland may be acquired by prescription other than by virtue of section 3(1) of the Prescription and Limitation (Scotland) Act 1973,
- (b) the reference in section 3(2) of that Act to a continuous period of 20 years is to be construed, in relation to the existence of any servitude of way across a railway track in Scotland, as referring only to a continuous period of 20 years which ended before that commencement,
- (c) no public right of way across a railway track in Scotland may be acquired by prescription, and
- (d) the reference in section 3(3) of that Act to a continuous period of 20 years is to be construed, in relation to the existence of any public right of way across a railway track in Scotland, as referring only to a continuous period of 20 years which ended before that commencement.

**46 Extinction of statutory right of way across railway track by negative prescription**

- (1) This section applies to a statutory right of way over a level crossing in Scotland if the crossing is required to be maintained in place by virtue of –
  - (a) section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 (works to be created for the accommodation of adjoining lands) as incorporated or applied, with or without modifications, in any special Act; or
  - (b) any provision of a special Act which has a similar effect to section 60 (so far as it relates to the provision of level crossings).
- (2) If, throughout a continuous period of 20 years, the right is not exercised then on that period expiring the right is extinguished.
- (3) In this section “continuous period of 20 years” does not include any such period which ends on or before the day on which this section comes into force.

**47 Discharge of statutory right of way across railway track**

- (1) This section applies to a statutory right of way over a level crossing in Scotland if the crossing is required to be maintained in place by virtue of –

- (a) section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 (works to be created for the accommodation of adjoining lands) as incorporated or applied, with or without modifications, in any special Act; or
  - (b) any provision of a special Act which has a similar effect to section 60 (so far as it relates to the provision of level crossings).
- (2) The statutory right of way may be discharged, as regards a plot of land which benefits from the right, by an agreement in writing (a “discharge agreement”) between the owner of the land on which the level crossing is located and the owner of that plot.
  - (3) A discharge does not affect any other person who, at the time the discharge agreement is entered into, has a right in that plot of land unless and until that person consents in writing (whether or not writing comprised within the discharge agreement) to the discharge.
  - (4) A discharge agreement (and any writing mentioned in subsection (3) but not comprised in the agreement) may be registered in the Land Register of Scotland or recorded in the General Register of Sasines, as appropriate, against (any or all) –
    - (a) a plot of land which benefited from the right extinguished,
    - (b) a plot of land which was encumbered with that right,
    - (c) the title of any tenant under a registered lease who has consented to the discharge.
  - (5) Provision may, by land register rules, be made with regard to –
    - (a) the form and execution of any discharge agreement (or other writing) to be registered under subsection (4) in the Land Register of Scotland, and
    - (b) registration of the agreement (or writing) in that register.
  - (6) “Land register rules” means rules made under section 115(1) of the Land Registration etc. (Scotland) Act 2012 (asp 5).
  - (7) The Scottish Ministers may by regulations, subject to annulment in pursuance of a resolution of the Scottish Parliament, make provision with regard to –
    - (a) the form and execution of any discharge agreement (or other writing) to be recorded under subsection (4) in the General Register of Sasines, and
    - (b) the recording of the agreement (or writing) in that register.
  - (8) The provision by virtue of which a statutory right of way to which this section applies subsists is not to be regarded as requiring or authorising any other private right of way over the railway to be created once the statutory right of way is discharged.
  - (9) Nothing in this section is to be taken as affecting any question as to the validity or effect of any agreement other than a discharge agreement made after the commencement of this section.

#### **48 Amendment of Title Conditions (Scotland) Act 2003**

- (1) Section 122 of the Title Conditions (Scotland) Act 2003 (asp 9) (interpretation) is amended as follows.
- (2) In subsection (1), in the definition of “title condition”, after paragraph (f)

insert –

- “(fa) a statutory right of way over a level crossing if the crossing is required to be maintained in place by virtue of –
- (i) section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 (works to be created for the accommodation of adjoining lands) as incorporated or applied, with or without modifications, in any special Act; or
  - (ii) any provision of a special Act which has a similar effect to section 60 (so far as it relates to the provision of level crossings);”.

(3) After subsection (3) insert –

- “(3A) In the definition of “title condition” in subsection (1) above –
- (a) “level crossing” and “statutory right of way” have the meanings assigned to those expressions by the Level Crossings Act 2013; and
  - (b) “special Act” means –
    - (i) an Act of Parliament or an Act of the Scottish Parliament, or
    - (ii) subordinate legislation made by virtue of an Act of Parliament or an Act of the Scottish Parliament,which authorises the construction of a railway (within the meaning of the Railways Clauses Consolidation (Scotland) Act 1845).”.

## PART 5

### SUPPLEMENTARY PROVISIONS

#### 49 Disapplication of statutory provisions relating to level crossings

- (1) The following provisions shall cease to apply in relation to level crossings on a railway in Great Britain –
- (a) section 1 of the Highway (Railway Crossings) Act 1839 (gates at level crossings);
  - (b) section 9 of the Railway Regulation Act 1842 (gates at level crossings);
  - (c) section 5 of the Railways Clauses Act 1863 (prohibition on shunting etc across a level crossing);
  - (d) sections 42 and 45 of the Road and Rail Traffic Act 1933 (gates at level crossings).
- (2) The reference in subsection (1)(c) to section 5 of the Railways Clauses Act 1863 includes a reference to that section as incorporated (with or without modifications) in –
- (a) any Act (including an Act of the Scottish Parliament or a special Act within the meaning of Part 1 of the Railways Clauses Act 1863);
  - (b) any order under section 2 of the Light Railways Act 1896; or
  - (c) any order under the Transport and Works Act 1992.
- (3) In –

- (a) paragraph 2(2) of Schedule 1 to the Transport and Works (Model Clauses for Railways and Tramways) Order 2006 (application of provisions of the Railways Clauses Act 1863), and
  - (b) paragraph 2(2) of the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (application of provisions of that Act)
- the reference to section 5 of the Railways Clauses Act 1863 shall cease to apply in relation to level crossings on a railway in Great Britain.

## 50 Interpretation

- (1) In this Act, unless a contrary intention appears –
- “Act” includes an Act or Measure of the National Assembly for Wales;
  - “carriageway” has the same meaning as in section 329 of the Highways Act 1980 (for England and Wales) or section 151(2) of the Roads (Scotland) Act 1984 (for Scotland);
  - “highway authority” has the same meaning as in the Highways Act 1980;
  - “level crossing” means a place where a railway track is crossed on the same level by –
    - (a) a highway (in England and Wales) or a road (in Scotland); or
    - (b) a way over which there is a private right of way;
 or both;
  - “private level crossing” means a level crossing over which there is a private right of way, but no public right of way;
  - “private right of way” means –
    - (a) a right of way or passage conferred by an easement or servitude, or
    - (b) a statutory right of way that is not conferred by an easement or servitude;
  - “public level crossing” means a level crossing over which there is a public right of way (whether or not there is also a private right of way over the crossing);
  - “public right of way” means the public right of way or passage over a highway in England and Wales or over a road in Scotland;
  - “railway” means a system of transport employing parallel rails which –
    - (a) provide support and guidance for vehicles carried on flanged wheels, and
    - (b) form a track of a gauge of at least 350 millimetres or a track of a smaller gauge which is crossed on the same level by a carriageway,
 but does not include a tramway;
  - “railway operator” means a person who is the operator of a network for the purposes of Part 1 of the Railways Act 1993 and “the railway operator”, in relation to a level crossing, means the railway operator whose network includes the crossing;
  - “railway track” means track employed in a railway (as defined for the purposes of this Act);
  - “road”, in relation to Scotland, has the same meaning as in section 151(1) of the Roads (Scotland) Act 1984;
  - “roads authority” has the same meaning as in section 151(1) of the Roads (Scotland) Act 1984;
  - “special Act” means –

- (a) an Act or Act of the Scottish Parliament, or
  - (b) subordinate legislation,
- which authorises the construction of a railway (within the meaning of the Railways Clauses Consolidation Act 1845 or the Railways Clauses Consolidation (Scotland) Act 1845, as the case may be);
- “statutory right of way” means a right of way or passage which –
- (a) was created, or subsists, by virtue of a provision of a local nature contained in an Act, an Act of the Scottish Parliament or subordinate legislation; and
  - (b) is not a public right of way;
- “traffic authority” and “local traffic authority” have the same meanings as in section 121A of the Road Traffic Regulation Act 1984 and “the local traffic authority”, in relation to a level crossing, means the authority which is –
- (a) in the case of a public level crossing, the local traffic authority (if any) for the highway or road over the crossing;
  - (b) in the case of a private level crossing, the local traffic authority whose area includes the crossing;
- “tramway” means a system of transport used wholly or mainly for the carriage of passengers employing –
- (a) parallel rails which –
    - (i) provide support and guidance for vehicles carried on flanged wheels; and
    - (ii) form a track of a gauge of at least 350 millimetres or a track of a smaller gauge which is crossed on the same level by a carriageway; and
  - (b) only vehicles which run predominantly at speeds enabling the driver to stop within the distance that can be seen to be clear ahead.
- (2) References in this Act to functions or activities of an authority which is a highway authority, roads authority or traffic authority (however expressed) are not, unless the contrary intention appears, limited to functions or activities of the authority in its capacity as a highway authority, roads authority or traffic authority (as the case may be).
- (3) Any track used as part of a system of transport described in the definition of “railway” is, for the purposes of this Act, part of the railway concerned notwithstanding that the same track is also used as part of a tramway.
- (4) In the definitions of “statutory right of way” and “special Act” references to subordinate legislation are to subordinate legislation within the meaning of the Interpretation Act 1978 or the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

## **51 Power of Secretary of State to make consequential amendments and repeals**

- (1) The Secretary of State may by order made by statutory instrument –
- (a) modify any Act or subordinate legislation in consequence of this Act;
  - (b) modify provisions of any special Act so far as they appear to the Secretary of State to relate to, or to the safety or convenience of users of, one or more level crossings in Great Britain.



- (2) An order under this section may make supplementary, incidental, consequential, transitional, transitory or saving provision (including provision modifying any Act or subordinate legislation) in connection with any modifications made under subsection (1)(a) or (b).
- (3) An order under this section may make provision which extends to Northern Ireland.
- (4) An order under this section which modifies provisions of any Act other than a local Act (whether or not the order makes other provision) may not be made unless a draft of the statutory instrument containing the order has been laid before and approved by a resolution of each House of Parliament.
- (5) A statutory instrument containing any other order under this section is subject to annulment in pursuance of a resolution of either House of Parliament.
- (6) For the purposes of this section—
  - (a) any reference to modifying legislation includes a reference to amending, repealing or revoking it;
  - (b) a power to modify any Act or subordinate legislation includes power to modify an Act passed, or subordinate legislation made, in the same Session as this Act;
  - (c) “subordinate legislation” means subordinate legislation within the meaning of the Interpretation Act 1978.

## **52 Power of Scottish Ministers to make consequential amendments and repeals**

- (1) The Scottish Ministers may by order made by Scottish statutory instrument—
  - (a) modify any Act, Act of the Scottish Parliament or subordinate legislation in consequence of this Act (if the modification is within the legislative competence of the Scottish Parliament);
  - (b) modify provisions of a special Act so far as they appear to the Scottish Ministers to relate, or relate to any extent, to one or more level crossings in Scotland.
- (2) An order under this section may make supplementary, incidental, consequential, transitional, transitory or saving provision (including provision modifying any Act, Act of the Scottish Parliament or subordinate legislation) in connection with any modifications made under subsection (1)(a) or (b).
- (3) An order under this section which (whether or not it makes other provision)—
  - (a) modifies provisions of an Act, other than a local Act, or
  - (b) modifies provisions of an Act of the Scottish Parliament other than a private Act,
 is not to be made unless a draft of the instrument containing the order has been laid before and approved by a resolution of the Scottish Parliament.
- (4) Any other order under this section is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (5) For the purposes of this section—
  - (a) any reference to modifying legislation includes a reference to amending, repealing or revoking it.
  - (b) a power to modify any Act or subordinate legislation made under an Act includes power to modify an Act passed, or subordinate legislation made, in the same Session as this Act;

- (c) a power to modify any Act of the Scottish Parliament or subordinate legislation made under an Act of the Scottish Parliament includes power to modify any such Act passed, or any such subordinate legislation made, before the end of the Session in which this Act is passed;
- (d) “subordinate legislation” means subordinate legislation within the meaning of the Interpretation Act 1978 or the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10)).

### **53 Extent**

- (1) Except as follows, this Act extends to England and Wales and Scotland only.
- (2) Part 3 extends to Scotland only.
- (3) In Part 4 –
  - (a) sections 41 to 43 extend to England and Wales only, and
  - (b) sections 44 to 48 extend to Scotland only.
- (4) Section 51 extends also to Northern Ireland.
- (5) Any modification, amendment or repeal made by a provision of Part 1, Part 2 or this Part has the same extent as the provision to which it relates.

### **54 Short title and commencement**

- (1) This Act may be cited as the Level Crossings Act 2013.
- (2) The provisions of this Act come into force on such day or days as the Secretary of State may, after consulting the Scottish Ministers and the Welsh Ministers, appoint by order made by statutory instrument.
- (3) An order under subsection (2) may –
  - (a) appoint different days for different purposes; and
  - (b) include transitional, transitory or saving provision relating to the provisions brought into force by the order.

## SCHEDULE

Section 11

## CLOSURE ORDERS: PROCEDURE

*Interpretation*

- 1 (1) This Schedule is to be read in accordance with this paragraph.
- (2) “Closure application” means an application for a closure order.
- (3) In relation to a closure application, “the level crossing” means the level crossing with respect to which the application is made.
- (4) In relation to a closure order or proposed closure order, “affected land” means –
  - (a) land benefiting from a right or interest that is to be extinguished or restricted by or by virtue of the order or proposed order,
  - (b) land, other than land of the railway operator, over which a right is to be created by the order or proposed order, and
  - (c) land that the applicant is authorised under the order or proposed order to acquire compulsorily.
- (5) For these purposes, land “benefits from” a right or interest if extinguishment or restriction of the right or interest (or steps having a similar effect) would be actionable at the suit or instance of the holder of an interest in that land, were the extinguishment or restriction to be effected (or the steps to be taken) otherwise than in the exercise of statutory powers.
- (6) A “directly affected person” is any owner, lessee, tenant (of whatever tenancy period) or occupier of affected land.
- (7) “EIA Directive” means Council Directive 2011/92/EU (which relates to the assessment of the effect of projects on the environment).

*Closure applications*

- 2 (1) The appropriate national authority may make rules about the making of closure applications.
- (2) Rules under this paragraph may include provision about (for example) –
  - (a) the form and content of applications,
  - (b) the form and content of the draft closure order that is to accompany an application,
  - (c) the manner in which applications must be submitted,
  - (d) the giving and publication of notices of applications, and
  - (e) other steps that must be taken before applications are made or in connection with the making of applications.
- (3) The rules may also require the payment of a fee to the appropriate national authority on the making of a closure application.

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- (4) The power in sub-paragraph (1) includes power –
- (a) to make provision requiring the appropriate national authority in certain circumstances to give a person proposing to make a closure application an opinion on the information to be supplied in connection with the application,
  - (b) to make provision requiring a relevant authority to give a person proposing to make a closure application information for the purposes of the application, and
  - (c) to make rules as to the publicity to be given to any environmental information provided in relation to a closure application.
- (5) “Relevant authority” means any authority in relation to which Article 5(4) of the EIA Directive applies, including –
- (a) Natural England,
  - (b) Scottish Natural Heritage,
  - (c) the Countryside Council for Wales,
  - (d) a local authority,
  - (e) a National Park authority,
  - (f) the Environment Agency,
  - (g) the Scottish Environmental Protection Agency, and
  - (h) Natural Resources Wales.
- (6) Paragraphs 3 and 4 set out minimum requirements with which the applicant must comply after having made a closure application.
- (7) Rules under this paragraph may add to or supplement those requirements, but not remove or restrict them.
- 3 (1) The applicant must as soon as reasonably practicable after applying for a closure order –
- (a) display a conspicuous notice of the application at or near each relevant site,
  - (b) publish a notice of the application in a publication circulating in the area where the level crossing is situated,
  - (c) make a notice of the application readily available to the public on an internet website, and
  - (d) give a notice of the application to each person listed in sub-paragraph (2).
- (2) The persons are –
- (a) any person whom the applicant, after making reasonable enquiry, knows to be or suspects of being a directly affected person,
  - (b) any other person whom the applicant, after making reasonable enquiry, knows to be or suspects of being a person to whom a notice would, on the relevant assumptions, have had to be given under 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,
  - (c) any person whom the applicant, after making reasonable enquiry, knows to be or suspects of being an owner, lessee, tenant or occupier of land to which the proposed order would authorise entry for the purposes of carrying out or preparing to carry out any works,
  - (d) whichever of the railway operator or the road authority for the area in which the level crossing is situated is not the applicant,

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- (e) the road authority for the area, or each area, in which any replacement or upgrade scheme would take place,
  - (f) any person who would be required by the proposed order to bear any costs of works to be carried out as part of the order,
  - (g) any relevant planning authority in relation to any works to be carried out as part of the proposed order,
  - (h) the Health and Safety Executive,
  - (i) the Office of Rail Regulation,
  - (j) 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, Scottish Natural Heritage, and
  - (k) the operator of any tramway that runs alongside or shares the railway track at the level crossing.
- (3) “The relevant assumptions” are –
- (a) that affected land were comprised in a compulsory purchase order within the meaning of the relevant Act mentioned in sub-paragraph (2)(b), and
  - (b) that the applicant were the acquiring authority.
- (4) Notice of a closure application must include –
- (a) the name and address of the applicant,
  - (b) a summary of the proposed closure order, and
  - (c) details of how to obtain further information about the application and about the procedure to be followed in relation to it.
- (5) A “relevant site” is –
- (a) the site of the level crossing, and
  - (b) if the application includes a proposed replacement or upgrade scheme, the site of any works that would be needed for the scheme.
- (6) In relation to works –
- (a) the reference to a “relevant planning authority” is to any local planning authority (or, in Scotland, any planning authority) that would, but for section 21(2) or (8), be an authority to which an application for planning permission would need to be made in order to carry out those works, but
  - (b) paragraph (a) does not include any authority to which such an application would be referred if a direction were to be given in relation to the application.
- 4 If the applicant withdraws a closure application, it must give and publish notice of the withdrawal in the same way as if the notice were notice of a closure application.

*Duty to consider appropriate procedure etc*

- 5 (1) As soon as reasonably practicable after receiving a closure application made in accordance with this Schedule, the appropriate national authority must consider whether the proposals in the application –
- (a) are of national significance or, in Scotland, would constitute a national development, or
  - (b) are not within paragraph (a) but ought to be dealt with under transport and works legislation nonetheless.

- (2) In considering the question in subsection (1)(b), the appropriate national authority must have regard to (among other things) –
  - (a) whether the proposals may need to be referred to a public local inquiry, and
  - (b) whether the authority may wish to exercise a power available to it under transport and works legislation that is not available to it under Part 2 of this Act.
- (3) If the authority concludes that the proposals are of a kind described in subsection (1)(a) or (b) –
  - (a) it must notify the applicant of that decision,
  - (b) the closure application is deemed to have been withdrawn by the applicant on receipt of that notice, and
  - (c) the applicant must give and publish notice of the deemed withdrawal in the same way as if the notice were notice of a closure application.
- (4) A decision of the appropriate national authority under this paragraph does not affect or limit any decision it may make under transport and works legislation in relation to the same or similar proposals (if an application were to be made under that legislation).
- (5) The appropriate national authority may make rules about the procedure to be followed in considering a question under this paragraph (including provision about the time within which a decision should be made).
- (6) “Transport and works legislation” means –
  - (a) the Transport and Works Act 1992 (as regards England and Wales),  
or
  - (b) the Transport and Works (Scotland) Act 2007 (as regards Scotland).
- (7) “National development” has the meaning given in section 13 of the Transport and Works (Scotland) Act 2007.

*Initial written consultation*

- 6 (1) The appropriate national authority must not make a closure order without first –
  - (a) allowing a period of time for any person wanting to do so to make written representations to the appropriate national authority about the closure application, and
  - (b) taking into consideration any representations so made.
- (2) The appropriate national authority may make rules about the consultation required by sub-paragraph (1).
- (3) The rules may include provision about (for example) –
  - (a) the period of time to be allowed for making representations,
  - (b) the process for giving notice of and publicising the consultation,
  - (c) the form in which representations must be submitted,
  - (d) the information that must be submitted with representations, and
  - (e) matters relating to the consideration of representations.
- (4) Before the consultation begins, the applicant must give notice of the consultation –

- (a) to the persons listed in paragraph 3(2), and
  - (b) to such other persons as may be specified in rules under this paragraph.
- (5) Rules under this paragraph may make provision about the form and content of any such notice.

*Post-consultation procedure*

- 7 (1) The appropriate national authority may –
- (a) appoint a person to hear oral representations about the closure application following the consultation under paragraph 6,
  - (b) invite written representations from the applicant and further written representations from any person following the consultation under paragraph 6, or
  - (c) do a combination of those things.
- (2) Alternatively, if no representations were made during the consultation, the authority may proceed directly to decide the application.
- (3) The appropriate national authority must in any event appoint a person to hear oral representations from such of the persons listed in sub-paragraph (4) as request the right to be so heard.
- (4) The persons are –
- (a) directly affected persons,
  - (b) any other person to whom a notice would, on the relevant assumptions, have had to be given under 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,
  - (c) whichever of the the railway operator or the road authority for the area in which the level crossing is situated is not the applicant,
  - (d) the road authority for the area, or each area, in which any replacement or upgrade scheme would take place, and
  - (e) if the draft closure order includes a proposal for development for which deemed planning permission would be needed –
    - (i) any relevant planning authority (as defined in paragraph 3) in relation to works needed for that development, and
    - (ii) the Health and Safety Executive.
- (5) “The relevant assumptions” are –
- (a) that affected land were comprised in a compulsory purchase order within the meaning of the relevant Act mentioned in sub-paragraph (4)(b), and
  - (b) that the appropriate national authority were the acquiring authority.
- (6) The appropriate national authority may make rules about the making of requests under sub-paragraph (3), including rules about –
- (a) the form in which requests must be made, and
  - (b) the time limits within which requests must be made.
- (7) A hearing held by a person appointed under this paragraph is to be a statutory inquiry for the purposes of section 9 of the Tribunals and Inquiries Act 1992 (procedure in connection with statutory inquiries), whether or not it would be one apart from this sub-paragraph.

*Hearings: supplementary*

- 8 (1) This paragraph applies to hearings under paragraph 7.
- (2) A person appointed to hear oral representations from particular persons may also invite any other person to make oral representations at the hearing.
- (3) Without limiting the power under sub-paragraph (2) –
  - (a) the appointed person must invite the applicant to make oral representations at the hearing, and
  - (b) any person who did not make a request under paragraph 7 to be heard but was entitled to do so is entitled to make oral representations at the hearing.
- (4) The appropriate national authority may make rules about the procedure to be followed in connection with hearings, including –
  - (a) rules permitting the person appointed to hold a hearing to determine the procedure for that particular hearing, and
  - (b) rules permitting hearings in respect of separate closure applications to be held together as if they were a single hearing.
- (5) Hearings must be held in public, but members of the general public attending a hearing are not entitled to make oral representations there (unless, in the case of particular individuals, they are invited to do so under sub-paragraph (2)).
- (6) The person appointed to hold a hearing may direct the applicant or any person who makes oral representations at the hearing to bear some or all of the costs (or, in Scotland, expenses) incurred by the appropriate national authority in relation to the hearing.
- (7) If a direction is given under sub-paragraph (6) –
  - (a) the appropriate national authority may arrange for the amount of those costs (or expenses) to be certified, and
  - (b) the portion that a person is directed to bear is recoverable by the appropriate national authority summarily as a civil debt (or, in Scotland, as a debt due to the Scottish Ministers).
- (8) The person appointed to hold a hearing may make orders as to the costs (or, in Scotland, expenses) of those making oral representations at the hearing and as to which of them is to bear any such costs (or expenses).
- (9) An order under sub-paragraph (8) may be made a rule of the High Court on the application of any person named in the order (or, in Scotland, may be enforced in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland).

*Making the decision*

- 9 (1) With respect to a closure application, the appropriate national authority may –
  - (a) make a closure order that gives effect to the proposals in the application without modification,
  - (b) make a closure order that gives effect to those proposals with modifications, or



- (c) decide not to make a closure order.
- (2) A decision not to make a closure order may be made—
  - (a) on the ground that the test set out in section 11(1) is not met,
  - (b) on the ground that the proposals in the application could be achieved by other means, or
  - (c) on the ground that the applicant has failed to comply with a material requirement imposed on the applicant by or under this Schedule.
- (3) The power in subsection (1) includes a power to make a decision about some of the proposals and to make a different decision about others or to defer consideration of others (and, in case of deferral, two or more closure orders may be made on the same application).
- (4) If the appropriate national authority proposes to make a closure order giving effect to proposals in the application with modifications that will materially change the proposals, it must—
  - (a) notify anyone who, in its view, is likely to be affected by the modifications,
  - (b) give them an opportunity to make representations about the modifications, and
  - (c) consider any representations so made before deciding whether to make the order.

*Publishing the decision*

- 10 (1) As soon as reasonably practicable after making a decision under paragraph 9, the appropriate national authority must—
- (a) notify the persons listed in sub-paragraph (2) and, if the decision is to make a closure order, give each of them a summary of the order, and
  - (b) publish details of the decision.
- (2) The persons are—
- (a) the applicant,
  - (b) whichever of the railway operator and the road authority for the area in which the level crossing is situated was not the applicant,
  - (c) any person who made representations during the consultation under paragraph 6,
  - (d) any person whom the appropriate national authority knows or reasonably believes to be a directly affected person, and
  - (e) any other person specified in rules made by the appropriate national authority under this paragraph.
- (3) The appropriate national authority may make rules about the notice to be given to the persons listed in sub-paragraph (2) and about publicising details of the decision.
- (4) Without limiting sub-paragraph (3), the notice to be given to the persons listed in sub-paragraph (2) must outline—
- (a) the main reasons for the decision and main considerations on which it is based,
  - (b) the participation of the public in the decision-making process, and
  - (c) how to challenge the validity of the decision.

- (5) If the decision is to make a closure order and the order includes provision for works of environmental significance, the notice must also describe the main measures to avoid, reduce and, if possible, offset the major adverse environmental effects of the works.
- (6) The reference to works of environmental significance is to works or other projects that—
  - (a) are in a class listed in Annex II to the EIA Directive, and
  - (b) by virtue of their nature, size or location, are likely to have significant effects on the environment.
- (7) The details to be published under sub-paragraph (1)(b) must state where copies of the notice given to the persons listed in sub-paragraph (2) may be obtained.

*Duty to send closure orders to relevant bodies*

- 11 (1) As soon as reasonably practicable after making a closure order, the appropriate national authority must send a copy of the order to the Office of Rail Regulation.
- (2) If the order creates a right over land, or extinguishes or restricts a private right or a private interest in or over land, the appropriate national authority must also send a copy of the order to the relevant land registrar.
- (3) The relevant land registrar is—
  - (a) for land in England or Wales, the Chief Land Registrar, and
  - (b) for land in Scotland, the Keeper of the Registers of Scotland.
- (4) For land in Scotland—
  - (a) the duty in sub-paragraph (2) applies only if the creation, extinguishment or restriction takes effect unconditionally on the making of the order, but
  - (b) paragraph (a) is without prejudice to any provision included in the order for notifying the Keeper of the Registers of Scotland once conditions imposed by virtue of section 15(1) have been met.

*Non-material amendments after order is made*

- 12 (1) The appropriate national authority may not amend a closure order under section 24 except on the application of—
  - (a) the applicant,
  - (b) whichever of the railway operator or the road authority for the area in which the level crossing is situated was not the applicant, or
  - (c) a directly affected person.
- (2) The appropriate national authority may make rules about the procedure for making and determining applications under this paragraph.
- (3) The rules may include provision about (for example)—
  - (a) the form and content of applications,
  - (b) consultation requirements, and
  - (c) publicity and notification requirements.

- (4) As soon as reasonably practicable after amending a closure order under section 24, the appropriate national authority must send a copy of the revised order to the Office of Rail Regulation.

*Rule-making powers*

- 13 (1) This paragraph applies to any power under this Schedule to make rules.
- (2) The power includes power –
- (a) to make different rules for different cases, and
  - (b) to make incidental, supplemental, consequential, transitional or saving provision in connection with the rules.
- (3) The power also includes power to make provision authorising the appropriate national authority to do any of the following in a particular case –
- (a) dispense with compliance with rules that would otherwise apply in that case,
  - (b) require compliance with rules that would not otherwise apply in that case, or
  - (c) require compliance with specific directions given by the appropriate national authority about the procedure to be followed in that case.
- (4) For the purposes of sub-paragraph (3) –
- (a) “rules” means rules made under this Schedule, and
  - (b) the power under paragraph (c) to give specific directions does not include power to give specific directions that are inconsistent with a specific requirement set out in this Schedule (rather than in rules).
- (5) Before making rules under this Schedule, the appropriate national authority must discuss its proposals with the other appropriate national authorities, with a view to trying to conform the rules made by each authority where reasonably practicable to conform them.
- (6) Any power under this Schedule to make rules is exercisable by statutory instrument.
- (7) A statutory instrument containing rules under this Schedule is subject to annulment in pursuance of a resolution of the relevant legislature.
- (8) “The relevant legislature” is –
- (a) for rules made by the Secretary of State, either House of Parliament,
  - (b) for rules made by the Scottish Ministers, the Scottish Parliament, and
  - (c) for rules made by the Welsh Ministers, the National Assembly for Wales.

# APPENDIX B

## EXPLANATORY NOTES FOR DRAFT LEVEL CROSSINGS BILL

### INTRODUCTION

- B.1 The draft Level Crossings Bill implements the recommendations made by the Law Commission and the Scottish Law Commission in their joint Report: *Level Crossings*, published in 2013.
- B.2 The Law Commissions' review was concerned with modernising and simplifying the law relating to level crossings. The recommendations in the Commissions' report are aimed at bringing the safety regime fully under the umbrella of the Health and Safety at Work etc. Act 1974; to create a bespoke system for closing individual level crossings and to make changes to the law relating to the creation and extinguishment of rights of way across the railway and to Scottish access rights across the railway.

### THE DRAFT LEVEL CROSSINGS BILL

#### Definitions

- B.3 A level crossing is a place where a railway line is crossed on the same level by a right of way. That right of way may be:
- (1) a public right of way, which will either be a highway in England and Wales or a road in Scotland (as defined in clause 50); and/or
  - (2) a private right of way, which may be an easement in England and Wales, a servitude in Scotland or a statutory right of way (as defined in clause 50).
- B.4 There may be both a public right of way and a private right of way over the same crossing.
- B.5 There are interpretation provisions in clause 8 (in relation to level crossing directions), clause 31 (in relation to Part 2) and clause 50 (in relation to the whole of the draft Bill) and in paragraph 1 of the Schedule.
- B.6 "Railway" is defined in clause 50 as a system of transport employing parallel rails. Where a railway has become disused, there will no longer be "a system of transport" and therefore the "railway" ceases to exist. It will be a question of fact whether or not a railway that is not in use is still a "railway" for the purposes of the Bill, but once the track has been permanently removed there is clearly no "railway".
- B.7 Miniature railways with a track gauge of less than 350 millimetres, are excluded from the definition of "railway". Level crossings on such railways are not covered by the provisions of the Bill, with one exception. The exception is where a railway with a smaller gauge is crossed by a carriageway, as defined in section 329 of the Highways Act 1980 (for England and Wales) or section 151(2) of the Roads (Scotland) Act. If a miniature railway is crossed by a carriageway, the provisions

of the Bill will apply to all level crossings along the whole of that railway, whether or not they are all crossed by a carriageway. In other words for a miniature railway to be covered by the provisions of the Bill, it is only necessary for the track to be crossed in one place by a carriageway.

- B.8 Tramways are excluded from the definition of railways. A tramway is a system of transport which runs predominantly on a “line of sight basis”. This means that trams are run at speeds where the driver can stop within the distance that can be seen to be clear ahead. Where a tramway is not running on a line of sight basis, for example where it shares a stretch of track with a railway, or where it shares a crossing with the railway, any crossings will be level crossings for the purposes of the Bill.
- B.9 The “railway operator” responsible for a railway is defined in clause 50 for the purposes of the Bill and would include Network Rail, as operator of the mainline network or a heritage rail operator such as West Somerset Railway plc.
- B.10 There are also definitions of “public right of way” and “private right of way” and “public level crossing” and “private level crossing” in clause 50.
- B.11 The construction of many railways was authorised under local Acts of Parliament known as “special Acts”. These are defined in clause 50. Railway construction may also be authorised by other statutory provision, including the Transport and Works Act 1992, in England and Wales and the Transport and Works (Scotland) Act

### **Part 1: Safety and convenience of users of level crossings**

- B.12 This Part of the Bill supplements and supports the governance of safety and convenience at level crossings under the Health and Safety at Work etc. Act 1974. It imposes general duties on railway operators, traffic authorities, highway authorities and, Ministers, when performing relevant statutory functions, to co-operate and to consider the convenience of all users of level crossings. Ministers are given the power to issue directions in respect of individual level crossings imposing requirements which are considered necessary or expedient for the safety or convenience of users of the level crossing. Provision is made to clarify the scope of health and safety regulations, made under section 15 of the Health and Safety at Work etc. Act 1974 in relation to level crossings, and to ensure that any such regulations may apply to those people specified in the Bill, whether or not they owe any general duty under the 1974 Act. The Office of Rail Regulation is given the power to issue approved codes of practice under section 16 of the 1974 Act, in the same way as the Health and Safety Executive may issue approved codes of practice in other areas.

### **Part 2: Closure of level crossings**

- B.13 In this Part, a bespoke procedure is created for closing individual level crossings, whether public or private, on the application of a railway operator, highway or roads authority. The resulting “closure order”, may provide consent for any replacement, including the diversion of existing rights of way or creation of new rights of way, planning permission to build any replacement, such as a bridge or underpass, and any compulsory purchase. Compensation arising from compulsory purchase, the extinguishment or restriction of rights is also provided

for. This new procedure provides an alternative to existing powers which might be used to close level crossings, including the Transport and Works Act 1992 and Transport and Works (Scotland) Act 2007 and, in relation to England and Wales, sections 116, 118A and 119A of the Highways Act 1980. The existing powers are still available.

### **Part 3: Access rights etc in Scotland**

- B.14 This Part enables the Scottish Ministers, to make orders to the effect that private level crossings are subject to access rights. It also provides for the Scottish Ministers to order the creation of new level crossings in furtherance of access rights. The Land Reform (Scotland) Act 2003 is amended so as to exclude the exercise on or across a railway track of the access rights provided for by Part 1 of the 2003 Act, subject to limited exceptions. The Town and Country Planning (Scotland) Act 1997 is amended to allow for deemed planning permission for a development, where it is required in connection with these provisions.

### **Part 4: Rights of way**

- B.15 In England and Wales, the future acquisition of private and public rights of way over the railway by prescription, or implied dedication is prohibited. Provision is made for agreements for the extinguishment of statutory rights of way to operate in the same way as agreements for the extinguishment of easements.
- B.16 In relation to Scotland, provision is made to clarify that a servitude of way or public right of way may be granted across the railway. Provision is included to prevent the acquisition of public rights of way and, other than in limited circumstances, servitudes across a railway track by operation of the law of prescription. There is also provision to the effect that if a statutory private right of way across the railway track is not used for a continuous period of 20 years the right of way is extinguished at the expiry of the 20 year period. Provision is made to put on a statutory footing "discharge agreements" entered into between the owner of the land on which the level crossing is located and the owner of land that benefits from a statutory right of way over a level crossing, to extinguish the right of way. The Title Conditions (Scotland) Act 2003 is amended to extend the jurisdiction of the Lands Tribunal for Scotland by empowering it to discharge statutory rights of way over level crossings.

### **Part 5: Supplementary provisions**

- B.17 In this Part, certain statutory provisions which have been superseded by subsequent statutory provisions, including the draft Bill, are disapplied in so far as they relate to level crossings within the meaning of the Bill. Powers are given to the Secretary of State and the Scottish Ministers to make consequential amendments and repeals.

### **Schedule: Closure orders – procedure**

- B.18 The Schedule to the Bill makes more detailed provision for the procedure relating to applications for orders to close level crossings. Provision is made for the giving of notice of closure applications, for the form and content of closure applications, for consultation in connection with closure applications, for hearings in limited circumstances, for the making and publication of the decision as regards applications and for the making of non-material amendments to closure orders.

Wide powers are given to the “appropriate national authorities” to make procedural rules, and they are obliged to consult with each other in making rules with a view to creating consistency where possible. The Schedule also imposes an obligation on the appropriate national authority to consider, at the earliest opportunity, whether the proposals in the application are such that the application is excluded from the closure procedure. The appropriate national authority may in any event determine that an application should be dealt with under the Transport and Works Acts, rather than under the new closure procedure.

## **COMMENTARY ON CLAUSES**

### **Part 1: Safety and convenience of users of level crossings**

#### **General duties**

##### ***Clause 1: Co-operation between traffic authorities and railway operators***

- B.19 Clause 1 imposes a duty on railway operators and traffic authorities to enter into and maintain arrangements with each other for the purposes of ensuring co-operation between them in carrying out their respective obligations so far as they relate to level crossings. Arrangements for co-operation may also include the beneficiary of any private right of way across the railway or anyone else whose activities might affect the safety or convenience of users. The traffic authority may be a local traffic authority, or the Secretary of State, the Scottish or Welsh Ministers in their role as traffic authority. The duty extends to functions relating to safety and/or convenience but is not limited to that. The provision leaves the parties to determine how to carry out the duty but also makes clear that the arrangements they make should where appropriate cover the exchange of information.
- B.20 The duty to co-operate is enforceable under clause 3, but is also enforceable in public law against any body carrying out public functions.

##### ***Clause 2: Duty to consider convenience of all users***

- B.21 This clause imposes a duty on certain persons to consider the convenience of users of a level crossing when making decisions which relate to a level crossing.
- B.22 Subsection (2) provides that the duty is imposed on the railway operator and the traffic authority for the level crossing, on the appropriate national authority when making level crossing directions under clause 4, and on the Secretary of State, the Scottish Ministers and Welsh Ministers when making decisions in the course of their statutory functions in relation to railways or roads.
- B.23 Subsection (3) provides that the duty is not just about decisions which directly affect the safety or convenience of the crossing. Relevant decisions might be local, such as a decision relating to the type of gates or warning lights at that level crossing, or they could be regional or national decisions, such as the frequency of trains on a particular line or the line speed.
- B.24 The duty to consider convenience is enforceable under clause 3, but is also enforceable in public law against any body carrying out public functions.

**Clause 3: Declarations etc regarding compliance with sections 1 or 2**

- B.25 This clause allows a person who claims that the duty under clause 1 or 2 has not been complied with, to apply to the High Court or in Scotland the Court of Session for a review and for a declaration or declarator to that effect. This applies whether or not the claimant could otherwise enforce the duty under the general law.
- B.26 Subsection (2) sets out a time limit of one year from the date the act or omission occurred within which proceedings must be brought. The court has a discretion to extend the time limit.
- B.27 Subsection (3) makes clear that the right to bring a claim under the clause does not affect any other right to enforce the relevant duty under the general law (for example in a claim for judicial review).

**Directions for the safety or convenience of users**

**Clause 4: Level crossing directions**

- B.28 The Secretary of State, the Scottish Ministers or Welsh Ministers, whichever is “the appropriate national authority” under the Bill, are given the power to issue directions in respect of individual level crossings. A direction may be given to the railway operator, the local traffic authority or where there is a private right of way over the level crossing, any person who appears to the appropriate national authority to be a beneficiary of that right of way *and* who is likely to be or to become a “relevant beneficiary” of that right of way.
- B.29 “Relevant beneficiary” is defined in clause 8 as a beneficiary of a private right of way over a level crossing who is subject to one or more of the duties under sections 2 to 4 of the Health and Safety at Work etc. Act 1974 in relation to the crossing. This means that a direction may be given to a person who is not currently subject to such duties in respect of their use of the level crossing, but is expected to become subject to such duties. However, a direction can only be enforced against a beneficiary of a private right of way who has such duties. So a beneficiary who has a private right of way over a level crossing but who does not have such duties in relation to the crossing is not required to comply with a direction.
- B.30 Subsection (3) provides that a direction may impose such requirements as the appropriate national authority considers “necessary or expedient for the safety or convenience” of users of the level crossing.
- B.31 Subsection (5) mentions two types of requirement that can be imposed by a direction. The subsection is not exhaustive but it is expected that these will be the most common types of requirement that might be needed. So a direction may include requirements as to particular arrangements at a level crossing, such as the protective equipment, gates, vehicle detection equipment, signs, road markings or road surfacing. Where the direction is given to the railway operator, the requirements can also relate to the operation of the railway near to the crossing, such as train speeds approaching the level crossing or even the maximum period per hour that the crossing may be closed to non-rail traffic.
- B.32 It is possible for more than one direction to be in force in respect of the same



level crossing. For example, there may be a direction relating to train speeds along a section of a railway line that affects a number of crossings, while a direction relating to one particular crossing might require a specific set of lights or type of barrier.

- B.33 A direction may be revoked by a subsequent direction under subsection (8) and it is not necessary for the subsequent direction to impose any requirements.

***Clause 5: Level crossing directions: supplementary***

- B.34 Clause 5 is mostly about the procedure for issuing a direction.
- B.35 Subsection (1) requires the appropriate national authority to consult the Office of Rail Regulation before issuing a direction. The Office of Rail Regulation is the safety regulator for the railways and may therefore wish to comment on the contents of a proposed direction.
- B.36 Subsection (2) requires an authority considering making a direction to take account of any statement issued by the Secretary of State under clause 7 setting out the policy with regard to use of the power to issue directions.
- B.37 Subsections (4) and (5) are intended to ensure that anyone interested has access to any directions given.
- B.38 Subsection (7) makes clear that a sign placed on a highway or road in terms of a direction is to be treated as if placed in terms of the Road Traffic Regulation Act 1984. This enables the offences under the 1984 Act to apply in relation to signs placed in terms of a direction.

***Clause 6: Level crossing directions: duty to comply and enforcement***

- B.39 This clause requires a person who is given a direction to comply with it. The duty always applies to the railway operator and the local traffic authority for the level crossing (for requirements imposed on them) but, in the case of a requirement imposed on a beneficiary of a private right of way, the duty only applies when the person is a “relevant beneficiary”.
- B.40 Subsection (2) treats clause 6 as one of the “relevant statutory provisions” as defined in the Health and Safety at Work etc. Act 1974. The effect of this is to make the duty to comply with a direction enforceable under the relevant provisions of the 1974 Act. For example, sections 21 to 23 of the 1974 Act provide for improvement or prohibition notices to be issued in respect of breaches of relevant statutory provisions, amongst other things. Section 33 of the 1974 Act creates criminal offences, including a failure to discharge obligations under sections 2 to 7 of the Act, breaches of health and safety regulations or improvement or prohibition notices.
- B.41 Subsection (5) makes clear that any arrangements under clause 1 (such as a level crossing plan) or provisions of a special Act which would otherwise apply to the level crossing, do not apply to the extent that they are inconsistent with the duty to comply with a direction. In other words where there are inconsistent duties the direction takes precedence.

***Clause 7: Statement of policy as to the use of the power to give level crossing directions***

- B.42 This clause gives the Secretary of State the power to draw up and publish a statement of policy setting out how the power to give directions will be exercised. The statement is intended to provide guidance to the public as well as to those who may be given, or affected by, a direction, about the circumstances in which a direction might be issued. This is thought necessary because the terms of the power itself are necessarily broad.
- B.43 Before making a statement the Secretary of State must consult the Scottish Ministers and the Welsh Ministers. A statement of policy must be publicly available and may be revised.

***Clause 8: Level crossing directions: interpretation***

- B.44 This clause provides definitions of the terms used in clauses 4 to 7 in relation to level crossing directions. The term “relevant beneficiary” is explained in paragraph A29. The other terms should be self-explanatory.

**Miscellaneous**

***Clause 9: Health and safety Regulations***

- B.45 This clause relates to the power to make health and safety regulations under section 15 of the Health and Safety at Work etc. Act 1974 in relation to level crossings.
- B.46 Subsection (1) makes clear that health and safety regulations can provide for the making of arrangements for the safety or convenience of users of level crossings, and in particular for the making, variation, lapse or revocation of a document recording requirements agreed under such arrangements. The main purpose of the subsection is to ensure that the powers to make health and safety regulations will cover the Commissions’ recommendations for level crossing plans. Without it there might be doubts about using the power to provide for a separate document (a level crossing plan) to contain enforceable requirements.
- B.47 Under subsections (2) and (3) health and safety regulations may make provision in respect of any person prescribed in the regulations, in connection with safety or convenience at level crossings, even if that person does not owe any duties under Part 1 of the Health and Safety at Work etc. Act 1974. That might be the case, for example, in relation to a beneficiary of a private right of way or where a heritage railway is operated on an entirely voluntary basis and has no formal “employees”. In that case it may not be entirely clear whether or not the operator is subject to any of the general duties under Part 1 of the 1974 Act, But the intention is that the operator should be able to enter into a level crossing plan.

***Clause 10: Codes of practice***

- B.48 When railway safety functions were transferred to the Office of Rail Regulation by the Railways Act 2005, the Office of Rail Regulation was not given the power to issue approved codes of practice under section 16 of the Health and Safety at Work etc. Act 1974. Currently, neither the Health and Safety Executive nor the Office of Rail Regulation may issue approved codes of practice in relation to level crossings.

- B.49 This clause amends Schedule 3 to the Railways Act 2005, so as to give the Office of Rail Regulation the power to issue such codes of practice, but only in relation to level crossings.

**Part 2: Closure of level crossings**

- B.50 In addition to the general interpretation provision in clause 50, Part 2 of the Bill includes an interpretation provision in clause 31 for the purposes of that Part. "Closing" a level crossing is explained. The "appropriate national authority" is defined as the Secretary of State in relation to crossings in England, the Scottish Ministers in relation to crossings in Scotland and the Welsh Ministers in relation to crossings in Wales. A "road authority" is defined, as are other terms, including "right of way" for the purposes of this Part.

***Clause 11: Power to make closure orders***

- B.51 Closure orders are orders which close level crossings or parts of level crossings by extinguishing the right of way over the crossing concerned. Closure orders can also enable a replacement crossing to be made either in the same place as the existing crossing or elsewhere, with the same, or a different, type of crossing. For example a closure order could close a vehicular level crossing and provide for a replacement footbridge further down the track.
- B.52 Subsection (1) gives the appropriate national authority the power to make closure orders and sets out the test to be applied in deciding whether to exercise the power. Subsection (3) provides that a closure order will extinguish the right or rights of way over the level crossing to be closed or part of the crossing, which is to be closed or replaced. These provisions permit a closure order to extinguish statutory rights of way under section 68 of the Railways Clauses Consolidation Act 1845 and section 60 of the Railway Clauses Consolidation (Scotland) Act 1845.
- B.53 Subsection (4) provides that a closure order can also extinguish other rights either over the track or over the way beyond the crossing, if this is necessary to effect the closure or replacement of the level crossing.
- B.54 Compensation for extinguishment of rights over land under clause 11(3) and (4) is provided in clauses 16 to 18.
- B.55 Subsection (5) provides that the appropriate national authority can only make a closure order on the application of the railway operator or the road authority for the area in which the crossing is situated.
- B.56 Subsection (6) provides that the schedule sets out the procedure for making and determining applications for closure orders.

***Clause 12: Closure orders - supplementary powers***

- B.57 When a crossing, or part of a crossing, is to be replaced or upgraded, clause 12(1)(a) empowers the closure order to create new rights over any land if the rights are needed for the replacement or upgrading scheme. Examples of the kind of rights which can be created are easements or servitudes. In Scotland, a lease, proper liferent or heritable security cannot be created under this power: clause 31(7).

- B.58 Compensation for the creation of such rights over land is provided in clauses 16 to 18.
- B.59 If a closure order creates a right over land using the power in clause 12(1)(a), the closure order can also extinguish or restrict any competing rights over the same land: clause 12(1)(a), including easements or servitudes.
- B.60 Compensation provisions for the extinguishment or restriction of such rights is provided in clauses 16 to 18.
- B.61 Under clause 12(1)(b) the closure order can authorise the applicant to acquire land compulsorily if it is required for the purposes of any replacement or upgrade scheme. A closure order which authorises a compulsory acquisition is treated as a confirmed compulsory purchase order so that no further procedure by the appropriate national authority is needed for the applicant to proceed with the acquisition of the land: clause 17(3) and (7)(a). The normal procedures for compulsorily acquiring land after a compulsory purchase order has been confirmed are applied to such acquisitions: clause 17(3) and (4) for England and Wales, and clause 18(3) and (4) for Scotland.
- B.62 If the closure order authorises the applicant to acquire land compulsorily, the order can also restrict or extinguish any existing rights over that land: clause 12(1)(b), including easements or servitudes. In Scotland, rights or interests in land, such as ownership and leases, cannot be extinguished using clause 12(1)(b): clause 31(7).
- B.63 When land in England and Wales is compulsorily acquired under this procedure, clause 19(5) incorporates section 236 of the Town and Country Planning Act 1990 unless the closure order provides otherwise. This means that all private rights of way or rights of laying down, erecting, continuing or maintaining apparatus on, under or over the land will usually be extinguished automatically on completion of the conveyance of the land to the applicant. There are two exceptions: the closure may make different provision, or the applicant may agree to different provision.
- B.64 However, clause 19(5) does not provide for extinguishment of all rights over land. Thus statutory undertakers' rights for the purpose of their undertaking, and rights conferred on electronic communications code network operators by the electronic communications code are excluded from automatic extinguishment by section 236(2) of the Town and Country Planning Act 1990. Also section 236 of the Town and Country Planning Act 1990 only applies to certain specified rights: for example it does not apply to rights of turbary (the right to cut turf).
- B.65 Clause 12(5) provides that a closure order cannot include a provision which would remove or limit any right to compensation to which a person would be entitled by virtue of clauses 16 to 18. A closure order may, however, provide compensation in circumstances other than where clauses 17 (as regards England and Wales) and 18 (as regards Scotland) require it, and may make more generous compensation, so long as the compensation satisfies the public interest test.
- B.66 The effect of clause 12(3)(a) is that closure orders cannot authorise compulsory acquisition of land in England and Wales which is either:

- (1) held inalienably by the National Trust, if the National Trust maintains an objection to the acquisition; or
  - (2) common or open land which is more than 250 square yards unless other similar land is being provided in exchange. Clause 12(3)(b) prevents closure orders from affecting land in Scotland which is either held inalienably by the National Trust for Scotland or which is a common or open space.
- B.67 Clause 12(4) requires the closure order to identify land which it authorises to be compulsorily acquired. This would ordinarily be done by reference to a map.
- B.68 Closure orders can also provide for the carrying out of works in connection with the scheme under clause 12(1)(c). The applicant will usually bear the cost of the work, but the closure order can require public and private bodies and individuals to pay all or some of the cost under clauses 12(1)(d) and 12(6).
- B.69 Clause 12(1)(e) empowers a closure order to make ancillary provision necessary to give effect to the order. This could include compensation for the extinguishment and restriction of rights under clause 12(1)(b).
- B.70 Clause 12(7) provides that ancillary provisions include the power to amend, repeal or revoke statutory provisions which apply locally, such as statutory rights of way over crossings under section 68 of the Railways Clauses Consolidation Act 1845 and section 60 of the Railway Clauses Consolidation (Scotland) Act 1845.

***Clause 13: Provision for the carrying out of works***

- B.71 This clause gives examples of the provision which may be made under the power in clause 12 for the carrying out of works. The power to provide for the carrying out of works is not limited to these examples.

***Clause 14: Factors to be taken into account***

- B.72 The appropriate national authority must consider all relevant matters when determining an application for a closure order and must give due weight to each. Clause 14(2) lists certain factors which must be taken into account in determining a closure application. No single factor is paramount and the factors are not listed in order of importance.

***Clause 15: Duration of closure orders***

- B.73 Mandatory changes take effect when the order is made unless the order provides otherwise. Mandatory changes are the restriction or extinguishment of a right of way, or other right or interest and the creation of a right of way, or other right or interest.
- B.74 The closure order can defer a mandatory change by providing that it does not take effect until conditions specified in the order have been met.

**CONDITIONAL CHANGES**

- B.75 Clause 15(2) provides that if the closure order does place any conditions on a

mandatory change it must also set out how to establish whether and when the conditions have been met and require interested parties to be notified of progress towards meeting the conditions. Such a provision might include a requirement to notify all those affected by the mandatory changes, the Land Registrar or the Keeper of the Registers of Scotland when the mandatory changes take effect. Provisions setting out how to determine when the conditions have been met might include a certification process requiring that the mandatory changes take effect on certification.

#### TIME LIMIT FOR MEETING CONDITIONS

- B.76 If any conditions are provided for a mandatory change, clause 15(3) and (4) set a time limit for meeting the conditions. The time limit is 3 years from the date on which the order is made.
- B.77 Clause 15(5) provides that the time limit can be extended once only, for up to 12 months if the appropriate national authority is satisfied that an extension is necessary in the exceptional circumstances of the case. If the national authority grants an extension the national authority may require the applicant to publicise the extension and keep interested parties informed of progress: clause 15(6). This allows the national authority to impose such requirements, where the original provisions in the closure order do not adequately cover the position.

#### ORDER CEASES TO HAVE EFFECT

- B.78 Clause 15(3) provides that if conditions are placed on mandatory changes and the conditions are not all met before the end of the permitted period, the closure order will cease to have effect. If this happens the applicant must notify anyone who had to be notified of the making of the order.
- B.79 If the closure order ceases to have effect then any powers which the order provides (whether directly or by a notice given by virtue of the order) will end. For example when an order ceases to have effect, the authority to enter on land to carry out works will end.
- B.80 If the closure order ceases to have effect, then any permission granted by or as a result of the order will lapse when the order ceases to have effect, whatever the closure order, or permissions themselves, or any underlying statutory provisions relating to such permissions, provide: clause 15(3)(b). Permissions granted "as a result of the order" include , consents or permissions referred to in clauses 21 and 22 of the draft bill, such as any deemed permission or deemed consent, whether granted by the appropriate national authority or another authority
- B.81 When an order ceases to have effect, anything done under or as a result of the order before then will remain valid: clause 15(7)(a). Clause 15(7)(b) specifically confirms the validity of anything done before the order ceases to have effect in reliance on a planning permission granted or deemed to be granted when the order was made, such as the building of a bridge.
- B.82 If the closure order ceases to have effect, then mandatory changes which have not been effected before the end of the permitted period cannot be effected using the closure order: clause 15(3)(a).

## EFFECT ON COMPULSORY PURCHASE IF ORDER CEASES TO HAVE EFFECT

- B.83 Where a closure order authorises the compulsory acquisition of land, we expect that there will always be conditions attached to the closure order. If the closure order authorises a compulsory purchase under clause 12(1)(b) then any compulsory purchase which has been completed during the permitted period will not be affected by the cessation of the closure order. Completion of a compulsory purchase is when title to the interest being acquired vests in the applicant: clause 15(8)(a). For general vesting declaration procedure, completion is when the notice period in the executed general vesting declaration expires: section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981 and paragraphs 2 and 7 of Schedule 15 to the Town and Country Planning (Scotland) Act 1997. For notice to treat procedure, completion is when a conveyance, or deed poll is executed in England and Wales, and when a conveyance is registered in Scotland.
- B.84 If the closure order authorises a compulsory purchase under clause 12(1)(b) and that compulsory purchase has not completed before the end of the permitted period, then the compulsory purchase can continue to completion only if a “critical milestone” in the purchase procedure has been reached: clause 15(3)(a) and (7)(c). A critical milestone is reached when the applicant enters on and takes possession of the land in accordance with normal compulsory purchase rules; compensation is agreed or awarded or paid either into court or a bank in accordance with paragraph 2(1) and paragraph 3(3) of Schedule 3 to the Compulsory Purchase Act 1965 or sections 75 and 84 of the Land Compensation (Scotland) Act 1845 or to the seller or the seller’s nominee; or if the question of compensation is referred to the Upper Tribunal or the Lands Tribunal for Scotland in accordance with normal compulsory purchase rules: clause 15(8)(b).
- B.85 Clause 15(9) sets out what happens if a notice to treat is served by the applicant but the compulsory purchase does not then complete or reach a critical milestone within the permitted period. If this happens, the notice to treat will cease to have effect by virtue of clause 15(3) and the applicant will have to notify the person on whom the notice to treat was served that this is the case and pay compensation to that person for any loss or expenses occasioned to him by the giving of the notice to treat and its ceasing to have effect. The Upper Tribunal or the Lands Tribunal for Scotland will determine the amount of such compensation if agreement cannot be reached. Any compensation payable will carry interest from the date on which the person was entitled to a notice that the notice to treat had ceased to have effect, until payment.
- B.86 Clause 12(1)(b) provides the appropriate national authority with the power to extinguish or restrict rights over land to be compulsorily acquired. We expect that this power will be exercised so that the extinguishment or restriction takes effect when the compulsory acquisition of the land completes. If the power is exercised as expected, the policy is that the extinguishment or restriction will take effect when the compulsory purchase completes even if that completion is after the end of the permitted period.

### ***Clause 16: Compensation for extinguishment or creation of rights over land etc***

- B.87 Clause 16 provides compensation when a closure order extinguishes a private

right or private interest under clause 11(3) or (4) or creates a new right (whether public or private) under clause 12(1)(a) or extinguishes or restricts under clause 12(1)(a) a private right which competes with a new right created under clause 12(1)(a). Compensation is not provided if the order extinguishes or restricts a public right or interest.

- B.88 A person who holds an interest in land is entitled to compensation, subject to one proviso, if either their interest falls in value as a result of a relevant change or they suffer damage as a result of their possession of the interest in land being disturbed by a relevant change.
- B.89 A claimant is only entitled to compensation if he has an interest in land, and only if the relevant change, or the steps taken on the land as a result of the relevant change, would provide the basis for him to bring a legal action if the relevant change or steps were not made under statutory authority. The former requirement will prevent those with no interest in land (such as a statutory undertaker) from claiming compensation for the loss of a right. The latter requirement will ensure that if the closure order extinguishes someone's legal right of access to land A which he also uses in practice to gain access to land B, compensation will be restricted to the depreciation in value and disturbance in relation to land A.

***Clause 17: Compensation under clause 16: land in England and Wales***

- B.90 Clause 17 provides for the assessment of compensation under clause 16. The amount of compensation payable is the depreciation in value or damage as a result of disturbance in possession of the interest in land, less any increase in value as a result of the changes made or to be made by or in consequence of the closure order: clause 16(3) and 17(4). So the fall in value of the interest in land will be determined. From this figure there will be deducted any increase in value due to any replacement rights granted or to be granted either by the order or the applicant over land the applicant either owns already or is acquiring. And then any disturbance payment will be added to the result to arrive at the final compensation figure.
- B.91 The depreciation in the value of an interest in land is to be determined by applying the compulsory purchase rules for valuation on a before and after basis: clause 17(2) to (4). Therefore the *Pointe Gourde*, or value to the owner, rule about disregarding the closure scheme will apply: see *Waters v Welsh Development Agency* [2004] 1 WLR 1304. If the interest in land is subject to a mortgage, the mortgage is disregarded when valuing the interest in land: clause 17(5)(a).
- B.92 The rules relating to calculation of disturbance payments on compulsory acquisition, such as causation, remoteness and the requirement to mitigate losses, will apply to determining compensation for damage suffered as a result of disturbance in possession of an interest in land.
- B.93 The date on which valuation of the interest in land is to be made, and thus the date on which the interest in land to be valued is identified, is the date on which the relevant change takes effect: clause 17(4)(a). Thus not only will the valuation be carried out with reference to values as at that date but also the nature of the interest to be valued will be assessed at that date. For example, if the interest in



land were a lease, then the period of the lease would be taken to be period to run at the valuation date.

- B.94 Any dispute as to the compensation payable under clause 17 is to be referred to the Upper Tribunal. The normal costs and expenses provisions are to apply to determinations by the Tribunals: clauses 17(1) to (3).
- B.95 Clause 17(5) makes provision for cases when an interest in land is subject to a mortgage. Where an interest in land is subject to a mortgage, the mortgagee or is not entitled to compensation for his interest in the land, but is entitled to claim payment of the compensation due for the interest in land over which he has a mortgage, without prejudice to any claim for compensation which the holder of the interest in land makes. For example any claim for compensation by a mortgagee will not affect any disturbance claim made by the holder of the interest in land. Although both mortgagee and holder of the interest in land are entitled to make the claim for compensation in respect of the interest in land, any compensation payable in respect of the interest in land is payable to the mortgagee or if there is more than one to the mortgagee whose security ranks first. When the mortgagee receives the compensation he will hold it in trust and must apply it as if it were proceeds of sale arising from a sale by the mortgagee or heritable creditor of the mortgaged interest in land.

***Clause 18 – Compensation under clause 16: land in Scotland***

- B.96 Clause 18 makes similar provision to clause 17, but in relation to land in Scotland. The differences are: (a) any dispute as to compensation is to be referred to the Lands Tribunal for Scotland; (b) certain provisions of the Land Compensation (Scotland) Act 1963 apply to such a reference; and (c) the equivalent Scottish land law terminology is used. Thus the provision deals with a “right in land” rather than an “interest in land” and land subject to a “heritable security” rather than a “mortgage”.

***Clause 19 – Compulsory acquisition of land***

- B.97 If a closure order authorises compulsory acquisition, clause 19 applies standard compulsory purchase procedure and compensation provisions to the compulsory acquisition powers as if the closure order were a confirmed a compulsory purchase order, subject to a few exceptions: clause 19(3), (4) and (7) to (9). Thus the normal time limit provisions for the operation of compulsory purchase powers are removed because the Bill provides its own time period for exercising these powers: clauses 15 and 19(3)(c) and (7)(b). Also the provisions for expiry of notices to treat are not incorporated because the Bill, by implication, makes provision for this: clauses 15(3) and (9) and, for England and Wales, 19(3)(c). Section 5(2A) and (2B) of the Compulsory Purchase Act 1965 which contain the normal provisions for expiry of notices to treat for England and Wales are therefore omitted from the draft Bill: clause 19(3)(c). The relevant Scottish provisions on expiry of notices to treat are found in section 78(1) and (2) of the Planning and Compensation Act 1991. The 1991 Act is not among the enactments listed in Schedule 2 to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 and therefore is not incorporated into the Bill: clause 19(7).

**Clause 20: Compensation for use of works**

- B.98 Part 1 of the Land Compensation Act 1973 and Part 1 of the Land Compensation (Scotland) Act 1973 provide compensation for depreciation in the value of interests in land by physical factors such as noise and vibration, caused by the use of public works. Clause 20 ensures that all works carried out pursuant to a closure order are public works for these purposes; and that any compensation payable under Part 1 of either 1973 Act for the use of these works is to be paid by the applicant.

**Clause 21: Planning matters**

- B.99 Where a bridge or underpass is to be built to replace a level crossing, planning permission may be required.
- B.100 Subsection (2) provides for deemed planning permission to be given in a level crossing closure order for the purposes of section 90 of the Town and Country Planning Act 1990. This is achieved by amending section 90(2A) of the Town and Country Planning Act 1990 which makes provision for deemed planning permission for development with government authorisation. Subsection (8) makes equivalent amendment to section 57(2A) of the Town and Country Planning (Scotland) Act 1997.
- B.101 Section 91 of the Town and Country Planning Act 1990 provides a general provision limiting the duration of planning permission. Section 91 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 makes similar provision to that applying in England under the 1990 Act. Subsection (4) of the 1990 Act disapplies section 91 in relation to certain types of planning permission. Clause 21(3) amends subsection (4) (as regards both England and Wales) to add reference to planning permission granted on the making of a closure order under the Bill. This means that planning permission granted on the making of a closure order will not be governed by the three (or five) year time limit set out in section 91 of the 1990 Act. Clause 21(9) makes a similar amendment to section 58 of the 1997 Act as regards Scotland.
- B.102 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. In the case of a closure order any conditions specified in the direction are not to reserve any decision to be made at a future date.
- B.103 There is a risk of blight where a closure order is proposed or made. 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. Clause 21(5) provides for land subject to compulsory purchase under the level crossings closure procedure to be classified as blighted land. Blight is not

provided for within limits of deviation. It is restricted to the precise area of the land to be compulsorily purchased.

- B.104 The issue of a blight notice requires the appropriate national 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.
- B.105 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, applies certain provisions of the 1990 Act, including the compensation provisions in part 4; the purchase notice provisions in chapter 1 of part 5, chapter 2 and certain enforcement provisions in part 6.

***Clause 22: Assimilation of procedures***

- B.106 Clause 22 applies where consent, permission or a licence is required under other statutory provisions, for some part of the project. It makes similar provision to that under section 15 of the Transport and Works Act 1992 and section 14 of the Transport and Works (Scotland) Act 2007. The appropriate national authority is empowered to make regulations to allow the procedures for obtaining any such consents to be assimilated into the procedure for obtaining a closure order. In addition, regulations may be made to exclude or modify the application of any other provision and may authorise the appropriate national authority to give directions or take steps in order to secure assimilation of the procedures.

***Clause 23: Legal challenges to decisions to make or not make closure orders***

- B.107 Clause 23 restricts challenges to a decision to make or not to make a closure order to judicial review. A claim form must be filed or in Scotland the application must be made within 42 days of publication of the decision.
- B.108 The provisions of clause 23 do not affect the availability of public law remedies in respect of any other part of the decision-making process under Part 2 of the draft Bill.

***Clause 24: Non-material amendments to a closure order***

- B.109 Material amendments may not be made to a closure order. An applicant wishing to make material amendments will have to apply for a fresh order. Clause 24 provides that the appropriate national authority may make non-material amendments to a closure order after it is made. The procedure for making non-material amendments is set out in the Schedule to the Bill. Clause 23 relating to the availability of judicial review, applies to decisions to make or not to make non-material amendments to a closure order.

***Clause 25: Public rights of way***

- B.110 Any obligation to maintain a level crossing must, by definition, cease when the right of way concerned is extinguished by a closure order.

**Clause 26: Powers of entry to survey land**

- B.111 Clause 26 empowers the appropriate national authority to authorise a person to enter land in order to carry out surveys in connection with an application for a level crossing closure order. This includes, but is not limited to, taking soil samples and boring to ascertain the nature of subsoil. Supplementary provisions governing entry in section 325 of the Town and Country Planning Act 1990 and section 270 of the Town and Country Planning (Scotland) Act 1997 are applied.

**Clause 27: Duty to enter closure orders on ORR register**

- B.112 The Office of Rail Regulation has a duty to maintain a register under section 72 of the Railways Act 1993. Clause 27 imposes a duty on the Office of Regulation to enter details of all closure orders, amendments to closure orders and notices of expiry of closure orders in that register. This duty will only apply if the closure order or notice is sent to the Office of Rail Regulation. If the order is not sent to the Office of Rail Regulation, it has no duty to make relevant amendments to the register.

**Clause 28: Consequential amendments**

- B.113 This clause makes textual amendments to existing planning legislation and also transport legislation, in consequence of the power in clause 11 to make closure orders.

**Clause 29: Relationship with other powers**

- B.114 Existing powers which enable level crossings to be closed are not affected by the draft Bill and will remain in force. These include powers under the Transport and Works Act 1992 and the Transport and Works (Scotland) Act 2007, as well as powers in relation to England and Wales under sections 116, 118A and 119A of the Highways Act 1980.

**Clause 30: Crown land**

- B.115 There are various categories of Crown land, which are listed in clause 30. Clause 30 permits a level crossing closure order, including compulsory acquisition where appropriate, to be made in respect of land which is not itself a Crown interest, but in which there is a Crown interest. Permission will be required from the “relevant person”, as defined in clause 30(5). Similar provision is made in the Transport and Works Act 1992 and Town and Country Planning Act 1990.

**Clause 31: Interpretation of Part 2**

- B.116 This clause defines terms used in the provisions of Part 2 of the Bill on closure of level crossings.

**Part 3: Access rights etc in Scotland**

**Clause 32: Meaning of “access rights”**

- B.117 This clause sets out the definition of “access rights” for the purposes of Part 3 of the draft Bill. Part 3 of the Bill extends to Scotland only. The access rights provided for in terms of the definition are in relation to the *crossing of* land and are those mentioned in section 1(2)(b) of the Land Reform (Scotland) Act 2003.

B.118 Access rights are non-vehicular in nature, on the basis of the conduct excluded from access rights by section 9(f) of the 2003 Act. This is subject to an exception only in relation to motorised vehicles adapted for the use of persons with disabilities, in so far as they are being used by such persons.

***Clause 33: Provision for certain level crossings to become subject to access rights***

B.119 This clause provides a power for the Scottish Ministers to make orders to the effect that the access rights mentioned in section 1(2)(b) of the 2003 Act are exercisable across existing private level crossings.

B.120 Subsection (2) makes clear that the order-making power under subsection (1) is not exercisable by statutory instrument. Rather, such orders are administrative in nature.

B.121 Subsection (3) provides that an application for an order under subsection (1) must be in such form as is prescribed in rules made by the Scottish Ministers.

B.122 Subsections (4) and (5) provide that on receipt of an application, the Scottish Ministers must notify certain specified parties and publish details of the application including on the internet, and in a newspaper circulating in the area of the level crossing, inviting the public to comment on, or submit representations as regards, the application.

B.123 Subsection (6) provides that after the consultation period of 12 weeks, the Scottish Ministers must decide the application taking account of comments and representations received and the considerations listed in subsection (7). Alternatively, under subsection (9) before they make a decision the Scottish Ministers can arrange an exchange of written representations or in exceptional circumstances, the holding of a hearing, or they can arrange for both written representations and a hearing.

B.124 Subsection (7) lists the considerations which the Scottish Ministers must be take into account in determining an application. In addition to the specific considerations, the Scottish Ministers can take account of any other consideration which they consider relevant.

B.125 Subsection (8) makes clear that there is no order of priority to the considerations listed in subsection (7); they are to be given equal weighting.

B.126 Subsection (10) sets out an overarching test for the determination of applications by the Scottish Ministers. An order for a private level crossing to become subject to access rights should not be made by the Scottish Ministers unless they are satisfied that the access rights requested are necessary for the enjoyment of access rights generally in the local area in which the level crossing is situated.

B.127 Subsection (11) makes clear that an invitation under subsection (4) or (5) must indicate that to be considered, comments or representations must be submitted before the expiry of the period of 12 weeks from the date on which details of the application are made available to the public on an internet website.

B.128 Subsection (12) provides that an order under subsection (1) comes into force on

the day it is signed.

- B.129 Subsection (13) gives the Scottish Ministers the power to modify the list in subsection (4) of persons to be notified of receipt of an application for an order.
- B.130 Subsection (14) provides that an order under subsection (13) amending the list of persons in subsection (4) must not be made unless a draft of the order has been laid before and approved by the Scottish Parliament. This is to ensure Parliamentary scrutiny of any change (by subordinate legislation) to the list provided for in clause 33(4) of the Bill.

***Clause 34: Creation of new level crossing in furtherance of access rights***

- B.131 This clause provides a power for the Scottish Ministers to make orders for the creation of new level crossings, to enable access rights mentioned in section 1(2)(b) of the 2003 Act to be exercised across such crossings.
- B.132 Subsection (2) makes clear that the order-making power under subsection (1) is not exercisable by statutory instrument. Rather such orders are administrative in nature.
- B.133 Subsection (3) provides that an application for an order under subsection (1) must be in such form as is prescribed in rules made by the Scottish Ministers.
- B.134 Subsections (4) and (5) provide that on receipt of an application, the Scottish Ministers must notify certain specified parties and publish details of the application including on the internet and in a newspaper circulating in the area of the proposed new crossing, inviting the public to comment on, or submit representations as regards the application.
- B.135 Subsection (6) provides that after the consultation period of 12 weeks, the Scottish Ministers must decide the application taking account of comments and representations received and the considerations listed in subsection (7). Alternatively, under subsection (9) before they make a decision, the Scottish Ministers can arrange an exchange of written representations or, in exceptional circumstances, the holding of a hearing, or they can arrange for both written representations and a hearing.
- B.136 Subsection (7) lists the considerations which the Scottish Ministers must take into account in determining an application. In addition to the specific considerations, the Scottish Ministers can take account of any other consideration which they consider relevant.
- B.137 Subsection (8) makes clear that there is no order of priority to the considerations listed in subsection (7); they are to be given equal weighting.
- B.138 Subsection (10) sets out an overarching test for the determination of applications by the Scottish Ministers. An order for the creation of a new level crossing should not be made by the Scottish Ministers unless they are satisfied that the new level crossing is necessary for the enjoyment of access rights generally in the local area in which the proposed new level crossing would be situated.
- B.139 Subsection (11) makes clear that an invitation under subsection (4) or (5) must

indicate that to be considered, comments or representations must be submitted before the expiry of the period of 12 weeks from the date on which details of the application are made available to the public on an internet website.

- B.140 Subsection (12) provides that an order under subsection (1) comes into force on the day it is signed.
- B.141 Subsection (13) gives the Scottish Ministers the power to modify the list in subsection (4) of persons to be notified of receipt of an application for an order.
- B.142 Subsection (14) provides that an order under subsection (13) amending the list of persons in subsection (4) must not be made unless a draft has been laid and approved by the Scottish Parliament. This is to ensure Parliamentary scrutiny of any change (by subordinate legislation) to the list provided for in clause 34(4) of the Bill.
- B.143 Subsection (15) gives the Scottish Ministers the power to make an order by statutory instrument to the effect that the function of making orders for the creation of new level crossings is not exercisable in relation to certain types of railway.

***Clause 35: Further provision as to orders under sections 33(1) and 34(1)***

- B.144 This clause makes provision about the content of orders under sections 33(1) and 34(1).
- B.145 Subsection (1)(a) makes clear that an order making an existing level crossing subject to access rights must identify and describe the level crossing to which it relates, in accordance with the requirements set out in rules made by the Scottish Ministers.
- B.146 Subsection (1)(b) makes clear that an order for the creation of a new level crossing must identify the location at which the new level crossing is to be situated, the identification being in accordance with requirements set out in rules made by the Scottish Ministers.
- B.147 Subsection (2) provides that an order to make an existing level crossing subject to access rights may specify works which the Scottish Ministers consider must be undertaken by the railway operator, and by the roads authority within whose area the level crossing is situated, for the purposes of ensuring that access rights across the level crossing may safely be exercised.
- B.148 Subsection (3) makes identical provision to that in subsection (2), in relation to the content of orders for the creation of new level crossings, the relevant roads authority being the authority in whose area the new level crossing is to be situated.
- B.149 Subsection (4) provides that any works required under subsection (2) (in connection with an order under clause 33(1)) must be completed within 6 months after the day on which the order comes into force (the day the order is signed). However, the Scottish Ministers have the power on cause shown to allow a longer period for works to be completed.

- B.150 Subsection (5) makes equivalent provision to subsection (4) in relation to works in terms of an order under clause 34(1).
- B.151 Subsection (6) provides that access rights provided for by an order under clause 33(1) become exercisable on completion of any works specified in the order or otherwise 6 weeks after the order comes into force (the day the order is signed).
- B.152 Subsection (7) makes equivalent provision to subsection (6), in relation to access rights provided for by an order under clause 34(1). Such orders will always require works to be carried out to construct the new crossing, and so this subsection simply provides that access rights are exercisable on completion of the works.
- B.153 Subsection (8) requires the railway operator, on the access rights becoming exercisable in terms of an order under clause 33(1) or 34(1), without delay, to place a notice at or near the level crossing informing the public that access rights may be exercised across it.
- B.154 Subsections (9) and (10) give the Scottish Ministers power to take action if they think it is necessary to secure completion of works required by an order under clause 33(1) or clause 34(1). This may include instigating legal proceedings, or defending any proceedings relating to the works.
- B.155 Subsection (11) gives the Scottish Ministers power to make regulations providing for matters relating to works required by an order under clause 33(1) or 34(1).

***Clause 36 Notification of decision on application under section 33(1) or 34(1)***

- B.156 This clause sets out the requirements for Scottish Ministers to notify and publish decisions about applications for orders under section 33(1) and 34(1).
- B.157 Paragraph (a) makes clear that notice of such decisions is to be given to the applicant and to those to whom notice of the application was given in terms of clause 33(1) or 34(1), as appropriate, within 14 days of the determination of the application. Paragraph (b) provides that publicity is to be effected in the same manner as provided for in clause 33(5) or 34(5), in relation to publicity for applications for orders.

***Clause 37: Lists of level crossings subject to access rights and of new level crossings***

- B.158 The purpose of this clause is to ensure that members of the public can obtain information about new level crossings and private level crossings made subject to access rights. The Scottish Ministers are required to keep lists of both categories of crossing on an internet website accessible to the public.

***Clause 38: Questioning a decision under section 33(1) or 34(1)***

- B.159 This clause makes provision for application to the Court of Session for judicial review of decisions of the Scottish Ministers relating to applications for orders under clause 33(1) or 34(1).



**Clause 39: Amendment of Land Reform (Scotland) Act 2003**

- B.160 This provides for the insertion of new subsections (1A), (1B) and (1C) into section 6 of the 2003 Act. The effect of the insertions is to exclude the exercise on or across a railway track of the access rights provided for by Part 1 of the 2003 Act, subject to limited exceptions.
- B.161 New subsection (1A)(b)(i) makes clear that the exclusion of access rights across the railway does not apply where the railway is crossed otherwise than at track level. Accordingly it would not apply where, for example, the railway was crossed by means of a footbridge. However, new subsection (1A)(b)(ii) provides for a further exception to the exclusion where the exercise of access rights across the railway consists of crossing the railway at track level by means of a core path. Access rights would be exercisable in that case.
- B.162 New subsection (1B) makes clear that the exclusion in new subsection (1A) does not apply where a private level crossing has been made subject to access rights by an order under clause 33(1) or where a new level crossing has been created in terms of an order under clause 34(1).
- B.163 The effect of new subsection (1B) as read with clauses 33(1) and 34(1) of the Bill, is that access rights are exercisable *across* crossings which have been made subject to access rights or new crossings created to facilitate access rights but not *on* such crossings.
- B.164 Subsection (3) provides for amendment of section 7(1) of the 2003 Act to make clear that the exclusion of access rights is provided for by section 6(1) only, not by section 6 in its entirety.

**Clause 40: Amendment of Town and Country Planning (Scotland) Act 1997**

- B.165 This clause provides for the insertion of a new subsection (2B) into section 57 of the Town and Country Planning (Scotland) Act 1997. The effect of the amendment is that where development is required in connection with an order under section 33(1) or 34(1) the order may direct that planning permission for the development is deemed to be granted.

**Part 4: Rights of way**

**England and Wales**

**Clause 41: Easement of way over a railway track not to be acquired by prescription**

- B.166 There is some doubt as to whether the law of criminal trespass precludes the acquisition of an easement across a railway line by prescription. In particular, it is possible that the decision in *Bakewell Management Limited v Brandwood* could be applied if a trespass can be rendered lawful by granting permission to cross.<sup>1</sup>
- B.167 Clause 41 removes that doubt by prohibiting the future acquisition of private rights of way across the railway by prescription, both at common law and under the Prescription Act 1832, from the date this clause comes into effect.

<sup>1</sup> [2004] UKHL 14, [2004] 2 AC 519.

- B.168 This clause only applies to rights of way across the railway on the same level as the track. It also only applies where there is a “railway” within the definition provided in clause 50. If there is no longer a railway, the ordinary law would apply.
- B.169 Sub-section (4) protects those who are within a year of satisfying the requirements of section 2 of the Prescription Act 1832.
- B.170 Subsection (5) is intended to leave open the question whether the law does permit acquisition by prescription (whether generally or in particular circumstances).

**Clause 42: Highway over a railway track not to be created by presumed dedication**

- B.171 Clause 42 applies a similar rule to clause 41, to prevent the creation of highways by way of presumed dedication. Here too, there is some doubt as to whether criminal trespass precludes presumed dedication of a highway, following the decision in *Bakewell Management Limited v Brandwood*.<sup>2</sup>
- B.172 Clause 42 removes that doubt. A highway may not be presumed to be dedicated under section 31 of the Highways Act 1980 unless the conditions for dedication under section 31 have already been met before clause 42 comes into force. Similarly, dedication of a highway across the railway may not be presumed at common law unless the conditions for dedication had been met before clause 42 came into force.
- B.173 This section will only apply where there is a “railway” within the meaning of clause 50. Where a railway no longer exists, the ordinary law will apply.
- B.174 Subsection (6) is intended to leave open the question whether a highway can be created by presumed dedication (whether generally or in particular circumstances).

**Clause 43: Release of statutory right of way across railway track**

- B.175 This clause makes provision for the owner of land which benefits from a statutory right of way over a level crossing to “release” the right of way (in other words to abandon it so that it ceases to exist) by agreement with the railway operator or unilaterally. Such a release would be contained in a deed.
- B.176 Subsection (1) provides that the clause applies to a statutory right of way over a level crossing if the crossing is required to be provided by virtue of the incorporation in a special Act of section 68 of the Railways Clauses Consolidation Act 1845, or by another provision in a special Act which has similar effect to section 68.
- B.177 Subsection (2) makes provision for the owner of a plot of land which benefits from a statutory right of way of the type described in subsection (1) to enter into an agreement with the railway operator that the right be extinguished. The agreement is known as a “release agreement”. In effect it amounts to the formal

<sup>2</sup> [2004] UKHL 14, [2004] 2 AC 519.

discharge of the obligation to provide the right of way. The agreement is made by deed and may also be made unilaterally by the owner of the land benefitted by the right of way. The intention is to place release agreements for statutory rights of way on an equal footing with release agreements for easements.

- B.178 Subsection (3) makes clear that such release agreements are binding on the successors of the owner of the land which benefitted from the right of way.
- B.179 Subsection (4) makes clear that once a release takes place the specific statutory provision which required the a right of way across the railway to exist will not subsequently operate so as to authorise or require the creation of a new right of way in substitution for the released right, whether at same site or elsewhere. Such a provision will often require the railway operator to “make and at all times maintain” accommodation works across the railway for some purpose or other.
- B.180 Subsection (5) restricts the definition of “owner” to the holder of a freehold or leasehold estate in the land. This applies to references to the owner of the benefitted land.

## **Scotland**

### ***Clause 44: Grant of servitude of way or public right of way across railway track***

- B.181 This clause provides for the voluntary grant of servitudes and public rights of way across the railway track.
- B.182 Subsection (1) places on a statutory footing power for the owner of the land on which the railway is situated to grant a servitude of way or a public right of way across the railway track. Normally the owner of the land on which the railway is situated will be the railway operator as in the case of Network Rail in relation to the mainline rail network. Particularly in relation to servitudes, this provision is intended to clarify what is thought to be the existing law. In view of the definitions of “public right of way” and “road” in clause 50, clause 44 could be used to create a new vehicular or pedestrian right of way.

### ***Clause 45: Servitude of way or public right of way across railway track***

- B.183 This clause prevents the acquisition of public rights of way and, other than in limited circumstances, servitudes across a railway track by operation of the law of prescription. The effect of the clause is not retrospective.
- B.184 Paragraph (a) excludes the acquisition of a servitude of way across any part of a railway track by the operation of prescription, other than by prescription in terms of section 3(1) of the Prescription and Limitation (Scotland) Act 1973. Prescriptive rights arise where a servitude or, as appropriate, a public right of way over land has been possessed for a continuous period of 20 years without judicial interruption. The right arises on the expiry of the 20 year period. The retention of section 3(1) of the 1973 Act is intended to preserve the possibility of prescription operating to remedy the invalidity of a deed which seeks to constitute a servitude over land.
- B.185 Paragraph (c) excludes the acquisition of a public right of way across any part of the railway track by the operation of prescription.

- B.186 Paragraphs (b) and (d) make clear that the exclusion of acquisition of servitudes and public rights of way by prescription does not apply where a continuous period of 20 years of usage has run and expired before the coming into force of the section. The 20 year period must be completed by midnight of the day immediately before the day of commencement.

***Clause 46: Extinction of statutory right of way across railway track by negative prescription.***

- B.187 This clause provides that if a statutory private right of way across a railway track is not used for a continuous period of 20 years the right of way is extinguished on the expiry of that period.
- B.188 Subsection (1) provides that the clause applies to a statutory private right of way over a level crossing if the crossing is required to be provided by virtue of the incorporation in a special Act of section 60 of the Railways Clauses Consolidation (Scotland) Act 1845, or by another provision in a special Act which has similar effect to section 60.
- B.189 Subsection (2) as read with the definition in subsection (3) of “continuous period of 20 years”, makes clear that time which has run prior to the commencement of the provision counts towards the period of 20 years, providing that the period of non-use is continuous and ongoing as at the date of commencement. In other words, the 20 year period must have at least one day left to run as at the date when the provision comes into force.
- B.190 Subsection (3) defines terms used in the clause. In particular the term “continuous period of 20 years” is defined so as not to include any 20 year period ending on or before the clause comes into force.

***Clause 47: Discharge of statutory right of way across railway track***

- B.191 This clause makes provision for the owner of the railway (in most cases this will be the railway operator) to enter into a discharge agreement with the owner of land which benefits from a statutory right of way over a level crossing, to extinguish the right of way. It also makes provision for the registration or recording of such agreements, as appropriate.
- B.192 Subsection (1) provides that the clause applies to a statutory right of way over a level crossing if the crossing is required to be provided by virtue of the incorporation in a special Act of section 60 of the Railways Clauses Consolidation (Scotland) Act 1845, or by another provision in a special Act which has similar effect to section 60.
- B.193 Subsection (2) makes provision for the owner of a plot of land which benefits from a statutory right of way of the type described in subsection (1) to enter into a written agreement with the owner of the land on which the railway is situated (normally the railway operator) that the right be extinguished. The written agreement is known as a “discharge agreement”. In effect it amounts to the formal discharge of the railway owner from the obligation to provide the right of way. The provision is intended primarily to provide clarification that discharge agreements are valid, and in particular that they are binding on the successors of the owner of the land which benefited from the right of way.

- B.194 Subsection (3) makes clear that the entering into of a discharge agreement between a railway operator and owner of a plot of land does not, in itself, affect any right held by another person in the plot of land, such as lessees. Such a right will only be discharged in the event that the other person consents in writing to the discharge.
- B.195 Subsection (4) provides a power for discharge agreements to be registered in the Land Register of Scotland or recorded in the General Register of Sasines, as appropriate. Written agreement to discharge by other persons holding rights may also be recorded or registered as appropriate. Subsection (4) also makes clear what a discharge agreement or written agreement to discharge by another person holding a right may competently be registered against.
- B.196 Subsection (5) as read with subsection (6) provides that the power in section 115(1) of the Land Registration etc. (Scotland) Act 2012 for the Scottish Ministers to make “land register rules” may be used to make rules with regard to the form and execution of discharge agreements to be registered in the Land Register and for the registration of agreements in the Register.
- B.197 Subsection (7) makes similar provision to subsection (5), in relation to the making of regulations by the Scottish Ministers with regard to the recording of discharge agreements in the Register of Sasines.
- B.198 Subsections (8) makes clear that any provision giving rise to a statutory right of way over a level crossing is not to be taken to require or authorise the creation of another private right of way over the railway once the statutory right of way has been discharged in terms of this clause
- B.199 Subsection (9) in effect makes clear that the provision does not affect the validity of any discharge agreement made before the commencement of the section.

***Clause 48: Amendment of Title Conditions (Scotland) Act 2003***

- B.200 This clause inserts a new paragraph (fa) in the definition of “title condition” in section 122(1) of the Title Conditions (Scotland) Act 2003. The effect of the new paragraph is to extend the jurisdiction of the Lands Tribunal for Scotland by empowering it to discharge statutory rights of way over level crossings which are required to be provided by a special Act incorporating section 60 of the Railways Clauses Consolidation (Scotland) Act 1845, or by another provision in a special Act which has a similar effect to section 60. Subsection (3) provides for insertion in section 122 of a new interpretation provision.

**Part 5: Supplementary provisions**

***Clause 49: Disapplication of statutory provisions relating to level crossings***

- B.201 The provisions listed in clause 49 are disappplied in relation to level crossings in Great Britain because they have been superseded by subsequent statutory provision, including the draft Bill or are otherwise obsolete, governing safety or convenience at level crossings.
- B.202 The provision of gates or barriers will be a matter for railway operators and others with obligations under the draft Bill and the Health and Safety at Work etc. Act 1974 to determine in accordance with the outcome of risk assessments.

Provision for gates or barriers may be made in arrangements (namely level crossing plans) under clause 9(1) or in directions issued under clause 4.

- B.203 Similarly, if a risk assessment carried out in pursuance of obligations under the Health and Safety at Work etc. Act 1974 showed that shunting of trains over level crossings did not satisfy the obligation to reduce risk so far as reasonably practicable, appropriate action could be taken by railway operators.

***Clause 50: Interpretation***

- B.204 This is discussed above under the heading “definitions”.

***Clause 51: Power of Secretary of State to make consequential amendments and repeals***

- B.205 Subsection (1)(a) gives the Secretary of State the power by order to amend, repeal or revoke provisions in primary or subordinate legislation in consequence of the Bill.

- B.206 Subsection (1)(b) gives power by order to amend, repeal or revoke provisions of a “special Act” which are thought to relate to, or to the safety or convenience of, users of a level crossing. This allows such provisions to be removed if no longer needed. For example a level crossing may have been created by virtue of a provision of a special Act requiring the railway operator must provide and “maintain for all time” a level crossing. Following a level crossing closure order, the Secretary of State might wish to amend or repeal that provision of the special Act as the duty to maintain a level crossing will be obsolete.

- B.207 Such orders would be made by statutory instrument. Where an order modifies an Act other than a local Act the order would be subject to affirmative resolution of both Houses of Parliament. Any other order under this clause would however, be subject to negative resolution procedure of either House of Parliament.

***Clause 52: Power of Scottish Ministers to make consequential amendments and repeals***

- B.208 This clause gives the Scottish Ministers corresponding powers to those in clause 51.

***Clause 53: Extent***

- B.209 This clause sets out the extent of Bill. The Bill forms part of the law of England and Wales and Scotland only with the following exceptions. Part 3 on access rights in Scotland extends only to Scotland. Part 4 on rights of way contains provisions which either extend only to England and Wales (clauses 41 to 43) or only to Scotland (clauses 44 to 48).

- B.210 Any amendment or repeal in Parts 1, 2 or 5 (including the disapplication in clause 49) has the same extent as the provision being affected. In the case of clause 49 the disapplication of the listed provisions therefore extends also to Northern Ireland (but only in relation to level crossings in Great Britain).

***Clause 54: Short title and commencement***

- B.211 Subsection (2) provides that the Bill is to come into force by means of

commencement order made by the Secretary of State. Any such order can only be made after consultation with the Scottish Ministers and Welsh Ministers.

**Schedule: Closure orders – procedure**

- B.212 The Schedule to the Bill makes more detailed provision for the procedure relating to applications for orders to close level crossings.
- B.213 Paragraph 1 of the Schedule provides definitions for some terms used in the Schedule.
- B.214 Paragraph 2 empowers the appropriate national authority to make rules in relation to applications for closure orders, sets out the scope of that power and provides a non-exhaustive list of topics which rules might cover. Rules may be made to require a fee to be paid to the appropriate national authority for a closure application. Provision is included to meet the requirements of Council Directive 2011/92/EU, known as the Environmental Impact Assessment Directive, similar to the provision made in sections 6 and 14 of the Transport and Works Act 1992. Rules may add to or supplement the minimum requirements set out in paragraphs 3 and 4 of the Schedule.
- B.215 Paragraph 3 sets out the minimum requirements for the applicant to publish and give notice of a closure application. Paragraph 3(2) lists those who must be notified of an application. This includes directly affected persons, who are owners, lessees, tenants or occupiers of affected land. If, after making reasonable enquiry, the applicant knows or suspects a person to be directly affected, they are obliged to notify that person of the application, but not otherwise. The railway operator and road authority for the area where the level crossing is situated and the area in which any replacement will be built, must be notified if they are not the applicant. This is so even if the application concerns a private level crossing. Paragraph 3(4) sets out the minimum a notice must contain, but it may contain more and rules might impose additional requirements.
- B.216 Paragraph 4 provides that the duty to give notice also applies where an application is withdrawn.
- B.217 Paragraph 5 requires the appropriate national authority to consider whether a closure application is automatically excluded from the closure procedure on any of the grounds set out in paragraph 5(1)(a) or should, in any event, be determined under the Transport and Works Act 1992 or Transport and Works (Scotland) Act 2007 instead. In reaching a decision, the appropriate national authority must consider all relevant matters, including those listed in paragraph 5(2). If the application is excluded under this paragraph, it is deemed to have been withdrawn. If the applicant wished to proceed under transport and works legislation, a fresh application would have to be made under that legislation, and any such application should not be prejudiced by the application made under the closure procedure. There is a power to make rules about this procedure under paragraph 5(5).
- B.218 Paragraph 6 requires consultation to take place before making any closure order. Power is given to the appropriate national authority to make rules about the consultation process. Notice of the consultation must be given to those persons who should receive notice of a closure application and rules may require

additional persons to be notified.

- B.219 Paragraph 7 sets out the procedure to be followed after consultation has taken place. The appropriate national authority has a discretion to convene an oral hearing, or proceed by way of written representations or combine these. The appropriate national authority may not proceed directly to decide the application unless no representations were made. An oral hearing must be convened if requested by certain persons, listed in paragraph 7(4). This includes directly affected persons and those who would be entitled to an oral hearing under ordinary compulsory purchase procedures, as well as the relevant highway or road authority and railway operator and where deemed planning permission is required for the closure scheme, any relevant planning authority and the Health and Safety Executive.
- B.220 Any such hearing is deemed by paragraph 7(7)(a) to be a statutory inquiry under section 9 of the Tribunals and Inquiries Act 1992, which includes a duty to give reasons for decisions. This provision is similar to the position under section 23(9) of the Transport and Works Act 1992.
- B.221 Paragraph 8 makes further provisions about hearings convened under paragraph 7. Any hearing under paragraph 7 must be held in public. The applicant has a right to make oral representations, as does anyone entitled to a hearing under paragraph 7. The person appointed by the appropriate national authority to conduct the hearing also has a discretion to invite others to make oral representations. Procedural rules may be made in respect of oral hearings. Provision is made for the person appointed to conduct the hearing to make costs or expenses orders and for those to be certified and enforced by the courts.
- B.222 Paragraph 9 sets out the final decisions the appropriate national authority may make in respect of a closure application. A closure order may only be made if the appropriate national authority thinks it is in the public interest to close or replace the crossing concerned. An application for a closure order may be allowed with or without modifications, or it may be refused. If it appears at the end of the application process that the application should be determined under a different procedure, such as the Transport and Works Acts, the appropriate national authority may decide not to make a closure order on that ground. An application may also be rejected at this stage if the applicant has failed to comply with material procedural requirements imposed on the applicant by or under the Schedule.
- B.223 The decision-maker may defer making a decision on part of the application and may consider more than one application together. This might happen where several level crossings along the same railway line are proposed for closure.
- B.224 If a closure order is to be made with material modifications, an opportunity to make representations must be given to anyone the appropriate national authority thinks is likely to be affected.
- B.225 Paragraph 10 makes provision for the decision to be published by the appropriate national authority. The persons listed in paragraph 10(2) must be notified of the closure order and given a summary. This list does not include all the persons required to be notified of a closure application under paragraph 3(2), but does include any person who made representations during consultation. Rules may be



made about notification, but minimum requirements for the notice are provided. These include requirements of the Environmental Impact Assessment Directive, similar to those provided in rules made under the Transport and Works Acts.

- B.226 In addition, details of the decision to make or not make a closure order must be published. Rules may be made about publication, but as a minimum the published notice must state where copies of the notice can be obtained.
- B.227 In addition, the appropriate national authority must send a copy of the closure order to the Office of Rail Regulation and the Chief Land Registrar or in certain circumstances to the Keeper of the Registers of Scotland, as appropriate, where a right, such as an easement or statutory easement, or servitude is extinguished or created. The duty under regulation 11 to send a copy of a closure order to the Office of Rail Regulation is subject to clause 27 of the draft Bill. That clause imposes a duty on the Office of Rail Regulation to create and maintain a record of the closure order on the register it keeps under the section 72 of the Railways Act 1993, but only if it has been duly notified of the order.
- B.228 Clause 24 of the draft Bill provides for non-material amendments to be made to a closure order. Paragraph 12 of the Schedule to the draft Bill restricts an application for a non-material amendment to the applicant, the railway operator, or highway or roads authority for the relevant area, or a directly affected person. Further rules may be made about applications for amendments.
- B.229 Paragraph 13 sets out the scope of rule-making powers under the Schedule. Rules are to be made by statutory instrument by negative resolution of the relevant legislature. It also provides that before making rules, the appropriate national authority must discuss the proposals with the other appropriate national authorities and attempt to ensure that any rules conform with rules made by other national authorities where reasonably practicable.

**APPENDIX C  
DRAFT LEVEL CROSSING PLANS  
REGULATIONS**

**2013 No. 0000**

**HEALTH AND SAFETY**

**Level Crossing Plans Regulations 2013**

*Made* - - - - - ... 2013

*Laid before Parliament*- ... 2013

*Coming into force in accordance with regulation 1(2) and 15(2)*

The Secretary of State makes these regulations in exercise of the powers conferred by sections 15(1) and (2) and 82(3) of the Health and Safety at Work etc. Act 1974, section 117(3) and (4) of the Railways Act 1993 and section 9 of the Level Crossings Act 2013.

These regulations give effect without modification to proposals submitted to the Secretary of State by the Office of Rail Regulation under paragraph 2(5) of Schedule 3 to the Railways Act 2005 after the carrying out by that Office of the consultation required by paragraph 2(6) of that Schedule.

**Title, commencement and extent**

- 1.—(1) These regulations may be cited as the Level Crossing Plans Regulations 2013.
- (2) These regulations (apart from regulation 15) come into force at the end of the period of 3 months beginning with the day on which they are made.
- (3) These regulations extend to England and Wales and Scotland only.

**Interpretation**

- 2.—(1) In these regulations—

“beneficiary”, in relation to a private right of way over a level crossing, means a person who, by virtue of—

  - (a) in England and Wales, holding an interest in land benefited by the right of way, or
  - (b) in Scotland, owning, or holding a lease or proper liferent in, land benefited by the right of way,

is entitled to use the private right of way;

“carriageway” has the same meaning as in section 329 of the Highways Act 1980 (for England and Wales) and section 151(2) of the Roads (Scotland) Act 1984 (for Scotland);

“level crossing” means a place where a railway track is crossed on the same level by—

  - (a) a highway (in England and Wales) or a road (in Scotland), or
  - (b) a way over which there is private right of way,

or both;

“level crossing plan” means a level crossing plan within the meaning of regulation 3(1);

“party”, in relation to a level crossing plan, means a person who is for the time being a party to the plan;

“private level crossing” means a level crossing over which there is a private right of way, but no public right of way;

“private right of way” means—

(a) a right of way or passage conferred by an easement or servitude; or

(b) a statutory right of way that is not conferred by an easement or servitude;

“public level crossing” means a level crossing over which there is a public right of way (whether or not there is also a private right of way over the crossing);

“public right of way” means the public right of way or passage over a highway in England and Wales or over a road in Scotland;

“railway” means a system of transport employing parallel rails which—

(a) provide support and guidance for vehicles carried on flanged wheels,

(b) form a track of a gauge of at least 350 millimetres or a track of a smaller gauge which is crossed on the same level by a carriageway,

but does not include a tramway;

“railway operator” means a person who is the operator of a network for the purposes of Part 1 of the Railways Act 1993 and “the railway operator”, in relation to a level crossing, is the railway operator whose network includes the crossing;

“railway track” means track employed in a railway (as defined for the purposes of these regulations);

“requirement” includes prohibition;

“road”, in relation to Scotland, has the same meaning as in section 151(1) of the Roads (Scotland) Act 1984;

“special Act” means—

(a) an Act or Act of the Scottish Parliament, or

(b) subordinate legislation made by virtue of an Act or Act of the Scottish Parliament,

which authorises the construction of a railway (within the meaning of the Railways Clauses Consolidation Act 1845 or the Railways Clauses Consolidation (Scotland) Act 1845, as the case may be);

“statutory right of way” means a right of way or passage which—

(a) was created, or subsists, by virtue of any provision of a local nature contained in an Act, an Act of the Scottish Parliament or subordinate legislation, and

(b) is not a public right of way;

“traffic authority” and “local traffic authority” have the same meanings as in the Road Traffic Regulation Act 1984;

“the traffic authority”, in relation to a level crossing, means the authority which—

(a) in the case of a public level crossing, is the traffic authority for the highway or road over the crossing, and

(b) in the case of a private level crossing, is the local traffic authority whose area includes the crossing;

“tramway” means a system of transport used wholly or mainly for the carriage of passengers employing—

(a) parallel rails which—

- (i) provide support and guidance for vehicles carried on flanged wheels, and
- (ii) form a track of a gauge of at least 350 millimetres or a track of a smaller gauge which is crossed on the same level by a carriageway; and

(b) only vehicles which run predominantly at speeds enabling the driver to stop within the distance that can be seen to be clear ahead.

(2) Any track used as part of a system of transport described in the definition of “railway” is, for the purposes of these regulations, part of the railway concerned notwithstanding that the same track is also used as part of a tramway.

(3) References in these regulations to functions or activities of a traffic authority (however expressed) are not limited to functions or activities of the authority in its capacity as a traffic authority.

(4) In the definitions of “statutory right of way” and “special Act”—

- (a) references to “an Act” include a reference to an Act or Measure of the National Assembly for Wales; and
- (b) references to subordinate legislation are to subordinate legislation within the meaning of the Interpretation Act 1978 or the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

#### Level crossing plans: general

**3.**—(1) A level crossing plan may be made for any level crossing and must at all times have at least two parties.

(2) A level crossing plan is a document imposing on any of the parties to the plan requirements specified in it of a description falling within regulation 4.

(3) A requirement imposed by a level crossing plan—

- (a) may be expressed to apply to any one or more of the parties to the plan, and
- (b) has no effect on a person unless that person is a party to the plan.

(4) A level crossing plan may include supplemental, incidental or consequential provision.

(5) A level crossing plan may provide for the plan to be in force only until such date as may be specified or described in the plan, but that date must not fall within the period of 3 years beginning with the day on which the plan comes into force.

(6) Only one level crossing plan may be in force at any one time in relation to a particular level crossing.

#### **Level crossing plan requirements**

**4.**—(1) Any requirement imposed by a level crossing plan must—

- (a) be a requirement that the parties to the plan consider to be necessary or expedient for the safety or convenience of users of the level crossing concerned, and
- (b) relate to action to be taken (or, in the case of a prohibition, not to be taken) by one or more of the parties at or near to that level crossing.

(2) The requirements which may be imposed include (without prejudice to the generality of paragraph (1)) any requirement which—

- (a) relates to the provision, maintenance or operation of any protective equipment or signs, or
- (b) in the case of action to be taken by the railway operator, relates to the operation of the railway at or near to the level crossing concerned.

(3) In paragraph (2)(a)—

“protective equipment” includes gates or other barriers, lights and any other object or device which the parties consider capable of contributing to the safety or convenience of any users of the level crossing; and

“sign” includes anything which is a traffic sign within the meaning of section 64(1) of the Road Traffic Regulation Act 1984.

## **Parties**

**5.**—(1) A person may be a party to a level crossing plan whether or not the plan imposes any requirements on that person.

(2) The following are eligible to be parties to a level crossing plan—

- (a) the railway operator for the level crossing;
- (b) the traffic authority for the level crossing;
- (c) in the case of a public level crossing over which there is a private right of way, the local traffic authority (if the traffic authority for the crossing is not a local traffic authority);
- (d) any beneficiary of a private right of way over the crossing.

(3) A level crossing plan has no effect unless—

- (a) the railway operator for the level crossing is a party to the plan, and
- (b) in the case of a public level crossing, the traffic authority is also a party to the plan.

(4) An eligible person may be a party to a level crossing plan by virtue of—

- (a) having agreed to the plan as one of the parties when it was made, or
- (b) becoming a party to the plan after it was made.

(5) A person may become a party to an existing level crossing plan only with the consent of all the parties to the plan at the time that person becomes a party (and the plan may be varied to provide for that person to be a party and, where relevant, for the operation of the plan in relation to that person).

## **Consultation before a level crossing plan can be agreed**

**6.**—(1) Before any level crossing plan for a public level crossing is agreed, the railway operator must carry out a public consultation.

(2) Before any level crossing plan for a private level crossing is agreed, the railway operator must—

- (a) consider whether it would be appropriate to carry out a public consultation, and
- (b) if so, carry out a public consultation.

(3) For the purposes of this regulation “public consultation” means a process in which representations as to the contents of a level crossing plan for the level crossing are invited from members of the public and interested organisations, including in particular—

- (a) anyone who could be a party to a level crossing plan for the level crossing,
- (b) users or potential users of the level crossing, and
- (c) other persons who may be interested in, or affected by, any arrangements for the safety or convenience of users of the crossing.

(4) The invitation to make representations may be made by whatever means (including the publication of notices) the railway operator considers appropriate.

(5) A public consultation must take place by reference to a published draft level crossing plan that has been provisionally agreed by the persons identified in the draft as the parties to the plan.

(6) Nothing in this regulation prevents any other consultation about the contents of a level crossing plan.

**7.** The parties to a level crossing plan must—

- (a) consult the Office of Rail Regulation before the level crossing plan is finally agreed, and
- (b) send a copy of the level crossing plan to the Office of Rail Regulation as soon as possible after it is made.

### **Variation or revocation of a level crossing plan**

**8.**—(1) The provisions of a level crossing plan may be varied by an instrument in writing made by or with the agreement of all the parties to the plan (including a new party to the plan in the case of variations made to reflect the accession of a new party to the plan).

(2) The variations which may be made under paragraph (1) include (without prejudice to the generality of that paragraph)—

- (a) changes to the parties to the plan,
- (b) changes to the parties who are subject to any requirement,
- (c) the addition, variation or omission of any requirement.

(3) A level crossing plan may be revoked by an instrument made by or with the agreement of all the parties to the plan.

(4) The parties to a level crossing plan must—

- (a) consult the Office of Rail Regulation before agreeing to the variation of the plan, and
- (b) send a copy of any instrument varying or revoking the plan to the Office of Rail Regulation as soon as possible after it is made.

(5) Nothing in this regulation affects the power under section 4(7) of the Level Crossings Act 2013 to revoke or suspend the whole or any part of a level crossing plan.

### **Ceasing to be a party to a level crossing plan**

**9.**—(1) A party to a level crossing plan may give notice in writing to the other parties to the plan and to the Office of Rail Regulation of an intention to cease being a party.

(2) A notice under paragraph (1) may not be given until after the end of the period of 30 months beginning with the day on which the plan comes into force or such longer period as may be provided for by the plan.

(3) A person who gives a notice under paragraph (1) ceases to be a party at the end of the period of 6 months beginning with the day after the day on which that notice was given (or if relevant the day on which the last of the other parties was given that notice).

(4) Paragraph (3) does not apply if, before the end of that period, the notice under paragraph (1) is withdrawn by the person concerned by notice in writing given to—

- (a) the Office of Rail Regulation,
- (b) if the person is not the railway operator, at least one other party including the railway operator, and
- (c) if the person is the railway operator, at least one other party to the plan.

**10.** A person who is a party to a plan as a beneficiary of a private right of way over the level crossing ceases to be a party to the plan if that person ceases to be a beneficiary of a private right of way over the level crossing.

### **Lapse of a level crossing plan**

**11.**—(1) A level crossing plan lapses if—

- (a) a new level crossing plan for the level crossing comes into force,
- (b) a person required by regulation 5 to be a party to the plan ceases to be a party,
- (c) as a result of changes to the parties to the plan, there is no or only one party left,

- (d) in the case of a plan relating to a public level crossing, a public level crossing ceases to exist at the relevant place on the railway track (whether or not there is a private right of way over the track at the same place), or
- (e) in the case of a plan relating to a private level crossing, a private level crossing ceases to exist at the relevant place on the railway track.

(2) A level crossing plan may provide for the lapse of the plan in other circumstances described in the plan.

(3) If a level crossing plan lapses, the railway operator for the level crossing must notify the Office of Rail Regulation as soon as possible after the lapse.

(4) The lapse of a level crossing plan does not prevent the making of another level crossing plan in relation to the same level crossing (or another level crossing at the same place).

### **Review of a level crossing plan**

**12.**—(1) The parties to a level crossing plan must keep the plan under review.

(2) In the case of a level crossing plan for a public level crossing the parties must carry out a public consultation at intervals of no more than 5 years.

(3) In the case of a level crossing plan for a private level crossing the parties must, at intervals of no more than 5 years—

- (a) consider whether it would be appropriate to carry out a public consultation, and
- (b) if so, carry out a public consultation.

(4) For the purposes of this regulation “public consultation” means a process in which representations as to—

- (a) whether the plan remains suitable for the level crossing, and
- (b) what changes, if any, should be considered,

are invited from members of the public and interested organisations.

(5) The members of the public and interested organisations who are to be invited to make representations include in particular—

- (a) any persons who are eligible to become parties to the plan;
- (b) users or potential users of the level crossing;
- (c) other persons who may be interested in, or affected by, any arrangements for the safety or convenience of users of the crossing.

(6) The invitation to make representations may be made by whatever means (including the publication of notices) the railway operator considers appropriate.

(7) Nothing in this regulation prevents any other consultation about the contents of a level crossing plan.

### **Duty to comply with requirements imposed by a level crossing plan**

**13.**—(1) While a level crossing plan is in force it is, subject to paragraph (2), the duty of each party to whom a requirement specified in the plan applies to comply with that requirement.

(2) A person who is a party to a level crossing plan as beneficiary of a private right of way over the level crossing concerned is only subject to the duty in paragraph (1) at times when that person is subject to any one or more of the general duties under sections 2 to 4 of the Health and Safety at Work etc. Act 1974 in relation to use of the level crossing for the purposes of an undertaking conducted by that person.

(3) A failure to comply with a requirement imposed by a level crossing plan is not actionable.

(4) Any duty imposed by or under a special Act on a person does not apply to that person to the extent that it is inconsistent with the duty to comply with any requirement imposed on that person as a party to a level crossing plan.



### **Defences to the offence of contravening regulation 13(1)**

**14.**—(1) It is a defence to any proceedings for an offence under section 33 of the Health and Safety at Work etc. Act 1974 (“the 1974 Act”) consisting of a failure to comply with the duty under regulation 13(1) for the accused to prove that—

- (a) it would have been impossible to comply with the duty without contravening—
  - (i) a general duty imposed by Part 1 of the 1974 Act,
  - (ii) a duty imposed by any health and safety regulations (other than these regulations), or
  - (iii) a duty imposed by or under any other Act; or
- (b) the accused took all reasonable precautions and exercised all due diligence to avoid the contravention.

(2) The reference in paragraph (1)(a)(ii) to any other Act—

- (a) subject to sub-paragraph (b), includes an Act of the Scottish Parliament or the National Assembly for Wales; but
- (b) does not include a special Act.

(3) The accused may not rely on the defence in paragraph (1)(a) if—

- (a) the accused has since the level crossing plan was made taken any action affecting the safety of users of the level crossing that was not required to be taken by a statutory duty applying to that person; and
- (b) the only basis on which that defence could be made out relates to the consequences of taking that action.

(4) The accused may not, without the leave of the court, rely on the defence in paragraph (1)(b) if it involves an allegation that the failure was due to the act or default of another person (other than an employee of the accused), or to reliance on information given by another, unless appropriate notice has been served on the prosecutor within a period ending 7 clear days before—

- (a) the hearing to determine mode of trial (for proceedings in England and Wales); or
- (b) the trial (for proceedings in Scotland).

(5) Section 36 of the 1974 Act (offences due to fault of other person) does not apply in relation to an offence mentioned in paragraph (1).

### **Repeal of Level Crossings Act 1983**

**15.**—(1) The Level Crossings Act 1983 is repealed.

(2) Paragraph (1) comes into force at the end of the period of 3 years beginning with the day on which these regulations come into force.

(3) If a level crossing plan is made within that period in relation to a level crossing which is the subject of an order made under the Level Crossings Act 1983, the order lapses on the day on which the plan comes into force.

### **Traffic signs**

**16.**—(1) A traffic sign placed on or near a road in pursuance of a requirement imposed by a level crossing plan is to be treated for the purposes of section 64(4) of the Road Traffic Regulation Act 1984 as having been placed as provided by that Act.

(2) In paragraph (1) “traffic sign” and “road” have the same meaning as in that Act.

Signed by authority of the Secretary of State for Transport

Date

*Name*  
Parliamentary Under Secretary of State  
Department for Transport

# **APPENDIX D**

## **EXPLANATORY NOTES FOR DRAFT LEVEL CROSSING PLANS REGULATIONS**

### **INTRODUCTION**

- D.1 These Regulations create a scheme for the agreement and enforcement of arrangements at individual level crossings, in relation to safety and/or convenience. Such arrangements would be given effect in a document called a “level crossing plan”. These Regulations replace the scheme of level crossings orders provided for under the Level Crossings Act 1983, which is repealed by these Regulations. These regulations are made under section 15 of the Health and Safety at Work etc Act 1974 and are subject to the provisions of that Act. They also rely on powers conferred by the Railways Act 1993 and the draft Level Crossings Bill.

### **THE DRAFT LEVEL CROSSINGS PLANS REGULATIONS**

- D.2 Regulation 2 contains interpretation provisions based closely on those in clause 50 of the Bill. These have to be repeated because the main powers under which the regulations are made are not powers conferred by the Bill, so the regulations do not benefit from the presumption that words in subordinate legislation have the same meaning as in the parent Act. A level crossing is a place where a railway track is crossed on the same level by a highway/road or a private right of way such as an easement or servitude, or both. A railway for the purposes of these Regulations would not include a disused railway where no system of transport still exists nor would it include tramways other than those which share a level crossing with a railway.
- D.3 Regulation 3 provides that a level crossing plan may be made in relation to any level crossing, whether a public or private right of way crosses the railway. Level crossing plans are entered into voluntarily. There is no power to impose a plan on any person. A plan may impose requirements on some or all of the parties, but may not impose requirements on a person who is not a party to the plan. There must be two parties to a plan at all times and certain parties are mandatory. Regulation 11 provides that a plan will therefore lapse if a mandatory party withdraws or only one party remains. A plan may provide for its own lapse on the occurrence of a particular event or date, but not within 3 years of the plan being made.
- D.4 Regulation 4 provides that a plan can only include requirements which the parties think are necessary or expedient for the safety or convenience of users of the level crossing. The plan must relate to action to be taken by one or more of the parties, at or near the level crossing. Otherwise, a wide power is given to the parties to agree requirements under a level crossing plan, similar to the range permitted in level crossing orders under the Level Crossings Act 1983.

- D.5 Regulation 5 restricts potential parties to a level crossing plan to the railway operator for the level crossing, the traffic authority for the area in which the crossing sits and, in the case of any level crossing over which there is a private right of way, the beneficiary of the private right of way. The regulation provides that a plan has no effect unless the mandatory parties, listed in regulation 5(3), are parties to the plan. Additional eligible parties may join with consent of the other parties.
- D.6 Regulation 6 requires the railway operator to carry out public consultation before a plan may be agreed in respect of a public level crossing. This Regulation does not prevent the railway operator from carrying out public or other consultation in respect of any level crossing plan. In addition under regulation 7, the Office of Rail Regulation must be consulted in respect of any level crossing plan, whether relating to a public or private level crossing.
- D.7 Regulation 8 sets out the circumstances in which a plan may be varied or revoked.
- D.8 Under regulation 9 a party may cease to be a party to a level crossing plan, but only on giving notice to all other parties, not to be given until after the end of the period of 30 months of the date on which the plan comes into force. Regulation 10 provides that in the case of a beneficiary of a private right of way, they cease to be a party to a plan if they cease to be a beneficiary of the right of way.
- D.9 Regulation 11 provides for the lapse of a level crossing plan where only one party remains, where any mandatory party withdraws, where a new plan is made, or the level crossing ceases to exist. A plan may provide for its lapse in other circumstances, such as on the completion of certain works.
- D.10 Regulation 12 requires a level crossing plan to be kept under review and for public consultation to be carried out at least every 5 years in respect of any public level crossing. Consideration must also be given to carrying out consultation on a private level crossing plan every 5 years.
- D.11 Regulation 13 imposes a duty on all parties to a level crossing plan to comply with any requirements the plan imposes upon them. But the duty is qualified in paragraph (2) of this regulation in the case of a beneficiary of private right of way. While a beneficiary of a private level crossing who is not an employer or otherwise subject to any of the general duties under sections 2 to 4 of the Health and Safety at Work etc. Act 1974 may be a party to a level crossing plan, any requirements imposed on such a beneficiary cannot be enforced. This means that a level crossing plan will only be enforceable against a beneficiary who is subject to duties under sections 2 to 4 of the 1974 Act. Regulation 13(4) provides that the terms of a plan supersede any inconsistent provisions in a special Act. The duty to comply with any requirements in a plan is enforceable under the 1974 Act. Failure to comply would be an offence under section 33 of that Act. Powers to issue prohibition or improvement notices under sections 21 to 23 of the 1974 Act also apply in respect of breaches of requirements imposed by a level crossing plan.

- D.12 Regulation 14 provides defences to any prosecution under section 33 of the 1974 Act, with the burden of proof on the accused to prove that compliance with the level crossing plan would have been impossible without contravening certain other duties under health and safety legislation. An alternative defence of due diligence is also provided. Further provisions are made in respect of the availability of these defences in regulation 14(3) and (4).
- D.13 Regulation 15 repeals the Level Crossings Act 1983 at the end of the period of 3 years beginning with the date on which the Regulations come into force. It also makes transitional provisions for plans to supersede level crossing orders under that Act, which are the current means of imposing requirements for the safety and convenience of users of level crossings. This allows for a period in which plans can be made for crossings currently subject to orders under that Act. There is currently the possibility under that Act of an order being made for certain crossings in England and Wales that are not level crossings under the draft Bill. It is not thought necessary to retain that option so the regulation repeals the Act for all purposes.
- D.14 Regulation 16 provides that any signs placed under a level crossing order are treated as if they had been placed in accordance with the Road Traffic Regulation Act 1984. This provision has the effect of ensuring that the enforcement provisions of the 1984 Act apply to any sign placed in accordance with the terms of a level crossing plan and applies the enforcement provisions of the 1984 Act to such signs.

## **APPENDIX E**

### **ADVISORY GROUP MEMBERS**

**THE FOLLOWING ASSISTED US BY PARTICIPATING IN OUR ADVISORY GROUP WHICH MET AT VARIOUS TIMES THROUGHOUT THE PROJECT**

- (1) Vicky Allen, British Horse Society
- (2) Helen Aluko-Olokun, The Guide Dogs for the Blind Association
- (3) Ann Bates, Disabled Persons Transport Advisory Committee (DPTAC)
- (4) John Bengough, Department for Transport
- (5) Alan Bennett, Rail Freight Group
- (6) Dave Bennett, Health and Safety Advisor, Associated Society of Locomotive Engineers and Firemen (ASLEF)
- (7) Helen Bennett, Office of Rail Regulation (retired)
- (8) Chris Carr, Department for Transport
- (9) John Cartledge, Safety and Policy Adviser, Passenger Focus; London TravelWatch
- (10) Geoffrey Claydon, Heritage Railway Association
- (11) Kevin Clinton, Royal Society for the Prevention of Accidents
- (12) Gary Cooper, National Task Force; Association of Train Operating Companies (ATOC)
- (13) Hugh Craddock, Rural Policy, Department for the Environment Fisheries and Food (DEFRA)
- (14) Simon Croft, Department for the Environment, Food and Rural Affairs (DEFRA)
- (15) Richard Cuthbert, Director, Institute of Public Rights of Way and Access Management
- (16) Alan Davies, National Programmes, Rail Safety Standards Board
- (17) Janet Davis, Ramblers
- (18) John D C Davies, Lawyer, Welsh Government
- (19) Ben Ellis, Transport and Inputs Advisor, National Farmers' Union
- (20) Olav Ernstzen, Disabled Persons Transport Advisory Committee (DPTAC)

- (21) Andrew Evans, Emeritus Professor, Centre for Transport Studies, Imperial College London
- (22) Gaynor Farrington, Network Rail
- (23) Anne Galewski, Head of Legal Services, Policy and Strategy, Network Rail
- (24) Peter Garbutt, National Farmers' Union
- (25) Rob Garner, Scottish Natural Heritage
- (26) Mike Hedderly, Local Government Association (LGA); Association of Directors of Environment, Economy, Planning and Transport (ADEPT); Association of Transport Co-ordinating Officers
- (27) Bill Hillier, Heritage Railway Association
- (28) David Holladay, Cyclists' Touring Club
- (29) Francis How, Railway Industry Association
- (30) Andrew Howard, The Automobile Association (The AA)
- (31) John Jones, Welsh Assembly Government
- (32) Albert Joyce, Department of Communities and Local Government
- (33) Joy Kabugu, Department for Transport
- (34) Sarah Kohl, Health and Safety Executive Advisory Team, Treasury Solicitor's Department
- (35) Lesley Latham, Department for Transport
- (36) Christopher R S MacRae, Manager, Rail Freight Policy, Freight Transport Association
- (37) David Markham, Natural England
- (38) Kraig McCarthy, Department for Transport
- (39) John McMorrow, Rail Safety Standards Board
- (40) George Menzies, Scottish Rights of Way and Access Society (Scotways)
- (41) David Morris, Office of Rail Regulation (retired)
- (42) Tom Naughton, (Inspector) British Transport Police
- (43) Tracy Phillips, Manager, Rail Safety Policy, Office of Rail Regulation
- (44) Dominic Pritchard, Health and Safety Executive advisory team, Treasury Solicitor's Department

- (45) Chrys Rampley, Road Haulage Association
- (46) Maggie Simpson, Rail Freight Group
- (47) Andrew Shirley, Country Land and Business Association
- (48) Alan Smith, Joint Committee for Mobility of Blind and Partially Sighted People
- (49) John Tilly, Director, Señalización Ltd (formerly Office of Rail Regulation)
- (50) Helen Todd, Ramblers Scotland
- (51) Brian Thompson, Divisional Highways Manager, Lincolnshire Country Council
- (52) Michelle Travers, Office of Rail Regulation
- (53) David Walmsley, Confederation of Passenger Transport UK
- (54) David Wells, Rail Industry Association
- (55) Matthew Youell, Highways Agency
- (56) Alastair Young, Transport Scotland