

**Law Commissions Review of Level Crossings
Department for Transport Response**

PART 1: INTRODUCTION

1 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]**

Accept: The Department welcomes the Law Commission and the Scottish Law Commission’s (“the Law Commissions”) recommendation to use a definition for “railway” which recognises those already in use in other legislation. The proposed definition provides consistency, in particular, with the Transport and Works Act 1992 and the Railways and Other Guided Transport Systems (Safety) Regulations 2006. This is critical to ensure consistency of scope and enforcement and preventing the introduction of gaps between regulatory regimes.

The Department notes that the recommendation does not include the words “(a) provide support *and guidance* for vehicles...” although this wording is included in the draft Bill. This is an important element of the definition which must be included to maintain consistency of application.

2 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]

Accept: The Department agrees that tramways should be excluded from the definition of “railway” for these purposes, as they are at present, with the exception of tracks which are used as both railways and tramways.

PART 2: SAFETY AND CONVENIENCE

3 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]

Modify: The Law Commissions recognise in their report that the number of incidents at level crossings in Great Britain is already low by comparison with other industrialised countries and have recommended regulation under the Health and Safety at Work etc. Act 1974 (“HSWA”) not for fear that the current safety regime is inadequate but that the current regulatory framework is unclear with too many sources of regulation.

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HSWA already applies to railways, and level crossings in particular, both in terms of train operations and the management of infrastructure and the regime is already well understood within the industry. Network Rail, and most heritage railway operators, are already subject to these duties. Network Rail, in particular, has indicated that it already assesses whether risk is as low as reasonably practicable at level crossings in accordance with HSWA.

The Office of Rail Regulation, in its role as the independent railway safety regulatory, also applies HSWA principles to the assessment of risk at level crossings and when drawing up level crossing orders under the Level Crossing Act 1983.

The Department will work with the Law Commissions, the Office of Rail Regulation and other stakeholders to develop the necessary supporting legislation and codes of practice to ensure that the implications of this change are clear to relevant duty holders.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

4 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]

Accept: The Department agrees that the extension of HSWA to cover the beneficiaries of private rights of way over level crossings would be contrary to the general approach of this legislation which is intended to impose duties in relation to safety on employers and self-employed persons who are conducting their undertaking.

Whilst the Department appreciates the benefits of the application of the same regulatory and enforcement regimes as those in place at level crossings over public rights of way, there are other options for the management of health and safety at these locations. Network Rail will also remain the relevant safety duty holder under HSWA at these sites with the same responsibility for its infrastructure at these locations as at other level crossings.

5 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]

Modify: The Department notes that heritage railways operated on an entirely voluntary basis with no employees already have obligations, as the relevant

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duty holders, to ensure the safe operation of their services and any level crossings on their networks.

The Office of Rail Regulation has published guidance offering advice and assistance on the appropriate management of safety, including level crossing operation, on heritage railways¹.

However, the Department considers that the extension of the application of similar duties to those under section 3 of HSWA to such railways requires further consideration and intends to consult with stakeholders, including the Office of Rail Regulation, the Heritage Railway Association and those operators who would be affected, to determine the potential impacts before making a decision on this recommendation.

If the Department concludes that the imposition of these duties is not appropriate, it accepts that there will remain a gap in the regulation of safety on these railways and will consider with stakeholders the most appropriate mechanism for dealing with this issue.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

6 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]

Modify: As with its response to **Recommendation 5**, the Department notes that the extension of Part 1 of HSWA requires further consideration with stakeholders. The Department also notes that such an extension could not be limited solely to the management and operation of level crossings.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

7 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]

Modify: The Department welcomes the Law Commissions' proposals and notes that the convenience of all users is of critical importance for the management and operation of level crossings. However, it believes further consideration will need to be given to exactly how, and by whom, matters of

¹ See <http://orr.gov.uk/about-orr/who-we-work-with/rail-infrastructure/minor-and-heritage-railways>.

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convenience should be considered in the context of the future legislative framework for the management and operation of level crossings in the context of its response to **Recommendations 10**.

The Department notes that, under HSWA, some consideration would naturally be given to the question of convenience during the risk assessment of individual level crossings since, if significant inconvenience is likely to arise, this should be identified as a safety issue due to the increased likelihood that greater risks may be taken by some crossing users. However, it also recognises that some matters of convenience may not have a direct relationship with safety and might not, therefore, be addressed under HSWA.

Although this is otherwise a reserved matter, should the Department conclude that such a duty should be imposed on Scottish and Welsh Ministers, it will need to consult fully with, and obtain the agreement of, the Scottish Government and Welsh Government before its introduction.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

8 We recommend a power to seek a declaration in the High Court, or a declaratory in the Court of Session, where the railway operator has failed to satisfy the duty to consider convenience. [Paragraph 2.106]

Modify: The Department agrees it is important that a form of redress is available should a railway operator fail to take convenience into account and will consider further whether a power of declaration or a declaratory is appropriate in the context of its responses to **Recommendations 7 and 10**.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

9 We recommend that level crossing orders should be abolished. [Paragraph 2.134]

Modify: See response to **Recommendation 10**.

10 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]

Modify: The application of HSWA ensures decisions about risk management at level crossings are framed by the general principles of prevention applied to the management of health and safety at work throughout all other sectors. The Department is clear that any document (legal or otherwise) which provides for site-specific information about a particular level crossing, whether

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this be a level crossing order, a level crossing plan or another form of documentation is not necessary to enable duty holders to discharge their obligations under HSWA and do not override their duties under Part 1 of HSWA.

However, the Department notes the clear preference of stakeholders for a single legal document which can be relied upon to provide site-specific information about an individual level crossing.

The Department accepts that, whilst it provides a number of advantages, the current structure of level crossing orders has nevertheless resulted in a number of practical difficulties which the Law Commissions highlight in their report. However, the detail of the Law Commissions' recommended level crossings plans has not been fully considered by stakeholders or consulted upon.

The Department will therefore explore with stakeholders whether level crossing orders should be abolished and, if they are, whether they should be replaced with level crossing plans as the Law Commissions recommend or a different system of recording the commitments of the parties at level crossings.

The Department believes it is critical that, if a new system is introduced, this must ensure that an appropriate balance between safety and convenience is maintained. It is also important that any new system disapplies the provisions of special Acts for the specific level crossing where the parties commitments for that crossing are recorded. It also notes that it is important that risk is continually assessed as required under HSWA and that any changes that need to be made as a result of such risk assessment can easily be implemented so that the duty holders can meet their obligations under HSWA. The Department notes that clause 9(2)(b) of the draft Bill includes a proposal to this effect in relation to the recommended level crossing plans.

If, after further consideration, level crossing orders are abolished the Department also notes the importance of ensuring that transitional provisions are included to preserve the effect of individual level crossing orders until such time as they may be replaced.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

11 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]

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Accept: The Department has considered, and in light of the findings of the Löfstedt review², whether the accepted recommendations will alter the regulatory regime at level crossings sufficiently to justify the extension of the powers of the Office of Rail Regulation to include the option of publishing approved codes of practice under section 16 of HSWA 1974 if these are decided to be an appropriate mechanism to support the new regime.

It has concluded that the maturity of the current railway safety regime is sufficient that such a power would now be beneficial and will ensure consistency with the regulatory powers available to the Health and Safety Executive to manage health and safety in other sectors.

In its response to the Law Commissions the Office of Rail Regulation indicated that, if its powers were extended in this way, it would consult widely in producing relevant guidance to ensure that an appropriate approach to risk management was established whilst allowing sufficient flexibility to allow for adaptation to technological advances and any changes to the structure of the industry or duty holder responsibilities.

12 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]

Modify: The Department will need to give further consideration, in consultation with the Office of Rail Regulation, as to whether its powers should be extended to issuing approved codes of practice beyond section 16 of HSWA to cover the whole railway network including heritage railways and tramways.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

13 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]

Modify: The Department accepts that, if level crossing orders are abolished (see **Recommendation 10**), provision needs to be made to provide directions

² Following a review requested by the Department for Work and Pensions to look at the potential for reducing the burden of health and safety on business whilst bearing in mind the necessity to continue improvements in health and safety outcomes, Professor Ragnar Löfstedt published his report "Reclaiming Health and Safety for All" in November 2011. This noted that approved codes of practice were a useful tool in certain circumstances.

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which would impose such requirements as are considered necessary or expedient for the purposes of safety or convenience.

The Department will need to consult further with the Scottish Government and Welsh Government if it concludes that the Law Commissions' recommendation should be implemented and the way forward would have to be agreed with them.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

14 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]**

Modify: The Department notes the issue which the Law Commissions have considered in recommending a new obligation on highway, traffic and roads authorities but believes that the current obligations on traffic authorities and the operator of the crossing under the Level Crossings Act 1983 remain appropriate within the envelope of a level crossing order (or any other single document that may be adopted in its place) and should be continued.

If, as the Law Commissions recommend, level crossing orders are abolished and the Level Crossing Act 1983 is repealed, the Department will consider how the current obligations that may be placed on traffic authorities in relation to specific level crossings should be perpetuated.

15 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]

Modify: Whilst the Department acknowledges that poor co-operation and consultation is a known weakness within the current system, it considers that the detailed proposals from the Law Commissions are overly burdensome.

The Department will consider further with stakeholders whether a more general duty to cooperate, such as that available under the Railways and Other Guided Transport Systems (Safety) Regulations 2006, would be beneficial and notes that there are already a number of highly successful

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road-rail partnerships in operation which could provide a model of best practice.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

16 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]

Modify: If the Department concludes that a more general duty to cooperate should be imposed (see **Recommendation 15**), it will decide whether a power to seek declaratory relief might be appropriate in circumstances where the parties have failed to comply with that duty.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

17 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]

Reject: The Department does not believe that the extension of the duty to cooperate to highway and road authorities would greatly increase safety at level crossings and may have unintended consequences. In particular, such a duty may inadvertently result in additional uncertainty as it would not be clear what additional statutory obligations this might place on these bodies under HSWA. This may result in conflict and, potentially, scarce resources being diverted away from road safety and into level crossings despite the higher numbers of accidents on the road.

18 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]

Accept: The Department agrees that the Office of Rail Regulation should continue to be the body responsible for enforcement of safety regulation at level crossings. It notes that, since its establishment, the Office of Rail Regulation has quickly become a well-respected body within the industry and continues to grow in both stature, experience and expertise.

19 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

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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]

Accept: The Department agrees that prescribing a clear regulatory boundary between the Office of Rail Regulation and the Health and Safety Executive is desirable and that responsibility for enforcement should be allocated depending on the source of the risk.

20 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]

Accept: The Department accepts that it is important for duty holders to understand which body is responsible for enforcement in any given case and that there is a potential for uncertainty and confusion at the boundary of the current enforcement arrangements. Given this potential, the Department will explore the most appropriate mechanism for implementation with the Office of Rail Regulation and the Health and Safety Executive.

The Department notes that similar agreements already exist between the Health and Safety Executive and local authorities and between the Office of Rail Regulation and the Office for Nuclear Regulation which could provide a useful model.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

21 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]**

Modify: The Department will consider, within the context of the accepted recommendations, whether it would remain appropriate for the above legislation to be disapplied in relation to Great Britain.

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This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

22 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]

Modify: If level crossing orders are abolished (see **Recommendation 10**) and provision is made for a legal document that sets out the responsibilities of the parties at individual level crossings, the Department will consider whether a power to make directions is needed. In the event that provision is made to provide directions (see **Recommendation 13**) it would at the same time consider whether any directions should take precedence over provisions contained in a special Act which relate to safety or convenience.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

23 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]

Modify: The Department agrees that the provisions of any legal document produced in relation to an individual level crossing (for example the level crossing plans proposed by the Law Commissions) should take precedence where a conflict arises with a special Act. The Department notes that clause 9(2)(b) of the draft Bill indeed provides for this in relation to requirements under the proposed level crossing plans.

Further consideration will need to be given as to whether health and safety regulations more generally should disapply inconsistent special Acts on a "blanket", rather than case-by-case, basis. There are around 10,000 special Acts. Some of these may contain specific convenience provisions and, in the case of private level crossings, the HSWA regime may sometimes only apply to the railway party where, for example, the user of the crossing is not an employer or self-employed person.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

24 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]

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Modify: The Department agrees that the provisions of level crossing orders (or whatever legal document is adopted in their place) should, where any conflict arises with a provision in a special Act, take precedence.

25 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]

Accept: The Department will consider what powers will be necessary to ensure the efficient operation of the new legislative regime once final decisions on its scope have been made.

PART 3: CLOSURE OF LEVEL CROSSINGS

26 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]

Modify: The Department thanks the Law Commissions for investigating the available options and suggesting how a new closure procedure might work in practice. It notes that the recommended proposal is extremely close to the existing system under the Transport and Works Act 1992 and that the scope for simplification is limited due to the necessity of reflecting the vital public protection elements, such as consultation, required under the European Convention on Human Rights.

The Transport and Works Act 1992 system was last comprehensively reviewed in 2006 and the Department will need to give further consideration with stakeholders to the benefits of introducing a new system and, in particular, the types of crossing for which this may be suitable. The introduction of a new system will only be considered if the Department concludes that the existing mechanisms available for closure cause specific problems which need to be addressed.

The Department has considered the Law Commissions' other recommendations in relation to closure were a new system to be introduced and, with the above caveat, has responded to each of these individually below.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

27 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]

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Accept: The Department considers that it is important that the power to make a final decision on closure should be made by the “appropriate national authority”. The procedures under the Transport and Works Act 1992 and the Highways Act 1980 have been demonstrated to work well in this respect and offer a useful model.

28 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]

Accept: The Department agrees that the “appropriate national authority” to make decisions in relation to the closure of specific level crossing under the new procedure should be the Secretary of State in relation to level crossings in England and, subject to the agreement of the Scottish Government and Welsh Government, the Scottish Ministers in relation to level crossings in Scotland and the Welsh Ministers in relation to level crossings in Wales.

29 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]

Accept: If the Department determines it should introduce a new closure regime it would consider, in conjunction with the Welsh Government, the most appropriate mechanism to determine how proposals for the closure of a level crossing in these circumstances should be decided.

The Department notes that any such cases are likely to be extremely rare and that a legislative procedure dealing with these matters already exists in similar circumstances under the Transport and Works Act 1992.

30 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]**

Reject: The Department is of the opinion that, if a new closure system was to be introduced, the specific criteria for the types of level crossing to which any new procedure might apply should be clearly established.

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As currently, it should remain for the applicant to determine which the most appropriate mechanism is given the specific circumstances of the application.

31 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]

Accept: The Department agrees that, where an application for a level crossing closure order is made involving such land, the special Parliamentary procedure provided for under the Transport and Works Act 1992 should be followed.

32 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]

Accept: The Department agrees that local authority land, Crown land and statutory undertakers' land and rights over or under land should not be automatically excluded from the level crossing closure procedure.

33 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]

Accept: The Department agrees that these standard provisions should be applicable in respect of any closure application.

34 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]

Reject: The Department believes that the applicant should be responsible for the public consultation exercise, and bear any costs arising, as they are currently under the Transport and Works Act 1992 and similar procedures elsewhere.

35 We recommend that the appropriate national authority should be given the power to appoint a person to convene a hearing. [Paragraph 3.102]

Accept: The Department notes that, whilst it anticipates that it should be possible to deal with the vast majority of applications for a level crossing closure order by way of written representations, the procedure will engage the European Convention on Human Rights. Whilst this does not require there to be an oral hearing the Department agrees, for reasons of fairness and transparency, with the Law Commissions' recommendation that such hearings should be available in limited circumstances. As such, the appropriate

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national authority should have the power to appoint a person to convene such a hearing.

36 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]**

Accept: The Department agrees that, whilst the possibility of an oral hearing should be available under the level crossing closure order procedure, the ability to request one should be limited to specified persons.

37 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]

Accept: The Department agrees that some or all of the costs incurred by the national authority in undertaking an oral hearing should be recoverable. Clear guidance will be needed to determine under what circumstances a person who is not the applicant might bear any of the costs in relation to a hearing.

38 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]**

Accept: The Department agrees that it is important to list the main factors which the national authority is required to take into account when considering an application for a level crossing closure order to provide transparency and

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both guidance and reassurance to all parties that they will be taken into account. The list of factors will be dependent on the type of crossing that will meet the criteria for any new closure regime.

39 We recommend that the statutory list of factors should not be in hierarchical order, nor should the list be exhaustive. [Paragraph 3.114]

Accept: The Department agrees, given the diverse nature of the level crossings which exist on the network, that the statutory list of factors should not be hierarchical or exhaustive.

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

Accept: The Department agrees that the appropriate national authority should have the power to make a closure order, with or without modification, to provide a degree of flexibility and recognise the wide variety of individual circumstances in which an application may be made.

41 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]

Accept: The Department agrees that the threshold for making a level crossing closure order should be that it is in the public interest to close or replace the crossing and that the appropriate national authority should have the power to make an order in such circumstances.

42 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]**

Accept: The Department agrees that these tests are appropriate in the circumstances.

43 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]

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Accept: The Department agrees that it should make its decision on a closure application public and to notify certain person of the outcome of the application.

44 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]

Accept: The Department agrees that the Office of Rail Regulation, as the independent railway safety regulator, should be informed about any confirmed closure order by the relevant national authority.

45 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]

Reject: The Department believes that it should be the responsibility of the applicant to send a copy of any confirmed closure order to the Chief Land Registrar, in relation to land in England or Wales, or the Keeper of the Registers of Scotland, in relation to land in Scotland.

46 We recommend that closure orders should be administrative orders, not statutory instruments. [Paragraph 3.143]

Accept: The Department agrees that closure orders should be administrative orders and not statutory instruments.

47 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]

Accept: The Department agrees that, since level crossing closure orders will not be statutory instruments, they should be made publicly available through the register already maintained by the Office of Rail Regulation to ensure that there is a single central collection of such documents.

48 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]

Accept: The Department agrees that level crossing closure orders should extinguish all or some of the rights of way over a level crossing with or without replacement.

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49 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]**

Accept: The Department agrees that the list of provisions which a level crossing closure order may contain are reasonable in the circumstances but that the criteria will be dependent on the type of level crossing that would be closed under any new closure regime.

50 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]

Accept: The Department agrees that a power to amend, repeal or revoke any special Acts or other statutory provisions of local application should be available to ensure that there is no regulatory conflict if this might otherwise arise.

51 We recommend that the appropriate national authority should have the power to make rules about the making of closure applications. [Paragraph 3.162]

Accept: The Department agrees that the power for the appropriate national authority to make rules concerning the making of closure applications should be available.

52 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]

Accept: The Department agrees that it will be important for the appropriate national authorities to consult with each other before making rules with a view to ensuring, as far as possible, that any such rules are consistent in respect of England, Scotland and Wales.

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53 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]

Accept: The Department agrees.

54 We recommend that the appropriate national authority should have the power to make non-material amendments to a closure order. [Paragraph 3.180]

Accept: The Department agrees.

55 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]

Accept: The Department agrees.

56 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]

Accept: The Department agrees.

57 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]

Accept: The Department agrees that, in circumstances where the conditions of a level crossing closure order require it, a power should be granted to the person who has been granted that order to acquire land compulsorily by way of notice to treat.

58 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]

Accept: The Department agrees.

59 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

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the provisions incorporated by Schedule 2, should apply to compulsory acquisition authorised by a closure order. [Paragraph 3.218]

Accept: The Department agrees.

60 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]

Accept: The Department agrees.

61 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]

Reject: The Law Commissions have noted that the current rules for the compulsory acquisition of interests in land under the Land Compensation Act 1961 appears to function satisfactorily and that the users and courts are familiar with these provisions.

The Department does not accept, given that the current provisions work in practice and are well understood, that there is any compelling case for the creation of a bespoke compensation scheme specifically for level crossings which would require significant resources to establish in consultation with the Upper Tribunal for England and Wales and the Lands Tribunal for Scotland.

62 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]

Accept: The Department agrees.

63 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]

Accept: The Department agrees.

64 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;

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- (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]**

Accept: The Department agrees.

65 We recommend that a closure order should cease to have effect three years after it is made. [Paragraph 3.291]

Accept: The Department agrees that level crossing closure orders should be permissive and that such orders should cease to have effect three years after they are made if any conditions under which an order is made are not met. This is in accordance with the standard period within which, for example, compulsory purchase powers should be exercised.

66 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]

Accept: Whilst there should be a presumption that the conditions under which a level crossing order is issued should be met within three years to minimise blight and improve the efficiency of the closure process, the Department recognises that there may be circumstances in which it is attractive to both the level crossing replacement scheme and the owner of the property for compulsory purchase powers not to be exercised within that deadline.

In exceptional circumstances only, the Department therefore agrees that an extension may be granted but that this should be time limited (although not necessarily to 12 months) and only be granted in respect of a level crossing order on one occasion.

67 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]

Accept: The Department agrees.

68 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]

Accept: The Department agrees.

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PART 4: RIGHTS OF WAY: ENGLAND AND WALES

69 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]

Reject: The Department does not consider that a statutory prohibition on the acquisition of rights of way across the railway by prescription is required since, in the rare cases that this might occur, the railway operator already has powers to 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.

In addition the railway operator also has a duty to take enforcement action where it has 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 under HSWA.

The Department notes that the Law Commission, in its “*Making Land Work: Easements, Covenants and Profits à Prendre*” report recommends a new statutory scheme for the prescriptive acquisition of easements. The Department does not believe that a separate system should exist purely for railways and, if the relevant recommendations are accepted and enacted by Parliament, there will be a statutory scheme that will apply to the acquisition of all prescriptive rights of way including for the railway.

70 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]

Reject: The Department notes that a private level crossing where the right of way over the railway is an easement can already be closed by agreement between the railway operator and the beneficiary of the right of way. The law of easements in England and Wales has also 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.

The Department does not, therefore, believe that there is any need to create an explicit statutory provision as it is already clear that such rights can be extinguished by agreement. Network Rail has been successful in closing over 800 level crossings since 2009 including a significant number of private, user-worked level crossings closed by agreement.

The Department notes the issues which have been identified by the Land Registry in England and Wales which indicated that it was not always possible

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to establish that all the beneficiaries of an easement have participated in the release so as to make it effective. In such 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. This problem applies to all deeds of release relating to any easement and are not specific to level crossings.

The Department's view is that any change to the release of easements should therefore be made when the law in relation to easements is reviewed so that the all deeds of release are placed on the same footing.

71 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]

Reject: The Department notes that it is already possible under current law to prevent implied dedication of a highway across a railway. In addition, any such acquisition is extremely rare and can be prevented by the railway operator. Railway operators are fully aware that dedication by long use may occur in the absence of a clear indication that they do not intend to dedicate a public right of way.

The position of railway operators in this respect is the same as that of any other landowner and the Department has concluded that existing legislation provides the necessary powers and protections.

PART 5: RIGHTS OF WAY AND ACCESS ISSUES: SCOTLAND

72 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]

This issue is a matter for the Scottish Government.

73 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]

This issue is a matter for the Scottish Government.

74 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]

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This issue is a matter for the Scottish Government.

75 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]

This issue is a matter for the Scottish Government.

76 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]

This issue is a matter for the Scottish Government.

77 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]

This issue is a matter for the Scottish Government.

78 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]

This issue is a matter for the Scottish Government.

79 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]

This issue is a matter for the Scottish Government.

80 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]

This issue is a matter for the Scottish Government.

81 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

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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]

This issue is a matter for the Scottish Government.

82 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]

This issue is a matter for the Scottish Government.

83 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]

This issue is a matter for the Scottish Government.

PART 6: OTHER ISSUES

84 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]

Reject: The Department is not convinced that there is sufficient evidence to support a wide-ranging review of all railway offences or that current provision for offences at level crossings are inadequate to deal with inappropriate crossing user behaviour.

85 We recommend that the review should include consideration of section 55 of the British Transport Commission Act 1949. [Paragraph 6.33]

Accept: The Department thanks the Law Commissions for highlighting the potential breach of the European Convention of Human Rights by section 55 of the British Transport Commission Act 1949 and will explore this issue further to determine whether these provisions should be re-enacted.

This work will be included in the Department's level crossing reform action plan which it intends to have produced by the end of 2014 with a view to subsequent consultation on key elements.

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**86 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]**

Modify: The Department has considered carefully whether there is any merit in removing the current provision for level crossing signs under the Traffic Signs Regulations and General Directions 2002 (“TSRGD”) and merging these with the Private Crossings (Signs and Barriers) Regulations 1996 to form a single set of level crossing regulations.

It notes that the regimes in place for public and private level crossings have a different legislative basis and are managed differently since responsibilities fall on traffic authorities (for public level crossings) and the railway operator (for private level crossings). The circumstances of the crossing points, such as the equipment available and conditions of use, are also likely to differ significantly with the result that a degree of diversification is always likely to be present. Responses from stakeholders also indicate that a lack of understanding of current signage and bad positioning were more important issues than its regulatory basis.

The Department has therefore concluded that a single set of regulations governing signage at all level crossings would not be appropriate but is considering the results of the research work undertaken by RSSB (formerly the Rail Safety and Standards Board) as part of its review of TSRGD and broader signage issues.