

Consultation response
Draft Prolonged Disturbance Compensation Scheme

Cllr Oliver Cooper

1. Introduction

- 1.1. I am responding to the draft Prolonged Disturbance Compensation Scheme (the “**PDCS**”) as a councillor and the Leader of the Opposition in the London Borough of Camden.
- 1.2. The House of Commons Select Committee on the High Speed Rail (London – West Midlands) Bill (the “**Commons Committee**”) noted that “Camden is exceptional, and needs special treatment”,¹ I agree with this as a matter of fact and sentiment. House of Lords Select Committee on the High Speed Rail (London – West Midlands) Bill (the “**Lords Committee**”) ² noted that HS2 will cause ‘unprecedented disruption’ to Camden. The HS2 will rend a significant hole in the heart of the borough, affecting tens of thousands of residents. If this is to happen, mitigation, amelioration, and compensation are absolutely paramount.
- 1.3. I thus welcome the Government’s commitment of January 2017 in response to the Lords Committee’s report (the “**Government Response**”) to introduce a scheme of extraordinary compensation that is ‘fair, reasonable, and proportionate, in the spirit of the strong recommendation of the [Lords] Committee’.³ However, it is clear that the PDCS does not meet this commitment.
- 1.4. I provide in Section 7 my answers to the five questions posed in the Questionnaire. However, any reasonable observer would deem them to be far too restrictive, given they are predicated on the scheme per se being capable of rational justification. I do not believe it is, and so I do not believe that HS2 Ltd can limit the scope of its enquiries to these questions. As such, I will not limit my comments to the questions posed, and expect my comments to be considered per the public law duty to consult.

2. Purpose of the scheme

- 2.1. The PDCS was developed in response to the Lords Committee. At paragraph 215 of its report, the Lords Committee made the ‘strong recommendation’ of the adoption of a compensation scheme that treated Camden as if it were part of the Rural Support Zone (the “**RSZ**”). Para 75 of Government Response committed to ‘ensure the scheme is fair, reasonable, and proportionate, in the spirit of the strong recommendation of the [Lords] Committee’.

¹ House of Commons (22 February 2016): “[High Speed Rail \(London – West Midlands\) Bill](#)”. HC 129

² House of Lords (15 December 2016): “[High Speed Rail \(London – West Midlands\) Bill](#)”. HL Paper 83.

³ Department for Transport (17 January 2017): “[Promoter’s Response to the Select Committee’s Special Report of Session 2016-17](#)”. Cm 9396

- 2.2. Given the Government Response stated that the PDCS must follow the Lords Committee's strong recommendation, there is a legitimate expectation that the rationale given in the Lords Committee is the rationale for the PDCS. The Lords Committee heard substantial evidence of the harm to the area and concluded that the traditional approach of considering construction noise to occur from time to time without requiring compensation to be inapplicable, due to the duration of the project, the noise of the project (reaching 90 decibels), the area effects on community cohesion due to such substantial works being concentrated in a small area, and the impact on human rights. Given the Government Response, except where noted, the PDCS must address all of these concerns, not just some of them.
- 2.3. In response to and summary of the evidence heard, para 74 (repeated at para 77) of the Government Response expressly notes that the purpose of the scheme is to mitigate the effects of "severe and prolonged noise **and disturbance**" (emphasis mine). Note in particular that noise insulation eligibility was noted by the Lords Committee as a test for eligibility for overall compensation, not just noted because the scheme relates solely to noise.

3. Application of the scheme to disturbance

- 3.1. Both the Commons Committee and Lords Committee have recognised that Camden will be significantly more greatly affected by HS2, and is in greater need of this scheme, than anywhere else. Para 75 of the Government Response notes that the scheme will be 'founded on criteria tailored to its intended purpose'. As noted at 2.3 above, this purpose is to compensate for disturbance as well as noise.
- 3.2. The Lords Committee expressly noted that 1,300 households would be so affected as to require extraordinary compensation. The PDCS does not recognise or refer to this and appears to misunderstand the basis on which this figure was arrived at or what it represents. HS2 Ltd has stated that it 'does not believe that the noise thresholds were appropriate, because the remedy would remove the impact and result in those properties remaining habitable'.⁴
- 3.3. However, noise is not the sole purpose for the compensation scheme, which is also being introduced to compensate for severe and prolonged disturbance more generally. As a consequence, mitigation of noise alone is simply not sufficient to have discharged this commitment. Noise insulation cannot prevent disturbance to communities, including traffic and pollution, the closing of local businesses, dislocation of public services, relocation of family and friends, and much more besides. As a result, compensation should be due even where noise insulation has been provided and should not require noise thresholds to be exceeded.
- 3.4. Furthermore, compensation for homes in the RSZ is not awarded solely where remedies fail to prevent uninhabitability. Noise mitigation and qualification for noise insulation does not exclude properties from the scheme. The Lords Committee – and

⁴ HS2 Ltd: "Further responses to questions raised at ECRG engagement on 11th June", Q20

thus the Government, per its response – stated that compensation should be applied equally to Camden, and thus the scheme should offer compensation to all 1,300 homes, not just those where mitigation has not taken place.

4. Number of affected properties

4.1. HS2 Ltd has stated that it expects there to be no cost of the scheme:⁵

“If the project is successful in meeting the principles of the Environmental Minimum Requirements and is able to design and construct a scheme that does not breach the temporary rehousing thresholds, then the cost of this scheme will be close to £0”

4.2. This admission that there is no cost is effectively a statement that nobody will qualify. This is despite the Government Response committing to following the spirit of a strong recommendation that 1,300 households should benefit from not just statutory but extraordinary compensation.

4.3. I note, however, that HS2 Ltd expressed the possibility that the project is not successful at meeting the requirements, and thus some households will be eligible for compensation. This is not an acceptable assumption to make. The Environmental Minimum Requirements, including the Code of Construction Practice, is – as the name states – a minimum expectation accompanying the High Speed Rail (London – West Midlands) Act. If the project cannot be delivered within the envelope of the Environmental Minimum Requirements, it cannot be said to have parliamentary approval and should not proceed.

4.4. The adoption of a scheme that relies on either failing to apply to anyone or failing to apply the already agreed and binding framework is not capable of rational justification as public policy. It should thus be completely reviewed and rewritten such that it will apply to at least the overwhelming majority of the 1,300 homes that the Lords Committee has recognised as sufficiently affected as to require the scheme.

5. Breach of human rights

5.1. I note that the Government Response stated the Government’s belief that a compensation scheme for urban areas is not required to discharge the duties of Article 14 of the European Convention on Human Rights (the “ECHR”). However, the Lords Committee noted its view that Article 8 of the Convention and Article 1 of its First Protocol are both engaged.

5.2. The project cannot continue unless due consideration is given to harm to those rights engaged under the Human Rights Act. However, the Government Response and HS2 Ltd have not published any consideration of these matters, and it is likely that the

⁵ HS2 Ltd: “Further responses to questions raised at ECRG engagement on 11th June”, Q3

PDCS will be able to be challenged on human rights grounds unless further measures are taken.

- 5.3. The Human Rights Act requires parties that breach human rights protected under the ECHR to do so only where it is legitimate, fair, and proportionate to do so. Where rights that are not absolute are engaged, this requires extraordinary compensation that meets these criteria instead, not just compensation for pecuniary loss or noise. Given HS2 Ltd expects no properties to benefit from the PDCS, and indeed caps the potential benefits even when they do to £30,000, the PDCS is not capable of being considered proportionate.
- 5.4. To avoid challenge under the Human Rights Act, any scheme should thus include an additional degree of compensation that reflects the breach of rights and should not contain a cap on compensation received by each household.

6. Value of homes

- 6.1. The tying of compensation to the unblighted value of properties poses significant problems when such considerable numbers of properties are affected, and the PDCS should offer compensation above this to reflect the long-term detrimental impact that HS2 has already had on the local property market.
- 6.2. Due to the uncertainty created by HS2, residents have been unable to sell their homes in the local area, and market property prices have been depressed significantly since 2010 compared to the case where HS2 were not being built. This has created long-term, residual blight over a large section of Camden, not just in the area proposed to be affected by the PDCS. The 'unblighted value of property' cannot therefore be fairly assessed simply by reference to the current market, but must be made by reference to the counter-factual property market in which HS2 were not being built.
- 6.3. Given the objective is to identify the value in a 'No-Scheme World', compensation should factor in the depreciation of property experienced to date. Since this counter-factual is impossible to ascertain with any certainty on a property-by-property basis, the PDCS should apply a mechanistic uplift in estimated property values when calculating the compensation that is due. Given general and local market trends, an uplift of 15-20% is appropriate and would ensure a more accurate counter-factual of a 'No-Scheme World'.

7. Answers to questions

Q1: Should the compensation for the scheme be a uniform payment per household, or based on the number of bedrooms in a property?

Neither. The compensation should be a combination of proportionality to the harm done to individual households and additional extraordinary compensation to reflect the breach of human rights. It should thus be greater for households with more persons, as the cost of

the alternative (rehousing) and mitigation are higher, and the harm to human rights is greater.

Q2: Should the cap of £30,000 apply equally to tenants and owner occupiers or should it be different?

There should not be an artificial cap for either tenants or owner-occupiers. There is no public policy justification for a financial limit except to reduce costs for HS2, and it is likely to be unlawful as it does not consider the human rights breached and thus is not capable of being proportionate to them.

Q3: How should payments be made?

This should be agreed with each household on a case-by-case basis. The area is very diverse and has a high index of multiple deprivation, with financial exclusion being consequently higher than in other areas, and so a one-size-fits-all approach will not work.

Q4: Should the “no prior knowledge” rule apply to social housing tenants?

It should not apply. Although HS2 has been long proposed, the effect of the scheme and its impact is still not quantifiable. As such, no person in the borough could have such prior knowledge as to give informed consent. Furthermore, Camden has a long social housing waiting list and prospective tenants rarely decline offers of social housing when they are made; to expect them to have done so because they may have had prior knowledge of the proximity of HS2 is unfair and unjust.

Q5: How would you expect financial compensation to affect tax and benefits?

The objective of the PDCS is to put residents in the same position that they would be in if disruption of HS2 did not occur. It should thus be considered akin to damages awarded by a court of law. Judicial awards are generally not subject to taxation unless they are matters related to loss of income. As this compensation is not related to loss of income, it should not be subject to taxation. It should also not affect benefit eligibility.

8. Conclusion

8.1. The PDCS does not achieve the policy objectives that the Lords Committee had in mind when it made the ‘strong recommendation’ for an extraordinary compensation scheme. As such, it cannot be said to abide by the spirit of that strong commitment, as the Government Response committed it to do.

8.2. The scheme is expected to apply to no persons in the borough where the Environmental Minimum Standards, which constitutes its legal authorisation, are met. This is not capable of rational justification. It should be discarded and started again with one stated objective of the new scheme being for all or at the overwhelming majority of affected residents in Camden to qualify for the highest-tier of compensation as a reflection of the ‘special treatment’ that the Commons Committee

expected Camden to receive due to the 'unprecedented disruption' described by the Lords Committee.

- 8.3. The scheme should not be capped at £30,000, which has no rational justification other than to save HS2 Ltd money, and is likely unlawful. It should not discriminate against social housing tenants, many of whom have no choice to live nearby. Furthermore, any awards under the scheme should not be subject to taxation and not affect benefits eligibility.

Cllr Oliver Cooper
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