



## **Bar Council response to the Law Commission consultation paper No.227 'Updating the Land Registration Act 2002'**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation paper No.227 'Updating the Land Registration Act 2002'.<sup>1</sup>
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **Overview**

4. The Bar Council supports the Law Commission's objectives in proposing reforms to the Land Registration Act 2002 that will ensure that conveyancing and questions of the ownership of land are as simple and predictable as possible. For this reason we agree with the majority of the proposals in the consultation paper. Those that we do not agree with are few in number and the disagreements are small. Our responses reflect the Bar's main experience of conveyancing being in the context of property litigation, which necessarily involves comparatively unusual circumstances. We have not felt able to contribute to many of the invitations to provide evidence and experience of conveyancing matters: this reflects our lack of experience of more routine conveyancing work.
5. We do not wish to keep this consultation response confidential.

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<sup>1</sup> Law Commission (2016) ' Consultation 227: Updating the Land Registration Act 2002'

**Question 1: We invite consultees to share their experiences of Land Registry's new practice of allowing the landlord's freehold title to remain on the register following a lease enlargement under section 153 of the Law of Property Act 1925, and in particular any practical problems that have arisen out of this practice.**

6. We have no relevant experience to share.

**Question 2: We invite the views of consultees as to whether the law should be clarified so that it is possible for an owner of an estate in mines and minerals held apart from the surface to lodge a caution against first registration of the relevant surface title.**

7. We tentatively agree with the proposal. The law should certainly be made clear on this issue and we see the benefit to a purchaser in knowing that another party claims the mines and minerals under the land in question. We leave it to others to say whether this might cause problems for conveyancing in practice.

**Question 3: We invite the views of consultees as to whether the provisions of section 4 of the LRA 2002 should be amended so that compulsory first registration of an estate in mines and minerals is triggered where mines and minerals are separated from an unregistered legal estate, and where an unregistered estate in mines and minerals held apart from the surface is transferred.**

8. We agree with the proposal. While we note that the requirement of compulsory registration may place a burden on those who inherit an estate in mines and minerals, that burden is likely to be a modest one.

**Question 4: We invite consultees to share their experiences of the extent to which the lack of compulsory registration of estates in mines and minerals is causing problems in practice.**

9. We have no relevant experiences to share.

**Question 5: We invite the views of consultees as to whether surface owners should be notified of an application to register title to the mines and minerals beneath their land, regardless of whether title is to be registered with qualified or absolute title.**

10. As set out in the paper, there are good practical reasons for notifying the surface owner, even if the notification will make little practical difference in many or even most cases. We do not think that the conceptual problems referred to should be a concern. Nor need the effect on those receiving notification necessarily be a concern: the notification could be accompanied by an appropriate leaflet explaining what has happened. We do however acknowledge that the administrative burden on Land Registry could be large in some cases. We are unable to say whether that burden outweighs the perceived benefits.

**Question 6: We provisionally propose that the requirement of registration should apply to the grant of a discontinuous lease out of a qualifying estate. Do consultees agree?**

11. Yes.

**Question 7: We provisionally propose that it should be possible to protect a discontinuous lease by notice on the register of title to the reversion, whatever the length**

of the discontinuous lease and whether or not it was compulsorily registerable. Do consultees agree?

12. Yes.

**Question 8: We provisionally propose that there should be no change to the threshold of the length of lease which is registrable under the LRA 2002. Do consultees agree?**

13. Yes.

## **First Registration**

**Question 9: We invite consultees to provide evidence of difficulties they have encountered when undertaking conveyancing in the twilight period.**

14. We have no relevant evidence to give.

**Question 10: We invite the views of consultees as to the form of protection that should be provided in respect of dispositions that take place in the twilight period.**

15. The current law is in need of reform, as is demonstrated by the consultation paper. Whatever the chosen solution is, it should be clear what protection is available and clear how to achieve it. The protection should meet two objectives: to protect the disponee of an interest during the twilight period and to allow a later transferee of the land to discover what rights in it have been created before the transfer. Furthermore, the protection should be based on clear rules rather than pragmatic solutions as seen in the Land Registry practice described in paragraph 4.22 of the paper.

16. We see no objection in principle to allowing the interest of the disponee (whether arising under the same instrument as that triggering the first-registration requirement or under a later one) to be protected under the existing regime for unregistered land. This would require no new machinery to be created and its mechanisms will already be familiar to conveyancers. It is acknowledged that a solution of this kind would require an amendment to Section 14(3) of the Land Charges Act 1972 and Rule 38 of the Land Registration Rules 2003.

**Question 11: We provisionally propose that it should be made clear that a person with a derivative interest under a trust may apply for a caution against first registration of the legal estate to which the trust relates. Do consultees agree?**

17. Yes.

## **The powers of the registered proprietor**

**Question 12: We provisionally propose that express provision should be made in the LRA 2002 that a person who has a transfer or grant of a registrable estate or charge in his or her favour is "entitled to be registered as the proprietor" of that estate or charge. Do consultees agree?**

18. Yes.

**Question 13: We provisionally propose that, for the purpose of preventing the title of a donee being questioned, the exercise of owner's powers of disposition by both registered proprietors and persons entitled to be registered as the proprietor should not be limited by:**

- (1) the common law principle that no one can convey what he or she does not own (*nemo dat quod non habet*);
- (2) other limitations imposed by the common law or equity or under other legislation; or
- (3) any limitation other than those reflected by an entry on the register or imposed under the LRA 2002.

**Do consultees agree?**

19. Yes. This is an area that has generated a significant amount of litigation and uncertainty. The proposed clarification is therefore valuable and, we would add, essential to promoting the objectives of the Land Registration Act 2002.

### **The general and special rules of priority in section 28 and section 29: the difference between registrable dispositions and the grant of other interests in registered land**

**Question 14: We provisionally propose that if an unregistrable interest is noted on the register, that interest should be subject only to the interests set out in section 29(2) of the LRA 2002. Do consultees agree?**

20. Yes. This change would promote certainty for those acquiring minor interests in registered land without any unfairness to the existing holders of such rights.

**Question 15: We provisionally propose that a person who takes an interest under a registrable disposition, but who fails to complete that disposition by registration, should not be able to secure priority against prior interests through the noting of that interest on the register. Do consultees agree?**

21. Other. We see the force in the argument that the availability of special protection of unregistrable or unregistered registrable interests should not provide an incentive to avoid completing a transaction by registration or, worse still, not complying with the required formalities for that kind of interest. However, we are not convinced that outweighs the need to protect those who inadvertently take interests without complying with the necessary formalities.

22. Paragraphs 6.16 to 6.28 of the consultation paper make out a compelling case for allowing unregistrable interests to be protected against prior interests. That case is no less compelling for those who have innocently failed to comply with formalities requirements. In such cases the parties are likely to have met some minimum standard for formalities (e.g.

having an agreement that complies with Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989) and, necessarily, the disponee's interest will merit the protection of equity. It seems hard to justify giving less protection to such persons.

23. Extending protection in that situation need not provide an incentive for disponees under registrable dispositions not to complete their dispositions by registration. One way of avoiding this might be for Land Registry to refuse to enter a notice protecting an interest under a disposition of a kind that is prima facie registrable unless the applicant can provide appropriate justification for not completing the disposition by registration under Section 27.

24. We see the force in the example given at paragraph 6.35 concerning a mortgagee getting priority over the beneficial interest of a beneficiary under a trust notwithstanding that there was only one trustee. However, it may be that the best solution is to specifically exclude such cases from the protection offered. This could be achieved in a number of different ways.

**Question 16: We provisionally propose that a person who takes an interest under a disposition which is of a type which would have been registrable if all proper formalities for its creation had been observed, but who fails to observe those formalities, should not be able to secure priority against prior interests through the noting of that interest on the register. Do consultees agree?**

25. See the answer to question 15 above.

**Question 17: Do consultees believe that home rights should be excluded from the effects of our proposal that noting an interest (such as a sale contract) on the register should secure priority against prior unregistered rights (which would otherwise include home rights)?**

26. Yes.

**Question 18: We provisionally propose that the priority of unregistrable interests created pre-reform should remain unchanged. Do consultees agree?**

**If consultees disagree, please state what period of time consultees consider should be allowed in order for holders of existing rights to note them on the register, before the rights become vulnerable to subsequent interests.**

27. Yes.

**Question 19: We provisionally propose that the holder of an unregistrable interest which has been noted on the register, whose priority is adversely affected by alteration of the register to correct a mistake, should be able to apply for an indemnity from Land Registry. Do consultees agree?**

28. Yes. We consider that the availability of the indemnity is essential in these circumstances. While the increased burden on Land Registry's indemnity fund is acknowledged, this is simply the cost of operating a fair system of land registration. As the reach of the registration system is extended, so must the indemnity be.

**Question 20: We invite consultees to submit examples of situations in which the holder of an unregistrable interest has suffered loss as a result of the discovery of a prior unregistrable interest with priority.**

29. We have no relevant examples to give.

**Question 21: We believe that our proposals on the relative priority of unregistrable interests will not lead to a material increase in the number of unregistrable interests being noted on the register, and therefore will not increase the burden on those entering into transactions for the grant of these interests, nor result in any additional resource requirements for Land Registry. Do consultees agree?**

30. Yes. We see no particular reason why it should.

**Question 22: We provisionally propose that it should be possible to make an official search with priority in relation to an application to note an unregistrable interest. Do consultees agree?**

31. Yes.

**Question 23: We provisionally propose that a priority search should also protect any ancillary applications arising out of the document which effects the registrable disposition which is the subject of the priority search, provided those ancillary applications are specified on the application form for the priority search. Do consultees agree?**

32. Yes.

### **Priorities under section 29: valuable consideration**

**Question 24: We provisionally propose that the requirement of valuable consideration in section 29 of the LRA 2002 should be retained, but should be clarified. Do consultees agree?**

33. Yes

**Question 25: We provisionally propose that the definition of valuable consideration in section 132 of the LRA 2002 be amended so that "a nominal consideration in money" is no longer excluded from the definition of valuable consideration. Do consultees agree?**

34. No. The policy behind Section 29 is to offer priority to the interest a transferee of a registered estate whose has acquired it for real valuable consideration; it excludes from such priority the interest of a donee of the registered estate. We agree that in doing so it strikes the right balance between the interests of transferees of registered estates and others with interests in those estates.

35. The value of excluding "a nominal consideration in money" from the definition of valuation consideration for the purpose of Section 29 is that it allows a distinction to be drawn between those instances where real value has changed hands (whether or not equivalent to the value of the estate transferred) from those where the transaction is in substance a gift even though some small consideration may be payable.

36. Any rule that provides this desirable flexibility will always generate borderline cases. And it is true that there is no obvious point where valuable consideration ceases to be nominal. However, this will be a matter of fact in every case, to be decided by reference to the amount of the consideration, the value of the interest transferred and the other material circumstances.

37. Sales of assets by insolvency office-holders should not generate difficulties in practice as usually other consideration will be given where assets are sold for £1 or some other nominal amount.

38. The approach taken in *Halifax v Curry Popeck* [2008] EWHC 1692 (Ch) is only likely to be available in cases of fraud and so does not replace the valuable flexibility in the current statutory formulation.

**Question 26: We do not believe that it is necessary to make any special provision for a reverse premium in the LRA 2002. Do consultees agree? If consultees disagree, we invite consultees to share any examples of transactions for which no form of consideration is given other than the reverse premium.**

39. We agree.

**Question 27: We provisionally propose that where an interest has a negative value, a disposition of that interest is to be regarded as being made for valuable consideration for the purposes of section 29 of the LRA 2002. Do consultees agree?**

40. Yes, if it will also have a negative value in the hands of the donee due to donee assuming liabilities arising from the ownership of that interest.

**Question 28: We invite consultees' views as to whether it would be beneficial to clarify the effect of a disposition for which a peppercorn is the only consideration. We invite consultees to provide examples of dispositions which may be structured in this way. If consultees agree that clarification would be beneficial, we invite consultees' views as to whether a peppercorn should engage the protection of section 29 of the LRA 2002.**

41. We are not aware of any need for such clarification. If the only consideration is peppercorn, which is merely nominal, it would be logical for the protection of section 29 not to be engaged.

**Question 29: We invite consultees' views as to whether there are any other types of bargain, not covered above, where consultees believe that it is unclear whether the disposition is made for valuable consideration for the purposes of section 29. Please explain in each case whether it is believed that the disposition should be included within, or excluded from, the priority protection of section 29.**

42. None.

**Question 30: We provisionally propose that our proposals on reform of the requirement for valuable consideration under section 29 should apply both to registrable dispositions and unregistrable interests which are noted on the register in accordance with our earlier proposals. Do consultees agree?**

43. Yes, for the sake of consistency.

**Question 31: We invite consultees' views as to whether any amendments are necessary to the definition of "valuable consideration" as it applies to section 30 of the LRA 2002**

44. We have no amendments to suggest.

**Question 32: We invite consultees' views as to whether any difficulties would arise if the proposed amendments to the meaning of valuable consideration were also to apply for the purposes of section 86 of the LRA 2002 (bankruptcy of the registered proprietor)**

45. Subject to what is said above at paragraph 35, we cannot think of any difficulties specific to section 86.

**Question 33: We believe that our proposals to clarify the meaning of "valuable consideration" for the purposes of section 29 can be applied equally to the meaning of that phrase in paragraph 5 of schedule 10 to the LRA 2002 (indemnity). Do consultees agree?**

46. Yes.

### **Priorities under section 29: postponement of interests, and the protection of unregistrable leases**

**Question 34: We provisionally propose that where a person applies for a unilateral notice in respect of an interest which was formerly overriding until 12 October 2013, and the title indicates that there has been a registered disposition of the title since that date, the applicant should be required to give reasons why the interest still binds the title. The notice will only be entered if the reasons given are not groundless. Do consultees agree?**

47. We are unconvinced by this proposal. As is acknowledged at paragraph 8.46 of the consultation paper, it has the effect of shifting the burden of proving that section 29 has not operated to the party seeking to register the notice. The applicant thus loses his opportunity to put the disponee under the registered disposition to proof that it has operated. We suggest that if this is a problem in practice, then it is likely to be a relatively short-term problem, and any prejudice to registered proprietors is more appropriately addressed by existing procedures and the potential for a claim under LRA 2002 s.77.

**Question 35: We invite consultees to provide evidence of the extent to which applications are being made for unilateral notices on registered titles where there has been an intervening disposition which engaged section 29, resulting in the postponement of the interest which is the subject of the notice to the interest under the intervening disposition.**

48. We have no evidence to give.

**Question 36: We invite consultees to provide evidence of the extent to which section 29(4) has operated to confer priority on an unregistrable lease over an interest which is protected by a priority search.**



49. We have no evidence to provide, but can add some general observations. We agree with the Law Commission's analysis of owner's powers, which reflects part of the court's analysis in the Redstone Mortgages case (in which one of the authors of this response appeared as counsel); and we agree with what the Law Commission's approach in paragraph 8.56 of the consultation paper.

50. Given the structure of the Land Registration legislation, it might be expected (and logical) that registration of a disposition within the period of priority granted by a priority search certificate would enable a disponee to obtain priority in s.29(4) situations as well, at least in situations in which the Supreme Court's analysis (which is essentially one of policy) in Southern Pacific applies. The Redstone Mortgages and Southern Pacific cases (and related cases) demonstrate that priority searches are – and probably should – be obtained by any intended registered chargee. The facts in at least some of the 'sale and rent back' cases demonstrate that this does not always happen, however. If this does not happen, then conveyancers who fail to request such searches may find themselves liable for the consequences.

51. On the other hand, we would express cautious agreement with the analysis in paragraphs 8.61 and 8.62, given (1) that the type of lease in question will often be a relatively informal transaction, and (2) even if it were possible for the grantee of such a lease to obtain priority protection him/herself (which it is not), the type of transaction is such that they would not be expected to consider doing so.

52. The answer in many of these cases (at least where the parties involved are acting honestly) may well be for appropriate pre-contract inquiries to be raised of both the seller and occupiers. The need for inquiries of a seller, as well as occupiers, for the purpose of ensuring priority applies in relation to other interests (see the Supreme Court decision in the Southern Pacific case at [76]). Such enquiries ought not to be onerous in practice.

53. In addition, a difficulty for a mortgagee is likely to arise in practice only if the lease is for a term which extends beyond the point at which the mortgagor defaults, or is given more secure statutory protection (e.g. where it is an assured tenancy, rather than an assured shorthold tenancy). Indeed, in many buy-to-let situations (or situations similar to this), a short assured shorthold tenancy may well be one which is permitted by the terms of the mortgage in any event.

54. As a final point, the transactions in the 'sale and rent back' cases pre-dated the regulation of such transactions by the FCA. Regulation ought to address the iniquities in those particular situations, so care needs to be taken in analysing and assessing the relevance for the future of any evidence provided in response to this question.

### **Protection of third party rights on the register Part I: Notices**

**Question 37: We provisionally propose that it should be possible to protect a right by one of two kinds of notice: a full notice and a summary notice. Do consultees agree?**

51. Yes, subject to what follows. There should still be two kinds of notice, one of which can be applied for by one party alone in a summary way.

**Question 38: We provisionally propose that an application for a summary notice should not need to be accompanied by any evidence to support the interest claimed. Do consultees agree?**

55. Yes.

**Question 39: We provisionally propose that, if a registered proprietor applies to cancel a summary notice, the beneficiary of the summary notice will be required to make an initial response within 15 business days (subject to an extension of up to a maximum of 30 business days). The response must demonstrate a case for the retention of the notice which is not groundless. Do consultees agree?**

56. Yes.

**Question 40: We provisionally propose that, in the event that the beneficiary submits an initial response objecting to cancellation of the notice, the beneficiary must produce evidence to satisfy the registrar of the validity of the interest claimed. Evidence must be provided within a maximum of 40 business days of the original notification of the application to cancel. Do consultees agree?**

57. Yes, subject to the answer to the next question.

**Question 41: We provisionally propose that where an application is made to cancel a unilateral notice following implementation of our reforms, the beneficiary of that notice should (following an objection to cancellation) be required to produce evidence to satisfy the registrar of the validity of the interest claimed. Do consultees agree?**

58. No. This presents too high a hurdle for the applicant for the reasons set out at paragraph 9.112 of the consultation paper. While in many cases it is likely to be reasonably clear whether a claimed interest is valid or not from the evidence presented at this stage, in other cases it will not be. For example, a right claimed by proprietary estoppel may look unpromising on paper but, after disclosure and cross-examination (which are essential elements of the fact-finding process in the Tribunal and the courts), it may become compelling. In these cases, the applicant would unfairly be left unprotected while the claimed right is established in the courts.

59. The registrar should again consider whether the fleshed out claim to the right is groundless and the notice should be maintained if it is not. The parties will then be able to attempt to settle any dispute or to resolve it through the Tribunal.

**Question 42: We provisionally propose that it should be clarified that an insolvency practitioner appointed in respect of an insolvent registered proprietor is able to apply to cancel a unilateral notice on behalf of the registered proprietor. Do consultees agree?**

60. Yes.

**Question 43: We provisionally propose that it should be clarified that attorneys acting under a power of attorney may apply to cancel a unilateral notice on behalf of a registered proprietor who is the donor of the power. Do consultees agree?**

61. Yes.

**Question 44: We invite consultees to share with us other situations in which they believe the persons who can make applications to Land Registry are unnecessarily limited.**

62. There is an argument for allowing one of a number of people who are joint proprietors of an estate, or jointly entitled to an interest in an estate, to make applications on behalf of all of them: the others may be incapable or unwilling to join in the application. There can be no prejudice to the interests of the other joint owners, as any application is only likely to benefit the estate. It is recognised however that such a facility could lead to problems in practice if the joint owners each act unilaterally but these may not be insuperable.

**Question 45: We invite consultees' views on what benefits would accrue if an agreed notice could identify the beneficiary of that notice, in a similar way to the entries made in relation to a unilateral notice? Would there be any disadvantages to identifying the beneficiary of an agreed notice in this way?**

63. There is an obvious benefit in that the beneficiary (or at least one potential beneficiary) could be easily identified, even if this is only a starting point. We can see no significant disadvantage in allowing the beneficiaries of agreed notices to be identified, other than the potential for a proprietor making an incorrect assumption that the stated beneficiary is still the beneficiary, or is the only beneficiary. Agreed notices (to a greater degree than unilateral notices) are likely to reflect interests which may endure through many changes in beneficiary, and even increases in the numbers of beneficiaries, which may reduce the benefits of identifying the initial beneficiary; but that does not mean that there should not be at least the option of identifying the original beneficiary.

**Question 46: If consultees support identifying the beneficiary of an agreed notice on the register, should this be mandatory or optional?**

64. It should be optional.

## **Protection of third party rights on the register Part II: Restrictions**

**Question 47: We have provisionally formed the view that it should continue to be possible to protect contractual obligations by means of a restriction. Do consultees agree?**

65. Yes. There is an obvious practical benefit in allowing contractual obligations to be protected by means of a restriction, and it is our impression that restrictions are being used for this purpose to a much greater extent than was the case under the LRA 1925. However care needs to be taken in striking the right balance between securing that benefit and not cluttering the land registration system with non-proprietary rights. Consideration might be given as to how this could be achieved.

66. In many cases they would be adequately protected by a restriction that afforded them a certain amount of notice before a disposition were registered. This would allow the person with such rights either to take informal steps to ensure compliance with the contract, or to seek appropriate relief from the courts. This would have the advantage of ensuring that what happens next is decided according to the general law, rather than by the person with the contractual right being able to veto the registration of the disposition, as would be the case with a restriction requiring that person's consent to registration of a disposition. Take as

an example the case where the courts would refuse that person an injunction preventing completion of the disposition by the courts on the grounds of their conduct: there is no reason why the restriction should give them any better rights than the court would grant. However we acknowledge that there may be other cases where a more restrictive form of restriction would be desirable.

**Question 48: We invite the views of consultees as to whether there are any particular types of contractual obligation which should not be capable of protection by way of a restriction. If so, please explain why these obligations should be treated differently from other contractual obligations.**

67. One candidate is a lessee's covenant not to assign or underlet without the lessor's consent, which is not to be unreasonably withheld or refused. If the lessor's consent is unreasonably withheld or refused, the lessee is free to assign or underlet and need not apply to court for a declaration that it was unreasonable. Even though a lessee would usually seek a declaration before assigning or underletting, it is desirable that it still have the option of continuing with the transaction and leaving the lessor to challenge it.

**Question 49: We provisionally propose:**

- (1) that it should continue to be possible to enter restrictions in Form K in relation to charging orders over beneficial interests; but
- (2) that the ability to enter restrictions should not be extended to holders of other derivative interests under trusts.

**Do consultees agree?**

68. We agree that it should remain possible to protect charging orders over beneficial interests by means of a restriction. See the answer below in relation to Form K. We agree that it should not be possible to enter restrictions to protect derivative interests under trusts.

**Question 50: We provisionally propose that it should be made clear that a court may order the entry of a restriction to protect a charging order relating to an interest under a trust, but that such a restriction must be in Form K. Do consultees agree?**

69. We agree that it should be made clear that a court may order the entry of a restriction to protect a charging order relating to an interest under a trust. But we think that serious consideration should be given to allowing a restriction that offers the charging-order creditor greater protection than Form K; we recognise that there are arguments either way on this though.

70. Form K is adequate to inform charging-order creditors that the charged beneficial interest is about to be overreached and that they should now make their claim to the proceeds of sale. But this is inadequate protection for the creditors' interests in this context. The context is necessarily one where the debtor and creditor have been engaged in hostile litigation and the judgment has gone unsatisfied. The creditor may be concerned that the debtor will try to avoid paying the judgment debt. There are two particular risks for the creditor: the debtor may dispose of the proceeds of sale before accounting to the creditor;

and, if the debt is greater than the value to be realised by the sale, the debtor may dispose of the interest at an undervalue, particularly in a collusive sale to a connected party.

71. A creditor with a charging order over the legal estate, and whose charging order is protected by a notice, is protected from these risks. The fact that the charging order will not lose priority to a disponee unless discharged means that the creditor can secure payment through the conveyancing process and, if the debt exceeds the consideration, he or she can refuse provide the necessary discharge. In contrast, Form K offers no protection at all against these risks. It may be true that charging-order creditors may have other remedies in these cases but these will involve them in further litigation and bring further uncertainty and legal expenditure that may never be recovered. This seems unfair.

72. There are a variety of means by which the charging-order creditor's interests could be protected in these cases. One example is a restriction in similar form to Form AA, which is used to protect property subject to a freezing injunction. This allows a disposition to be registered only with the consent of the party who obtained the injunction or with the consent of the court.

73. This would allow a charging-order creditor to have enough control over the transaction to ensure that it receives the proceeds realised by the sale of the charged share in the property and yet it would allow a trustee of the land to apply to court for an order permitting the sale on the proposed terms if the creditor were behaving unreasonably (under Section 14 of TLATA). Although this is anomalous, and provides the creditor with a partial "stranglehold" over the registered estate, it might be thought a reasonable solution to this practical problem.

74. However we recognise that the reasonableness of this solution depends on the charging-order creditor behaving reasonably. There is potential for unfairness if the creditor behaves unreasonably, particularly if the party intending to sell cannot afford to go to court for an order permitting the sale. For this reason, we invite the Law Commission to consider the responses of those most likely to be affected by these matters.

## **Overriding interests**

**Question 51: We believe that it should continue to be possible for an estate contract to be protected as an overriding interest where the beneficiary of the contract is in actual occupation. Do consultees agree?**

75. Yes.

**Question 52: We believe that the fact that the benefit of an interest has been registered should not preclude that interest from being an "unregistered interest" (and so overriding) for the purposes of schedules 1 and 3 to the LRA 2002. Do consultees agree?**

76. Yes.

**Question 53: We invite consultees' views as to whether section 29(3) of the LRA 2002 serves a useful purpose and should be retained.**

77. We do not have a strong view about this, but on balance would favour its repeal.

**Question 54: We invite consultees to provide examples of situations where section 29(3) has either created a problem in practice, or conversely performed a useful function.**

78. We can give only one example. The details are confidential, so we can describe it only in general terms. The situation involved poor practice some years ago by conveyancers and by the Land Registry when registering a notice under LRA 1925, which gave rise to doubt as to whether a particular right was protected by that notice. The existence of s.29(3) had the result that the beneficiary might have been forced to defend the applicability of the notice, even if it believed that it did not protect the right in question (which would, instead, have been an overriding interest), in order to avoid the risk of losing any protection for that right. Had the beneficiary not been in receipt of legal advice, it could well have been caught out.

**Question 55: We invite consultees' views as to whether any transitional provisions are necessary in the event of the abolition of section 29(3).**

79. We do not see the need for any transitional provisions. Conveyancers should be aware of the change and when it takes effect from. Purchasers will still make the usual enquiries of occupiers.

## **Lease variations and registration**

**Question 56: We provisionally propose that express provision should be made to permit the recording of a variation of a lease on either the landlord's registered title, or the tenant's registered title, or both. Do consultees agree?**

80. Yes, provided it is voluntary.

**Question 57: We invite the views of consultees as to whether express provision should be made to permit the recording of any other documents which are ancillary to a lease on either the landlord's registered title, or the tenant's registered title, or both.**

81. Yes, although we do not see a strong need for this. This kind of material should be revealed by the ordinary conveyancing process but it is desirable, provided the Land Registry has sufficient resources to deal with it.

**Question 58: We invite the views of consultees on the severity and extent of problems with the Landlord and Tenant (Covenants) Act 1995. We invite consultees to provide evidence in support of their views.**

82. With the exception of one issue, we do not offer any views on this at this stage but would wish to respond to any consultation on the 1995 Act. The exception concerns the issues raised in the Briefing Note to the Secretary of State for Communities and Local Government, dated 18 May 2016, prepared by the Property Litigation Association, and available on its website: [http://www.pla.org.uk/images/uploads/library\\_documents/PLA\\_-\\_Briefing\\_Note\\_on\\_Landlord\\_and\\_Tenant\\_%28Covenants%29\\_Act\\_to\\_DCLG\\_-\\_May\\_2016.pdf](http://www.pla.org.uk/images/uploads/library_documents/PLA_-_Briefing_Note_on_Landlord_and_Tenant_%28Covenants%29_Act_to_DCLG_-_May_2016.pdf). We share the concerns expressed, which in our experience are creating real,

practical difficulties for commercial landlords and tenants, for the reasons explained in the Briefing Note.

## **Alteration and rectification of the register**

**Question 59: We provisionally propose that the ability of a person to seek alteration or rectification of the register to correct a mistake should not be capable of being an overriding interest pursuant to paragraph 2 of schedule 3 to the LRA 2002. Do consultees agree?**

83. Yes. Otherwise arbitrary results follow that are hard to justify as a matter of principle.

**Question 60: We provisionally propose that a chargee who has been registered by mistake, or the chargee of a registered proprietor who has been registered by mistake, should not be able to oppose rectification of the register so as to correct that mistake by removing its charge. Do consultees agree?**

84. Yes. However, on a related point, we add there is potential for unfairness in the way that Section 131(2) of the LRA would operate if a mortgagee in possession has let the property, e.g. under the statutory powers of leasing, for a short term (which cannot, thus, give the lessee a registered title which the lessee could defend in its own interests). In that case, the lessee's landlord will be the mortgagee and the lessee's possession would be deemed to be the mortgagee's possession. If, under the proposal, the mortgagee would not be entitled to oppose the application for rectification, then that could be unfair on the lessee, who will lose its right to possession of the property. That unfairness might be cured, however, if the proposal applied only to those situations in which a mortgagee is not in possession under the rules in s.131(2).

**Question 61: We provisionally propose that where the proprietor of a registered estate has been removed or omitted from the register by mistake, the proprietor should be restored to the register if he or she is in possession of the land, save in exceptional circumstances. Do consultees agree?**

85. Yes.

**Question 62: We provisionally propose that a successor in title to that proprietor should be restored to the register if he or she took over possession of the land, save where there are exceptional circumstances. Do consultees agree?**

86. Yes, although consideration should be given to providing this protection only to involuntary transferees of that proprietor. In practical terms the transfer is only likely to happen by involuntary means or if the transferee has failed to make proper enquiries (at least by checking the register). Such a transferee deserves less sympathy than the original proprietor and it may be desirable to allow such cases to be considered in a more balanced way.

**Question 63: We provisionally propose that:**

- (1) The protection afforded to the proprietor of a registered estate who has been removed or omitted from the register by mistake should not be confined to when he or she is personally in possession, but should apply where a proprietor would be considered a proprietor in possession within section 131 of the LRA 2002.
- (2) The protection afforded to the proprietor of a registered estate who has been removed or omitted from the register by mistake should not be confined to situations where his or her possession of the land has been continuous, as long as he or she is the proprietor in possession when schedule 4 is applied.

**Do consultees agree?**

87. Yes, we agree with both proposals.

**Question 64: We provisionally propose that the register should not be rectified to correct a mistake so as to prejudice the registered proprietor who is in possession of the land without that proprietor's consent, except where:**

- (1) the registered proprietor caused or contributed to the mistake by fraud or lack of proper care; or
- (2) less than ten years have passed since the original mistake and it would be unjust not to rectify the register.

**Do consultees agree?**

88. Yes, we agree with both proposals

**Question 65: We provisionally propose that after ten years from the mistaken removal of the former registered proprietor from the register, the register should not be rectified to correct the mistake so as to prejudice the new registered proprietor even where that proprietor is not in possession of the land. Exceptions should be provided only for where the new registered proprietor consents to the rectification or where he or she caused or contributed to the mistake by fraud or lack of proper care. Do consultees agree?**

89. Yes, on the assumption that this will not apply if the former proprietor is in possession of the land.

**Question 66: We provisionally propose that the period of time after which the register becomes final should be ten years. Do consultees agree?**

90. We would prefer for the period to be 12 years, on the basis that the limitation period for bringing an action for possession of land is widely known, but we recognise that there is no principled reason why the periods should be the same.

**Question 67: We provisionally propose the following:**

**Cases of double registration should be resolved through the application of our proposals in respect of indefeasibility. Therefore, in a case of double registration, a claim to adverse possession should not be possible.**



Where as a result of the operation of the long stop a double registration remains on the register, the party who does not benefit from the long stop should have their title amended accordingly to remove the double registration. The party whose title is amended in such circumstances should be entitled to an indemnity.

Do consultees agree?

91. Yes.

Question 68: We provisionally propose that section 29 should be subject to schedule 4. This means that where, through a mistake, a derivative interest has been omitted or removed from the register, the holder of the interest should be able to apply for alteration or rectification of the register to have the priority of the interest over the registered proprietor restored. The outcome of the application should be determined by the same principles that apply when the application for alteration or rectification relates to the title to the estate, including the operation of the long stop. Do consultees agree?

92. Yes.

Question 69: We provisionally propose that, where the application for alteration or rectification relates to a derivative interest, the ten year long stop on alteration of the register should run from the time that, as a result of the mistake, the holder of the derivative interest lost priority, not from the time of the mistake. Do consultees agree?

93. Yes.

Question 70: We provisionally propose that section 11 should be subject to schedule 4. This means that where, through a mistake, a derivative interest has been omitted from the register, the holder of the interest should be able to apply for alteration or rectification of the register to have the priority of the interest over the registered proprietor restored. The outcome of the application should be determined by the same principles that apply when the application for alteration or rectification relates to the title to the estate, including the operation of the long stop. Do consultees agree?

94. Yes.

Question 71: We provisionally propose that where a first registered proprietor was bound by an interest through the operation of priority rules in unregistered land, but obtains priority over the interest on registration as a result of section 11, no indemnity should be payable on rectification of the register to include the interest at a time when the estate is still vested in the first registered proprietor. Do consultees agree?

95. Yes.

Question 72: We provisionally propose that alteration or rectification of the register should not be possible in respect of an interest that ceased to be overriding on 13 October 2013, where first registration or a registered disposition of the affected estate takes place on or after that date. An exception should be made, however, where on first registration Land Registry omitted a notice in relation to that interest that should have been entered under rule 35 of the LRR 2003, or overlooked a caution against registration. Do consultees agree?

96. Yes.

**Question 73: We provisionally propose that in the case of competing derivative interests, rectification should operate retrospectively. Do consultees agree?**

97. Yes, we agree. However consideration should be given to how to deal with any difficulties that may arise out of what the parties have done in the period between the making of the mistake and the rectification. If changes have been made to the property in that period, or its condition has been allowed to deteriorate, there is the potential for a dispute between the owners of the two interests. At the moment there is nothing to provide the answer to the question of whether one is liable to the other for such matters. It is also possible that circumstances might occur which would give rise in equity to an estoppel, and we suggest that any final proposals should cater for this possibility (which could be through the application of the “exceptional circumstances” exception).

**Question 74: We invite consultees to share with us any practical difficulties that consultees have experienced following the decision in *Gold Harp*.**

98. We have no evidence to give.

## **Indemnity**

**Q75 We invite consultees’ views as to whether there should be a cap on the indemnity that can be paid to a claimant following rectification of the register (or where rectification is available but is not ordered), except where the mistake that leads to rectification is attributable to fault by Land Registry.**

99. It is our strong view that there should not be a cap on the indemnity that can be paid to a claimant following rectification of the register (or where it is available and not ordered). Such a cap would breach the fundamental structure of the land registration system.

100. Furthermore, it may not be possible to replace the protection currently afforded by the uncapped indemnity by private insurance. Even if satisfactory insurance were available, it is only likely to be taken out when someone acquires a registered estate, and then only if that person can afford it. In practice a large number of proprietors are likely to remain uninsured. And it is those who are most at risk of fraud – e.g. the elderly – who are most likely not to have insurance.

101. If a cap were imposed on the indemnity scheme, then it would have to be considered whether the alteration and rectification provisions would need to be changed. Instinctively, whether a party will be fully compensated in the event of a rectification will affect the justice of whether it should be ordered in the first place. While the question of whether one party is insured or not would not usually affect the outcome of litigation between them and someone else, it is hard to ignore the fact that some people may not have been in a position to insure themselves against property fraud.

**Question 76: We invite consultees’ views as to the level at which any cap should be set.**

102. There should be no cap. But, if there were one, it should be set at a level above the value of most residential properties in the country, including in London and South-East of England, as it would be unreasonable to expect homeowners to insure against fraud. It is recognised that a cap at that level may not make a material difference to the cost of providing the indemnity.

**Question 77: We invite consultees' views as to whether conveyancers should be required to make a declaration on Land Registry's forms to the effect that they have taken sufficient steps to satisfy themselves that documents relating to the application are genuine.**

103. We agree with this proposal.

**Question 78: We invite consultees' views on the following issues.**

**(1) Should there be a general statutory tort imposing a duty to take reasonable care in respect of the granting of deeds intended to be registered and applications made to Land Registry, as a supplement to the existing statutory rights of recourse?**

**(2) Should any statutory tort be imposed on all those who grant deeds intended to be registered and make applications to Land Registry, or are there any categories of person (for example individuals) who should be excluded?**

**(3) Other than confining a statutory tort to a duty to take *reasonable* care, are there any exclusions or restrictions that should apply to the scope of the tort?**

104. We have serious reservations about this proposal. We consider that Land Registry's position will be adequately protected by the statutory tort proposed in Q79 below in most cases. We do not understand what a duty to take care "in respect of the granting of deeds" amounts to, nor what mischief it is directed at. There is no reason why grantors of deeds should be subject to any duty to Land Registry when dealing with their own property. If the role of the duty of care is to provide a right of action against those who forge deeds, then it should expressly say so. The duty of the conveyancer would in the ordinary case amount to a duty to take reasonable care to verify that grantor of the deed is the person who is entitled to deal with that property: that is adequately provided for in the proposal below. We are concerned that an unnecessarily wide statutory duty could lead to unintended consequences.

105. We also have deep reservations about the right to an indemnity being limited where the claimant has a right of action against his or her conveyancer. The great advantage of the indemnity scheme is that it is simple and risk-free in its application. The claimant's remedy will usually be clear to see and available reasonably quickly, subject to quantification. However, that is not the case if the claimant must embark on what may be difficult and protracted litigation against his or her conveyancer in order to achieve full compensation.

**Question 79: We invite consultees' views on whether, as an alternative to a general statutory tort, there should be a specific statutory tort imposing a duty of care in respect of verifying identity.**

106. This is preferable to the general statutory tort for the reasons given in the answer above.

**Question 80: We invite consultees to share their experience of any difficulties they have experienced with current requirements in respect of verifying identity and whether they consider that the requirements could usefully be rationalised.**

107. We do not have any such experience.

**Question 81: We invite consultees' views as to whether, in principle, Land Registry's powers in respect of identity checks should be enhanced to enable the registrar, through Directions, to provide mandatory requirements in respect of identity verification, including provision for electronic verification of identity and sub-delegation.**

108. We have no strong views on this, but would mention that in the case of incorporated bodies, the process of identification and confirmation of authority is more complex than that discussed in the consultation paper, which relates only to individuals.

**Question 82: We invite consultees to provide evidence as to the significance of the indemnity scheme in lending decisions (in the residential and commercial sectors) and of the potential repercussions of reforms that limit its availability to lenders.**

109. We have no evidence to offer.

**Question 83: We invite consultees' views on whether the ability of mortgagees to obtain an indemnity should be limited to claims arising from mortgages granted on the basis of a mistake already contained in the register.**

110. We do not express a view on the policy question that lies behind this proposal. However, we observe that not every mortgagee is a bank and so the justification that a mortgagee is best placed to avoid or carry the commercial risks of identity fraud will not apply in every case. We wonder whether, if the other proposals in this chapter are accepted, the savings justify the consequences for non-commercial mortgagees.

**Question 84: We invite consultees' views on whether the entitlement of mortgagees to obtain an indemnity should be subject to compliance with a statutory duty to take reasonable care to verify the identity of the mortgagor.**

111. We do not see the need for this proposal given paragraph 5 of Schedule 8 to the LRA.

**Question 85: We invite consultees to provide evidence in respect of the following issues:**

**(1) the incidence in practice of questions concerning the limitation period applicable to indemnity claims; and**

**(2) how their practice has been affected by questions concerning the limitation period applicable to indemnity claims.**

112. We have no relevant evidence to give on these matters.

**Question 86: We provisionally propose that for indemnity claims under schedule 8, paragraph 1(a) and (b) the limitation period should start to run on the date of the decision as to rectification. Do consultees agree?**

113. Yes.

**Question 87: We provisionally propose that for indemnity claims under schedule 8 paragraph 1(c) to (h) the limitation period should start to run when the claimant knows, or but for their own default would have known of the claim. Do consultees agree?**

114. Yes.

**Question 88: We provisionally propose that the registrar's rights of recourse under schedule 8, paragraph 10(2) ought to be subject to the following statutory limitation periods:**

**In a case within schedule 8, paragraph 10(2)(a), Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the indemnity claimant would have had if an indemnity had not been paid; or (ii) 12 months from the date the indemnity is paid.**

**In a case within schedule 8, paragraph 10(2)(b), Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the person in whose favour rectification has been made would have had if the rectification had not been made; or (ii) 12 months from the date the register is rectified.**

**Do consultees agree?**

115. Yes. However 12 months may not leave enough time for the potential claim to be investigated and the necessary pre-action conduct to be carried out. A period of two years is more appropriate and in line with that provided for contribution claims under the Civil Liability (Contribution) Act 1978.

**Question 89: We provisionally propose that where an indemnity is payable in respect of the loss of an estate, interest or charge following a decision not to rectify, the value of the estate, interest or charge should be regarded as not exceeding the current value of the land in the condition the land was in at the time of the mistake. Do consultees agree?**

116. We agree with this proposal subject to what follows. The existing rule that applies in this situation does not fairly reflect the loss to the disappointed applicant: a change to a cap at the current value is therefore appropriate. But whether it is fair to take the property to be in the condition it was in at time of the mistake will depend on the facts of the case. The applicant is left undercompensated if he or she has spent money on improving the property in ignorance of the mistake. There should be some flexibility to allow for these cases.

117. This flexibility may be accommodated in a way that is consistent with the proposal by making it clear that compensation may be given for such matters in addition to value of the estate under the proposed formula.

**Question 90: We invite the views of consultees as to any difficulties that might arise in determining the current value of land in the condition the land was in at the time of the mistake.**

118. We do not see any difficulties with this in principle. Retrospective property valuations are commonplace.

## **General boundaries**

**Question 91: We provisionally propose that there should be a non-exhaustive list of factors which may be used to distinguish boundary and property disputes. This list could include factors such as:**

- (1) the relative size of the contested land in comparison to other land clearly within the remainder of the registered proprietor's title;**
- (2) the importance of the land to the registered proprietor;**
- (3) the application of any of the common law presumptions; and**
- (4) the manner in which the error in the boundaries shown on the title plan came about.**

**Do consultees agree?**

119. Yes. The applicability of Sch.6 para.5(4)(c) could also usefully be linked to this, so as more clearly to avoid its application beyond its intended scope, and arguments that a failure to do so reflects an intention that it should have a wider application.

**Question 92: We invite the views of consultees as to the type of factors which should be given consideration when distinguishing boundary and property disputes.**

120. None in addition to those listed above.

## **Easements**

**Question 93: We provisionally propose that, where the grant of a lease is not a registrable disposition, easements which benefit that lease and which are created within the lease itself should not be required to be completed by registration in order to operate at law.**

**Do consultees agree?**

121. Yes.

**Question 94: We provisionally propose that all easements granted by or implied in leases which are not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, including equitable easements, should be capable of being overriding interests. Do consultees agree?**

122. Yes

**Question 95: We provisionally propose that:**

- (1) easements benefiting a lease which is not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, where those easements are created separately from the lease, should be capable of being overriding interests; but**
- (2) the grant of an easement benefiting any other lease which is created outside of the lease document should remain a disposition which must be completed by registration to take effect at law.**

**Do consultees agree?**

123. Yes.

## **Adverse possession**

**Question 96: We provisionally propose that a claimant to title to land through adverse possession should be prevented from making a second application for registration when an application for registration has been rejected under schedule 6, paragraph 6, unless the conditions in that paragraph under which a second application is currently permitted are fulfilled. Do consultees agree?**

124. Yes, but we would also propose adding some clarification of what amounts to a relevant application/rejection for the purposes of para.6.

125. We consider that the right approach is first to make clear that an application under para.6 can only be made if the sole ground for rejection of a prior para.1 application was the applicant's failure to rely on or inability to satisfy the para.5 criteria following the registered proprietor giving notice requiring the application to be dealt with under para.5. It would be wrong for an application rejected at the outset on the ground of substantial invalidity, or following a successful objection (under s.73) to the applicant's right to apply under para.1, to be a relevant application for the purposes of a second application under para.6. Currently, this is not entirely clear in the legislation, and we believe it should be. One contributor to this response has had experience of just such a situation having arisen (the proceedings were settled, so there was no judicial decision on the issues).

126. On the other hand, if a para.1 application is 'rejected' on receipt or after objection (particularly because 10 years' adverse possession has not yet occurred), we see no objection in principle to another application being made under para.1 (but not directly under para.6, with the automatic consequences that this would bring). In that type of situation, we do not feel that the registered proprietor should be put to an election to sue if the right to make a para.1 application has not yet been made out in the first place (otherwise very short periods of adverse possession could lead to para.6 applications); but, equally, neither the applicant nor the registered proprietor should lose out in the event of rejection of an application on

receipt. In making these suggestions, we have borne in mind the decision of the Court of Appeal in Baxter.

127. It could be reasonable, however, to prevent reliance on para.5 in any further para.1 application which is rejected on the ground that the right to apply has not been made out, with the possible exception of the third condition (bearing in mind the proposed time limitation on the belief element in that condition).

128. If an application/rejection is, on that basis, a relevant one for para.6, then a para.6 application will be legitimate, subject to the circumstances in Baxter. We would agree, however, that it should not be possible in those circumstances to make another para.1 application rather than an application under para.6, for the reasons given.

**Question 97: We invite consultees to provide evidence relating to the use of the first two conditions in paragraph 5 of schedule 6.**

129. We have no relevant evidence to give.

**Question 98: We invite consultees' views as to whether the first two conditions in paragraph 5 of schedule 6 should be removed.**

130. We have no strong view on this either way. But to remove the first condition could expose an applicant who has alternative adverse-possession and proprietary-estoppel claims to more complex proceedings than before. Consideration should be given to some mechanism to allow the claims to be dealt with together, either in the FTT or the court. And as to the second condition, we suggest that consideration be given to providing applicants with interests under wills another route to apply.

**Question 99: We provisionally propose that where an applicant relies on the condition in schedule 6, paragraph 5(4), his or her reasonable belief that the land belonged to him or her must not have ended more than six months from the date of the application. Do consultees agree?**

131. We agree with the proposal save that we think that period should be twelve months. The period must accommodate (i) the likelihood that the date on which the reasonable belief ended may be difficult to identify, (ii) any time spent trying to resolve the dispute about ownership privately between the parties, (iii) the time taken by the applicant to recognise the need to take action to resolve the dispute, (iv) time to take advice and consider it, and (v) time to prepare the application. Six months is unreasonably short given that – unlike the case of eviction – the applicant may well hesitate before escalating what may be a minor dispute between neighbours into a full legal dispute.

**Question 100: We provisionally propose that where a person becomes the first registered proprietor of title to land which has in fact been extinguished by an adverse possessor, where (i) the registered proprietor did not have notice of the adverse possessor's claim and (ii) the adverse possessor is not in actual occupation of the land at the time of registration, an application for alteration of the register should be classed as a rectification. Do consultees agree?**



132. We see this essentially as a matter of policy and we acknowledge the logic behind reasons given for the proposal.

**Question 101: We provisionally propose that an adverse possessor of unregistered land should not be able to apply for registration with possessory title until title has been extinguished under the Limitation Act 1980. Do consultees agree?**

133. Yes.

**Question 102: We provisionally propose that an adverse possessor of registered land should not be able to apply for registration except through the procedure in schedule 6. Do consultees agree?**

134. Yes.

**Question 103: We provisionally propose that where an adverse possessor in unregistered land is registered with possessory title in the reasonable (but incorrect) belief that the prior title has been extinguished, the period of adverse possession should continue to run while the possessory title is open. Do consultees agree?**

135. Yes.

**Question 104: We provisionally propose that where a tenant is in adverse possession of land (other than land belonging to the landlord) and the presumption that the tenant is acting on behalf of his or her landlord is not rebutted, the landlord should be able to make an application under schedule 6 based on the tenant's adverse possession. Do consultees agree?**

136. Yes.

## **Further Advances**

**Question 105: We invite the views of consultees as to whether the Law Commission should conduct a project reviewing the law of mortgages as it applies to land. If consultees consider a project should be so conducted, we invite consultees to share examples of areas that such a project should cover. Please include evidence as to the problems that the law is creating in practice and the potential benefits of reform.**

137. We have no views on this.

**Question 106: We invite the views of consultees as to the circumstances in which the provisions in section 49 are most likely to be relied upon by all tiers of lender. Where lenders prefer to enter into agreements between themselves to regulate the position, is this because the legislation is perceived to be inadequate, or simply because commercially it is desirable for arrangements to be put on a contractual footing?**

138. We have no knowledge of this.

**Question 107: We invite the views of consultees as to whether the fact that, where a loan is drawn down in instalments, those instalments are classified as “further advances”, is causing problems in practice.**

139. We have no views on this.

**Question 108: We invite the views of consultees as to whether it should be possible for persons other than the proprietor of a registered charge to make further advances on the security of that charge which rank in priority to a subsequent charge pursuant to the provisions of section 49 of the LRA 2002.**

140. We have no views on this.

**Question 109: We invite consultees to submit evidence as to whether, given the use of inter-creditor agreements to regulate priority within the commercial lending market, an extension to the persons who can make further advances under section 49 would be likely to have an effect in practice.**

141. We have no evidence to give on this.

**Question 110: We invite the views of consultees, if they believe that it should be possible for persons other than the proprietor of a registered charge to make further advances on the security of that charge, as to who should be enabled to do so.**

142. We have no views on this.

**Question 111: As part of our call for evidence in relation to a separate project on mortgage law, we invite consultees to share their experiences of any benefits or difficulties caused by the principle that an equitable chargee may serve notice on a prior legal chargee and thereby prevent the legal chargee’s right to tack.**

143. Although we have no experience of this, there is an obvious practical difficulty caused in cases where the legal chargee wishes to make a further advance to a commercial borrower in order to ensure that the borrower is able to trade through a difficult period. For it do so may be a benefit to itself and to the subsequent equitable chargee. But the legal chargee may only be willing to make the advance if it is to rank in priority to the equitable charge. However, this is not necessarily a reason to criticise the law in this respect.

**Question 112: We invite the views of consultees on the extent to which lenders are relying on section 49(4) to stipulate a maximum amount for which a charge is security.**

144. We have no views on this.

**Question 113: We invite consultees to provide any evidence that reliance on section 49(4) in this way is preventing borrowers from obtaining further finance elsewhere.**

145. We have no evidence to give on this.

## **Sub-charges**

**Question 114: We provisionally propose that section 53 of the LRA 2002 should be clarified to ensure that its effect is to confer powers on a sub-chargee, not remove them from the sub-chargor. It would be open to the parties to a sub-charge to agree otherwise. Do consultees agree?**

146. Yes.

**Question 115: We provisionally propose that, unless there is an appropriate restriction on the register, the powers of the sub-chargor shall be taken to be free from any limitation contained in the sub-charge. This would not affect the lawfulness of the disposition as between the sub-chargor and the sub-chargee. Do consultees agree?**

147. Yes.

**Question 116: We invite consultees to submit evidence of their experience of the discharge of a principal registered charge where there is an existing registered sub-charge. We invite consultees' views on whether there needs to be a mechanism built into the land registration system to allow a sub-chargee to prevent the principal chargee from discharging the principal charge, where this would not be permitted under the terms of the sub-charge. How do consultees believe this could best be achieved?**

148. We have no evidence to give. As to the second question, it would make sense in principle for a discharge to be required from both the chargee and the sub-chargee, as the ability to discharge the charge or to withhold the discharge provides the principal practical means of ensuring that those with security over a property are paid when it is sold.

**Question 117: We invite the views of consultees as to whether transitional provisions are necessary for existing sub-charges as a result of our proposals, or if it is sufficient that an existing sub-chargee may apply for a restriction in order to reflect any limitation on the rights of the principal chargee laid down in the sub-charge.**

149. We have no views on this.

## **Electronic conveyancing**

**Question 118: We provisionally propose that:**

- (1) simultaneous completion and registration should no longer be required in a system of electronic conveyancing implemented under the LRA 2002; and**
- (2) equitable interests should be capable of arising in the interim period between completion and registration.**

**Do consultees agree?**

150. Yes.

**Question 119: We provisionally propose that:**

(1) the decision to enable electronic conveyancing and the subsequent decision to end paper-based conveyancing should be vested in the Secretary of State, to be enacted through secondary legislation;

(2) following the enactment of such secondary legislation, the timetable for the introduction of electronic conveyancing and for ending paper-based conveyancing, in each case on a disposition by disposition basis, should be delegated to the Chief Land Registrar; and

(3) the Secretary of State and the Chief Land Registrar should be required to consult with stakeholders before exercising their powers in respect of electronic conveyancing.

Do consultees agree?

151. Yes.

**Question 120:** We provisionally propose that the following propositions of law should be confirmed:

(1) trustees may collectively delegate their power to sign an electronic conveyance and give receipt for capital monies to a single conveyancer under section 11 of the Trustee Act 2000;

(2) a beneficiary's interest in a trust of land will be overreached when trustees collectively delegate their power to a single conveyancer to sign an electronic conveyance and give receipt for capital monies; and

(3) a beneficiary's interest in a trust of land will be overreached when two or more trustees, by power of attorney, grant to a single conveyancer the power to sign an electronic conveyance and give receipt for capital monies.

For overreaching to take place it will remain necessary for the disposition that follows the delegation to be one with overreaching effect.

Do consultees agree?

152. Yes.

### **The jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber)**

**Question 121:** We provisionally propose that the Land Registration Division of the First-tier Tribunal (Property Chamber) should be given an express statutory power to determine where a boundary lies when an application is referred to it under section 60(3) of the LRA 2002. Do consultees agree?

153. Yes.

**Question 122:** We invite the views of consultees as to whether the jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber) should be expanded to include an express statutory jurisdiction in cases that come before it to allow it to:

- (1) **determine how an equity by estoppel should be satisfied; and**
- (2) **determine the extent of a beneficial interest.**

154. We can understand the reason for expanding the jurisdiction of the FTT in the way suggested. However, there is a significant school of thought that the jurisdiction of the FTT has been interpreted more widely than Parliament originally intended and that a tribunal that is administrative in origin should not be deciding rights and granting remedies in the way that the courts have done hitherto. The judges of the Land Registration Division of the FTT (Property Chamber) are undoubtedly specialists, but they are not as senior as nor likely to be as experienced as the judges who would be likely to decide these matters in the courts, whether in the County Court or the High Court, given their complexity and likely high value.

**Bar Council<sup>2</sup>**  
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