London Property Support Lawyers Group

Response to Law Commission Consultation on the Land Registration Act 2002

3 THE REGISTRABLE ESTATES

3.1 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.

[Paragraph 3.14]

We have not had experience of any practical problems that have arisen out of the Land Registry's practice. Applications to enlarge leases are rare as long commercial leases usually include residual forfeiture provisions and obligations to pay service charge rent and insurance rent that would take the lease outside the qualifying conditions in section 153 Law of Property Act 1925.

One of the member firms has had to consider the potential consequences of enlargement upon title to the sub-surface of a highway that ran through the leasehold / freehold title. Questions included how the stopping-up procedure would operate and title would pass if the lease were enlarged and then the stopping-up process commenced.

Similarly, if there were two freehold titles, it would make the process for a local authority seeking to exercise compulsory purchase powers more complex and introduce novel elements to the process of calculating the compensation payable to the respective freeholders.

Given the uncertainty about the legal status of the landlord's freehold following enlargement, we appreciate that the Land Registry has to take a cautious view and therefore we consider it sensible for the Land Registry to leave the landlord's title on the register until the issue has been clarified in the courts.

In relation to the question of subinfeudation referred to in the consultation document, the Statute Quia Emptores prohibited subinfeudation by the tenant but did not prevent subinfeudation by the Crown who could still create new tenures at will or, indeed, grant licences to the tenant to do so. *JMW Bean, The Decline of English Feudalism* (Manchester: Manchester University Press 1968) suggests that the Crown initially granted licences liberally. Therefore, intrinsically, there is nothing within the Statute Quia Emptores that prohibits the creation of two freehold titles. The concept of there being concurrent titles of this nature is not, intrinsically, much different to the concept of commonhold title introduced by the Commonhold and Leasehold Reform Act 2002.

3.2 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.

[Paragraph 3.51]

The current Land Registry practice is best described as being over generous in its application. Frequently a registered surface title will contain an entry which, on further investigation, has been entered in relation to an application to register a caution against first registration (often in relation to large areas of land). Either the Land Registry are taking an expedient step of simply registering it against all land in the area of the application so that it does not have to determine which land within the application is unregistered and which is registered or the Land Registry believe that the application relates to registration of the mines and minerals themselves, rather than first registration of the surface title which would seem to be counter to the rule that a land owner cannot enter a caution against first registration in respect its own land.

We are against the proposal that would allow the owner of a mines and minerals estate to register a caution to protect rights that may or may not exist. Cautions against first registration are usually used to ensure that a person with the benefit of a specific right over unregistered land is notified if there is an application to register title to the land. This gives the person with the benefit of the right the opportunity to ensure that their rights are protected on the newly created title. Typical examples would be the benefit of an easement over an unregistered title.

The proposals would apply whether or not the person making the application for a caution against first registration claims any rights over the unregistered surface title. It would encourage applications to be made on the off chance that the ownership of mines and minerals may include rights over the surface title whether or not those rights exist. If the applicant believes that it has title to the mines and minerals, the answer is not to register a caution against first registration (which does not prove the existence of any rights) but to make an application to register title to the mines and minerals themselves so that ownership would be evident to anyone searching the index map. If specific rights are then identified, cautions against first registration could be made in respect of the specific rights over the unregistered surface titles.

In addition, the blanket approach adopted by the Land Registry in registering cautions against first registration is creating additional time and expense. In one case, an index map search revealed a caution against first registration against a registered title. A copy of the caution was obtained which was accompanied by an A0 plan showing an area of land affected by the caution that covered half of a small city. On reading the entry in the caution, it stated specifically that it did not affect any registered titles within the area of the plan. It is time consuming enough to investigate actual mines and minerals rights without having to carry out additional searches that turn out to have no relevance at all to the registered title but which are still revealed on search results.

3.3 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.

[Paragraph 3.59]

Given the complex nature of mines and minerals and the lack of transparency over their ownership and effect on the surface title, we are in favour of registration so that surface land owners have a clear appreciation of their land ownership and the rights that affect them.

The obligation to register might also focus the mind of a person who claims to have the benefit of mines and minerals and prevent spurious claims being made. In one case, a firm was approached by a potential client who wanted assistance to identify and acquire mines and minerals around a large city. The client made it clear that the purpose was to establish ransom strips to make money from potential developments – the firm politely declined to act. If there was an obligation to register any mines and minerals acquired, the applicant would need to prove title to them.

There is a suspicion that the current complexity of the law means that due consideration is not actually given to the rights or title acquired. A landowner faced with a person who claims title to unregistered mines and minerals may find it easier to compromise than to unravel what title and rights exist. An obligation to register title would make it easier for the parties to establish what title exists.

3.4 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.

[Paragraph 3.60]

Other than the comments set out above in relation to compulsory registration, we have not encountered any specific issues where the lack of compulsory registration has been an issue.

3.5 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.

[Paragraph 3.67]

This is arguably the single most important issue arising out of the registration of mines and minerals and creates the most problems in practice. One example of this concerned a securitisation of a

wind farm. A clear SIM search had been obtained at the outset of the transaction and pre-completion searches in relation to the surface title were clear. In order to obtain a title indemnity policy, a second SIM search was carried out. This revealed the existence of a new title number. On investigation, it transpired that an application had been made to register title to the mines and minerals under the wind farm. No record of this appeared on the day list to the surface title and no notice of the application had been given to the surface owner. Discovery of the new title was purely fortuitous and prevented the firm involved giving a certificate of title certifying that there were no third party interests in relation to the property, which would have been manifestly incorrect. Additional time and costs (and potential delays to completion) were incurred that could have been avoided had notice of the application been given to the surface owner. As a result of these problems, firms are:

- Carrying out additional SIM searches before completion where mines and minerals may have an impact on a development or funding transaction. This clearly doubles the workload for the SIM searches team at Telford Land Registry and in conversations with them, they have noticed the additional workload that this is creating; and
- When providing certificates of title and reports on title, additional qualifications have to be negotiated as conveyancers cannot certify that the title is free of any adverse Land Registry applications on the date that the certificate or report is given. This adds time and cost to transactions.

There are many inconsistencies in the Land Registry's current practice:

- There is no logical reason why the Land Registry should treat an application to register mines and minerals with qualified title and with absolute title differently. The impact on the surface owner's use and occupation of the land is affected either way. In one case, the surface owner will be notified of the application and in the other, it will not.
- If an application is made to register a UN1 in relation to rights to work mines and minerals, the surface owner will always be notified of the application and have an opportunity to challenge the application. However, if an application is made to register a title to mines and minerals, then no notice is given. Given that the Land Registry already have to serve notices in relation to UN1 claims, we do not believe that it would be unreasonable to require them to do the same in relation to applications to register mines and minerals. This would be no more of a large administrative task than that undertaken in relation to notifying surface owners of UN1 applications.

As a result, we believe that surface owners should always be notified if an application to register a title under their land is made. This would make the Land Registration system clearer and more transparent, which was one of the principles underpinning the Land Registration Act 2002.

3.6 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?

[Paragraph 3.78]

Yes: **X**	No:	Other:
This seems eminently sensible given the anomalies that have been identified.		

3.7 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?

[Paragraph 3.79]

Yes: **X**	No:	Other:
We agree with this proposal.		

3.8 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?

[Paragraph 3.94]

Yes: **X**	No:	Other:
We agree with the comments made in the consultation document that little would be achieved by reducing the threshold other than additional costs, time and aggravation for the landlord, the tenant and the Land Registry.		

4 FIRST REGISTRATION

4.1 We invite consultees to provide evidence of difficulties they have encountered when undertaking conveyancing in the twilight period.

[Paragraph 4.34]

We have not encountered any difficulties in practice. What is important is that a title number has been allocated by the Land Registry so that priority searches can be made. Where the unregistered title has been deduced, a view can be taken on the matters to which the new registered title will be subject. Where there are complex unregistered titles or a local authority has an unregistered title, the unregistered owner will sometimes give a certificate of title to avoid a complex examination of the unregistered title having to be undertaken. What is more of an issue is the lack of experience of many lawyers with unregistered titles. Lawyers who deal routinely with unregistered land are adopting a proactive approach and encouraging clients to use the voluntary first registration procedure to avoid future delays when a sale of the land takes place or an option or conditional contract is to granted prior to the development of the land.

4.2 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.

[Paragraph 4.35]

As we have not encountered any difficulties in practice, so cannot form a view of any protections that may be required.

4.3 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?

[Paragraph 4.39]

Yes: **X**	No:	Other:
We agree. If this is the Land Registry's current practice we do not have a problem with it being put on a statutory footing although the existing approach is not causing difficulties.		

5 THE POWERS OF THE REGISTERED PROPRIETOR

5.1 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?

[Paragraph 5.30]

Yes: **X**	No:	Other:
Yes, we would welcome clarity as to what has to be done for someone to be entitled to be registered as proprietor for the purposes of s.24 LRA. Acquisition financing and sub-sales are very common practice and an express provision to the above effect would be of practical use. We note that a disposition / charge in a person's favour was sufficient under the LRA 1925 for that person to dispose / charge the land and are not aware of any reason / intention for this to have changed under the LRA 2002.		

5.2 We provisionally propose that, for the purpose of preventing the title of a disponee 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?

[Paragraph 5.63]

Yes: **X**	No:	Other:
(1) It is apparent that the LRA is unclear as to whether owner's powers supersede nemo dat or whether nemo dat limits the exercise of owner's powers and we agree that clarity is needed. We agree that nemo dat should not limit owner's powers, as a person entitled to be the registered proprietor should have the same powers to make dispositions as the registered proprietor in order to protect disponees. (2) We agree, the purpose of s.26 LRA is to protect disponees from limitations that are not reflected on the register or imposed by the LRA. (3) We agree, with the same reasoning as for (2).		

6 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

6.1 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?

[Paragraph 6.30]

Yes: **X**	No:	Other:
Agreed (with reservations), although this may have some unexpected consequences. For example, take the securitisation of a large portfolio of public houses. It has become market practice not to transfer the legal title to the pubs to the issuer. Instead, the transaction rests on agreement to transfer with completion deferred until the happening of specified events. As there are likely to be many hundreds of pubs, no notice of that agreement is registered against the individual titles. The agreement is therefore vulnerable to subsequent registrable dispositions which are registered. This risk is explained in the offering circular issued in connection with the securitisation. Under the new proposal, the agreement could also lose priority to subsequent unregistrable interests which are noted. On balance, we do not think this is a reason to change the proposal. It will just be an extra risk factor which practitioners will have to analyse and take into account when dealing with transactions such as this where, for practical reasons, steps are not taken to protect an unregistrable interest.		

6.2 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?

[Paragraph 6.36]

Yes:	No:	Other: **X**
The example in the consultation is of a mortgagee circumventing the overreaching mechanism and still securing priority for the mortgage over a beneficial interest arising under a trust. We agree that this outcome is undesirable. However, a common situation we see is where a mortgage has been taken over a number of properties perhaps with limited or even no due diligence. When the time comes to register the charge, there are found to be restrictions on the title to some of the properties requiring a third party's consent to the registration of a disposition. Obtaining that third party's consent can be time consuming and difficult. In those circumstances, it is common to register a notice against the titles to protect the priority of the charge while seeking the relevant third party's consent. The proposal would leave the chargee in much the same position as at present – they could register a notice which would preserve priority over subsequent dispositions but leave them subject to prior unregisterable interests (at least until the charge itself is substantively registered). But we question the logic of leaving them in a worse position than somebody registering a notice to protect an interest which is not capable of substantive registration. Most unregistrable interests can be protected by notice. The problem in the case of the trust example arises because beneficiaries cannot protect their interest by notice. We understand why, later in the consultation, you reject the idea of giving beneficiaries some additional means of protecting their interest because of the curtain principle and we agree with this. We are not sure we have a "middle way" - one possibility might be that the form of restriction put on the register of title where there is a trust could be changed to prevent the registration of a notice which would give priority to a third party over a beneficiary's interest. However, at present, a restriction can only		

refer to dispositions of the registered title and not to the registration of notices on the title. Whilst we understand the reasoning behind this, perhaps a limited exception could be made in relation to trust restrictions to provide the protection required.

6.3 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?

[Paragraph 6.37]

Yes:	No:	Other: **X**
The comments made above also apply here. Failure to comply with the proper formalities means that only an equitable interest would arise when a legal interest was intended. We question the logic of not giving a notice registered to protect that unintended equitable interest the same priority advantage as a notice registered to protect some other equitable interest.		

6.4 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)?

[Paragraph 6.49]

We do not have experience of acting on the type of transaction where home rights would create an issue so cannot comment on this proposal.

6.5 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.

[Paragraph 6.54]

Yes: **X**	No:	Other:
We believe that the existing position should be retained. The majority of registered proprietors cannot be expected to spot when they need to instruct solicitors to protect something that is (today) perfectly well protected as an overriding interest.		

6.6 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?

[Paragraph 6.57]

Yes: **X**	No:	Other:
Agreed.		

6.7 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.

[Paragraph 6.59]

We do not have any direct examples of loss being suffered but as a matter of general Land Registry law, between themselves equitable interests rank in order of priority according to the date that they were created, not the date (if any) that they were registered. Assume that a developer takes an option to acquire land and there is a prior unprotected equitable interest (for example an equitable mortgage created by a debenture that has not been registered at the Land Registry). If the debenture holder exercises their rights under the charge, then the developer suffers loss as the debenture holder may be able to sell free from it.

6.8 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?

[Paragraph 6.63]

Yes: **X**	No:	Other:
Agreed – though if the official search is extended to cover applications to note an unregistrable interest the number of official searches that will be carried out will increase significantly – probably by a far greater number than the number of outline applications presently carried out.		

6.9 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?

[Paragraph 6.71]

Yes: **X**	No:	Other:
Agreed.		

6.10 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?

[Paragraph 6.79]

Yes: **X**	No:	Other:
Agreed.		

7 PRIORITIES UNDER SECTION 29: VALUABLE CONSIDERATION

7.1 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?

[Paragraph 7.68]

Yes: **X**	No:	Other:
We agree with the proposal.		

7.2 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?

[Paragraph 7.69]

Yes: **X**	No:	Other:
We agree with the proposal. We can see the logic, in light of the decision in *Halifax plc v Curry Popeck* [2008], that where consideration is stated and not paid this may mean "the concept of consideration is meaningless", but in the commercial sphere (eg in the insolvency context) it is not uncommon that consideration of £1/peppercorn is stated but not paid so it would be of concern if this fact rendered s29 protection nugatory.		

7.3 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.

[Paragraph 7.70]

Yes:	No:	Other: **X**
There are differences of opinion on this question. Some of us believe that a reverse premium cannot be consideration for the disposition and that the LRA 2002 should not make special provision for this. Others believe that it is important to make it clear that a reverse premium counts as valuable consideration as, without this, there will always be a question mark over whether a transaction involving payment of a reverse premium includes any other valuable consideration that brings the transaction within section 29 of the LRA 2002. For example on the surrender of a lease where the tenant pays a reverse premium, if the landlord formally releases the tenant from past, present and future breaches of the terms of the lease, it could be argued that this is valuable consideration but should it even be necessary to have to consider this point? If the transfer or deed of surrender is silent on the question of a release of the tenant's obligations, there is yet more uncertainty. Whether or not it is directly relevant, we also note that the Land Registry treat a reverse premium as consideration for the disposition when calculating the fee payable for registering disposition.		

7.4 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?

[Paragraph 7.71]

Yes: **X**	No:	Other:
We agree with the proposal.		

7.5 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.

[Paragraph 7.72]

We do not have any direct examples of this. However, on the grant, for example, of a sub-station lease, there is usually only nominal consideration. The utility company would expect to obtain priority for the registration of its lease whether or not the consideration was a peppercorn, nominal or valuable. Sometimes, the assignment of a lease at an open market rent may be for a peppercorn, though it is more usual to include consideration of £1.

7.6 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.

[Paragraph 7.73]

On the current proposals we question how a transfer between an outgoing and incoming trustee/security trustee would be treated for the purposes of section 29 and section 30.

7.7 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?

[Paragraph 7.75]

Yes: **X**	No:	Other:

7.8 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.

[Paragraph 7.78]

We believe that to ensure consistency between sections 29 and 30, the same definition of "valuable consideration" should apply to both sections.

7.9 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).

[Paragraph 7.81]

We disagree with the proposal; this is a special case. A change would also create a mismatch with s342(2) Insolvency Act 1986 which imposes both a good faith and for value requirement.

7.10 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?

[Paragraph 7.83]

Yes: **X**	No:	Other:
We agree with the proposal.		

8 PRIORITIES UNDER SECTION 29: POSTPONEMENT OF INTERESTS, AND THE PROTECTION OF UNREGISTRABLE LEASES

8.1 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?

[Paragraph 8.48]

Yes: **X**	No:	Other:
We agree in principle with the Law Commission's proposal. We note that the Land Registry would have to make a judgement in each case as to whether the reasons given by the applicant are "groundless", whereas currently the Land Registry is not required to consider whether the application is validly made. However, it should not be the case that interests which are no longer binding can be noted at the Land Registry. Perhaps one solution would be for the applicant to certify when it makes the application that it does not relate to an interest whose overriding status has been lost following a disposition for value made after 12 October 2013.		

8.2 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.

[Paragraph 8.49]

Ruoff and Roper states (at para 30.013): "A registrable disposition of a registered estate for valuable consideration, when completed by registration, takes effect subject to interests which are protected by a notice in the register and overriding interests. Making an official search with priority can get round the problem of third party interests being noted in the register in the period up to registration: this is done by deferring dealing with the third party's application for entry of the notice until the end of the purchaser's priority period. During this time, the purchaser's application should have been made. But an official search does not give the purchaser priority over an interest which

is an overriding interest. Such an interest is instantly binding, without there having to be any application for an entry in the register to protect it: there is nothing to defer."

This is undoubtedly a correct statement of the law but it can create issues where an overriding interest comes into being between the date of a priority search and the registration of a transaction protected by that search.

Assume a bank taking security does a priority search: it is clear. Before completion of the charge, the owner grants an unregistrable lease and the tenant takes up occupation. The lease includes an option for the tenant to buy the freehold. The charge is subsequently completed and a registered and, at a later date, the lease and the option to purchase in the lease are noted on the title.

The option and the lease are both overriding interests unless the bank can show that the tenant's occupation and the bank's knowledge of it was 'not enough' for Schedule 3 Land Registration Act 2002. That will probably be difficult in practice, since it is occupation at the date of disposition which is relevant. How in practice can a bank (or realistically any purchaser) check that? It raises the following questions that we believe the Law Commission should consider:

- should occupation protect an option which ought to be protected by notice? We don't think it should, especially if the proposals in chapter 7 are enacted;
- if the lease was registrable and registered at the same time as the option, we think the lease itself would also be an overriding interest and so have priority over the charge (because the only exclusion of leasehold estates from paragraph 2 of Schedule 3 to the Land Registration Act 2002 relates to reversionary leases (para 2(d)). If a lease is not within paragraph 1 of Schedule 3, should occupation make it an overriding interest under paragraph 2?
- more generally:
  - should a priority search afford protection to the holder of the search in relation to overriding interests that come into being during the priority period;
  - in relation to overriding interests that lose their overriding status following a disposition for value, should a priority search afford protection to the holder of the search in relation to an application made to protect by notice such an overriding interest received during the priority period?

8.3 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.

[Paragraph 8.65]

We have not encountered any examples where this has been an issue.

9 PROTECTION OF THIRD PARTY RIGHTS ON THE REGISTER PART I: NOTICES

9.1 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?

[Paragraph 9.116]

Yes: **X**	No:	Other:

We agree with the retention of a dual notice system over a return to a single notice system primarily because this is the most straightforward method of preserving the priority of a third party interest without sensitive or confidential information appearing on the public register. If the decision is taken to move to a single notice system where the applicant has to provide information that is not

currently required on an application to registered a unilateral notice, the reforms must allow for the information provided to be kept confidential using the "exempt information document" procedures. We also agree with the change in terminology to 'full notice' and 'summary notice'.

9.2 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?

[Paragraph 9.117]

Yes:	No:	Other:
We agree, provided that the reforms to (1) the application procedure for unilateral notices to protect former overriding interests outlined in Chapter 8 and (2) the cancellation procedure outlined in Option 2A are both adopted in order that a registered proprietor can obtain detailed evidence at an early stage of the nature of a beneficiary's claim to a unilateral notice. See also our response in paragraph 9.3 below regarding response times for the production of supporting evidence. Whilst we broadly support the changes to the application procedure for unilateral notices for former overriding interests outlined in Chapter 8, we do not believe these will address all issues arising from the continued ambiguity surrounding the legal status of chancel repair liability. Please see our response to Paragraph 8.48 in this regard.		

9.3 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?

[Paragraph 9.118]

Yes: **X**	No:	Other:
We agree with the proposed two-stage objection procedure. Having a short initial objection stage gives the registered proprietor a means of removing a unilateral notice from its title in situations where the beneficiary of the notice does not object or respond to the cancellation application or has no grounds to object. However, we believe that the proposed period of 15 business days (which is effectively the same as the present objection period) is still too long. There were differences of opinion about this but the majority view was that a shorter period would be better. Assuming a beneficiary has a genuine claim, it should be able to respond quickly at this first stage. The consultation does not specifically state what evidence the beneficiary would need to provide, but suggests that it would be similar to that required under the current system, i.e. evidence to demonstrate that the notice is not 'groundless'. This sets a low threshold for the beneficiary to cross in order to preserve its right to object. We propose a time limit of 10 business days with the ability, with good reason, to request an extension provided this did not extend the overall time limit for objection.		

9.4 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?

[Paragraph 9.119]

Yes:	No:	Other: **X**
We agree with a two-stage objection procedure. However, we believe that the overall time limit of 40 business days (8 weeks) should be reduced. One of the main issues with removal of unilateral notices is the length of time that this can take. A beneficiary with a genuine claim to a notice should already have evidence of this to hand or should be able to gather evidence relatively quickly. We suggest that a maximum period of 30 business days (6 weeks) for the entire two stage objection procedure would be adequate.		

9.5 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?

[Paragraph 9.121]

Yes: **X**	No:	Other:
Having one single cancellation procedure for new and existing unilateral notices is the simplest approach.		

9.6 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?

[Paragraph 9.141]

Yes: **X**	No:	Other:
We agree, provided the usual evidence of appointment of the insolvency practitioner is lodged with the application for cancellation.		

9.7 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?

[Paragraph 9.142]

Yes: **X**	No:	Other:
We agree, provided the usual evidence of the attorney's appointment and scope of powers is lodged with the application for cancellation.		

9.8 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.

[Paragraph 9.144]

We have not encountered any other situations where there are unnecessary limitations.

9.9 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?

[Paragraph 9.153]

The main advantage of identifying the beneficiary of an agreed notice on the register would be to assist a registered proprietor or a person investigating title to trace the beneficiary of the notice. However, there is no guarantee that this information would be kept up to date unless this was a mandatory requirement, which we would not support. An agreed notice already gives full details of the interest protected and usually a copy of the original supporting document and therefore, in many cases, provides means for the beneficiary to be traced. The disadvantage of the proposed change would be to complicate the agreed notice procedure and to bring it closer to unilateral notices, potentially increasing the possibility of confusion between the two. It would create another procedural layer and additional work for registered proprietors, conveyancers and Land Registry. Therefore, we do not support this proposal.

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

[Paragraph 9.154]

See 9.153 above.

10 PROTECTION OF THIRD PARTY RIGHTS ON THE REGISTER PART II: RESTRICTIONS

10.1 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?

[Paragraph 10.25]

Yes: **X**	No:	Other:
On balance we agree that it should be possible to protect a contractual obligation by means of a restriction. We say 'on balance' because a case can be made for saying that it is not the function of a land registration system to protect pure matters of contract (still less the role of the Land Registry to police such matters). The reasons why, on balance, we agree that this function of restrictions should be retained are because, under English law, positive covenants do not run with freehold land and negative covenants may not be restrictive covenants (and therefore not bind successors in title) where there is no land that benefits from the covenant. It might be preferable to cure these problems rather than continue with what can be a very cumbersome sticking plaster. That said, restrictions, and how they operate under the Land Registration Rules, can cause real problems in practice. Standard form restrictions often do not match the underlying contract which they have to protect. Additional contractual protections are necessary to ensure that the restriction can be made to work. This can be a trap for the unwary (poorly advised) and can hinder the alienability of land. Changes in the forms of permitted (and standard form) restrictions can make them difficult or sometimes impossible to operate. It would be helpful if a review of restrictions took the provisions of the rules in to account.		

Also, at present, if a restriction is registered, it is not possible, even where the parties want to, to vary or extend the restriction and there should therefore be a mechanism that allows an existing restriction to be varied by agreement between the registered proprietor and the person with the benefit of the restriction.

10.2 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.

[Paragraph 10.29]

We do not think that a restriction to protect against unlawfulness, where that unlawfulness would be a breach of contract, should be within the discretion of the registrar under section 42(1). If the registered proprietor is party to a contract, that contract should be capable of 'protection' by a restriction only with the consent of the registered proprietor. The need for such consent might avoid some of the problems highlighted in relation to leases and charges, and also appears right in principle: it should not be for the registrar to determine the parties' choice of enforcement mechanism(s). In any event, a restriction should not be allowed to protect an illegal contract (we are thinking here particularly of contracts illegal under consumer protection legislation) and any consent to the entry of a restriction in these circumstances should be of no effect. It seems scant protection that a proprietor may go to court (or the Tribunal) to have the restriction lifted: the difficulties which may have arisen in the meantime from an inability to sell or charge the land could be substantial and not capable of easy remedy (or remedy within the land registration system).

10.3 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?

[Paragraph 10.41]

Yes: **X**	No:	Other:
We agree with this proposal.		

10.4 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?

[Paragraph 10.52]

Yes: **X**	No:	Other:
We agree with this proposal.		

11 OVERRIDING INTERESTS

11.1 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?

[Paragraph 11.30]

Yes:	No: **X**	Other:

The consultation makes a key point at paragraph 11.20: an interest which is protected by occupation should be a "right which it is unreasonable to be registered."

There seems to be nothing unreasonable about expecting those in occupation with the benefit of an estate contract to protect their interest on the register by way of a notice.

On the grounds of public policy there will always be interests where it would be unreasonable to expect the occupier to register the interest. Rights which arise informally, for example, under a constructive trust or by estoppel are obvious examples. Those with the benefit of such rights may not even be aware of their existence and to require registration would defeat the recognition of their status. However the system of land registration strives for a conclusive register of title and the existence of overriding interests contradicts that. Surely we should be striving to narrow the class of interests that override and so where a right displays the characteristics of an estate contract, is it not more appropriate to require the right to be protected by way of notice on the register of title?

Electronic conveyancing has not become a reality and the registration gap remains. Therefore bona fide purchasers and mortgagees remain at risk of becoming subject to overriding interests so long as it remains the case that it is at the date of registration that the actual occupation is relevant.

To suggest that purchasers and mortgagees can simply rely on the protections in the Land Registration Act 2002 of inspection and making enquiries of occupiers places a heavy burden on purchasers and mortgagees. In practice, enquiries are never made directly of occupiers in commercial transactions. Also, the provisions in relation to overriding interests make it clear that it is occupation at the date of the disposition that is relevant. It is impossible to make an inspection that would discover such interests ***at the date of the disposition***.

The proposals miss the fact that in this day and age enquiries and site inspections have been carried out prior to completion of the transaction and are not repeated prior to registration. As the case of *Ferrishurst Ltd v Wallcite Ltd* demonstrates even where the occupation is obvious there may be nothing which would alert the purchaser to the need to make further enquiries.

In any event this concept of notice does not sit well with the integrity of the register. Of course there is still a need to balance the right for purchasers to rely on the register against the rights of those in occupation. However estate contracts are not informal rights but are created expressly and are documented, so why shouldn't occupiers with the benefit of an estate contract be subject to the rigours of registration of a notice. Whilst a notice may be vulnerable to cancellation, this is a well understood concept and the beneficiary of the interest is given ample opportunity to assert the validity of its interest.

11.2 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?

[Paragraph 11.41]

Yes: **X**	No:	Other:
Yes, for the reasons set out in paragraphs 11.37 to 11.39.		

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

[Paragraph 11.54]

Section 29(3) should be retained. It is an important provision as it encourages overriding interests to be brought onto the register. As explained in paragraph 11.52 of the consultation document section 29(3) provides the incentive for the beneficiary of a notice to respond to an application to cancel it. If the overriding status of the interest revived after the renewal of the notice there would be no such incentive. It seems sensible that all interests, once protected by a notice on the register need to be treated in the same way. The whole registration system relies on the premise that the number of "unregistered interests that override" should be kept to a minimum. Therefore once an overriding interest has been brought onto the register its overriding status should not thereafter revive.

11.4 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.

[Paragraph 11.55]

We have not come across any situations where section 29(3) has been a problem in practice or when it has performed a useful function.

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

[Paragraph 11.57]

We do not support the abolition of section 29(3).

12 LEASE VARIATIONS AND REGISTRATION

12.1 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?

[Paragraph 12.40]

Yes: **X**	No:	Other:
Agreed – this is in line with the main objective of the LRA 2002 and would ensure that variations are noted in a consistent way. We agree that the registration should be voluntary and any mechanism should make it clear that recording a lease variation is not necessary save where		

expressly required in order for a disposition effected by the variation to operate at law under the LRA 2002, or in order to preserve the priority of the interest.

12.2 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.

[Paragraph 12.44]

We do not believe that express provision needs to be made to permit the recording of any other documents which are ancillary to a lease on either the landlord's registered title, to the tenant's registered title or both. The examples given include a licence to alter / assign / rent review memorandum. A licence to assign is likely to result in an application to register the assignment and any variations contained would fall within the ambit of the voluntary registration mechanism. As set out above noting of these documents is not necessary to bind successors in title. Whilst it would seem to support the goal of the register being a complete and accurate record of the state of title to the register additional documents would unnecessarily clutter up the titles creating a burden on the expiry of the lease and likely leading to a bigger clean up job on the sale of a reversion.

12.3 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.

[Paragraph 12.48]

We endorse the views of the Property Litigation Association on the problems created by the courts' interpretation of the Act contained in their paper "Proposed Amendments to the Landlord and Tenant (Covenants) Act 1995" which was addressed to the Secretary of State. There are differences of opinion on whether their proposed solutions are sufficient and we believe that a fuller review of the Act is required to address the undoubted problems with the operation of the Act.

13 ALTERATION AND RECTIFICATION OF THE REGISTER

13.1 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?

[Paragraph 13.87]

Yes: **X**	No:	Other:

Yes, provided that the Land Registration Rules are amended to make it easier for an alleged fraud victim to register a unilateral notice in a hurry, so as to protect his/her interests while a problem is being investigated and before litigation is practicable.

As observed in para 13.85, only proprietary interests can be protected by a notice. So if the right to seek rectification is no longer to be proprietary, a suitable alternative must be available.

13.2 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?

[Paragraph 13.95]

Yes:	No: **X**	Other:
We do not agree with the proposal, particularly if (as suggested in chapter 14) mortgagees' ability to obtain an indemnity may be limited. We are concerned that any attempt to water down the protection of mortgagees will have an adverse effect on the lending market. Mortgagees cannot be expected simply to bear such losses. The proposed change would give rise to additional costs for borrowers, as lenders would seek to protect themselves against risk by, for example, insisting on new title insurance policies that are not currently required. Mortgagees ought to have the same rights as other stakeholders. If there are "exceptional circumstances where it would be right not to rectify in A's favour so as to remove a charge" (para 13.94), then the charge should not be removed in those circumstances. As the Commission says, such circumstances must be rare, so the supposed difficulties caused by such cases should be limited. Para 13.94 expresses concern about chargees prolonging litigation by arguing that such circumstances exist. But in cases where the mortgagee's arguments are groundless, summary judgment or cost penalties ought to deter such an approach.		

13.3 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?

[Paragraph 13.109]

Yes: **X**	No:	Other:
Yes, for the reasons stated in para 13.106.		

13.4 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?

[Paragraph 13.110]

Yes: **X**	No:	Other:
Yes, for the reasons stated in para 13.107.		

13.5 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?

[Paragraph 13.114]

Yes: **X**	No:	Other:
(1) Yes, for the reasons stated in para 13.112. (2) Yes, for the reasons stated in para 13.113.		

13.6 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?

[Paragraph 13.120]

Yes: **X**	No:	Other:
(1) Yes, for the reasons stated in paras 13.117-13.119. (2) Yes, again for the reasons stated in paras 13.117-13.119.		

13.7 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?

[Paragraph 13.123]

Yes: **X**	No:	Other:
Yes, for the reasons stated in para 13.122.		

13.8 We provisionally propose that the period of time after which the register becomes final should be ten years.

Do consultees agree?

[Paragraph 13.126]

Yes: **X**	No:	Other:
Yes, for the reasons stated in paras 13.124-13.125		

13.9 We provisionally propose the following:

(1) 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.

(2) 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?

[Paragraph 13.151]

Yes: **X**	No:	Other:
(1) Yes, for the reasons stated in para 13.140. (2) Yes, for the reasons stated in para 13.150.		

13.10 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?

[Paragraph 13.169]

Yes: **X**	No:	Other:
Yes, for the reasons stated in paras 13.160 and 13.162.		

13.11 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?

[Paragraph 13.170]

Yes: **X**	No:	Other:
Yes, for the reasons stated in para 13.166.		

13.12 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?

[Paragraph 13.180]

Yes: **X**	No:	Other:
Yes, for the reasons stated in para 13.172.		

13.13 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?

[Paragraph 13.181]

Yes: **X**	No:	Other:
Yes, for the reasons stated in para 13.178.		

13.14 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?

[Paragraph 13.188]

Yes: **X**	No:	Other:
Yes, for the reasons stated in paras 13.186-13.187.		

13.15 We provisionally propose that in the case of competing derivative interests, rectification should operate retrospectively.

Do consultees agree?

[Paragraph 13.196]

Yes: **X**	No:	Other:
Yes, assuming that the rules to decide who gets their interest reinstated and who gets an indemnity will still contain some in-built flexibility and fact-sensitivity, as discussed in many places elsewhere in this chapter.		

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

[Paragraph 13.197]

Whilst not directly related to the *Gold Harp* case, the case of *EMI Group Limited v O&H Q1 Limited* [2016] EWHC 529 (Ch) illustrates some of the issues that can arise. The court held that an assignment of a lease by the tenant to its guarantor was void. However, and although not discussed in the case, the assignment should have been registered at the Land Registry (though it is not clear if the registration had been made). In addition an underlease had been granted. If the underlease itself had been registered and a charge granted over the underlease, the complexities of unravelling the consequences of the void assignment would be considerable. What is the status of a proprietor who has been registered at the Land Registry when the assignment of the lease is void? What is the status of an undertenant from the assignee who had no power to grant the underlease?

If there had been further assignment from the guarantor to a third party who had not realised that the original assignment was void, the same issues would arise.

14 INDEMNITY

14.1 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.

[Paragraph 14.60]

We do not consider that there should be a cap on the indemnity paid in these circumstances. The resulting limited title guarantee for high value transactions would amount to a defect in title and the risk would need to be covered by insurance in the open market. This would result in:

- a more fragmented conveyancing process;
- increased expense through insurance premiums and additional legal advice;
- a slower conveyancing process through the involvement of insurers and their legal advisers;
- increased complexity; for example, what would happen on an onward sale by the insured? What if there is a rectification in favour of the insured?

Our views are summarised in paragraph 14.54 of the consultation document: we consider that the purpose served by indemnity could not be replicated through reliance on private insurance without a significant risk to security of title and public trust and confidence in the property market, in addition to the loss of economic efficiency and the adverse impact on conveyancing transactions.

We recommend that the impact of the Law Commission's proposals is discussed thoroughly with indemnity insurers as, ultimately, they would be asked to cover any gap between the capped indemnity and the loss suffered by the claimant and may not be willing to insure such losses or only do so for a substantial premium.

It is also important to note that registration of title is mandatory. A person therefore has no choice but to place their title onto a public register that opens the possibility to identity theft and the risk of registration fraud. The indemnity system needs to take this into account and not be watered down.

14.2 We invite consultees' views as to the level at which any cap should be set.

[Paragraph 14.61]

We do not consider that any cap should be set. If increased indemnity payments require additional funding, the most straightforward solution would be to increase fees on the registration of high value interests in land. However the Land Registry Annual Report and Accounts 2014/15 seem to

indicate that the current net surplus income of the Land Registry is more than sufficient to meet the current level of indemnity payments made.

14.3 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.

[Paragraph 14.72]

No, conveyancers should not be required to make such a declaration.

This and the following proposal are too broad and unquantifiable. While we agree that additional measures are needed to help tackle fraud, they should be specific and realistic. These proposals go too far in seeking to increase the responsibilities and duties of care of conveyancers and also go much further than is necessary to deal with the problems sought to be dealt with here.

In relation to the proposed declaration:

- Its scope is unascertainable. Conveyancers would have no clear idea of what compliance with it would entail and it would be a recipe for disputes and litigation.
- It potentially covers matters that are likely to be outside the control of the conveyancer making it and this would not be acceptable to the conveyancer or to their firm. Documents executed overseas would be particularly problematic. By analogy with undertakings, many firms instruct their fee earners that they should never give an undertaking to do something that is outside their control.
- Such an unspecific declaration and the potential liability under it would be likely to result in increased solicitors' indemnity insurance premiums and a more protracted due diligence process, as many conveyancers who are not clear as to the precise scope of their obligations will err on the side of caution.

14.4 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?

[Paragraph 14.80]

No, we do not consider that there should be a new general statutory tort along the lines described. This would be far too wide and go much further than is necessary to deal the problems with the current law that are under discussion.

There are already existing rights of recourse against conveyancers who do not take proper care, including the statutory rights to recover indemnity payments under para. 10 of Schedule 8 Land Registration Act 2002. Case law is also extending the duty of care owed by conveyancers – see, for example, *Purrunsing v A'Court & Co (a firm) and another* [2016] EWHC 789 (Ch). Existing rights coupled with the more specific solutions suggested in this chapter seem to us to be preferable to the sledgehammer approach of a new general statutory tort.

We also strongly disagree with the implication that an indemnity should be denied to a potential claimant whose conveyancer has acted in breach of such a duty and who would instead need to rely on a course of action against their conveyancer. This is contrary to a key principle of the

current indemnity scheme – that an indemnity is available as a first resort – and in our view this key feature should be retained whatever proposal is adopted.

14.5 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.

[Paragraph 14.85]

No. we do not agree that there should be such a specific statutory tort.

A better alternative in our view would be to add another limb to paragraph 10 of Schedule 8 LRA 2002 (Recovery of indemnity from registrar) to include a right of recovery against a conveyancer in respect of any loss caused by the conveyancer's failure to comply with the rationalised identity requirements referred to in 14.6 in relation to their own client. This would be fairer and less complex.

If such a tort is nevertheless introduced:

- It should be limited to verifying the identity of the conveyancer's own client
- It should not operate as a limitation on the availability of an indemnity to a claimant whose conveyancer has acted in breach of the duty, requiring them instead to bring an action against their conveyancer. This is contrary to a key principle of the current indemnity scheme – that an indemnity is available as a first resort – and in our view this key feature should be retained whatever proposal is adopted.

14.6 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.

[Paragraph 14.91]

We consider that the current requirements in respect of verifying identity could usefully be rationalised. This would give clarity and a greater degree of certainty as to what is required. This would, in turn, speed the conveyancing process and would also, in our view, encourage compliance.

However, this should be a case of rationalising existing requirements and should not be used as an opportunity to impose additional burdens and duties on conveyancers.

Any new process or checklist introduced as a result of such a rationalisation should be realistic and workable in practice.

As to examples of difficulties experienced in relation to current identity requirements, several signatory firms have experienced real problems in relation to identity checks for attorneys who sign on behalf of a company and suggest that confirmation from the company that the attorney is duly authorised should be sufficient in these circumstances.

14.7 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.

[Paragraph 14.101]

No we do not agree that the Land Registry's powers in respect of identity checks should be enhanced in this way.

There is a risk that the Land Registry would introduce new mandatory requirements that would be far too burdensome and unrealistic in a commercial environment and would also go too far in

shifting liability to conveyancers and lenders. In our view this risk would increase if, as is likely, Land Registry operations are moved to the private sector.

The ability to verify through a satisfactory electronic system sounds very sensible.

14.8 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.

[Paragraph 14.109]

Although we do not have any specific evidence as to the significance of the indemnity scheme in lending decisions as this issue has not needed to be considered before now, we believe that the indemnity scheme is a key factor in lending decisions and limiting its availability to lenders would have a significant effect on the mortgage market.

Lending decisions are predicated on ownership, good title and the value of the land. A key lending financial test is the loan to value ratio whereby a lender will lend a percentage (e.g. 60%) of the value of a property. The valuation of the property will assume that there are no title defects. For valuation purposes, if a title defect is revealed (e.g. an old restrictive covenant against the current use) the lender will require the mortgagor to take out an insurance policy to cover the defect. The terms of such policy (e.g. amount of any excess or cover) will influence the valuation and therefore the amount the lender is prepared to lend. If the cover is insufficient, the lender may decide not proceed. The defective title policy will benefit both the borrower and the lender as lenders insist on being able to call on the policy in their own right.

In light of this standard practice, we believe that if a lender's rights under the indemnity scheme are limited, lenders will as a matter of course require borrowers to cover the risk by obtaining title insurance in the open market for the lender's benefit. This would increase conveyancing costs for borrowers and slow down the conveyancing process.

14.9 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.

[Paragraph 14.117]

We strongly disagree with the option of providing only a limited state title guarantee to lenders in these circumstances. We are of the view that a mortgagee should not be treated any differently (or less favourably) than a buyer or a tenant, as a mortgagee also has a significant financial interest in the mortgaged property.

The suggestion that the indemnity scheme should not cover commercial risks undertaken by lenders is not, in our view, logical. Purchasers also acquire property as a financial investment rather than for occupation and it is difficult to see why their financial interest should be treated more favourably than the financial interest of a mortgagee.

Another argument used for limiting the indemnity available to lenders is that lenders have the ability to uncover cases of identity fraud for themselves. But however rigorous a lender's procedures and however diligent they are in complying with them, they may still be the victim of fraud and it would be inequitable to limit their right to an indemnity in these circumstances. In any event, if a lender does not take proper care, a remedy already exists under para. 5 of Schedule 8 Land Registration Act 2002, which provides that no indemnity is payable (or it is reduced) where a claimant has suffered loss as a result of his own lack of proper care.

As already mentioned any attempt to restrict a lender's ability to claim an indemnity will also have an adverse impact on lending decisions and is likely to increase conveyancing costs for borrowers as the mortgagee will look to cover the increased risk though insurance in the open market.

We also consider that a consistent approach is important to maintain the integrity and the simplicity of the current system.

14.10 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.

[Paragraph 14.123]

We are strongly of the view that the entitlement of mortgagees to obtain an indemnity should not be subject to compliance with a statutory duty to take reasonable care to verify the identity of the mortgagor. The same principles should apply to mortgagees as to other claimants. There is already a remedy against claimants, including mortgagees, who do not take proper care. Paragraph 5 Schedule 8 Land Registration Act 2002 provides that no indemnity is payable on account of any loss suffered by a claimant as a result of the claimant's own lack of proper care. All that is needed is to make clear that, where the claimant is a mortgagee, "lack of proper care" includes a failure to comply with the rationalised identity requirements referred to in paragraph 14.6 in relation to the mortgagor.

14.11 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.

[Paragraph 14.133]

We have not come across these issues so cannot comment on them.

14.12 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?

[Paragraph 14.136]

Yes: **X**	No:	Other:
Yes, we agree with this proposal as it is sensible and will result in greater clarity and certainty.		

14.13 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?

[Paragraph 14.138]

Yes: **X**	No:	Other:
Yes, we agree.		

14.14 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:

(1) 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.

(2) 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?

[Paragraph 14.146]

Yes: **X**	No:	Other:
Yes, we agree with these proposals. We consider that they are rational and will bring greater clarity and certainty.		

14.15 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?

[Paragraph 14.159]

Yes: **X**	No:	Other:
Yes, we agree with this proposal.		

14.16 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.

[Paragraph 14.160]

This is outside the scope of our expertise.

15 GENERAL BOUNDARIES

15.1 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?

[Paragraph 15.35]

Yes: **X**	No:	Other:
We agree that a list could give more clarity and result in a more consistent approach, which would be welcomed. As it is non-exhaustive, the flexibility required to take into account particular characteristics of a case is retained.		

In relation to factor (2) however, this is arguably a subjective factor. We would expect that the disputed land will almost always be "important" or why would the parties expose themselves to the time and expense of going to court?

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

[Paragraph 15.36]

There are other factors which arguably warrant consideration, such as whether the land in dispute has been built on, the degree of possession and the current use and value of the land in question.

16 EASEMENTS

16.1 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?

[Paragraph 16.32]

Yes: **X**	No:	Other:
We agree with the policy behind this proposal, namely of realigning the registration requirements for short leases and for easements which benefit them and are contained in the lease itself. We consider that the current requirements as to knowledge inspection and use will be sufficient to operate as an effective limitation on the nature and number of easements which will arise as overriding interests in consequence. The due diligence which a purchaser must undertake to ascertain the nature and extent of occupation rights will not increase significantly as a result of this change.		

16.2 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?

[Paragraph 16.40]

Yes: **X**	No:	Other:
We agree with the limited change in the treatment of equitable easements as overriding interests in the context of leases not required to be by deed by virtue of section 52(2)(d) LPA 1925. We note that this change will extend to code rights (as currently contained in the draft Electronic Communications Code) granted in leases which do not need to be registered. We consider that the current requirements as to knowledge inspection and use will be sufficient to operate as an effective limitation on the nature and number of easements which will arise as overriding interests in consequence. Again we consider that the due diligence which a purchaser must undertake to ascertain the nature and extent of occupation rights will not increase significantly as a result of this change.		

16.3 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?

[Paragraph 16.44]

Yes:	No:	Other: See below
In relation to limb (1) of this proposal, we disagree with the proposal; in our view an arrangement created separately from the original lease capable of constituting an easement should only be protected if registered. The due diligence required to investigate such arrangements if they were allowed to subsist as overriding interests would be significant, in contrast to the converse position of easements created (whether expressly or impliedly) on the grant of the original lease for a term not exceeding three years, as part of the 'original occupational package'. In relation to limb (2) of this proposal, we agree that such easements should remain registrable to take effect at law.		

17 ADVERSE POSSESSION

17.1 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?

[Paragraph 17.24]

Yes: **X**	No:	Other:
We agree with this proposal, so long as it is clear that this applies only if the stage has been reached that notification has been sent to the registered proprietor. As explained in para 17.22 of the consultation paper, this should not apply in circumstances where (for example) the fee has mistakenly been omitted from the application, or the applicant has not established occupation through adverse possession, or sufficient adverse possession (as explained in para 17.17). In such cases, the applicant should be permitted to correct the error and then re-submit an application.		

17.2 We invite consultees to provide evidence relating to the use of the first two conditions in paragraph 5 of schedule 6.

[Paragraph 17.33]

We do not have any evidence relating to the use of the first two conditions.

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

[Paragraph 17.34]

Removal of the first two conditions would certainly make Schedule 6 simpler to understand, but we have no firm views either way.

17.4 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?

[Paragraph 17.47]

Yes: **X**	No:	Other:
As the consultation paper explains in para 17.46, it would be sensible for there to be a longstop date after which the claimant has to start proceedings. Using a period of six months – the same period as relates to eviction in para 1(2) of Schedule 6 – seems a sensible suggestion.		

17.5 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?

[Paragraph 17.62]

Yes: **X**	No:	Other:
This seems to be such an odd circumstance that is hardly seems necessary to make provision for it. But logically, in the light of section 58, it seems necessary to make this amendment. However, it seems to us that the only party that could be disadvantaged by such an arrangement would be the Land Registry, since classifying this alteration as a "rectification" would require the Land Registry to pay compensation. We would therefore expect that all respondents (save perhaps for the Land Registry) would agree with this suggestion.		

17.6 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?

[Paragraph 17.70]

Yes: **X**	No:	Other:
We agree with this proposal.		

17.7 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?

[Paragraph 17.71]

Yes: **X**	No:	Other:
We agree with the comment on para 17.67 of the consultation paper that "the argument against enabling registration of possessory title under section 9(5) of the LRA 2002 is overwhelming. It should not be possible for an adverse possessor to circumvent the procedure in schedule 6."		

17.8 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?

[Paragraph 17.79]

Yes: **X**	No:	Other:
We agree with this suggestion. It is unsatisfactory that there appears to be no clarity as to how the law on this question currently stands.		

17.9 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?

[Paragraph 17.86]

Yes: **X**	No:	Other:
Yes. This complicates the operation of Schedule 6 but it is important that the procedure under the Land Registration Act 2002 should accommodate the presumption that a tenant in adverse possession is acting on behalf of his landlord. We express no view on whether the presumption is a sensible one, as that is not relevant for these purposes.		

18 FURTHER ADVANCES

18.1 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.

[Paragraph 18.7]

We agree that the Law Commission should conduct a project reviewing the law of mortgages as it applies to land but we would prefer that this was in the context of a wider review of the law of secured lending. We appreciate that this is outside the ambit of this consultation.

18.2 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?

[Paragraph 18.15]

Generally, commercial lenders do not rely on section 49 alone. We agree that the condition that the advance must be made in pursuance of an obligation creates difficulties where, for example, a second charge breaches a negative pledge. Likewise there are difficulties in syndicated lending that further advances must be made by the registered chargee. Therefore, where it is known at the start of a transaction, that there will be a senior and junior lender, an inter-creditor agreement will be entered into. This agreement will resolve not only the above issues but will also deal with other significant issues such as a junior's lenders right to buy out a senior lender, the payments waterfall and the agreed enforcement strategy.

Section 49 would only come into play where further charges are entered into by the borrower and other creditors, who are not party to the inter-creditor agreement.

Another reason why section 49 is considered inadequate is that as soon as a borrower is in default there will be no obligation on a lender to make further advances as the lender will have discretion (therefore the further advances will not be protected).

18.3 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.

[Paragraph 18.22]

The classification of instalment payments as "further advances" does cause problems in practice. For example, a first ranking creditor agrees to lend money on the security of a registered long Lease over land which is to be developed. There is also an agreement by the borrower for the grant of an Underlease at a rack rent of the completed development to a company with a first class covenant. Value depends on completion of the grant of the Underlease. The long Lease provides for the freeholder being able to forfeit it if the development is not completed by a stated date. The lender is obliged to advance its loan by stages as the development proceeds. The loan agreement provides that the borrower may not create second ranking or subsequent charges and that the lender's obligations to lend will be discharged if the borrower breaks those provisions. The lender's obligation to make further advances is noted on the register under Section 49(3). A Restriction against registration of dispositions without the lender's consent is also registered against the borrower's title.

The borrower also has an unsecured overdraft facility with another lender. The borrower pays its contribution to the development costs out of that account.

Time passes. The secured lender makes its advances as the development proceeds. The borrower uses up its unsecured overdraft facility. The other lender is prepared to increase the overdraft facility if the borrower creates a second ranking fixed charge over the Lease. The borrower creates that second charge and the other lender gives notice of it to the first ranking creditor. The other lender also protects the priority of its second ranking charge (which it cannot substantively register because of the Restriction) by registering a Notice against the borrower's title.

Where does that leave the first ranking lender when it receives a request for a further advance? This has been an issue in practice. If the first ranking lender does not make the further advances the development will not be completed and there is a real risk that the freeholder will forfeit the lease. If the first ranking lender does make the advances, they will rank behind the second lender's charge.

The intercreditor agreements contemplated by paragraph 18.15 of the Consultation Paper may be easy enough to put in place at the time the secured loans are made; but less so in other circumstances (as in the example above).

18.4 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.

[Paragraph 18.27]

We agree that it should be possible for persons other than the proprietor of a registered charge to make further advances. As mentioned, in syndicated loans, the mortgagee is often not a lender and therefore does not make the further advances.

18.5 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.

[Paragraph 18.28]

We believe that an extension to the persons who can make further advances under section 49 would have an effect in the practice as parties do not always put in place inter-creditor agreements. See example at paragraph 18.22.

18.6 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.

[Paragraph 18.31]

We agree that it should be possible for persons other than the proprietor of a registered charge to make further advances under section 49. We do not believe, however, that it is necessary or desirable to define or limit who should be able to make the further advances. The loan agreement will define the secured obligations, parties etc. The issue is simply whether the advances are secured by the registered charge or not. Any amendment in this regards, should ensure that the notice under s49(1) need not be served on anyone other than the registered proprietor of the charge.

18.7 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.

[Paragraph 18.41]

See example at 18.22 above.

18.8 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.

[Paragraph 18.58]

We are not aware of lenders relying on section 49(4) to stipulate a maximum amount, notwithstanding that it is likely to be beneficial as it would be a way of protecting undrawn further advances. We believe that this may be perceived as being commercially unattractive. Mortgages secure not only repayment of the loan amount but also interest, break costs, enforcement costs etc. As a result, a lender wishing to rely on section 49(4) would have to specific a maximum amount which will cover these additional items/costs and this sum is therefore likely to be

significantly more than the loan amount. The stating on a public register of such a large sum may fetter the borrower's ability to raise finance from another chargee.

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

[Paragraph 18.59]

As mentioned above, we do not have any evidence of lenders relying on section 49(4) but believe that if section 49(4) was relied upon by lender this may prevent borrowers from obtaining further finance elsewhere.

19 SUB-CHARGES

19.1 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?

[Paragraph 19.34]

Yes: **X**	No:	Other:
Yes, we agree with the proposal.		

19.2 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?

[Paragraph 19.35]

Yes: **X**	No:	Other:
Yes, we agree with the proposal.		

19.3 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?

[Paragraph 19.38]

We have had limited experience of a discharge of a principal registered charge where there is an existing registered sub-charge. In the few occasions where this has happened, the note of the sub-charge has not been removed from the Register. As a result, on a subsequent sale or a re-mortgage, the issue of the sub-charge has had to be resolved in order to effect the sale/re-mortgage. We agree that a mechanism should be 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. As a minimum, the sub-chargee should be able to apply to put a note on the Register stating that the sub-chargee's consent is required to discharge the principal registered charge. This note could be added to the details of the registered propriertor of the principal charge. Ideally, a new form of restriction against discharging would be created for this purpose.

19.4 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.

[Paragraph 19.43]

Provided that a note (as mentioned at 19.38 above) is placed on the Register we do not think transitional provisions are necessary for existing sub-charges.

20 ELECTRONIC CONVEYANCING

20.1 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?

[Paragraph 20.25]

Yes: **X**	No:	Other:

20.2 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?

[Paragraph 20.35]

Yes:	No: **X**	Other:
We believe that any proposals to move from a paper based system of conveyancing to an electronic based system should be by primary legislation to allow for the fullest discussion and consultation of the proposals as this would be a major shift in conveyancing policy. We also question whether it is desirable or fair to move to a mandatory system of electronic conveyancing as this would exclude those who by reason of age or disability are less able to use computer systems.		

20.3 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.

(4) 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?

[Paragraph 20.47]

Yes: **X**	No:	Other:

21 THE JURISDICTION OF THE LAND REGISTRATION DIVISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

21.1 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?

[Paragraph 21.24]

Yes: **X**	No:	Other:
We have no additional comments on the proposals.		

21.2 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.

[Paragraph 21.28]

We wonder if the tribunal is the most appropriate forum to determine these issues. Unlike the preceding question about boundaries, the determination of equities and the extent of beneficial interests may include detailed questions of trust law and complex legal issues on which legal argument will be heard with counsel for both sides. Without expressing a preference either way, might these issues be better suited to be determined by the Chancery division of the High Court?