THE LAW COMMISSION

UPDATING THE LAND REGISTRATION ACT 2002:
A CONSULTATION PAPER

This optional response form is provided for consultees' convenience in responding to our Consultation Paper.

The response form includes the text of the questions in Chapter 22 of the Consultation Paper, with boxes for yes/no answers (please delete as appropriate) and space for comments. You do not have to respond to every question. Comments are not limited in length (the box will expand, if necessary, as you type).

Each question gives a reference in brackets to the paragraph of the Consultation Paper at which the question is asked. Please consider the surrounding discussion before responding.

We invite responses from 31 March 2016 until 30 June 2016.

Please return this form:

By email to: propertyandtrust@lawcommission.gsi.gov.uk

By post to: Jennifer Boddy, Law Commission, 1st Floor, Tower, Post Point 1.53, 52 Queen Anne's Gate, London SW1H 9AG

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CONFIDENTIALITY

Do you wish to keep this response confidential?

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THE REGISTRABLE ESTATES

22.1 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 no experience of practical problems arising from the Land Registry's new practice although we doubt whether it can really have been intended that following a lease enlargement under section 153 two fee simple estates should subsist in the same land even if, which is controversial, this is theoretically possible. However, we accept that the Land Registry's previous practice, which left the effect of section 153(8) on the enforcement of covenants unclear, was also unsatisfactory. Clarification of the effect of section 153 would be desirable but in the present state of uncertainty we do not see a strong case for recommending that the Land Registry should revert to its previous practice.

22.2 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]

We agree that this should be possible.

22.3 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]

Unless the responses to 22.4 show clearly that the lack of compulsory registration causes practical problems we do not consider that this is justified, particularly bearing in mind that in most cases only a qualified title will be registered.

22.4 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]

We have no experience of this.

22.5 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]

We consider that there are quite strong arguments for and against a requirement for such notification but on balance we favour the requirement. Experience of the worry, uncertainty and expense caused to surface owners by the recent mass registration of mineral rights during the "sunset period" suggests that this may in many cases outweigh any benefit resulting from such notification. On the other hand there is a serious risk that in the absence of notification a property owner may wish to carry out development or sell the property and not search the register and learn of the registration of mineral rights until an inconveniently late stage. We consider that this risk justifies imposing the requirement in spite of the inconvenience to the surface owner which it will cause in some cases.

22.6 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		

22.7 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		

22.8 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		

FIRST REGISTRATION

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

[Paragraph 4.34]

We have no evidence on this one way or the other.

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

[Paragraph 4.35]

If there is evidence of significant difficulties arising during the twilight period we think it preferable that the registered, rather than the unregistered, conveyancing regime should govern the position. It follows that the disponee should able to lodge a caution against first registration. Other considerations apart, the land charges regime, which operates by reference to the names of estate owners, is less satisfactory than the registered regime, which operates by reference to the land.

22.11 We provisionally propose that it should be made clear that a person with a derivative interest under a trust may apply for a caution against first registration of the legal estate to which the trust relates.

Do consultees agree?

[Paragraph 4.39]

Yes		

THE POWERS OF THE REGISTERED PROPRIETOR

22.12 We provisionally propose that express provision should be made in the LRA 2002 that a person who has a transfer or grant of a registrable estate or charge in his or her favour is "entitled to be registered as the proprietor" of that estate or charge.

Do consultees agree?

[Paragraph 5.30]

		Other

If there is serious doubt about this we agree that the powers of a disponee prior to registration of the disposition should be clarified but we find the proposed definition of the words "entitled to be registered as the proprietor" unsatisfactory for a number of reasons:

It is an odd use of language to say that a person is entitled to be registered if, for example, there is a restriction requiring the consent of X to registration.

The words "transfer or grant" in the proposal presumably mean a valid transfer or grant e.g, not a forgery. However, other proposals, in particular those under 22.13, assume that even the disponee under a forged disposition has the owner's powers. There appears to be some inconsistency here.

We do not think that the answer to the problem created by the concurrence of powers in the registered proprietor and the disponee given in para 5.65 of the Paper is satisfactory. The problem should be addressed in the land registration legislation not left for solution through trust law.

We are unclear what the position is in the sub-sale scenario if, as will frequently be the case, the first disposition is never registered. If that disposition is invalid is it validated by the registration of a subsequent disposition made by the disponee?

In our view all that is needed is a statutory recognition of the concept of "feeding the estoppel". If a subsequent disposition is registered that should validate preceding dispositions. It seems to us that the proposal in 22.13 may achieve this and make the proposal in 22.12 unnecessary in any event.

22.13 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:

the common law principle that no one can convey what he or she does not own (*nemo dat quod non habet*);

other limitations imposed by the common law or equity or under other legislation; or

any limitation other than those reflected by an entry on the register or imposed under the LRA 2002.

Do consultees agree?

[Paragraph 5.63]

		Other

We are unclear what is meant by the phrases "preventing the title of a disponee being questioned" and "should not be limited by".

In its very recent decision in Mortgage Express v Lambert [2016] EWCA Civ 555 the Court of Appeal expressed strong support for the view that the existing LRA 2002 section 26(3) prevents a person in actual occupation from asserting an equitable interest against a disponee (or a successor) if that would involve impugning the disponee's title although it appears to us that it did not base its decision on that ground.

We are concerned about the situation, which was not that in the Mortgage Express case, where the relevant interest of the occupier is known to the disponee. Paragraph 4.11 of the pre-2002 Act Law Commission Report contemplates that the existing section 26(3) does not prevent knowing receipt claims giving rise to financial remedies being made provided that they do not involve questioning the title of a disponee or a successor. There seems to us to be some inconsistency in the concept that knowing receipt claims may be made, possibly against a chain of recipients, without this involving the questioning of the title of the recipients. In addition it seems to us that the second sub-paragraph of the proposal may impose a wider restriction on such claims than the existing section 26(3) does.

We suggest that more consideration needs to be given to the rights of the holder of an equitable interest, particularly one in actual occupation, against a disponee (and his successors) who have actual notice of a breach of trust.

Since the word "registered" does not appear before "disponee" in the second line it is assumed that the proposal is not limited to questioning the title of a registered proprietor. Does it therefore mean that the entitlement of a disponee to be registered cannot be challenged? Does it mean that a purchaser from a disponee cannot object to the vendor's title on the ground that the transfer to the vendor is forged or otherwise invalid?

With regard to the individual sub-paragraphs:

In relation to registered proprietors this accords with the principle that, subject to alteration, the register is conclusive even when it is wrong. However, as mentioned above, it is not satisfactory if it applies in the period prior to registration.

If this means that a disposition is deemed to be valid for all purposes it is very far-reaching and in our view, and including for the reasons given in the third and fourth paragraphs above, unacceptable. Does the reference to the powers not being limited by limitations imposed by equity mean that the fact that a disposition made in breach of trust is deemed not to have been so made? Further, does the reference to "other legislation" mean that a disposition is deemed to be valid notwithstanding that it would be invalid or be liable to be set aside under other legislation (and which might undercut the policy of such other legislation)?

If this provision is to be included we think the words "or contract" should be inserted.

Is the phrase "imposed under the LRA 2002" intended to refer simply to procedural requirements under the Act or to substantive limitations on powers? If it is intended to refer to substantive limitations we do not know what provisions of the Act are affected by it.

We assume that this proposal is subject to the alteration/rectification provisions in schedule 4.

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

22.14 We provisionally propose that if an unregistrable interest is noted on the register, that interest should be subject only to the interests set out in section 29(2) of the LRA 2002.

Do consultees agree?

[Paragraph 6.30]

	No	

This is a major step which would extend the basic principle underlying land registration which is concerned with the registration of legal estates and the definition of the equitable interests binding on the owners of such estates. To date it has not been concerned with the relative rights of owners of equitable interests and on balance we consider that this should remain the case.

Many equitable interests are created informally e.g. rights arising under constructive trusts or by way of equitable estoppel, in circumstances where protection by registration would not ordinarily be contemplated and we do not consider that the priority of such rights should be governed by the timing of registration.

If this proposal is adopted special provision should be made for charging orders and other statutory charges. We can see no reason why these should obtain priority over equitable interests previously created simply by virtue of having been registered. Also they are a non-consensual means of enforcement and, unlike other equitable charges, there will normally have been no transaction entered into in reliance on the contents of the register.

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

Do consultees agree?

[Paragraph 6.36]

	No	
This proposal lacks logic if the proposal in 22.14 above is implemented. If an equitable charge can obtain priority over subsequent interest by noting it on the register why should not the holder of a legal charge be able to do the same. The lack of logic in this proposal suggests that the proposal in 22.14 above is flawed.		

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

Do consultees agree?

[Paragraph 6.37]

	No	
Again equitable charges present a problem with this proposal. A charge may be equitable because it was intended to create a legal charge but it was done in writing rather than by deed. It may be deliberately created as an equitable charge only. We are unclear whether this proposal is intended only to equitable charges of the first kind or to both kinds. If it is intended to apply in both cases it makes considerable inroads into the proposal in 22.14 above. If it is intended to apply only in the first case we can see neither logic nor fairness in the distinction.		

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

[Paragraph 6.49]

Yes, granted the special treatment of home rights in the existing legislation.

22.18 We provisionally propose that the priority of unregistrable interests created pre-reform should remain unchanged.

Do consultees agree?

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

[Paragraph 6.54]

Yes		

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

Do consultees agree?

[Paragraph 6.57]

Yes:		

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

[Paragraph 6.59]

We have no examples to provide.

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

Do consultees agree?

[Paragraph 6.63]

		Other:
We are unsure about this. There may be a significant increase in the number of estate contracts, which are not commonly protected at present, being protected by a notice. If there is evidence from consultees that this is likely to be the case this would be a further argument against the proposal in 22.14 above.		

22.22 We provisionally propose that it should be possible to make an official search with priority in relation to an application to note an unregistrable interest.

Do consultees agree?

[Paragraph 6.71]

Yes:		

22.23 We provisionally propose that a priority search should also protect any ancillary applications arising out of the document which effects the registrable disposition which is the subject of the priority search, provided those ancillary applications are specified on the application form for the priority search.

Do consultees agree?

[Paragraph 6.79]

Yes:		

PRIORITIES UNDER SECTION 29: VALUABLE CONSIDERATION

22.24 We provisionally propose that the requirement of valuable consideration in section 29 of the LRA 2002 should be retained, but should be clarified.

Do consultees agree?

[Paragraph 7.68]

Yes:		

22.25 We provisionally propose that the definition of valuable consideration in section 132 of the LRA 2002 be amended so that "a nominal consideration in money" is no longer excluded from the definition of valuable consideration.

Do consultees agree?

[Paragraph 7.69]

Yes:		

22.26 We do not believe that it is necessary to make any special provision for a reverse premium in the LRA 2002.

Do consultees agree? If consultees disagree, we invite consultees to share any examples of transactions for which no form of consideration is given other than the reverse premium.

[Paragraph 7.70]

Yes:		

22.27 We provisionally propose that where an interest has a negative value, a disposition of that interest is to be regarded as being made for valuable consideration for the purposes of section 29 of the LRA 2002.

Do consultees agree?

[Paragraph 7.71]

Yes:		

22.28 We invite consultees' views as to whether it would be beneficial to clarify the effect of a disposition for which a peppercorn is the only consideration. We invite consultees to provide examples of dispositions which may be structured in this way.

If consultees agree that clarification would be beneficial, we invite consultees' views as to whether a peppercorn should engage the protection of section 29 of the LRA 2002.

[Paragraph 7.72]

We have no experience of a form of disposition for which a peppercorn is the only consideration but, if such dispositions are made, logically they should, like dispositions for a nominal consideration in money, they should engage the protection of section 29 of the LRA 2002.

22.29 We invite consultees' views as to whether there are any other types of bargain, not covered above, where consultees believe that it is unclear whether the disposition is made for valuable consideration for the purposes of section 29.

Please explain in each case whether it is believed that the disposition should be included within, or excluded from, the priority protection of section 29.

[Paragraph 7.73]

We have no views on this.

22.30 We provisionally propose that our proposals on reform of the requirement for valuable consideration under section 29 should apply both to registrable dispositions and unregistrable interests which are noted on the register in accordance with our earlier proposals.

Do consultees agree?

[Paragraph 7.75]

Yes:		
This is logical if the proposals in 22.14 are implemented.		

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

[Paragraph 7.78]

We are not aware of any.

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

[Paragraph 7.81]

We do not think so.

22.33 We believe that our proposals to clarify the meaning of "valuable consideration" for the purposes of section 29 can be applied equally to the meaning of that phrase in paragraph 5 of schedule 10 to the LRA 2002 (indemnity).

Do consultees agree?

[Paragraph 7.83]

Yes		

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

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

Do consultees agree?

[Paragraph 8.48]

Yes		

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

[Paragraph 8.49]

We have no evidence of this.

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

[Paragraph 8.65]

We have no evidence of this.

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

22.37 We provisionally propose that it should be possible to protect a right by one of two kinds of notice: a full notice and a summary notice.

Do consultees agree?

[Paragraph 9.116]

		Other:
We agree that there should be two kinds of notice but consider that the division between the two kinds should be based essentially on whether the lodging of the		

notice is hostile or consensual rather than, as is the focus of the Paper, on the nature of the information registered. Although the current nomenclature, agreed notice and unilateral notice, can be said to be a little misleading it is well understood and reflects the essential division between consensual and hostile notices. We see no reason for the proposed change of names.

22.38 We provisionally propose that an application for a summary notice should not need to be accompanied by any evidence to support the interest claimed.

Do consultees agree?

[Paragraph 9.117]

Yes		

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

Do consultees agree?

[Paragraph 9.118]

Yes		

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

Do consultees agree?

[Paragraph 9.119]

	No:	
We agree that the beneficiary should be required at this stage to provide evidence in support of the interest claimed because this may cause the registered proprietor to accept the validity of the notice at a nearly stage and avoid the need for a reference to the First Tier Tribunal. We strongly disagree, however, with the proposal that the beneficiary should have to satisfy the registrar that it is more likely than not that the		

interest claimed exists. The principle underlying the creation of the Adjudicator in 2000 was that the registrar should no longer have jurisdiction to decide questions of this kind which can raise complex issues of fact and law. It would be wholly inappropriate to give the registrar power to decide, for example, whether a claim to an interest based on a proprietary estoppel is more likely than not to succeed. The jurisdiction of the registrar should be limited to determining, as is the case with objections to applications, whether the beneficiary's claim to an interest is groundless. Requiring the beneficiary to satisfy the registrar that the interest probably exists is wrong in principle, places an excessive evidential burden on the parties at an early stage and is bound to lead to a number of judicial reviews.

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

Do consultees agree?

[Paragraph 9.121]

	No	
See our comments under 22.40 above.		

22.42 We provisionally propose that it should be clarified that an insolvency practitioner appointed in respect of an insolvent registered proprietor is able to apply to cancel a unilateral notice on behalf of the registered proprietor.

Do consultees agree?

[Paragraph 9.141]

Yes		

22.43 We provisionally propose that it should be clarified that attorneys acting under a power of attorney may apply to cancel a unilateral notice on behalf of a registered proprietor who is the donor of the power.

Do consultees agree?

[Paragraph 9.142]

Yes:		

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

[Paragraph 9.144]

We have no comment to make on this.

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

[Paragraph 9.153]

We can see no reason why the beneficiary of an agreed notice should not be able to be identified on the register.

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

[Paragraph 9.154]

We think it preferable that identification should be optional.

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

22.47 We have provisionally formed the view that it should continue to be possible to protect contractual obligations by means of a restriction.

Do consultees agree?

[Paragraph 10.25]

Yes:		
We recognise the usefulness of this as a mechanism assisting the enforcement of positive covenants such as overage provisions but it is illogical that a land registration system should be used to protect non-proprietary interests in this way. It effectively enables the party who has imposed the restriction, by refusing to consent to registration of a disposition unless his claim to accepted, to enforce a purely contractual right as if it were proprietary. We suggest that the appropriate form of restriction to protect a contractual right should identify the relevant contractual right, or at least the contract under which it arises, and should be to the effect that no disposition should be registered unless either the beneficiary of the restriction has consented or [x] days' notice of the application for registration has been given to him.		

This would enable the beneficiary to take such proceedings for enforcement of his contractual rights, for example by applying for an injunction, as are appropriate. This is in our view the limit of the protection which should be given to purely contractual rights.

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

[Paragraph 10.29]

We have no views on this.

22.49 We provisionally propose:

that it should continue to be possible to enter restrictions in Form K in relation to charging orders over beneficial interests; but

that the ability to enter restrictions should not be extended to holders of other derivative interests under trusts.

Do consultees agree?

[Paragraph 10.41]

	No:	
In our view there is no justification for maintaining the distinction between charging orders and other derivative interests under trusts and it is illogical that restrictions can be used to protect purely contractual but not proprietary rights of this kind. We consider that charging orders and other derivative interests under trusts should be dealt with in the same way. We do not consider that a restriction in Form K is satisfactory. It simply gives notice after the event that the derivative interest has been overreached. If such an interest is to be effectively protected we consider that the appropriate form of restriction would be similar to that proposed by us in 22.47 above in relation to contractual rights. The beneficiary should be given an opportunity, before the disposition is registered, to protect his position by applying for an injunction.		

22.50 We provisionally propose that it should be made clear that a court may order the entry of a restriction to protect a charging order relating to an interest under a trust, but that such a restriction must be in Form K.

Do consultees agree?

[Paragraph 10.52]

We agree with the first part of this proposal but for the reason given under 22.49 the restriction should not be in Form K but should in the form suggested there.		

OVERRIDING INTERESTS

22.51 We believe that it should continue to be possible for an estate contract to be protected as an overriding interest where the beneficiary of the contract is in actual occupation.

Do consultees agree?

[Paragraph 11.30]

Yes		

22.52 We believe that the fact that the benefit of an interest has been registered should not preclude that interest from being an "unregistered interest" (and so overriding) for the purposes of schedules 1 and 3 to the LRA 2002.

Do consultees agree?

[Paragraph 11.41]

Yes		

22.53 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]

We consider that section 29(3) does serve a useful purpose and should be retained. It prevents a beneficiary of a notice who has removed it at the instance of a registered proprietor from subsequently seeking to assert the previously protected interest against a purchaser.

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

[Paragraph 11.55]

We have no experience of this.

22.55 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]

This does not arise if, as we recommend, section 29(3) is retained.

LEASE VARIATIONS AND REGISTRATION

22.56 We provisionally propose that express provision should be made to permit the recording of a variation of a lease on either the landlord's registered title, or the tenant's registered title, or both.

Do consultees agree?

[Paragraph 12.40]

Yes		

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

[Paragraph 12.44]

We agree with this.

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

[Paragraph 12.48]

The case law shows in our view that there are serious problems with the 1995 Act which merit consideration in depth. One example is that in EMI v O&H [2016] EWHC 529 (Ch) it was held that a lessee cannot assign the lease to its guarantor notwithstanding that they might both have powerful commercial reasons for wishing to do this and neither the guarantor nor the landlord would suffer any prejudice.

ALTERATION AND RECTIFICATION OF THE REGISTER

22.59 We provisionally propose that the ability of a person to seek alteration or rectification of the register to correct a mistake should not be capable of being an overriding interest pursuant to paragraph 2 of schedule 3 to the LRA 2002.

Do consultees agree?

[Paragraph 13.87]

Yes		

We agree that the second ground for the decision in *Malory* should also be reversed in this way. It is illogical since Schedule 4 to LRA 2002 is clearly intended to provide a comprehensive code governing rectification and alteration of the register.

However, it is essential in our view that in addition to reversing the second ground for the decision in *Malory* detailed consideration is given to certain factors which led to that decision.

(1) The logic of Schedule 3 to LRA 2002 is that "actual occupation" should protected. If this proposal is implemented the position of true owner who is in actual occupation when there is a mistaken change in the register will depend on whether the registered proprietor is in "possession" at a future date (according to *Fitzwilliam* the date of trial) and whether he is at fault. In many cases the true owner may well fail to obtain rectification and be left with an often protracted claim to an indemnity. We doubt the justice of this and consider that (a) it should be specifically provided that the actual occupation of the true owner at the time of the mistake is relevant to the question whether "it would be unjust not to rectify the register" and (b) more generally there should be a list of other factors which are relevant to that question.

(2) It is unclear what the position is in the "twilight" period between the mistaken registration and its correction by alteration/rectification. If the true owner is in occupation is he liable to the registered proprietor for mesne profits for trespass throughout this period? Also, can the newly registered proprietor demolish buildings with impunity, or be prevented from doing so, even though he knows of the true owner's claim or is party to a fraud? It is also unclear whether and to what extent rectification is backdated in this context. We consider that, contrary to what was suggested in *Fitzwilliam*, rectification should be backdated to the date of the application to rectify and not take effect only at the date of trial. This would shorten the twilight period but not eliminate it. The only way of dealing with the position in the twilight period fairly would in our view be to give the court a discretion with regard to payment of mesne profits during the period.

(3) We are unclear whether it is envisaged that, if there is rectification in a case where the true owner was in actual occupation at the time of the mistake, the incorrectly registered proprietor should be entitled to an indemnity. It was held in *Swift* that he is and we assume that the position will remain the same. It seems odd to us that a registered proprietor should be entitled to an indemnity in these circumstances simply because the transfer to him is a forgery and he has suffered no loss through reliance on the incorrect registration. However, we recognise that

the principle underlying the indemnity scheme does not necessarily require the claimant to prove loss.

22.60 We provisionally propose that a chargee who has been registered by mistake, or the chargee of a registered proprietor who has been registered by mistake, should not be able to oppose rectification of the register so as to correct that mistake by removing its charge.

Do consultees agree?

[Paragraph 13.95]

Yes:		
On balance we are inclined to agree with this but have three comments arising out of the discussion of this topic in the Paper. (1) The interests of many registered freehold proprietors are purely financial in the sense that they can be adequately compensated by an indemnity following rectification. We consider that the adequacy of an indemnity should be expressed to be a factor relevant to the decision whether to rectify. (2) This proposal should not apply where the proprietor who is or would be obtaining the benefit of the rectification has been fraudulent. (3) In the discussion of this topic it is stated that the effect of section 131(2) of LRA 2002 is that a mortgagee cannot ever be in possession for purposes of section 131(1). This implies that the effect of section 131(2) is that the first-mentioned person is in possession to the exclusion of the second-mentioned person. We are unsure whether that is correct but, if it is, a tenant under a long lease can never be in possession and will never be able to rely on the provisions of Schedule 4 paras 3(2) or 6(2). That cannot be intended and the position must be clarified.		

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

Do consultees agree?

[Paragraph 13.109]

Yes:		
We consider, however, that actual occupation at the time of the mistake, rather than possession, should be sufficient to protect the true owner, see our comments under 22.59(1) above.		

22.62 We provisionally propose that a successor in title to that proprietor should be restored to the register if he or she took over possession of the land, save where there are exceptional circumstances.

Do consultees agree?

[Paragraph 13.110]

Yes:		

22.63 We provisionally propose that:

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.

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		
Our agreement with the first proposal is subject to the point we have made regarding section 131(2) under 22.60(3) above. With regard to the second proposal the meaning of the phrase "when schedule 4 is applied" needs to be clarified. We have suggested under 22.59(2) above that the appropriate date is the date of the application to rectify although this still leaves the problems with twilight period which we discuss there.		

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

the registered proprietor caused or contributed to the mistake by fraud or lack of proper care; or

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:		
Our agreement in principle is subject to three points. (1) We consider that twelve years, the normal period for acquisition of title by adverse possession, would be more logical than ten years. (2) As suggested above "possession" should be determined as at the date of the application to rectify. (3) The test of whether it would be unjust not rectify is unsatisfactory. The judicial approach to it has been generally restrictive and its application is very hard to predict. As we have said under 22.59(1) above we consider it important that some statutory guidance should be provided.		

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

Do consultees agree?

[Paragraph 13.123]

		Other
We assume that this is intended to be subject to 22.61 and does not apply where the former proprietor is in possession. We agree that there has to be a long stop period but there will be cases where the former proprietor does not learn of the mistake until long after the event. The justice of rectification in such a case has to be balanced against the merits of finality. We consider that (a) the period should be twelve years, see 22.64(1) above, and (b) consideration should be given to the feasibility of extending the period where, although the new proprietor has not contributed to the mistake, he has concealed it after becoming aware of it.		

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

Do consultees agree?

[Paragraph 13.126]

		Other
See 22.65 above.		

22.67 We provisionally propose the following:

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

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

Do consultees agree?

[Paragraph 13.151]

Yes		
Our agreement is subject to the points raised under 22.65 and 22.66 above.		

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

Do consultees agree?

[Paragraph 13.169]

Yes		
In order to provide for an indemnity in all appropriate cases it will be necessary to amend the definition of rectification in Schedule 4 para 11(2)(b) since it will need to cover cases where the title of registered proprietor is not prejudiced but the holder of a derivative interest is.		

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

Do consultees agree?

[Paragraph 13.170]

		Other:
The points made under 22.65 above apply equally here.		

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

Do consultees agree?

[Paragraph 13.180]

Yes:		
The comment made under 22.68 above applies equally here.		

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

Do consultees agree?

[Paragraph 13.181]

Yes		

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

Do consultees agree?

[Paragraph 13.188]

Yes		

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

Do consultees agree?

[Paragraph 13.196]

Yes		
We agree that, although the interpretation of LRA 2002 in *Goldharp* may not be that intended by the authors of the Act, it should be affirmed. However, there remain two problems to be addressed. (1) If rectification, as held in *Goldharp*, results in the relevant interest having priority over past transactions but only "for the future" when does the future begin? We consider that it should begin when the application for rectification is and should certainly not depend, as suggested in *Fitzwilliam*, on which procedure for rectification is followed. (2) There remain the problems of the parties' rights during the twilight period. Is the true owner who obtains rectification in due course liable for mesne profits for trespass during this period and can the wrongly registered new proprietor destroy or damage the property with impunity during this period? These problems could be neatly solved only by making rectification wholly retrospective. If that the "compromise" solution in *Goldharp* is affirmed we consider it imperative that the court should be given discretion to provide just remedies in respect of events and transactions occurring during the period between the mistake and the application to rectify. These problems would be even worse if the decision in *Goldharp* were reversed and rectification were not retrospective at all.		

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

[Paragraph 13.197]

We have no experience of any such difficulties as yet.

INDEMNITY

22.75 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 such a cap. The principle underlying land registration is that it is scheme run on behalf of the State for providing certainty in relation to land title with insurance, funded by fees, for compensation for any errors. We can see no logical basis for limiting the amount of compensation payable. We also consider that the proposed exception for mistakes attributable to fault by the Land Registry could give rise to difficult issues of fact and law which, as they would only arise in cases where the indemnity might exceed the cap, would be the subject of litigation. The Land Registry's rights of recourse, as extended by the proposals made below, must provide a considerable protection against large claims where the Registry is not at fault.

We repeat the point made under 22.59(3) above. Part of the problem is caused by the fact that, if a forged disposition is registered (most large claims are likely to involve such dispositions) the new proprietor will entitled to an indemnity if the register is rectified even though neither he nor anyone else has relied on the incorrect register. We would favour entitlement to an indemnity being essentially tort-based, that is for loss caused by reliance on an incorrect register, rather than on the basis that the Land Registry effectively warrants that the register is accurate. This approach is adopted in the proposal in 22.83 relating to mortgagees and we consider that it should apply generally.

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

[Paragraph 14.61]

If there is to be a cap, which we do not support, it should be at level which excludes almost all residential properties since it would not be acceptable that purchasers of such properties would have to insure against the risk of land registration errors.

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

[Paragraph 14.72]

We agree with this in principle but are not entirely happy with the proposed wording. It is unclear to us whether it is intended (a) that the conveyancer should warrant that he has taken sufficient steps or (b) that he should declare that he has taken reasonable care. If (b) is correct, as we believe it to be and agree that it

should be, this should be clarified.

22.78 We invite consultees' views on the following issues.

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?

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?

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]

We agree that there should be a statutory tort as proposed but have the following comments in relation to the proposal.

(1) The duty should be to act in good faith as well as to take reasonable care.

(2) We do not consider that any category of person should be excluded from this duty.

(3) We do not consider that there should be any exclusions or restrictions affecting the scope of the tort beyond those applicable to torts generally.

(4) Consideration should be given to imposing a similar duty on those i.e. conveyancers who submit deeds and applications to the Land Registry. We see no reason in principle why the proposed statutory duty should not be extended in this way although we do recognise that there are strong arguments against it. There would problems of professional privilege to be considered and some risk of a flood of claims by one party against another party's lawyers.

(5) On a related matter we believe that section 77 of LRA 2002, which causes many problems, should be amended as follows:

(a) the test of not exercising rights " without reasonable cause" should be replaced, in line with the proposed new tort, with a duty to act in good faith and with the exercise of reasonable care;

(b) the duty should be extended to the making of applications to the registrar; and

(c) it should be made clear that the damages recoverable for breach of the duty are in accordance with usual tort measures.

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

[Paragraph 14.85]

We doubt the value of this alternative proposal in view of the ease of obtaining false identification.

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

[Paragraph 14.91]

Our experience suggests that the requirements are costly and fairly ineffective. We are aware of a case where an identity fraudster seeking refinance had changed his name by deed poll and produced documentation, partly false and partly genuine, which all looked entirely credible.

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

[Paragraph 14.101]

We see no objection to this but it should not be seen as providing any guarantee against fraud.

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

[Paragraph 14.109]

We have no evidence to provide on this.

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

[Paragraph 14.117]

We agree with this but it highlights the illogicality of providing an indemnity simply because a mistake has been made when no-one has relied on it. We consider that

the approach underlying this proposal should apply to entitlement to indemnity generally, see our comments under 22.75 above. We see no reason why it should apply only to mortgagees.

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

[Paragraph 14.123]

This is effectively provided for in schedule 8 para 5 subject to the provision for apportionment in the case of contributory negligence in para 5(2). If the intention is that any breach of the statutory duty should wholly disentitle the mortgagee to an indemnity we would not support it. The existing provision for partial indemnity where responsibility is shared should be retained.

22.85 We invite consultees to provide evidence in respect of the following issues:

the incidence in practice of questions concerning the limitation period applicable to indemnity claims; and

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

[Paragraph 14.133]

The existing provision undoubtedly causes problems. The question has arisen in cases within our experience whether schedule 8 para 1(3) has the effect of postponing the start of the limitation period until a decision on rectification has been made or a protective claim for indemnity has to be made before it is known whether rectification would take place. Para 8(b) of the schedule also offers excessive scope for argument about the steps which the claimant might have taken and would have resulted in his knowing of his claim earlier.

22.86 We provisionally propose that for indemnity claims under schedule 8, paragraph 1(a) and (b) the limitation period should start to run on the date of the decision as to rectification.

Do consultees agree?

[Paragraph 14.136]

Yes		
We agree, save that the date should be that on which the claimant was notified of		

the decision.

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

Do consultees agree?

[Paragraph 14.138]

Yes:		
Our agreement is subject to the following comments: (1) We consider that, as in the case of latent damages cases under section 14A of the Limitation Act 1980, there needs to be a detailed definition of what is meant by "knows". The date of knowledge, it is suggested, should be when the claimant is aware of the facts giving rise to his claim and that his claim is for a significant amount. (2) The words "or but their own default should have known" will cause problems. They will enable the Land Registry to argue that the claimant should have done earlier searches which would have revealed the error. This is wrong in principle. It should be the Registry's responsibility, not the claimant's, to discover the error. (3) We consider that there should be a discretion for the court to extend the time limit for claims.		

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

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

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

Do consultees agree?

[Paragraph 14.146]

Yes		
We consider that the proposed time limit of 12 months is too short. We suggest 2 years, by analogy with that applicable to contribution claims under the Civil Liability		

(Contribution) Act 1978.

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

Do consultees agree?

[Paragraph 14.159]

		Other
We agree that the existing provisions of LRA 2002 are unsatisfactory and need to be changed but this proposal does not address all the problems. (1) The time at which the "current" value is to be assessed has to be defined. It could be the date of (a) the application to rectify, (b) the decision on rectification, (c) the claim for the indemnity or (d) the decision on the indemnity claim. There is probably no single fair answer. If property values fall and the problem came to light when the owner decided to sell he should be able to recover the value at the date of his application to rectify. On the other hand, if values rise justice may require the owner to recover the value at the date when his entitlement to an indemnity is established. We suggest that, as in cases where the court is assessing damages based on property values, it should have a discretion to decide the appropriate date for assessing values. (2) We consider that there needs to be a discretion in the court to include in the indemnity (a) compensation to the true owner who fails to obtain rectification but has carried out improvements to the property in good faith for the value of such improvements and (b) similar compensation to the wrongly registered proprietor where the register is rectified, but limited to the cost of the improvements. This is not just a matter of land registration but, apart from the indemnity provisions, there should be a restitutionary remedy where one party has in good faith effected improvements the benefit of which is obtained by the other.		

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

[Paragraph 14.160]

We do not anticipate particular valuation difficulties but, if there are, the case for restoring the property to the true owner by rectification is strengthened.

GENERAL BOUNDARIES

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

the relative size of the contested land in comparison to other land clearly within the remainder of the registered proprietor's title;

the importance of the land to the registered proprietor;

the application of any of the common law presumptions; and

the manner in which the error in the boundaries shown on the title plan came about.

Do consultees agree?

[Paragraph 15.35]

Yes		
It is inherently unsatisfactory in our view that the distinction between boundary and title disputes, which is of considerable practical importance, should be so difficult to define and depend to the extent that it does on decisions of judges which are hard to predict. We therefore strongly support the proposal that detailed statutory guidance on the issue should be provided to judges.		

22.92 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]

We consider that in addition to the factors mentioned in 22.91 above the presence of buildings or other substantial structures on the disputed area of land should be a relevant factor.

EASEMENTS

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

Do consultees agree?

[Paragraph 16.32]

Yes		

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

Do consultees agree?

[Paragraph 16.40]

Yes		

22.95 We provisionally propose that:

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

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		

ADVERSE POSSESSION

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

Do consultees agree?

[Paragraph 17.24]

Yes		

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

[Paragraph 17.33]

In our experience there is little use of the first two conditions and there is an oddity about using a procedure for obtaining a title by adverse possession in order to claim a title, or lesser remedy, based on proprietary estoppel.

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

[Paragraph 17.34]

We consider that they should be removed subject to three points. (1) Where title is claimed on multiple grounds e.g. proprietary estoppel and adverse possession the claimant should not be exposed to multiple fees. (2) There are jurisdiction problems with applications on multiple grounds as schedule 6 gives the Land Registry, and in case of dispute, the FTT exclusive jurisdiction over adverse possession claims. We consider that section 110 of LRA 2002 should make it clear that the FTT can transfer a dispute under schedule 6 to the court. This is particularly important in a case where a party seeks interim relief. (3) The second condition can be useful in transitional cases and we consider that there should be concurrent jurisdiction in the court and the registrar, and FTT, in such cases.

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

Do consultees agree?

[Paragraph 17.47]

Yes		
However, we consider a period of twelve months would be more appropriate particularly as there is likely to be scope for dispute about the commencement of the period.		

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

Do consultees agree?

[Paragraph 17.62]

We agree that in such a case the registered proprietor in possession should normally succeed in resisting alteration of the register. However, for the reasons given in 22.59(3) above we do not consider that, if the register is altered, he should be entitled to an indemnity simply because he has been erroneously registered.		

22.101 We provisionally propose that an adverse possessor of unregistered land should not be able to apply for registration with possessory title until title has been extinguished under the Limitation Act 1980.

Do consultees agree?

[Paragraph 17.70]

Yes		
We doubt whether the Land Registry's present view of section 9(5) of LRA 2002 is correct in law but have no objection to the law being clarified along these lines.		

22.102 We provisionally propose that an adverse possessor of registered land should not be able to apply for registration except through the procedure in schedule 6.

Do consultees agree?

[Paragraph 17.71]

		Other
We agree subject to the solution of two jurisdictional problems. (1) Where a claim for adverse possession involves other issues the court should have concurrent jurisdiction to determine the whole or alternatively the FTT should at least have jurisdiction under section 110 of LRA 2002 to transfer the schedule 6 proceedings to the court. (2) As suggested under 22.98(3) above, the court and the FTT should have concurrent jurisdiction over transitional cases under schedule 12 para 18.		

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

Do consultees agree?

[Paragraph 17.79]

Yes:		

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

Do consultees agree?

[Paragraph 17.86]

Yes:		

FURTHER ADVANCES

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

[Paragraph 18.7]

We have no views on this.

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

[Paragraph 18.15]

We have no views on this.

22.107 We invite the views of consultees as to whether the fact that, where a loan is drawn down in instalments, those instalments are classified as "further advances", is causing problems in practice.

[Paragraph 18.22]

We have no views on this.

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

[Paragraph 18.27]

We have no views on this.

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

[Paragraph 18.28]

We have no evidence on this.

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

[Paragraph 18.31]

We have no views on this.

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

[Paragraph 18.41]

We have no experience of this.

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

[Paragraph 18.58]

We have no views on this.

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

[Paragraph 18.59]

We have no evidence on this.

SUB-CHARGES

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

Do consultees agree?

[Paragraph 19.34]

Yes		

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

Do consultees agree?

[Paragraph 19.35]

Yes		

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

[Paragraph 19.38]

We have no evidence on this.

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

[Paragraph 19.43]

We have no evidence on this.

ELECTRONIC CONVEYANCING

22.118 We provisionally propose that:

simultaneous completion and registration should no longer be required in a system of electronic conveyancing implemented under the LRA 2002; and

equitable interests should be capable of arising in the interim period between completion and registration.

Do consultees agree?

[Paragraph 20.25]

Yes		

22.119 We provisionally propose that:

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;

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

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]

		Other:
We doubt whether it is acceptable that decisions on the timetable for introducing electronic conveyancing, and ending paper-based conveyancing, in relation to particular kinds of disposition should be delegated to the Chief Land Registrar and not require secondary legislation.		

22.120 We provisionally propose that the following propositions of law should be confirmed:

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;

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

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

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

Do consultees agree?

[Paragraph 20.47]

Yes		

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

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

Do consultees agree?

[Paragraph 21.24]

Yes:		
This is probably academic in the light of recent decisions of the Upper Tier Tribunal but we agree that it should be enacted “for the avoidance of doubt” that his is the position.		

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

determine how an equity by estoppel should be satisfied; and

determine the extent of a beneficial interest.

[Paragraph 21.28]

The FTT may already have such jurisdiction but we agree that it should be made clear that it has. It would be anomalous if it had such jurisdiction in schedule 6 cases but not others. Judges of the FTT already have power to sit as county court judges and vice versa. If the Interim Report of the Civil Justice Council on Property Disputes in Courts and Tribunals is implemented and specified types of property dispute can be freely transferred or retained by the county court or the FTT the various jurisdictional problems we have identified above will largely disappear. In addition the FTT will be able not only to make the determinations mentioned above but give consequential relief such as orders for sale and monetary relief.