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# **Updating the Land Registration Act 2002: A Consultation Paper Summary**

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**Consultation Paper No 227 (Summary)**

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# SUMMARY

## UPDATING THE LAND REGISTRATION ACT 2002

### A CONSULTATION PAPER

#### INTRODUCTION TO OUR PROJECT

- 1.1 The importance of clear and efficient law governing the ownership of land cannot be overstated. The days when title to land was always proved by the production of a bundle of deeds are long gone. Today, most landowners in England and Wales have registered title to their land. That means that their ownership is recorded on a register kept by Land Registry. Entry on the register is all that is needed to prove title. Furthermore, the law guarantees the correctness of the register.
- 1.2 It is estimated that around 86% of land in England and Wales is now registered, amounting to over 24 million registered titles.<sup>1</sup> All remaining land will be registered the next time it is sold or otherwise transferred (for example on the death of the owner) or when one of a number of specified transactions takes place in respect of the land.
- 1.3 An effective land registration law is essential for everyone who owns land, whether the land is a home, a business or an investment. Most people who have come across land registration in their everyday lives have done so through buying and selling their own home. Land registration also has wider importance for business and the economy. A recent report from the World Bank suggests that a “well-designed land administration system ... makes it possible for the property market to exist and to operate”.<sup>2</sup>
- 1.4 Land registration in England and Wales is governed by the Land Registration Act 2002 (which we refer to as the “LRA 2002”). The Act was a major reform of the law; it repealed and replaced its predecessor, the Land Registration Act 1925 and accomplished a great deal of modernisation. The LRA 2002 has operated successfully for over 12 years now.<sup>3</sup>
- 1.5 Our project is designed to update the LRA 2002 in light of the experience of its operation. The project is not designed to provide a comprehensive reformulation of the Act, but to improve the operation of specific aspects of the legislation within the existing legal framework. While our discussion of the Act is wide in its scope, it is not fundamental in its nature.

<sup>1</sup> Land Registry, *Annual Reports and Accounts 2014/15* (July 2015) p 9.

<sup>2</sup> World Bank Group, *Doing Business 2016: Measuring Regulatory Quality and Efficiency* (October 2015) p 1.

<sup>3</sup> The Act came into force on 13 October 2003.

- 1.6 Inevitably, in a statute as far-reaching as the LRA 2002, it has become clear that in a number of areas there is scope for reform. Additionally, the landscape within which land registration operates has changed considerably since the LRA 2002 came into force. We have seen an increase of incidents of fraud relating to registered land, the legal consequences of which have been difficult to resolve, while technology has not developed in the way that was predicted at the time of the legislation. We have also witnessed a global economic crisis and a domestic recession. Although the market has since improved, the effects of these events continue to be felt: they shape attitudes to mortgage-lending decisions and therefore to property transactions. In forming our provisional proposals we have been conscious of the need to ensure that they are fit for purpose not only now, but also for the future.

### **Government consultation on privatisation of Land Registry operations**

- 1.7 Our project is confined to updating the LRA 2002. The question of whether Land Registry operations should be moved into the private sector is not a matter that falls within the scope of our work.
- 1.8 When we announced that we would undertake our independent review of the LRA 2002 in July 2014,<sup>4</sup> the Government had reported on a proposal to create a new service delivery company to have responsibility for processes relating to land registration.<sup>5</sup> The Government noted that while it continued to believe that there could be benefits in creating an arm's length service delivery company, no decision had yet been taken.<sup>6</sup> Following indications that a further consultation would take place,<sup>7</sup> on 24 March 2016 the Government published a consultation document on moving Land Registry operations to the private sector.<sup>8</sup> At the time of that publication, the provisional policy contained in our Consultation Paper, which represents the independent view of the Law Commission, had already been finalised. The Government's previous announcements had, however, already placed particular focus on how Land Registry may operate in the future.
- 1.9 Our Consultation Paper raises a range of important issues. Many of these are technical, but others consider fundamental questions about what land registration does. We are aware that any potential changes to Land Registry may impact on consultees' views on some of the issues included in our update of the LRA 2002. We are confident, however, that all of the issues that we discuss will remain significant in practice irrespective of any decision by the Government on the ownership of Land Registry. As our project progresses we will ensure that our final recommendations fully take into account any Government decision in respect of Land Registry operations.

<sup>4</sup> Twelfth Programme of Law Reform (2014) Law Com No 354.

<sup>5</sup> Department for Business, Innovation and Skills, *Introduction of a Land Registry service delivery company: government response* (2014).

<sup>6</sup> Above, part 2, paras 9 and 10.

<sup>7</sup> HM Treasury, *Spending Review and Autumn Statement 2015* (November 2015) Cm 9162, para 1.302; HM Treasury, *Budget 2016* (March 2016) para 2.25.

<sup>8</sup> Department for Business, Innovation and Skills, *Consultation on moving Land Registry operations into the private sector* (March 2016).

## **Our approach in the Consultation Paper**

- 1.10 Many of the topics that we discuss in our Consultation Paper are primarily of interest to legal professionals (especially conveyancers) and others whose practice or research relates to land registration and conveyancing. Parts of our work will also be of interest to lenders and other professionals working within the financial services and property markets. Some aspects of our work will be of interest to a wider audience, including our discussion of the circumstances in which the land register can be changed (alteration and rectification), the operation of Land Registry's indemnity scheme, the application of the LRA 2002 in the context of adverse possession or "squatting", and the development of electronic conveyancing. Readers may also have had personal experience of some of the issues which we consider in our Consultation Paper; for example, their home may have been subject to claims to manorial rights or to liability for chancel repairs, or they may own property in respect of which rights to mines and minerals beneath the surface have been registered.
- 1.11 Land registration is a technical and complex area of law. In order to understand difficulties and uncertainties in the current law, and to ensure that our proposals are workable, it has been necessary for us to explore the issues at a forensic level of detail. In our Consultation Paper we provide an outline of registration of title to assist the non-expert reader.<sup>9</sup> Our Consultation Paper also includes a Glossary that readers of this Summary may find useful to refer to for an explanation of some of the technical terms that we use.
- 1.12 In our Consultation Paper we make a number of provisional proposals for reform of the LRA 2002 and invite consultees' views on a range of other matters. In some areas, we call for evidence of people's experience of the Act or of the effect of law reform proposals that we are considering. We also take the opportunity to seek views on two particular areas of law which fall outside the scope of the current land registration project, to see if there would be support for a future project examining these issues. These relate to a general review of the law of mortgages,<sup>10</sup> and (separately) a review of problems which have arisen out of the operation of the Landlord and Tenant (Covenants) Act 1995, which governs particular aspects of the relationship between landlords and tenants.
- 1.13 In this Summary we do not cover all of the issues that are raised in our Consultation Paper. Instead, we provide the context of our Consultation Paper and highlight some key areas in which we are provisionally proposing reform. References in this Summary are to chapters of the Consultation Paper, unless otherwise stated.

<sup>9</sup> Chapter 2.

<sup>10</sup> We discuss some particular issues relating to the registration of mortgages under the LRA 2002 in Chapters 18 and 19.

## WHY DO WE HAVE LAND REGISTRATION?

- 1.14 Land is a complex asset and buying land is not like buying other things. When a new bicycle is bought, for example, from a reputable shop for cash, it is certain that no-one else owns it. A buyer of land, by contrast, may find that it is subject to a mortgage that has not been discharged, or that a member of the owner's family is a part owner of the land, or a neighbour has a right of way over it. The possibilities are many and the buyer has to be sure that he or she will buy the land free of unwelcome or undisclosed interests. The role of land registration is to draw a careful balance between the interests of different parties: a purchaser of land who wants to know what he or she will obtain if the purchase goes ahead; and those with property rights in the land, whose interest (depending on the nature of the property right held) will be either to ensure that their rights remain enforceable on a sale, or that they receive money that they are due from the proceeds of sale.
- 1.15 By way of example, say that C wants to buy land from B. B says that he bought the land from A ten years ago. How can C be sure that B really did buy the land from A? And how can C be sure that the land is not subject to a mortgage or a lease that she has not been told about and that could be binding on C if she buys the land?
- 1.16 Without a system of land registration the answer is that C has to look at B's documents of title: B's deeds, as we say colloquially. Investigating a title through the deeds is a complex process. It is inefficient as the process must be repeated each time the land is sold or mortgaged. It is also uncertain, as deeds can be lost, concealed or forged.
- 1.17 Land registration ultimately aims to reduce or eliminate complexity and uncertainty in conveyancing and provide a more efficient system in which information can be found on a central register, rather than by looking back through the deeds. The register sets out the details of ownership and of any other rights in the land. Broadly speaking, what is seen on the register is what the purchaser gets. That is a simplification, as some information about the land will be recorded elsewhere,<sup>11</sup> while there are some property rights in land which are not recorded on the register at all, but which will still be enforceable against the purchaser (called overriding interests). That category exists because there are some circumstances in which the law has long accepted that people's property rights should be preserved without the need for them to be registered. In Chapter 11 we make some provisional proposals to review and clarify the law on overriding interests; however, in view of the fact that the LRA 2002 comprehensively reformed overriding interests, we do not make proposals for far-reaching reform in this area.

<sup>11</sup> For example, information on local land charges: see Chapter 1.

- 1.18 For land registration to eliminate the need for the purchaser to investigate title it must go one step further than gathering together on the register information about the land. It must also guarantee the truth of what it says about ownership of land. As well as telling a prospective purchaser or lender “there are no unregistered interests in this land” (which, as we have noted, the register says with some qualification) it must also say “the registered proprietor owns the land and can transfer it to you”. That is known as the guarantee of title or the “title promise”, which is reinforced by provision for payment of compensation (or an “indemnity”) if the register transpires to be wrong.
- 1.19 What the register says about ownership of land, the information about other property rights that it records, how the information is contained on the register, the effect of registration and the operation of the guarantee of title, are some of the topics considered in our Consultation Paper.

## **REGISTRATION OF OWNERSHIP OF LAND**

### **Freehold and leasehold estates**

- 1.20 English law recognises two legal “estates” in land, the name given to bundles of rights that carry the idea of ownership of land. The two estates are the freehold, which lasts forever; and the leasehold, which lasts for a fixed period of time. Freehold estates and leases created for more than seven years are each given their own title number on the register. The register for that title number will set out who owns the estate, a description of the land and any further interests that benefit or burden the estate. Some mortgages and rights over land (known as easements) are also registrable interests, but they are registered as a right or a burden attached to a registered freehold or lease, rather than with their own title number.<sup>12</sup>
- 1.21 Freehold estates and leases of more than seven years’ duration are subject to compulsory registration. In our Consultation Paper we consider whether the duration of leases that have to be registered, and are given their own title number on registration, should be reduced to cover leases of more than three years.<sup>13</sup> Prior to the LRA 2002, only leases of more than 21 years were registrable. That was reduced by the LRA 2002 to leases over seven years, partly in response to changing trends in lease length. We provisionally propose that there should be no reduction in the length at which leases become registrable. The duration of business leases has continued to fall since 2002. We are not convinced, however, that the practical advantages to a tenant of registering a short lease outweigh the disadvantage of additional regulation and cost to businesses. Registration could also be burdensome for landlords who would need to be vigilant to ensure that leases were cleared from the register at their termination.

<sup>12</sup> We make proposals in Chapter 16 as to the circumstances in which easements should have to be entered on the register where they benefit a lease.

<sup>13</sup> Chapter 3.

## **Mines and minerals**

- 1.22 Where a person is registered with title to land, there is a presumption – unless the register indicates otherwise – that the registered proprietor also owns any mines and minerals beneath the surface. In fact this presumption is qualified as ownership of some mines and minerals, such as oil and gas (including shale gas), is vested in the Crown, while coal and coal mines are generally vested in the Coal Authority.
- 1.23 An estate in mines and minerals can, however, be owned by someone other than the registered proprietor of what we describe as the “surface title”. Where an estate is owned in mines and minerals separately from the surface title, the estate is not currently subject to compulsory first registration – although such estates can be registered voluntarily and the disposition of an existing registered estate in mines and minerals must be registered. The reason for the exclusion of mines and minerals from compulsory first registration appears historic and has its roots in the difficulty of proving ownership to mines and minerals. We invite consultees’ views as to whether compulsory first registration should be extended to estates in mines and minerals.<sup>14</sup> We also invite consultees’ views on whether the owner of the surface title should always be informed when an application is received by Land Registry to register an estate in mines and minerals.

## **Powers of the registered proprietor and restrictions on the register**

- 1.24 The LRA 2002 gives a person who is registered as proprietor of an estate in land certain powers to dispose of the land. The principle of the Act is that those who deal with the registered proprietor (for example to buy the land or lend money on the security of the land) should be able to rely on the register to tell them if there are any limitations on the ability of the proprietor to deal with the land. In our Consultation Paper we make provisional proposals to resolve areas of doubt which have arisen over the extent of the protection the Act confers to ensure that this is the case.<sup>15</sup>
- 1.25 The method by which limitations on the powers of a proprietor are entered on the register is by a restriction. In our Consultation Paper we consider whether it is appropriate for restrictions to be entered on the register to prevent dealings with land being carried out in breach of contract: for example, where the term of a mortgage requires the borrower to obtain the consent of the lender before taking out a second mortgage with another lender; or where a lease requires the landlord’s consent to a disposition of the lease. We conclude that this use of restrictions, which is well established, should be able to continue.<sup>16</sup> We also consider the use of restrictions in respect of beneficial interests under trusts and in particular those who have property rights attached to beneficial interests (for example, a charging order over the share of one partner in a jointly owned home).

<sup>14</sup> Chapter 3.

<sup>15</sup> Chapter 5.

<sup>16</sup> Chapter 10.

## **REGISTRATION AND OTHER PROPERTY RIGHTS**

- 1.26 We have explained that freehold estates and some leases may be registered with their own title number and that some other property rights may also be registered as a right or a burden attached to a registered title. Other property rights in land are not registrable in this way but may still be recorded on the register. Where an interest is recorded, its validity is not guaranteed, but if it in fact exists then it will be enforceable against anyone who acquires the freehold or any other interest in the land. The interests that may be recorded on the register include restrictive covenants (promises not to use land in a particular way) attached to freehold land and contracts for the sale of land. In our Consultation Paper we consider both how these interests are recorded on the register and the effect of their entry on the register.

### **Recording property rights: notices**

- 1.27 The method of recording a property right on the register is through the entry of a “notice”. The LRA 2002 created two forms of notice: “agreed notices” and “unilateral notices”. In our Consultation Paper we consider a number of options to reform the system of notices.<sup>17</sup> Our review of the law is prompted by concerns raised with us in respect of unilateral notices. Under the current procedure, there is no requirement for the beneficiary of the notice to produce evidence in support of the right claimed. That may hamper attempts between the parties to negotiate a solution if there is a dispute over the existence of the right, and if the dispute cannot be resolved it must be referred by Land Registry to the Land Registration Division of the Property Chamber of the First-tier Tribunal (the Tribunal).<sup>18</sup> Registered proprietors may therefore find themselves embroiled in proceedings before the Tribunal to challenge the entry of a notice before any evidence has been produced of the right that is being claimed.
- 1.28 Concerns with the unilateral notice procedure were brought into sharp relief by the report of the House of Commons Justice Committee on Manorial Rights, published in January 2015.<sup>19</sup> Manorial rights are of ancient origin and include some rights to mines and minerals, sporting rights and rights to hold fairs and markets. These rights, along with another type of right, chancel repair liability (an obligation to pay for the repairs to the chancel of a church), were thrust into the spotlight by reforms made by the LRA 2002. Until 12 October 2013, manorial rights and chancel repair liability were overriding interests, but following that date they need to be recorded on the register if they are to bind future purchasers. The change in the status of these rights led to an increase in the number of applications to record them on the register. The experience of those subject to such applications served to highlight some of the concerns that registered proprietors have with the unilateral notice procedure.<sup>20</sup>

<sup>17</sup> Chapter 9.

<sup>18</sup> We discuss the Tribunal further below, and in Chapter 21.

<sup>19</sup> Justice Committee, *Manorial Rights* (HC 657, January 2015).

<sup>20</sup> We consider the particular problems experienced in relation to manorial rights in Chapter 9.



- 1.29 We identify a number of objectives that should underpin reform of the notice procedure, to balance the competing interests of registered proprietors, prospective purchasers and those with property rights who need a secure means of protecting their claims. We suggest that these interests can best be protected by maintaining a system which permits two different types of notice to be entered on the register, but we propose amending the procedure for unilateral notices so that evidence of the interest claimed must be produced at an earlier stage than would currently be the case in a dispute. This reform will ensure, in particular, that the registered proprietor is provided with evidence of the interest claimed before being forced into Tribunal proceedings.
- 1.30 We also provisionally propose changing the names of these forms of entry on the register to a “full notice” and a “summary notice”. In the light of experience since the LRA 2002, these names seem more accurately to reflect how the forms of entry differ in the information that they provide.

### **The effect of a notice**

- 1.31 We have explained that there are many different types of interest capable of existing in land apart from freehold and leasehold estates. Sometimes these interests may conflict. It is therefore important in any system of land registration for there to be clear rules governing which interests are enforceable against other interests, or, in the language of the LRA 2002, the relative priority of different interests. One of the ways of ensuring that an interest binds a person taking a subsequent interest in the land (such as a buyer, tenant or mortgagee) is through the entry of a notice on the title.
- 1.32 Priority questions arise in a number of different contexts. Say, for example, A is the registered proprietor of a freehold estate. A grants an equitable charge over the land to X. A then sells the freehold to a purchaser B, who becomes registered proprietor. Priority rules are used to determine whether X’s charge is enforceable against B, or whether B takes priority over X and therefore takes free from X’s equitable charge. In other words, priority rules will determine whether B must pay X the sum of money secured by the charge over the land B has purchased. In that example, the priority question arises between the owner of a registered estate (B) and the holder of an interest that cannot be registered, but can be recorded on the register.<sup>21</sup>
- 1.33 Priority disputes can also arise between the holders of two interests that can be recorded on the register. To use a different example, say that A has entered into a restrictive covenant with his neighbour, B, which would restrict the use of A’s land to residential purposes. A then grants an option to purchase the land to Y, who wants to develop the land for commercial use, before B has an opportunity to record her restrictive covenant on A’s title. Can B force Y to comply with the covenant if Y’s option to purchase is exercised?

<sup>21</sup> We use the example of an equitable charge because this type of charge cannot be registered.

- 1.34 Under the current law, enshrined in the LRA 2002, priority questions are generally determined by the order in which interests are created. In other words, the person whose interest was created first has priority over any later interests. That basic rule is, however, subject to an important qualification. Most priority disputes that arise between the holder of a registered estate and the holder of an interest that cannot be registered are determined by special rules contained in section 29 of the LRA 2002.<sup>22</sup> The result of those rules is generally that a purchaser of a registered estate is not bound by property rights (other than overriding interests) unless the right is recorded on the register. The “first in time” rule is displaced to enable the purchaser to rely on the information contained in the register. Section 29 does not, however, apply to determine the priority between competing interests that cannot be registered but can be recorded.
- 1.35 In our Consultation Paper, we provisionally propose extending the special protection that section 29 confers so that in certain circumstances it can also apply to interests that cannot be registered, but can only be recorded on the register. We can illustrate the effect of our proposal by reference to the example we gave above. Under the first in time rule in the current law, the neighbour B has priority over Y, the beneficiary of the option, because the covenant with B was created first. But what if B had not recorded her covenant on the register by entry of a notice at the time that Y’s option was created? Y may have no means of discovering the potential restriction on his use of the land. Nonetheless, under the current law B could record the covenant on the register at any time before a disposition made pursuant to the option was registered, and B would still have priority over Y. Under our provisional proposal, Y would be able to claim priority over B if B’s covenant is not recorded on the register when Y records its option. That means that when Y enters into the option he knows, from looking at the register, what restrictions he must comply with once the option is exercised.

#### **THE GUARANTEE OF TITLE**

- 1.36 We explained above that the register must guarantee the truth of what it says and that the guarantee is reinforced by provision of an indemnity. The guarantee of title is central to an effective system of land registration. The guarantee is given in section 58 of the LRA 2002, which provides that the person the register shows as proprietor of a legal estate will be its owner by virtue of registration, even if that person would not otherwise be the owner.
- 1.37 The guarantee contained in section 58 of the Act must, however, be read in conjunction with other provisions of the LRA 2002 which permit the register to be altered in specific circumstances. There are some instances when the register must inevitably be altered, the operation of which is uncontroversial: for example, where the register contains a typographical error in the address of a property or a registered proprietor has changed his or her name.

<sup>22</sup> We consider LRA, s 29 in Chapters 6, 7 and 8.

- 1.38 In other circumstances, however, the question whether the register should be altered is contentious as alteration may appear to undermine the guarantee of title. That is particularly the case when the alteration is what the LRA 2002 describes as a “rectification” of the register; an alteration to correct a mistake, in a manner prejudicial to the title of a registered proprietor. Classification of an alteration to the register as rectification is important because where the register is rectified, or a decision is made not to make an alteration which would amount to a rectification, a party who suffers loss is entitled to claim an indemnity. The extent to which a title is secure, or the extent to which it may be altered, affects how indefeasible the title is. This debate is therefore known as the indefeasibility question, and the Consultation Paper reviews this question in some detail.
- 1.39 How the guarantee contained in the LRA 2002 operates has come under particular scrutiny since the legislation came into force in the context of registered title fraud. There are many instances when a question of rectification of the register arises, many of which do not involve fraud. But fraud has provided the context for the leading cases interpreting the relevant provisions of the Act, and in all but one year since 2008 to 2009 it has been the cause of at least half the total amount paid by Land Registry by way of indemnity.
- 1.40 An example illustrates the difficult questions that must be answered by the guarantee of title. Imagine a case where at the outset A is registered proprietor of land. B buys the land, believing that the person selling it him is A. In fact, the person with whom B is dealing is (unknown to B) a fraudster who is impersonating A. A is unaware of the sale. As a result of the fraud, the transfer is void (or has no effect) at common law, but B becomes registered proprietor in place of A and then sells the land to C. The transfer from B to C is an entirely genuine one (C is actually dealing with B, who has decided to sell the land) and C becomes the registered proprietor in place of B. At that point A discovers what has happened. We now have three people who have relied on the register, one of whom has the land (C), one of whom has the price of the land (B) and one of whom apparently has nothing (A). Yet all relied on the register to give them a guarantee of title and all have acted entirely conscientiously. C wants to keep the land, while A wants the land returned. How does the system of land registration respond to these facts?

### **Rectification of the register**

- 1.41 Experience of the LRA 2002 has shown that the answer to the question posed is not as readily or clearly provided as it needs to be.<sup>23</sup> In particular, courts have questioned whether C’s registration can be described as a “mistake”, as the transfer from B to C is a genuine one. We agree with the conclusion now reached in the case law that rectification of the register must be available against C. Otherwise, A – an innocent victim of the fraudster’s activities – is left without the land and without an indemnity. That still leaves other questions: should C retain the land and A be indemnified or should the land be returned to A leaving C with an indemnity? Should it matter how much time has passed since the fraud took place?

<sup>23</sup> Chapter 13.

1.42 In our Consultation Paper we identify four objectives that should be achieved when answering the indefeasibility question: the legislation should provide clarity; there should be a point when finality is provided so that there is no question of a registered proprietor losing his or her title; the rules must enable fact-sensitivity to determine which party gets the land and which receives an indemnity; and the register must be reliable, which means that an adequate indemnity must be available to the party (or parties) who lose out because the register was wrong. We provide a set of proposals which we believe will balance the objectives. Our proposals do not seek to provide a complete answer in every case; the need for fact sensitivity and the complex factual circumstances in which indefeasibility questions arise mean that a degree of discretion is appropriate. But our proposals will enable solutions to be devised in all circumstances without there being issues of principle left unresolved.

1.43 Key features of our proposals include the following:

- (1) Where the registered proprietor's name is removed (or omitted) from the register by mistake (A in our example), then the law should be weighted in favour of returning the land to him or her.
- (2) However, we propose retaining the protection the law currently affords to a registered proprietor in possession in determining who should retain the land. English law has long seen possession as an indication of who most needs or values land in the context of indefeasibility questions.
- (3) We propose the introduction of a "long stop" so that after ten years rectification of the register should generally cease to be available. The main exceptions to this long stop arise where: (a) the person whose name was mistakenly removed or omitted from the register remains in possession; or (b) the registered proprietor caused or contributed to the mistake by fraud or lack of proper care. The operation of the long stop would not, however, affect the ability of a party to claim an indemnity.
- (4) We make proposals to ensure that where a charge (a mortgage) is registered by mistake (for example, because the charge was forged) or is granted by a registered proprietor whose own registration is a mistake, then the chargee should not be able to oppose rectification of the register, but should be confined to receiving an indemnity. We consider this proposal reflects the fact that the chargee's interest is financial only.

- 1.44 Central to the consistent and principled operation of the guarantee of title is the idea that all questions of indefeasibility are answered by reference to the factors laid down in the LRA 2002 which govern the circumstances in which the register may be rectified. Shortly before the Land Registration Bill that became the LRA 2002 received Royal Assent, a decision of the Court of Appeal under the Land Registration Act 1925<sup>24</sup> gave rise to the possibility of indefeasibility questions being determined by other factors: either through the law of trusts; or through recognition of the statutory right to seek rectification of the register as a property right which, in some circumstances, means that the right is an overriding interest. That decision has since been declared to have been decided wrongly in respect of the application of the law of trusts. Its treatment of the statutory right to rectify as capable of being an overriding interest has, however, been confirmed.<sup>25</sup> We provisionally propose that the statutory right to seek rectification of the register should not be capable of being an overriding interest. This proposal ensures that all questions of indefeasibility will be answered by reference to the statutory criteria that have been devised specifically to determine the appropriate outcome of such cases.
- 1.45 In our Consultation Paper we also consider other aspects of the operation of the rectification provisions of the LRA 2002. In particular, we discuss the application of the provisions to so-called derivative interests in land<sup>26</sup> and the issue of whether rectification should operate retrospectively.

### **Indemnity**

- 1.46 Provision for indemnity is a common feature of systems of land registration<sup>27</sup> and is classically described as the “insurance principle”. This principle captures the idea that because people need to rely on the register, if the register is shown to be incorrect those who suffer loss are compensated. In many ways, “insurance” is a good analogy for Land Registry’s liability. Once a transaction is registered, the risk – for example, that the transaction has been obtained by fraud – passes to Land Registry. In our example at paragraph 1.39 above, as soon as B is registered, Land Registry is liable for the losses incurred by A or (subsequently) C because Land Registry accepts the risk that the transfer from A to B was fraudulent. A or C (whichever party does not keep the land) can claim an indemnity from Land Registry, which is liable as an insurer of first resort. Land Registry then has statutory rights of recourse which enables it in some circumstances to recover the sum paid from a party who is at fault.

<sup>24</sup> *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216.

<sup>25</sup> *Swift 1<sup>st</sup> v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602.

<sup>26</sup> A term used to describe property rights granted out of a superior right, such as a lease which is granted out of a freehold.

<sup>27</sup> Chapter 14.

- 1.47 In some respects, however, Land Registry's liability extends beyond that of a standard insurer. In particular, there is no cap on Land Registry's liability. While the indemnity fund is provided by fees paid to Land Registry, it is ultimately underwritten by the State and there is potential for catastrophic loss. When the existing indemnity rules were devised in 1987, the average house price in the UK was just over £43,000. Nowadays, the average is just short of £194,000. One of the questions we raise in our Consultation Paper is whether a cap should be imposed. We are not convinced that it would be appropriate to do so. Any cap that was set would need to be at a sufficiently high level to ensure that most claims were still fully covered, in order to meet the purposes of the indemnity scheme. The existence of a cap would, however, mark a significant change in policy towards the indemnity.
- 1.48 The provision of an indemnity is an essential part of the land registration system, but the ultimate aim is to prevent fraud from happening in the first place. One of the concerns of the current law is that while Land Registry carries the risk of transactions once they are entered on the register, Land Registry is not best placed to detect fraud. Those who may be better placed – such as conveyancers and mortgage lenders – may not be incentivised to develop best practice because they will not necessarily bear the cost. Of course the vast majority of conveyancers and mortgage lenders conduct their business in a professional manner and exercise all due diligence in their dealings with land. We consider whether any reforms should be made to ensure that the financial consequences of fraud fall on the minority who fail to do so, as a means of encouraging best practice. In particular, we ask whether a duty of care that conveyancers may owe Land Registry in respect of applications that they make should be enhanced and whether a statutory duty of care should be introduced.
- 1.49 Identity fraud is a particular concern in the context of registered land. We therefore invite views on specific reforms aimed at detecting and preventing this type of fraud. Currently, conveyancers may be subject to different guidance on what steps should be taken to verify a person's identity, according to whether the conveyancer is a solicitor. We question whether the existing requirements could be rationalised. We also ask for views on how the land registration system could include more effective identity checks.
- 1.50 Finally, we consider whether specific provisions should be made in relation to mortgagees. Currently, the indemnity scheme does not draw any distinction between different claimants. Any party who suffers loss in circumstances that attract an indemnity is entitled to make a claim. It would therefore be a significant step to make specific provision for one category of applicant. But it is a step that has been taken in some jurisdictions and we question whether the same approach should now be adopted here.
- 1.51 We are aware, however, of the importance of mortgage lending to the property market. For example, the availability of mortgage finance underpins access to home ownership and enabling people to buy their own homes has been the central plank of housing policy for successive governments. In the context of mortgagees, the availability of an indemnity may be performing a specific objective of facilitating the operation of the mortgage market.

- 1.52 We want to understand the effect of proposals that limit the circumstances in which mortgagees can claim an indemnity, and so our Consultation Paper includes a call for evidence from consultees as to the significance of the indemnity scheme to lending decisions. The paper also discusses the implications of either removing the ability of mortgagees to obtain an indemnity from Land Registry in certain circumstances, or imposing a specific statutory duty on mortgagees to verify the identity of borrowers.
- 1.53 We are aware that in our review of the LRA 2002 any proposals to change the operation of the indemnity provisions are likely to be contentious. There may be a natural inclination to resist any suggestion that the scope of the indemnity scheme should be narrowed. As we have explained, during the course of our work on this Consultation Paper announcements by the Chancellor of the Exchequer indicated that the Government would consult on moving Land Registry operations into the private sphere. The Government's consultation document was published on 24 March 2016, after the provisional policy contained in our Consultation Paper had been finalised. Against the background of the Government's previous announcements it was already inevitable that discussion of indemnity would be subject to particular scrutiny. Notwithstanding, the operation of the indemnity scheme clearly falls within the scope of our independent review of the LRA 2002 and we consider that a review of the scheme is appropriate, irrespective of any possible move of Land Registry operations into the private sphere. We are not questioning the fundamental basis of the indemnity, but calling for evidence and for views from consultees as to its future possible development.

#### **ELECTRONIC CONVEYANCING**

- 1.54 The LRA 2002 provides the framework for the creation of an ambitious electronic conveyancing model.<sup>28</sup> The Act envisages that all aspects of a conveyancing transaction will occur electronically and that the creation and registration of interests will take place simultaneously. The LRA 2002 did not provide detailed legislative provisions for the introduction of electronic conveyancing, but provided the framework and contained a flexible rule-making power.
- 1.55 Since the LRA 2002 was enacted, several significant steps towards electronic conveyancing have been taken. However, an electronic conveyancing system which implements the model envisaged in the LRA 2002 has not been developed and in 2011 Land Registry put the development of electronic conveyancing on hold.
- 1.56 It is clear that at the current time a number of practical barriers stand in the way of a system of electronic conveyancing that provides for simultaneous completion and registration of an interest, (the model envisaged in and permitted by the LRA 2002). We consider that simultaneous completion and registration should remain the goal of electronic conveyancing, but we have concluded that it is not practical to move directly to such a model from paper-based conveyancing.

<sup>28</sup> Chapter 20.

- 1.57 We consider that for electronic conveyancing to become a practical reality it is necessary to step back from the original goal. From the experience of other jurisdictions, we believe that removing the requirement of simultaneous completion and registration will open up avenues along which electronic conveyancing can develop. We provisionally propose that the requirement of simultaneous completion and registration should be removed from the LRA 2002. We also consider the legal process by which electronic conveyancing should be able to be introduced, and then how decisions to phase out paper-based conveyancing may be made. Additionally, we make proposals to ensure that overreaching – a process whereby certain interests in land (beneficial interests under a trust) are removed from the land and transferred into the proceeds of sale – continues to operate in the context of electronic conveyancing.

### **ADVERSE POSSESSION**

- 1.58 The operation of adverse possession or “squatting” in registered land was subject to significant reform in the LRA 2002.<sup>29</sup> In particular, reflecting the idea of title being acquired by registration, the Act removed the ability of an adverse possessor to obtain title to registered land merely through possession. Instead, the Act introduced a wholly new procedure under which a person who has been in adverse possession of land for ten years can apply to become the registered proprietor of the land. If the application is successful, then the registered proprietor’s title is transferred to the adverse possessor. When an application is made, notice of it is given to the registered proprietor (and certain other parties, including the holder of a registered charge) who can oppose the application. If the application is opposed, then generally it is rejected and the registered proprietor is given two years to bring possession proceedings against the adverse possessor. If, however, the applicant’s claim falls within one of three “conditions” the adverse possessor will be registered as proprietor notwithstanding that the application is opposed.
- 1.59 The operation of this procedure in respect of adverse possession claims is of considerable practical significance. In our Consultation Paper, we consider whether there are aspects of the procedure that could be improved or clarified, including the three conditions when an adverse possessor can be registered despite an objection. We do not, however, propose any fundamental changes to the framework governing applications or to the policy that led to the changes introduced by the LRA 2002.
- 1.60 We also make provisional proposals designed to clarify the relationship between the procedure under the LRA 2002 and the general law of adverse possession.

<sup>29</sup> Chapter 17.



## **TRIBUNAL JURISDICTION**

- 1.61 One of the innovations introduced by the LRA 2002 was the creation of the office of Adjudicator to HM Land Registry to provide a completely independent forum for the adjudication of land registration disputes.<sup>30</sup> The functions of the Adjudicator have passed to the Land Registration Division of the Property Chamber of the First-tier Tribunal. The Tribunal (like its predecessor) operates primarily to determine disputes arising out of applications made to Land Registry which cannot be resolved by agreement. Disputes are generally referred to the Tribunal by Land Registry.
- 1.62 In our Consultation Paper we consider the jurisdiction of the Tribunal when an objection is lodged to an application to determine a boundary under section 60(3) of the LRA 2002.<sup>31</sup> The Tribunal's jurisdiction in this area was recently considered by the Upper Tribunal.<sup>32</sup> The Upper Tribunal held, on the facts of the case before it, that upon finding that the application to determine the boundary should be rejected because the plan was inaccurate, the Tribunal did not have jurisdiction to decide where the boundary did lie.
- 1.63 The full implications of the Upper Tribunal's decision – and the extent to which the Tribunal has jurisdiction to determine the exact position of the boundary upon a reference under section 60(3) – are unclear. We provisionally propose that, on any reference under section 60(3), the Tribunal should have an express statutory power to determine where a boundary lies. We consider that this policy will reduce lengthy litigation between neighbours, diminish the stress and inconvenience of parties as well as reducing costs to the parties and to courts and tribunals.
- 1.64 Additionally, we invite views as to whether the Tribunal should be given an express statutory jurisdiction in cases that are referred to it in two other matters: first, to determine what remedy should be awarded to a person to satisfy a claim to proprietary estoppel;<sup>33</sup> and secondly to determine the extent of a person's beneficial interest under a trust.

## **IMPACT OF REFORM**

- 1.65 We ask consultees to share with us their experiences of the operation of the current law in practice and any difficulties that they have encountered, including details of the time and costs involved in complying with the law. We also ask consultees to share their views on the impact of our provisional proposals for reform and whether they would result in costs savings, or additional costs.

<sup>30</sup> Chapter 21.

<sup>31</sup> Boundaries in registered land are general boundaries unless they have been determined. We discuss the general boundaries rule in Chapter 15.

<sup>32</sup> *Murdoch v Amesbury* [2016] UKUT 3 (TCC).

<sup>33</sup> Proprietary estoppel is an equitable principle through which a person obtains a claim against an owner of an estate in land, which may lead to the creation of rights in the land in that person's favour.

## **RESPONDING TO THE CONSULTATION**

- 1.66 The Consultation Paper, this summary and an optional response form are available on our website at <http://www.lawcom.gov.uk/project/updating-the-land-registration-act-2002/>. We invite consultation responses by 30 June 2016.
- 1.67 If you wish to respond to all or any of the proposals and questions in the Consultation Paper, please send your response:
- (1) by email to [propertyandtrust@lawcommission.gsi.gov.uk](mailto:propertyandtrust@lawcommission.gsi.gov.uk); or
  - (2) by post to Jennifer Boddy, Law Commission, 1st Floor, Tower, Post Point 1.53, 52 Queen Anne's Gate, London SW1H 9AG.
- 1.68 If you send your comments by post, it would be helpful if, where possible, you could also send them electronically (for example, by email to the above address, in any commonly used format).
- 1.69 For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality of consultees' responses, please see page iii of the Consultation Paper.

31 March 2016