RESPONSE TO B.I.S. CONSULTATION DOCUMENT

"Introduction of a Land Registry Service Delivery Company"

SOCIETY OF LEGAL SCHOLARS
PROPERTY LAW SECTION

1. The following response to the BIS Consultation Paper "Introduction of a Land Registry Service Delivery Company" is prepared by the Property Law section of the Society of Legal Scholars. All Property Law members were invited to contribute to this response, which reflects the consensus of the individual contributions.

2. The Society of Legal Scholars is a learned society whose members teach law in a University or similar institution or who are otherwise engaged in legal scholarship. Founded in 1909, and with around 3,000 members, it is the oldest as well as the largest learned society in the field. The great majority of members of the Society are legal academics in Universities, although members of the senior judiciary and members of the legal professions also participate regularly in its work. The Society's membership is drawn from all jurisdictions in the British Isles and also includes some affiliated members typically working in other common law systems. The Society is the principal representative body for legal academics in the UK as well as one of the larger learned societies in arts, humanities and social science.

PART A. GENERAL OBSERVATIONS

The Society of Legal Scholars does not have any philosophical or political leaning towards any particular model. But we are keen to ensure that a change of status does not diminish customer experience or undermine confidence in the register.

Financial Pressures

3. The Consultation Paper proposes for consideration that HM Land Registry move from a Trading Fund status to separate entities: a civil service Office of Chief Land Registrar, and a Service Delivery Company (para 34). The transition is sought with a view to bringing a greater focus on service delivery, greater flexibilities to operate around pay, recruitment and possibly provide other services (para 28). It is envisaged that the reform will be, amongst others, a means to increase efficiency and reduce cost to customers (paras 24-26).

4. The proposal is for a service delivery company limited by shares. The directors of the service delivery company will have a duty to advance the interests of the company.

5. We anticipate that within the new company form, there are likely to be even stronger pressures than currently exist to generate efficiencies. We anticipate that the company form will be more susceptible to financial pressures. We anticipate that there will be an even more irresistible drive to raise income and diminish costs than under the current trading fund structure under which surpluses are returned to the

Treasury (£98.8 million in 2012-13). We anticipate that there will be greater capacity to respond to that drive since the company will operate outside civil service and trading fund regulations. Financial pressures are likely to increase even further in the event that the current consultation models for the 'transition phase' lead to a later full-scale privatisation of the Land Registry.

6. From those foundational observations, we expect that there will be some potential pressures that are not necessarily in the best interests of property owners and Land Registry customers. In particular, we anticipate that the company's drive to minimise costs could have an adverse effect on the experience of those who deal with the Land Registry and could jeopardise the integrity of the register and could prejudice the title guarantee currently provided by indemnity. The fact that, unlike a company, the Land Registry does not intentionally seek to make a profit destined for private parties is a significant factor in explaining the historically strong (and continuing) sense of public trust in its neutrality and integrity.

Customer Experience & Accountability of the Company

7. Because the registry's functions will be split between the OCLR and the service delivery company, we anticipate that the company's drive to minimise costs will create a potential pressure to exploit any actual or imagined lack of precision in the artificial demarcation of functions between the two bodies. In particular, we anticipate that the company will be under potential pressure to minimise costs by passing the work burden onto others whenever possible. This effect would be exacerbated by the proposed division of functions under which the OCLR has responsibility for "keeping" the register of title, but the "maintenance" of the register would be the responsibility of the service delivery company. The difficult and hazy line of demarcation between those functions would create an environment which invites the respective entities to grasp or deny jurisdiction as it suits best.

8. Where there are shared functions, we anticipate the company will come under potential pressure to seek to pass work onto the OCLR. The risk is that the OCLR will be burdened with work that could have been handled expeditiously by the company without referral. This would impair the customer experience. The public would not be well served if every customer with an unusual case were refused processing by the company and, in order to get the burdensome customer off its books, sent off to a separate organisation. That would add to delay in processing for that customer. If the OCLR sent the matter back on the basis that it was outside its remit, then the customer is likely to suffer delay and a sense of being pushed around with nobody willing to take responsibility. This in turn could generate an excessive workload for the OCLR due to repeated batting backwards and forwards which could amplify delays. The necessary corollary of dividing the functions will be arguments over the dividing line between the OCLR and Service Delivery Company. Apart from the problem of delays, it will also be necessary to set up and operate the new architecture for proper adjudication of these disputes about the respective functions of the two bodies. These problems do not arise under the current unified structure.

9. We anticipate that the company's drive to minimise costs will create a potential pressure to lower the standards of service to customers. Without an effective sanction for poor performance by the company there is difficulty in applying the normal

financial accountability experienced by private non-monopoly companies to improve performance. These will be all the more pronounced as the company is to have a legal monopoly in the provision of the services, and there will be a limited field of repeat players who experience multiple interactions as consumers. While the OCLR might have oversight powers and power to recommend or direct changes in practice, it will not have immediate management of employees that is found in the current unified structure. We anticipate that the company's drive to minimise costs might lead to its resistance to implementing costly improvements recommended by the OCLR. The sanction mentioned in Consultation Paper is the termination of the service contract. We anticipate that such an enormous step against a company that has committed to massive infrastructure investment is unlikely to be effective as a routine threat on account of its disproportionate effect.

10. The Land Registry in its current form consults frequently and widely with other interested parties, including the judiciary, practitioners, the Law Commission and other land registries on difficult matters of practice and policy. We anticipate that given the cost pressures the company will have little appetite to carry out these valuable activities that ensure its responsiveness to stakeholders and market demands.

11. The Land Registry currently provides expert advice to customers and their lawyers on how particular problem situations would be dealt with by the Registry. It is provided by very well qualified and experienced Land Registry caseworkers, lawyers and local land registrars. This is borne out by the customer satisfaction rating of 98%. This service helps customers in a variety of ways. First, it avoids the cost and delay that would occur if an application were made, rejected, and resubmitted with various amendment until the acceptable version were stumbled upon by trial and error. Secondly, it centralises expertise within the registry and avoids the fragmentation of knowledge amongst private external agencies that submit property dealings. Thirdly, it helps avoid defective applications from becoming entered on the register. We anticipate that the potential pressures on the company arising from the drive to minimise costs might lead to the loss of all of these advantages of the current, unified structure.

12. In dealing with all but the simplest applications, the Land Registry's staff are involved in significant quantities of quasi-judicial decision-making. This might be at a low level, but the decisions made by Land Registry staff have a legal effect. If the Land Registry enters a new owner's name or a mortgage, easement or restrictive covenant on the title to a property then the content of the owner's rights and those of interested third parties are necessarily affected. The Register is legally deemed to be conclusive under section 58 of the Land Registration Act 2002. There are corrective processes that can be used to deal with erroneous entries, but rectification may not always be possible and even if the power to rectify is available it will not always be ordered. It is therefore important that entries made on the Register are correct from the beginning.

13. The decision to make an entry or not is often far from straightforward. For example, an application for first registration of a plot of land might require a Land Registry employee to enquire into overlapping or underlapping boundaries with neighbouring plots of land, investigate claims based on adverse possession, and query gaps in the chain of title and so on. This is not merely a tick-box exercise. Instead,

highly experienced and trained employees have to engage with complex legal and factual enquiries before they can decide whether or not to make an entry on the Register, and in what form. The allocation of land and the resources attached to it have always been viewed to be an integral public function, no matter what political system or form of government exists. This is partly why so many national constitutions (including the European Convention on Human Rights incorporated into UK law by the Human Rights Act 1998) contain explicit property protections preventing the State from interfering with private property without a public interest justification and the payment of appropriate compensation.

14. The current trading fund structure recognises and respects the significant role played by the State in not only allocating land but also recognising and protecting existing proprietary entitlements. This relationship between the State and its citizens is an important element of government. The current trading fund structure of the Land Registry respects the nature of this complex governmental relationship with citizens. Land Registry employees are civil servants, based in this jurisdiction, and thus viewed as representatives of the State. The Land Registry itself is a creature of statute and as such bounded by statutory controls that are potentially susceptible to judicial review. As a government trading fund, the Land Registry remains subject ultimately to ministerial accountability and thus (in an attenuated form) to democratic accountability via Parliament.

15. The proposed alternative structures would risk diluting not only the significance of the State's involvement in the recognition and enforcement of land ownership, but would also risk diluting the ultimate democratic accountability of the decisions undertaken by the service provider. If one of the consultation structures were to be pursued, it would be vital for market confidence that the business of registering land in England and delivery services take place within the jurisdiction, rather than being outsourced to overseas subcontractors. As part of the Critical National Infrastructure, we suggest that the site of the register, and the location and supervision of the employees who make the entries in it, is of vital national interest. Similarly, the identity of majority shareholders would be highly significant and a matter of national interest. Not only would the identity of shareholders in the service delivery company be a matter of national interest, but it might also affect market confidence in the delivery of the service of maintaining the register. It would be feasible under the current consultation models for significant conflicts of interest to arise between the interests of shareholders and those of business users and the wider public.

Integrity of the Register

16. We anticipate that the company's drive to minimise costs will create a potential pressure to find savings which will extend to the cost of maintenance of the register itself. The minister has confirmed that the guiding principle will be the protection of the integrity of the register and the Consultation Paper recognises that preserving the integrity of the register is important and is not to be compromised; it points out that obligations about quality will be included in the service contract, that the OCLR will define how the register is kept, will set working parameters, will prescribe forms and give directions, and will oversee registration. Nevertheless, there is the potential pressure to exploit and take advantage any actual or imagined gaps or lack of precision in such stipulations from the OCLR. We anticipate that there will be

practical opportunities for the company to escape from existing stipulations. For example, new varieties of transaction are frequently developed by the property market that fall outside the existing rules. We also anticipate that there will be opportunities to save effort by liberal exercise of the general discretionary power that the company will possess to accept applications which are less than perfect. That would increase the likelihood of errors becoming entered on the register to the prejudice of the true property owner. This would be to the significant detriment of consumer and lender confidence in the accuracy and integrity of the register.

17. We noted above that we anticipate that the company's drive to minimise costs will create a potential pressure to pass the work burden onto others whenever possible; another area where we anticipate this to occur relates to the shifting of burdens onto registration users. There have been previous proposals from a joint report of the Land Registry and the Law Commission to set up a regulated system for authorised users to play a direct role in updating the register (Law Com 271) which contained detailed regulation for registry oversight. The emphasis on delivering digitisation, the recognition of substantial investment in new IT networks, and the references to automation (para 35), open up the prospect of passing the responsibility for register "maintenance" to users. If, as we anticipate, the company's drive to minimise costs will create a potential pressure to find savings which extend even to the costs of monitoring how users maintain the register in this model, then there is a much increased risk to the integrity of the register and the system's vulnerability to property fraud. In particular, there may well be significant problems posed by the involvement of inexperienced non-repeat players who do not fully appreciate the significance of the questions asked or answers given when required to update the register. The Land Registry has a considerable institutional memory which enables employees to seek internal advice on complex issues. Outsiders do not have access to this type of expertise and may be not only at risk of creating financial liabilities for themselves, but also affecting third party rights and adversely affecting the integrity of the register itself. The inherent risk is that complicated points are not detected and filtered out at an early stage, but lead to more serious problems and liabilities later on.

Indemnity

18. The Consultation Paper states that indemnity will continue to be state backed. We are pleased to see that commitment. But as it stands that is not sufficient and we would like to see it reinforced by other specific commitments concerning indemnity. Without such reinforcement, we anticipate widespread dissatisfaction with the guarantee of register reliability, loss of appeal to property market participants, and the prospect of increased costs from seeking the reassurance of private indemnity insurance.

19. Under the current structure, HM Land Registry administers the indemnity applications. Land Registry was established as a Trading Fund in April 1993. As such it may maintain reserves such as the Indemnity Fund which was established in its current form in 1993. Since 2011, that fund represents the amount calculated by independent professional actuaries as being required to fulfill the statutory duty imposed on Land Registry to indemnify registered title in England and Wales. Following an actuarial review, it was recommended to increase the fund to £26.8 million as at 31 March 2012. It is from this fund that indemnity claims are paid, in the

first instance. If it were to prove insufficient then recourse would be had to central government funds. Effectively there is currently a primary source and a secondary source against which indemnity can be charged, but ultimately the cost of indemnity payments is always kept within government.

20. If the proposal is to replicate this primary and secondary fund model when the Land Registry is separated into OCLR and the service delivery company, so that it must set aside an indemnity fund, then again there will be effectively two sources of indemnity, with the company as first call, and central government as the state guarantor. Following the separation, we anticipate that the company's drive to minimise costs could create two potential pressures with adverse effects. First, we anticipate that it would create potential pressure on the company to drop the size of the fund appropriated to future indemnity payments as it would represent dead capital. Secondly, we anticipate that it would create potential pressure on the company to resist indemnity claims. The effect of pressure to resist indemnity claims has been well documented in other countries, even when administered by public bodies, and has received widespread condemnation (see, for example, S R Simpson *Land Law and Registration* and D J Whalan *The Torrens System in Australia*). When the expertise, resources, deep pockets and the ability to delay are deployed in response to an indemnity claim, there is a risk that the citizen may simply concede defeat and give up the fight, thus potentially losing property rights without compensation.

21. Under the current structure, the Land Registry has the right to pursue recoupment from third parties of the amounts paid out in indemnity by exercising the rights of action mentioned in Land Registration Act 2002, schedule 8, para.10(2). The exercise of that power to seek recoupment is currently constrained by judicial review. During the passage of the Land Registration Act 2002 through the House of Lords, the power of recoupment was also the subject of a particular assurance by Baroness Scotland that recoupment would only be sought against somebody who was at fault through fraud or negligence. If the proposed separation of Land Registry functions is to give the power of recoupment to the service delivery company rather than the OCLR, then we anticipate that the company's drive to minimise expenditure will create a potential pressure to seek recoupment outside these constraints. That would significantly alter the distribution of responsibilities between the service provider and practitioners, and would alter the behaviour of those involved in property dealings to the detriment of customers by encouraging new and undesirable defensive practices.

22. All of the potential pressures on indemnity could be avoided either by retaining the current, unified structure of the Land Registry, or by keeping the indemnity fund and its administration within the exclusive control of the OCLR and giving the OCLR exclusive control over any recoupment action.

Conclusion

23. There are critical risks attending the proposed separation of the land registry functions. They are not addressed in the Consultation Paper. In particular, the proposals do not sufficiently ensure that the registration system is isolated from commercial pressures so that the current levels of confidence in the integrity, neutrality and accuracy of the Land Registry could be retained.

24. We anticipate that the proposals would not contribute to greater ease of registering, better efficiency and improved customer benefits (p.12) because:

- confidence in the current structure and status quo at the Land Registry seems to be unimpeachable, with 97% satisfaction in the year 2012-13, and 99% satisfaction in the final three months of this period;
- the Consultation Paper does not pinpoint any particular aspects of the service which need to be improved;
- the Consultation Paper takes the view that the proposals "would have a very limited impact on customers" (p.14) who would "see little or no change" (p.19); and
- we have identified important areas in which the proposed system would be less convenient, less efficient, and cause deterioration in customer experience.

25. We have demonstrated that there are strong policy reasons for continuing the current unified structure in public ownership and control on the basis that:

- the land register is listed as Critical National Infrastructure;
- the current model assists in preserving the perception of neutrality and sustaining market confidence in the operation of a key driver of domestic economy;
- the current model assists in maintaining strong institutional accountability;
- the satisfaction figures show that its public status has not jeopardised a highly-rated customer experience;
- the register's integrity and the title guarantee are, as we have explained in the detailed reasons, substantially dependent on administration by a unified public authority.

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Dr Emma Waring
Mr Christopher Bevan
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Mr Robin Lister
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18 March 2014.

PART B. THE SPECIFIC QUESTIONS

1. Do you agree that by creating a more delivery-focused organisation at arms length from Government, Land Registry would be able to carry out its operations more efficiently and effectively for its customers?

No. The current legal structure of the Land Registry, as a government trading fund, already allows for sufficient operational flexibility and generates particularly high levels of customer satisfaction.

2. Do you agree that the OCLR should retain exclusive responsibility for the functions set out in paragraph 49?

Any division of the type envisaged is likely to be a source of contention between the proposed OCLR and the service delivery company. As noted in paras. 7 - 15 of our response, there is a danger that responsibilities will fall between two stools and this is likely to cause difficulties for the two entities and for customers.

3. Are there additional functions that should be retained in the OCLR? Please explain what and why.

See answer to Q2.

4. What are your views in respect of the proposals for shared functions set out in paragraphs 50-51?

See answer to Q2.

5. What are your views on the proposed approach to service delivery company functions in paragraph 52?

See answer to Q2. We are also concerned that it is not accurate to portray the vast majority of functions relating to land registration as 'administrative in nature.' Even seemingly simple applications can raise complex legal issues that require an element of quasi-judicial decision making by Land Registry employees. See paras. 11 - 13 of our response.

6. Do you agree that the overall design provides the right checks and balances to protect the integrity of the Register and safeguard the provision of indemnities and state title guarantee? If not, please state your reasons why not.

No. See paras. 16 - 22 of our response.

7. Would you be comfortable with non-civil servants processing land registration information provided they do so within the framework set out by the OCLR through the service contract? If not, please explain your reasons why not.

For this question it is important to understand its scope. It refers to non-civil servants carrying out the function of “processing land registration information”. As noted earlier in paras. 11-13 of our response, the functions which are proposed to pass to the service delivery company go significantly beyond “processing ... information” and involve quasi-judicial decision making. We would not be comfortable with those functions being carried out by non-civil servants. As noted earlier in paras. 14 - 15 of our response We think that ultimate responsibility must rest within government and thereby provide the public with a sense of democratic accountability via Parliament.

8. Are there any situations, other than those set out in this consultation, in which you would want to see an escalation process to the OCLR? Please explain what and why.

9. Do you agree with the proposed approach for handling complaints, as set out in paragraph 56? If not, please explain your reasons why not.

10. Do you agree with the escalation process set out for objections in paragraph 56? If not, please state your reasons why not.

11. Do you think the Rule Committee should include a representative from the service delivery company? Please explain why or why not.

12. The Data Protection Act would protect personal data that is provided to the service delivery company. Would you like to see any protections beyond this? If so please explain what and why?

We understand that much of the information held by the Land Registry is exempt from the disclosure provisions of the Data Protection Act 1998 because of the exception contained in section 34. There would therefore need to be particularly strong protections against the misuse and mishandling of data by any service delivery company as the sale of private information would be highly detrimental to public confidence in the integrity and neutrality of the operations of the Land Registry or delivery company.

13. What are your views on the proposed system for safeguarding customer service issues and the continued role of the Independent Complaints Reviewer?

See paras. 7 - 15 of our response.

14. Do you think there is a difference between the opportunities and risks depending on whether operational control over the service delivery company is entrusted to Government or a private sector company? If yes, what?

Yes. The opportunities are not identified with sufficient specificity in the Consultation Paper for us to make a judgment on them. The risks described in paras. 7 - 22 of our response, on the other hand, would be lower if operational control of service delivery

passed to government rather than the private sector. They would be would be avoided altogether by retaining trading fund status.

15. Do you think there is a difference between the opportunities or risks depending on whether the service delivery company is owned by the Government or a private sector company or both? If yes, please explain your reasons.

Yes. The opportunities are not identified with sufficient specificity in the Consultation Paper for us to make a judgment on them. The risks described in paras. 10 - 22 of our response would be lower if ownership of the service delivery company passed to government rather than the private sector. They would be would be avoided altogether by retaining trading fund status.

16. What do you think are the constraints and dependencies for Land Registry's successful delivery of the business strategy?

This is not the area of our expertise.

17. Do you have any other comments on the proposals contained in this consultation?

See paras. 3 - 25 of our response.

18. Do you have any other comments that might aid the consultation process as a whole? Please use this space for any general comments you may have. Comments on the layout of this consultation would also be welcome.

We feel that the consultation process would be aided by an extension to the short deadline. We feel that the consultation process would be aided by giving wider publicity to the consultation paper. We feel that the consultation process would be aided by a fuller statement of the perceived potential opportunities that would come from separation of functions and private ownership.