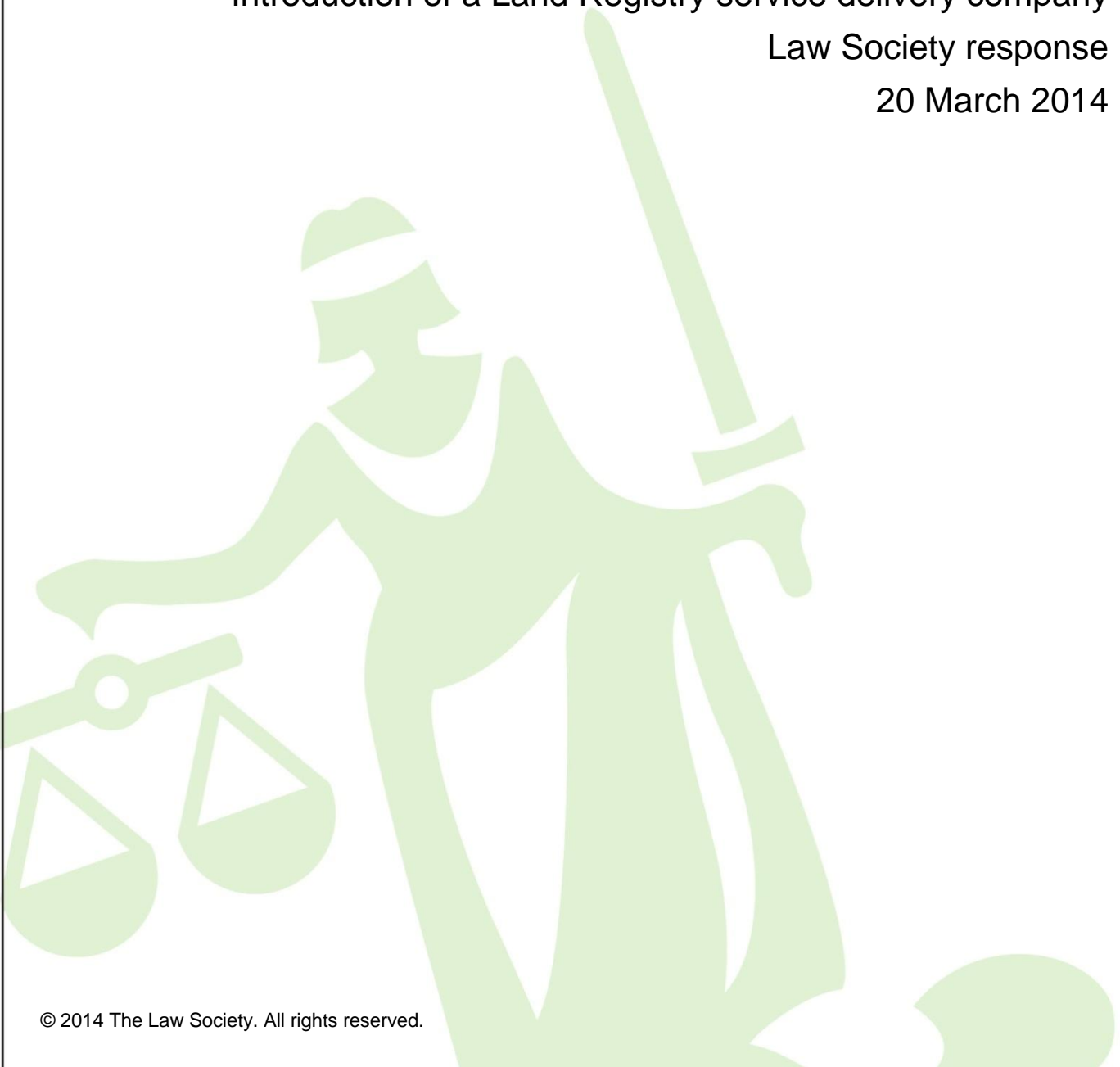




The Law Society

Department for Business, Innovation and Skills  
Consultation paper BIS/14/510:  
Introduction of a Land Registry service delivery company  
Law Society response  
20 March 2014



## Introduction

1. This response has been prepared by the Law Society of England and Wales (“the Society”). The Society is the professional body for the solicitors’ profession in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and the regulatory bodies and has a public interest in the reform of the law.
2. Conveyancing and property related work is an important business activity for our members, involving as it does, approximately one fifth of the profession. Both commercial and residential conveyancing involve dealings with the Land Registry. Land Registry maintains property records which may be used in other kinds of legal work – litigation, corporate, company, tax, family wills and probate etc. Solicitors constitute one of the Land Registry’s main user groups.
3. The Society welcomes the opportunity to respond to the Department for Business, Innovation and Skills (BIS) consultation paper, ‘Introduction of a Land Registry service delivery company’.
4. The broad proposal set out in the consultation paper is that Land Registry be re-structured so that a small policy making and oversight part remains within government (the Office of the Chief Land Registrar (OCLR)) and the remainder becomes a different entity sitting outside government (the Service Delivery Company (SDC)). This SDC may be partly privatised from its inception, or partly or fully privatised at a later stage.

## Executive Summary

5. All organisations can benefit from a review of the scope of the services they provide, the processes they use and their governance structure. Given the drive towards greater use of digital processes, the Government's 'Digital by Default' agenda and the potential scope and reach of 'Big data', we understand why BIS might want to review Land Registry services and structure...
6. However we have concerns about the risks and potential results of what is proposed in the consultation paper. In this paper and the recent consultation paper of Land Registry<sup>1</sup>, the current legislative constraints are portrayed negatively and yet they also provide benefits, namely the framework for the transparency and accountability of Land Registry activities. This framework is important to the market.<sup>2</sup>
7. Whilst we do not have detailed knowledge of all of the current internal processes and structures of Land Registry, we are aware that our members are broadly satisfied with the service they currently receive. Proposing that Land Registry markedly changes the method of service delivery, without supplying more detailed information about what is proposed and how this might occur, makes it difficult for the Society to provide informed comment.
8. The Law Society does not have any philosophical or political leaning towards any particular structural model. However, we are keen to ensure that any change of Land Registry's status does not undermine the integrity of the Register for all users, including government, as Land Registry is part of the Critical National Infrastructure. We are concerned that the proposals for change could undermine the integrity of the Register and result in increased opacity, an increase in process and costs.
9. The importance of the integrity of the Register should not be underestimated. It is crucial that this integrity is maintained. The functions of granting and validating legal title must be carried out impartially. Any element of privatisation has the capacity to introduce concerns about conflicts of interest and undermine that integrity. Full or

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<sup>1</sup> Land Registry: Wider Powers and Local Land Charges consultation:

<http://consultations.landregistry.gov.uk/consult/ti/LLC1/consultationHome>

<sup>2</sup> See, for example, BNP Paribas Real Estate, *Guide to Investing in London 2013*:

[http://www.realestate.bnpparibas.co.uk/upload/docs/application/pdf/2013-10/investing\\_in\\_london\\_guide\\_2013\\_bnp\\_paribas\\_real\\_estate\\_uk.pdf](http://www.realestate.bnpparibas.co.uk/upload/docs/application/pdf/2013-10/investing_in_london_guide_2013_bnp_paribas_real_estate_uk.pdf)

partial privatisation could lead to the imposition of additional and more complex processes with resultant delays and increased costs. This in turn could have potentially adverse economic consequences and detrimentally affect the UK's position in the 'registering property' section of the World Bank's 'Doing Business' report.

10. England and Wales, and London in particular, attract a disproportionately high level of international property investment. Part of the United Kingdom's attraction as a 'safe haven' for property investment is the fact that the rule of law underpins the system. The investigation and registration process have integrity and are reliable in a way that many other countries cannot begin to emulate.
11. The rationale for the split of policy making from delivery has not been elucidated. The proposals for some functions to be split between the OCLR and the SDC, and for other functions to be a shared responsibility for both the OCLR and the SDC risks creating duplication, an increase in administration and an inward rather than outward facing focus.
12. It is not clear that the OCLR would have sufficient regulatory control over the SDC to provide the assurances required in terms of customer service and the integrity of the Register.
13. We are concerned about the ability of the OCLR to be able to effectively manage, regulate and control the SDC, particularly if the SDC is privatised. The Public Accounts Committee ('PAC') recently said that *"Government is clearly failing to manage performance across the board, and to achieve the best for citizens out of the contracts into which they have entered."*<sup>3</sup> This clearly presents a risk.
14. We are also concerned that other non-registration services, which have no statutory controls on prices, could become the most important part of the business to shareholders of any privatised entity. This could result in resources being diverted to these parts of the business rather than being invested in core registration services.

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<sup>3</sup> Public Accounts Committee, 47th Report, 26 February 2014:  
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77702.htm>

15. If primary legislation is required to set up the new structure this presumably could be used to procure a trading or operational model in any such form as the Government sees fit. Land Registry's functions do not necessarily need to be split in the manner suggested or at all.
16. We assume that much investigation, research and analysis has been carried out in order to arrive at the options proposed but this work has not been set out in the consultation. The Government needs to be more specific about the benefits for the public of the proposals, particularly in view of the inherent risks. Many parts of the paper state that users "should see little or no change" as a result of the split but this of itself does not support the proposal for change. Benefits for users and the public need to be elucidated.
17. If Government is determined to proceed with the split and the setting up of an SDC of some kind, of the three options proposed the 100% government owned company would be the most acceptable, particularly if it were possible to give some assurances, preferably in terms of a commitment in legislation, not to sell shares to the private sector either, at all, or for at least a number of years. This would allow an analysis of the operation to take place and revisions to be made before any such sale occurred.

## Consultation questions

18. The title of the consultation paper is 'Introduction of a Land Registry service delivery company': it seems to assume that an SDC should be set up. It puts forward three alternate structures. All but the first of the consultation questions assume that an SDC will be set up. Our responses may address the questions posed as though we accept the proposals. We remain unconvinced and our responses should be read in this context.

### Question 1

**Do you agree that by creating a more delivery-focused organisation at arm's length from Government, Land Registry will be able to carry out its operations more efficiently and effectively for its customers?**

19. No. The current Land Registry appears to be broadly delivery focused and our members praise its efficiency and expertise.
20. The consultation paper seems to suggest that the SDC will automatically be more efficient than a trading fund. The creation of an organisation at arm's length from Government does not of itself mean that it will be more efficient and effective.
21. The full rationale for the splitting of functions has not been supplied. The paper states that BIS considers that the Land Registry would benefit from a separation of policy and delivery, but does not explain why. Such separation could lead to overlap of functions, confusion, excess administration and cost, particularly in the short term.
22. The paper underestimates the importance of the Land Registry's role in the economy of England and Wales. This is achieved by its closeness to Government, by the Government's guarantee of title and by the expertise of its staff. There is a significant danger that the private sector will not have the same cultural understanding of, or financial interest in the public interest side of the operation. There is a danger that attempts to gain "efficiency" will in fact mean that Land Registry will have fewer and less well-qualified employees, and there may be a knock-on effect in terms of the quality of advice and judgement from Land Registry. This may, in turn, affect the integrity of the property market in England and Wales.

23. Cost savings could be made by not carrying out certain tasks or functions, or by carrying them out more efficiently. There are risks; any cost savings in the immediate term may result in higher costs in the future and an undermining of the integrity of the Register over time.

## **Question 2**

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

24. Yes. The reason that Land Registry was always part of the Ministry of Justice (MOJ) and that part of it still remains in MOJ (even though the remaining parts now report to BIS) is because of its judicial roles. The Lord Chancellor said recently:

*“Increasingly, this country is the jurisdiction of choice for international commercial disputes because a decision from a UK court carries a global guarantee of impartiality, integrity and enforceability.”*

25. The same may be said of the registration process here; England, and London in particular, is one of the main choices of location for property investment because of the impartiality and integrity of the land registration system.
26. The introduction to the consultation paper indicates that BIS has sought to mitigate concerns previously expressed by customers and stakeholders by designing the proposals so that the Office of the Chief Land Registrar (OCLR) is retained and invites comments on this feature.
27. As was highlighted when it was proposed that all of Land Registry would report to BIS rather than MOJ in 2011, it was not possible to transfer that part of Land Registry that had statutory judicial functions. It is unclear from the consultation whether what is proposed is an attempt to mitigate concerns expressed then, or whether it has proved impossible to transfer the whole of the operational function outside government.
28. The proposed retention of a small OCLR shows that there has been a recognition within Government that the role of the Chief Land Registrar ('CLR') needs to be set out in statute and needs to have defined powers to keep the Land Register, to grant Title where evidenced, to guarantee Title where registered on behalf of the state and,

crucially, to ensure that the system of land registration is carried out impartially and free from any conflicts of interest. By proposing that the CLR is maintained, BIS seems to have recognised that it would not be possible, suitable or desirable to pass these powers to a company and ultimately, the private sector. However we are not certain what the role of the CLR would be under the proposed new regime. This needs further explanation unless it is intended that it be identical to the current role.

29. In relation to the specific powers set out in paragraph 49, only the first two functions relate to judicial tasks and are limited in scope.
30. Provision of the state guarantee is not mentioned here as a key OCLR function. It is fundamental that the state guarantee is in no way interfered with or diminished by the proposals. The Government must continue to stand behind this.
31. Paragraph 41 of the consultation paper states that it is anticipated that any service contract would contain provisions to enable Government to take back delivery responsibility should the SDC fail to fulfil its terms of service. It is vital that the OCLR has the power to take back delivery responsibility within a short specified period to protect the public interest and to avoid any lacuna in the provision of the services.
32. It is stated in paragraph 43 of the consultation paper that the OCLR would have ultimate responsibility for the keeping of the Register. We would like to have more information about what that might mean in practice. The proposed distinctions between 'keeping' and 'maintaining' the Register appear strained and require more exposition. Similarly we would like to have more information about what OCLR's "overall control", as mentioned in paragraph 48, would involve.
33. We agree that the OCLR would need not only to define the "business rules", but also devise and implement the legal rules and practice in conjunction with the Rule Committee as described in paragraph 47.
34. Depending on the answer to this question, by proposing that the Chief Land Registrar is maintained, BIS seems to have recognised that it would not be possible, suitable or desirable to pass these powers to a company and ultimately, the private sector.



35. The proposal to set up the OCLR and the proposed continuation of the state guarantee are no doubt intended to provide some reassurance about the privatisation proposals. However, the lack of detail supplied about the nature and operation of the proposed division of functions and how the guarantee will operate provides little reassurance. The option of privatising or changing the trading fund status of Land Registry has been considered a number of times and we are not aware of any investigations that have recommended privatisation of its core functions.

36. The United Nations Seminar on Land Registration and Economic Development in Europe in 1993 concluded that:

*"The most successful division of responsibilities and functions between the private and public sectors leaves the private sector providing mortgages, estate agency services and lawyers providing independent legal advice but for those private sector agents to provide inexpensive, certain and dependable services to the citizen or business it is essential the State reserves to itself the impartial granting, validation, adjudication of title and the maintenance of the public land register."*

37. This seems to support the retention of a single entity to supply the registration service rather than the divided service proposed in the consultation. The Law Society continues to broadly concur with those views.

### **Question 3**

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

38. Please see our response to question 2.

39. The functions listed in paragraph 49 are stated only to be examples of the activities the OCLR would take exclusive responsibility for, not a comprehensive list. As a result it is difficult to know what might be 'additional functions'.

40. The state guarantee is not mentioned in paragraph 49 as a key OCLR function. However, as stated in our response to question 2, it is vital that the OCLR retains this function.

#### **Question 4**

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

41. Insufficient detail has been supplied about the separation of functions and the proposed operational model. As stated above, in the absence of full details about what is proposed as a result, we do not think that the case for separation has been demonstrated.
42. In particular there is insufficient detail about the separation of functions and the proposed operational model. In terms of sharing responsibility for certain functions between the OCLR and the SDC there is a danger of confusion and gaps between the respective responsibilities, together with duplication, excess administration and cost. Each entity's respective roles must be carefully prescribed and the operational parameters precisely crafted. Paragraph 50(c) implies that the SDC will not make any decisions in relation to certain functions or activities but it is not clear what functions or activities are meant. This needs clarification.
43. As explained in our response to question 2, the distinction between 'keeping' and 'maintaining' the register set out in the paper appears to have been devised to facilitate the concept of some retention of state control rather than what is required, which is a single monopoly register centrally operated under the aegis of the Chief Land Registrar.
44. It is unclear from the consultation paper whether, and/or which of the OCLR and the SDC will be liable for mistakes on the Register and which entity will take responsibility for preventing fraud.
45. In terms of the split of functions between OCLR and the SDC generally, we assume that there will be some kind of arbitration process if there is uncertainty over who carries out a particular function or a dispute between the OCLR and SDC over something to do with the Register. However, this is not made clear in the consultation paper.

## Question 5

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

46. Paragraph 52 states that "the vast majority of functions in relation to land registration are administrative in nature." However the nature of land registration is not, in our view, wholly akin to say Driver and Vehicle Licensing Authority registration where the changes made are broadly administrative and factual. Whilst there may be a case for saying that some of the functions of the Land Registry are 'administrative' in nature such as providing responses to searches, supplying copy documents or other information that is already registered, much of the work has a quasi-judicial nature that relates to establishing and registering title.
47. These quasi-judicial functions stem from the statutory position of the CLR and should not be dealt with by the SDC. Even if it were agreed that quasi-judicial decisions were referred to the OCLR, the proposed OCLR would need to be of a much larger scale than what appears to be envisaged to accommodate this.
48. Although there is insufficient information in the consultation paper so as to be able to establish the exact nature of the split in the work to be undertaken by the OCLR and the SDC, it appears to indicate that matters of a quasi-judicial nature would be the responsibility of the SDC. We are concerned that if such decisions are being made by an SDC, particularly a privatised SDC, its aim could be to pass risk and take shortcuts to maximise profits and dividends. A privatised SDC would be answerable to, and driven by, shareholders. If quasi-judicial decisions were to be made on commercial grounds, for example, where it is administratively cheaper to make one decision rather than another, confidence in the register may be eroded.
49. It had been understood until very recently that the SDC would be a company 100% owned by Government (the 'GovCo' option). However the consultation document now proposes three options for the SDC. These are:
- 1) The GovCo referred to above;
  - 2) An SDC jointly owned by the Government and a private sector entity;
  - 3) An SDC 100% owned by the Government but with devolved operations that would be carried out by a private sector company on behalf of the Government.

50. The consultation states that “beyond the transformation phase” Government will “review the ownership and control of the [SDC] in line with the policy on asset ownership...and consistent with the policy to continue to keep assets under review to ensure the best value for money for the taxpayer.” The inference from this is that whichever SDC is selected (assuming that one of them will be) increased private sector participation, or full privatisation, is a possibility.

51. If the SDC is not fully owned by Government presumably there would need to be a full procurement exercise. If the SDC were owned, for example, by a major IT company, a foreign registration service, a land and property data provider or a major current operator in the market, there may well be competition law concerns over the process. Government procurement exercises have been described as too lengthy and risk averse which can be damaging to the operation.

52. If it is the case that one of the three proposals will be implemented by Government we would be more minded to opt for the 100% GovCo but only on the basis that it contained sufficient safeguards within primary legislation to ensure that privatisation could not take place without further primary legislation. Any such further proposals should only be considered after a full assessment of the operation of the SDC, full consultation with users and a full analysis of the concerns, in the light of the experience of the operation of the SDC, that might arise if the shareholding were to be fully privatised.

## **Question 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.**

53. No. There are two major risks:

- the integrity of the Register
- the provision of indemnities and state title guarantee

### *The integrity of the Register*

54. The main concern in relation to core registration functions is the potential for the proposals to undermine confidence in the Register.

55. It is probably impossible to quantify the value of confidence in Land Registry or, conversely, the harm, if such confidence were to be lost.
56. Confidence in land and property relies on a land registration system administered with integrity and free from any conflict or perceived conflict of interest. This requires neutrality and independence: registration is not an activity that can easily be undertaken by a commercial entity. Even if it could, it is unlikely that the perception of it would be that it was sufficiently independent.
57. Part of the essential nature of a register of land is that it is trusted and can be relied upon in order to continue to provide the sound basis for the important economic role that property plays in the economy.
58. According to the Office for National Statistics, nearly 60% of the country's £7.3 trillion net worth is tied up in housing (this excludes the value of commercial property). The monopoly Register provides the information on which government, business, owners, lenders, landlords, tenants and prospective purchasers and many others, rely.
59. As the guardian of this monopoly Register, Land Registry is the repository of information that relates to a fundamental part of the economy and the tax base. It is therefore vital that the information that underpins the effective running of the property market has integrity and is wholly reliable. Part of the essential nature of Land Registry is that it must be trusted and be capable of being relied upon in order to continue to provide the sound basis for the important economic role that property plays in the economy.
60. Land Registry is part of the Critical National Infrastructure. If privatisation of some sort, or a stepping stone to privatisation, introduces any perception, that there could be a conflict of interest for the entity responsible for maintaining the Register, this may undermine confidence in the Register itself. Providing a role for the private sector company may therefore create a conflict of interest which may be damaging to the wider property market.
61. Part of the reason that customers have confidence in Land Registry is the quasi-judicial, independent and impartial manner in which decisions are made. This engenders and maintains confidence. If quasi-judicial decisions were to be made on commercial

grounds - for example, because it is administratively easier to make a quick decision rather than perhaps the 'correct' decision - this could lead to more regular challenges to the Register. Similarly, if operational considerations began to affect the registration - for example, if fewer notifications were sent out in circumstances where another may have a right to object in order to achieve targets and minimise costs, rights could be lost in the short term. This could also lead to more challenges to the Register.

62. Any increase in litigation, even if there is some, admittedly watered down, sort of state guarantee, could erode the integrity of, and confidence in, the Register. This could lead to people not trusting what is on the face of the Register. The Register and any data sets flowing from it would gradually lose usefulness once the integrity of the Register has become impaired.

63. There is the obvious danger here of private concerns overriding the public interest. It is not enough to rely on oversight by the OCLR to mitigate these concerns and risks. Any split in functions between the OCLR and an SDC could lead to concerns that the SDC's aim will be to pass risk and potentially to make 'efficiencies' or take shortcuts to maximise profits.

64. The OCLR would be unlikely to be in a position to control this effectively on the basis of past experience (see the Public Accounts Committee 47th report into 'Private contractors and public spending' 2014<sup>4</sup>). What protective mechanisms will there be to reduce the likelihood of this occurring and will the OCLR be in a position to regulate them effectively?

65. It is essential that there should be proper protective measures to prevent this occurring and the paper is silent on what these will be.

#### *The provision of indemnities and state title guarantee*

66. The OCLR remains ultimately responsible for the indemnity. This has to mean that the Government stands fully behind the OCLR in that regard. This is a crucial point for the successful operation of the property industry.

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<sup>4</sup> Public Accounts Committee, 47th Report, 26 February 2014:  
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77702.htm>

67. Without the state standing directly, comprehensively and firmly behind the Register, its efficacy and reliability may be called into question. Doubts of this sort could, over time, fundamentally undermine the purpose and function of the Register.
68. If a private company were to operate the Register, underpinned by a state guarantee, that would add an extra layer of cost and possibly process.
69. It may well be in this situation that the consumers confidence could be diluted as it is likely that the state guarantee would become conditional. Lenders may also lose confidence in the Register and may want to insure any actual or perceived increase of risk by taking out extra insurance. The process generally would be made more cumbersome and expensive and may lead to unintended consequences.

## **Question 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.**

70. No. The main concerns here are whether the service could be provided impartially by non-civil servants and the potential lack of efficacy of the OCLR to regulate non-civil servants.

71. The Civil Service Code (s10-15) sets out that civil servants:

- cannot favour or discriminate against a particular group
- are to provide information and advice objectively, and
- carry out responsibilities in a way that is fair, just and equitable.

72. As against this the PAC's report into 'Private contractors and public spending' this year states that *"contractors have not consistently demonstrated the high ethical standards expected in the conduct of public business."*<sup>5</sup>

73. The PAC has also recommended that:

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<sup>5</sup> Public Accounts Committee, 47th Report, 26 February 2014:  
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77702.htm>

*"The Cabinet Office needs to be clearer with firms which seek to win government contracts that they are expected to behave with the same standards of honesty, integrity and fairness that apply to the public sector itself."*<sup>6</sup>

74. It may be possible for non-civil servants to perform the truly administrative functions (and we think there are a far smaller number than seems to be implied in the paper) e.g. providing responses to searches, supplying copy documents or other information that is already registered, provided that they were held to the same standards of impartiality that civil servants are under. However, it is by no means clear how this might be achieved.
75. However, for any of the other services that have some element of decision making (of which there are a far larger number than seems to be implied) these need to be carried out by civil servants because of the quasi-judicial nature of these services.
76. For example, the current objections process appears to work satisfactorily. If, however, decisions at first instance were to be taken by employees of the SDC – non civil servants - this may increase the risk of staff being affected by business concerns such as saving money, meeting targets and saving process time, whereas civil servants have a duty to act impartially and objectively. It is crucial that the rights of third parties would be protected and procedures would be put in place to ensure that appropriate processes were not circumvented, for example that staff were not encouraged to send out fewer notices in order to meet targets. In the absence of such procedures, there would be risks to the rights of business and consumers.

## **Question 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.**

77. The role of, and steps to be taken by, the OCLR in the event of serious service failure or company failure by the SDC need to be elucidated.

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<sup>6</sup> Ibid.



### **Question 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.**

78. We agree generally that the Office of the Independent Complaints Reviewer (ICR) should be retained whatever the outcome of the consultation, even though the demands on this service are limited.

79. Land Registry appears to have an effective complaints service currently. Our members appear to be broadly satisfied with the service provided by Land Registry.

80. Where there are multiple complaints from one complainant that include both service and registration issues, there needs to be clarity as it is not clear whether these would be referred:

- to both the ICR and the OCLR for resolution independently, or
- to the OCLR with a referral on by them of the service issue for resolution by the ICR with the resolution being supplied to the OCLR who would provide the responses to all complaints to the complainant, or
- as immediately above but via the ICR.

### **Question 10**

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

81. Please see our response to question 9.

### **Question 11**

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

82. No.

83. Although it is proposed that the OCLR control and regulate the SDC in practice this is unlikely to be effective in practice. This year's PAC report demonstrates the potential difficulties the OCLR will have in regulating the SDC and says "*central government's management of private sector contracts has too often been very weak.*"<sup>7</sup> Ceding further control by giving a place on the Rule Committee to the SDC would be of no benefit.
84. Were the functions to be separated it may be that the Rule Committee might have a representative from the SDC not as a full member but as an observer, or with speaking, but not voting, rights. Part of the control and regulation of the SDC might be impacted by the information and so it would not be appropriate for them to have full representation on the Rule Committee.
85. There would also be the concern about private interests, unrelated to, and perhaps in conflict with, Land Registry's own best interests, being given a forum at the Rule Committee.
86. It is the case that information from the SDC should be given to the Rule Committee.

## Question 12

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

87. Yes.
88. Land Registry holds a range of information including personal financial details, information about changed relationship or mental status, and participation in trusts., This is potentially very sensitive data and appropriate restrictions over and above what is in the DPA are likely to be required, especially as it is not known to what purposes the data will be put . Nor is the nature of the contracts that those dealing with the service may be required to enter into, known at this stage.

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<sup>7</sup> Public Accounts Committee, 47th Report, 26 February 2014:  
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77702.htm>

89. This is an area where the retention of accountability on the part of Government and those with whom they may contract, or with whom they own shares in joint ventures, is very important.
90. Citizens and the business community appear to be content for this type of information to be held as it is currently by civil servants on behalf of Government.
91. If both the status of those holding the data, and the potential exploitation of the data, changes, the view taken is likely to be different and significant objections could be raised.
92. The commercial exploitation of this Land Registry data should be reviewed in the light of the concerns expressed recently in the NHS care.data project. The proposals to use data from the NHS have been deferred. The Guardian reported that:
- “The care.data project was promoted in two ways: we will use your data for lifesaving research, and we will give it to the private sector for commercial exploitation, creating billions for the UK economy. This marriage was a clear mistake: ...the public support public research, but are nervous about commercial exploitation of their health data.”*<sup>8</sup>
93. The Wellcome Foundation research on the same topic found that:<sup>9</sup>
- Some see immediate benefit in the realm of catching out fraudsters etc; but there is also cynicism that when the ‘government’ is involved, it will be looking to pay less or do less.
  - If commercial organisations are involved, members of the public feel they need to be on their toes to see if there is true gain to them, or just to those selling to them.
94. The public may have similar concerns around mental health data and other personal data held at Land Registry.

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<sup>8</sup> The Guardian, 21 February 2014: <http://www.theguardian.com/society/2014/feb/21/nhs-plan-share-medical-data-save-lives>

<sup>9</sup> The Wellcome Trust, *Summary Report of Qualitative Research into Public Attitudes to Personal Data and Linking Personal Data*, July 2013: [http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh\\_grants/documents/web\\_document/wtp053205.pdf](http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh_grants/documents/web_document/wtp053205.pdf)

95. The aim of maximising the re-use of data for the benefit of the wider economy must not be at the expense of data protection. There needs to be robust control mechanisms, especially if there is private ownership of the company where the data could provide important corporate benefits to the owners of the company. There is a risk that there will be parallels with the recent sale of postcode information as a result of the privatisation of Royal Mail. Concerns have recently been expressed by the Public Accounts Committee (PAC) about the inclusion of the Postcode Address File in the Royal Mail flotation. The PAC chairman said:

*"The sale of the PAF with the Royal Mail was a mistake. Public access to public sector data must never be sold or given away again."*<sup>10</sup>

96. The PAC was also concerned about the credibility of assurances that had been given about continued access to the data for small businesses and others, now that it was in private hands, and said that the disposal of the data for short term gain would impede economic growth.

97. Care needs to be taken over these concerns for the Land Registry and Government needs to be explicit about its intentions.

### **Question 13**

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

98. Safeguarding customer service is an important issue. The impact of private provision generally, particularly where there is some element of a monopoly supply e.g. privatisation of water and energy companies, has caused some commentators to say that this has resulted in worse outcomes for consumers - often as result of price increases supply issues, lack of transparency and accountability.

99. There is no suggestion that there should be anything other than a single monopoly Register and we are wholly supportive of this. However there is, of course, potential for monopoly providers to have less incentive to provide a good service to customers as

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<sup>10</sup> BBC News, 17 March 2014: <http://www.bbc.co.uk/news/business-26605375>

there is no one to compete against. The drivers for private companies here are different to those where the services are operated by Government.

100. As suggested in our response to question 9 there is not sufficient detail about the safeguards for us to consider that they are adequate.

#### **Question 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?**

101. Yes this is fundamental.

102. As mentioned above there are serious risks if Government does not fully stand behind the Register. The support of Government forms part of the transparency and accountability that investors seek.

103. BNP Paribas' 'Real Estate Guide to Investing in London 2013' states that:<sup>11</sup>

*Overseas investors were behind £4.15bn of property transactions in the City of London during the first six months of 2013.*

104. It also lists one of the 'top 10 reasons to invest in London' as:

*"TRANSPARENCY, WHATEVER THE CYCLE*

*The simplicity and efficiency of the UK legal system and market practices means investors are able to access accurate market information about particular assets, as well as about the market in general."*

105. The proposals in the paper threaten this perceived simplicity and efficiency, and anything that risks the integrity of the register would have a damaging effect given that investors place value on accurate market information.

106. Please also see our response to questions 2 and 3.

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<sup>11</sup> BNP Paribas Real Estate, *Guide to Investing in London 2013*:  
[http://www.realestate.bnpparibas.co.uk/upload/docs/application/pdf/2013-10/investing\\_in\\_london\\_guide\\_2013\\_bnp\\_paribas\\_real\\_estate\\_uk.pdf](http://www.realestate.bnpparibas.co.uk/upload/docs/application/pdf/2013-10/investing_in_london_guide_2013_bnp_paribas_real_estate_uk.pdf)

## Question 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.**

107. Yes - this is fundamental.
108. The integrity of the Register is important because of the level of confidence and reliance its users place in it and on it.
109. Short term gains might seem superficially attractive but they could also have longer-term unintended, and economically adverse, consequences.
110. Risk is delicately balanced between several players in the property market, including buyers, sellers, insurers, lenders, solicitors and others. The proposals in the consultation paper threaten the certainty provided by the state guarantee of title, and the confidence that is placed on the information on the Register, thus potentially destabilising this fine balance of risk.
111. The Register might be completely unchanged in its structure, behaviour and performance, but the identity of who is running it - whether that is Government, a private sector company, or a joint venture between Government and the private sector - would completely change the perception of all users; solicitors, lenders and the ultimate business and lay clients alike. Any actual or perceived taint of commerciality would lessen the confidence users would have in the Register.
112. If functions were to be divided between the OCLR and a SDC, the nature of the state guarantee is likely to change. For example, the state may wish to caveat the guarantee to mitigate circumstances where the SDC introduced processes that increased the risks of making errors in matters affecting a property's title.
113. If the state guarantee of title were to be diminished in any way, users would be less willing to rely on the information in the Register. They may begin to be wary of potential mistakes and errors. Certain users may wish to try to insure against such risks. Title insurance policies are already available in the United Kingdom, and if the proposals were

to result in a diminution in the state guarantee of title, insurers may attempt to step in and meet users' demand for certainty and reassurance through such policies. Although this may appear to provide a solution to any reduction in the scope of the state guarantee, it could actually increase the complexity, time and expense of the conveyancing processes. This in turn may adversely impact the standing of England and Wales in the registering property section of the World Bank Report 2014.

114. The proposal is that the majority of the day to day functions of Land Registry would be carried out by an SDC.

115. Where the tasks are delegated to an SDC and the SDC is owned in the private sector the risks are:-

- Ensuring data is protected;
- Ensuring data is safeguarded;
- Ensuring independence and impartiality in decision making;
- Maintaining stakeholder confidence;
- Retaining the ability of users to influence policy and legislation; and
- Ensuring transparency and sharing intelligence with Government (fraud).

116. Serious concerns have been expressed about the operation of outsourcing or control of private sector companies by government, as is evidenced below.

117. The PAC report into Private contractors and public spending 2014 says:<sup>12</sup>

*“Government is clearly failing to manage performance across the board, and to achieve the best for citizens out of the contracts into which they have entered. Government needs a far more professional and skilled approach to managing contracts and contractors, and contractors need to demonstrate the high standards of ethics expected in the conduct of public business, and be more transparent about their performance and costs. The public’s trust in outsourcing has been undermined recently by the poor performance of G4S in supplying security guards for the Olympics, Capita’s failure to deliver court translation services, issues with Atos’s*

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<sup>12</sup> Public Accounts Committee, 47th Report, 26 February 2014:  
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77702.htm>

*work capability assessments, misreporting of out of hours GP services by Serco, and most recently, the astonishing news that G4S and Serco had overcharged for years on electronic tagging contracts: these high profile failures illustrate contractors' failure to live up to standards expected and have exposed serious weaknesses in Government's capability in negotiating and managing private contracts on behalf of the taxpayer."*

118. The report went on to say:<sup>13</sup>

*"There is significant scope for government to improve its approach to contracting for public services. The Cabinet Office told us that there is a long way to go before government has the right commercial and financial skills to manage contracts and it needs to use the full range of powers at its disposal. For example, the Cabinet Office told us that only a third of contracts are on an open-book basis and, even then, departments rarely use the access provided and have a shortfall in the capability required to do so."*

## **Question 16**

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

119. Please see our response to question 15.

120. In its appearances before the PAC, Government has acknowledged that it has insufficient expertise in relation to the management of the contracts that would be necessary.<sup>14</sup>

121. We are invited to comment on dependencies for the delivery of the business strategy without being supplied with it or a summary of it. Other than being *"to improve the ease with which land registration services are provided"* we are not sure what this strategy entails. Without this information it is hard to comment or provide any detailed analysis.

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<sup>13</sup> Public Accounts Committee, 47th Report, 26 February 2014:

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77702.htm>

<sup>14</sup> Public Accounts Committee, 47th Report, 26 February 2014:

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77702.htm>



122. We suspect that many of the dependencies will be those highlighted by the PAC.
123. These may relate to the capability of Government not to sell assets off too cheaply (see Royal Mail).
124. Many of these will also relate to the contents and management of the contract between the OCLR and the SDC.
125. Any contract should:
- contain full contingency plans for the continuity of services in the event of supplier failure;
  - ensure that the government and the taxpayer are protected financially;
  - protect both the taxpayers' interest and the service users' legitimate expectations.
126. The PAC report into Private contractors and public spending 2014<sup>15</sup> says:
- “The Cabinet Office told us that government has a long way to go before it has the skills required to manage contracts properly... there is a longstanding problem of insufficient investment in staff with contract management skills... The Cabinet Office recognises the skills gap in departments and agencies and told us about plans to recruit people with the relevant skills and commercial expertise. It remains to be seen whether the Cabinet Office can deliver on its ambitious agenda for improving skills across government, and secure the resources necessary to do so. In our view, investment in the right people with the right commercial skills is essential if the Government is to achieve the objectives of contracting out.”*<sup>16</sup>

## Question 17

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

#### *Risk of irreversible nature of proposals*

127. There is a serious and pressing risk that if an SDC is set up, it will be extremely difficult to control. It will also be extremely difficult to take back powers from the SDC if it

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<sup>15</sup> Public Accounts Committee, 47th Report, 26 February 2014:

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77702.htm>

<sup>16</sup> Public Accounts Committee, 47th Report, 26 February 2014:

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77704.htm#note28>

does not do what is intended. There is also the risk of loss of expertise that could not be recreated.

128. The most likely risk is that the SDC will not achieve the service levels required of it.

129. A less likely risk is that the private company could fail. Any contract would need to set out clearly from the outset what is to happen in these circumstances. A complete failure of the SDC could have an extremely damaging impact on the flow of tax receipts to Government and the property market itself. This relies on the functioning of Land Registry not only for registration post completion of transactions but in order to obtain the necessary protective searches in order to complete.

130. If customers become concerned about service integrity and profiteering, this undermines the whole Register and its resultant data sets. It would be extremely difficult, if not impossible for a long time, to restore customer confidence in the Register should this happen. This could lead to a reduction in the amount of overseas investment in the English and Welsh property markets.

131. There is a risk in terms of the identity of the private company or partner or outsourcer. If they already operate in the market, this may lead to distortions in the wider property market.

*The lack of information in the consultation document*

132. The consultation proposals have implications for the wider economy and the tax base. It seems rather surprising that the operative part of the consultation document should be only 15 pages long and no impact assessment has been supplied for what is clearly a major policy change. We can only assume that the consultation document is a very high level indication of what is proposed, but it is difficult to make informed comment as a result.

133. The lack of detail in the proposals is an overriding weakness at this stage. A number of statements are made which sound positive, but there is very little to show how any 'benefits' will be achieved.

134. Paragraph 3 states that there will be significant benefits to customers from the proposals including reduced risk of error and fraud, but there is no information to show how this might be brought about.
135. The stated benefit of reduced processing times brings with it a concern about reduced accuracy and quality in the provision of the service. The benefit may be richer data sets, but if they are perceived to be less reliable some value is lost.
136. The paper includes insufficient information about:
- the full Business Strategy;
  - what the Memorandum and Articles of Association of such SDCs might say – whether there would be restrictions on those who could acquire shares, whether there would there be different classes of share etc;
  - the likely structure of the proposed split between the OCLR and the SDC;
  - the proposed distinctions between ‘keeping’ and ‘maintaining’ the Register - these appear strained and require more exposition;
  - the separation agreement;
  - the operational model;
  - the likely contractual terms between the OCLR and the SDC;
  - information about the likelihood of contracts between the OCLR and SDC being contained in legislation and including provisions set out by the PAC;
  - the Heads of Terms of the proposed service contract or details of the way in which the SDC would interact with the new OCLR;
  - the draft legislation that might go before Parliament;
  - the regulatory and operational issues that will no doubt arise;
  - the KPMG consultants’ reports or even extracts from them;
  - the focus that a privatised company might have on matters such as the provision of evidence of SDLT or equivalent tax in Wales and the cross border implications arising from devolution of this tax to Wales;
  - what happens if the privatised SDC becomes insolvent? CLR would manage or oversee relationships with the Rule Committee etc “depending on the circumstances” – those circumstances need to be specified;
  - whether other splits of function have been considered e.g. retaining the registration services as a single unit within Government and having consultancy services and/or data services in a separate delivery arm outside Government;

- the information and processes that have led to the proposals set out;
- how these proposals relate to other privatisation models in England and Wales and Land Registration systems internationally; and
- an assessment of the likely impact of the proposals.

137. It appears from comments made during the Westminster Hall debate on 25 February 2014 that much research, management consultancy and other work has been carried out in relation to the proposals, that has not been made available as part of the consultation.

138. Without this detail it is difficult to make informed and pertinent comments. It appears, following similar splits in functions in other public services, that much effort, funding and energy goes towards querying, arguing over and establishing the dividing lines between the different parts of the operation. Endeavouring to control the service element, delivery arm and regulating its operational mechanisms becomes the focus of the entity rather than customer service, which ought to be the main focus.

139. With such little information available at this stage, it is not possible to establish that the case for any sort of halfway house to privatisation, let alone full privatisation, is made out.

#### *Conveyancing self-service*

140. In the Westminster Hall debate on 25 February 2014 Sian James MP said:<sup>17</sup>

*“...part of the rationale for moving from a trading fund to a company is tied to “speeding up” new methods of service delivery. That new service delivery, which is part of the Government’s digital by default agenda, appears to be a plan to remove the vast majority of the service provision of land registration from the Land Registry and move it to the customers—conveyancers and solicitors. Those solicitors and conveyancers will have to self-serve and they, not the Land Registry, will have to register legal interests in dealing with land on behalf of the public. If that is what is*

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<sup>17</sup> Hansard, 25 February 2014, column 68WH:

<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140225/halltext/140225h0001.htm#14022559000296>

*planned, where is the evidence that solicitors and conveyancers have been consulted?"*

141. In his reply, Minister Michael Fallon MP said:

*"...about conveyancing self-service. I make clear to him that the current customers of the Land Registry will have their views sought before any new or revised services are launched. They would certainly be consulted again before any such services were mandated by the Land Registry. I hope that that reassurance will be of use to him."*<sup>18</sup>

142. We would like to learn more about what is proposed here. A statement that there will be *"consultation before services are mandated"* does not provide much comfort. What is the likely impact of these proposals on underwriting requirements and the state guarantee? Presumably these proposals would reduce the incidence of the quasi – judicial decisions referred to above.

143. The potential seems to be for processes which require a certificate signed by the conveyancer or solicitor, to whom the risk is effectively transferred, to be increased.

## **Question 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.**

### *The context for the proposals*

144. Land Registry has operated as a non Ministerial executive agency trading fund for over 20 years. It is self funding and must finance all of its operating costs from its income. In 2012/13 it made a surplus of £98.8million. The Land Registry is profitable without privatisation. Whilst we appreciate that trading funds are not meant to make a

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<sup>18</sup> *Hansard*, 25 February 2014, column 91WH:  
<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140225/halltext/140225h0001.htm#14022559000296>

profit and have restrictions in terms of financing and funding, primary legislation could be used to change the structure. It is difficult to see how privatisation is expected to fare in comparison particularly without seeing an impact assessment.

### *The Shareholder Executive*

145. In response to an interview question about the policy case for retaining a government holding in Land Registry, Mark Russell, chief executive of the Shareholder Executive said:<sup>19</sup>

*"It's an extremely well-established part of the government infrastructure. Could you argue that it could be serviced in the private sector? Possibly; I don't know. It's like many functions the government carries out. You could at an academic level say: 'Well a number of these functions could be carried out by the private sector perfectly adequately,' but actually when you get into how that would be done, what would be the change, the case isn't overwhelming."*

146. When asked whether transferring Land Registry services to the private sector would benefit the public, Russell said:<sup>20</sup>

*"Well no, not necessarily at all, because you'd then have a situation where they'd want to make profits, and although you'd have a capital receipt up front, the ongoing cost to the public would be higher."*

147. The Law Society agrees with the views of Mark Russell that:

- if privatisation takes place there is the prospect of the increased ongoing cost to the public to feed shareholder demands; and
- the case for privatisation of Land Registry generally is not overwhelming.

### *Previous considerations of privatisation*

148. As stated above, the option of privatising or changing the trading fund status of Land Registry has been considered a number of times and we are not aware of any investigations that have recommended privatisation of its core functions.

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<sup>19</sup> Civil Service World, 3 July 2013: <http://www.civilserviceworld.com/interview-mark-russell/>

<sup>20</sup> Civil Service World, 3 July 2013: <http://www.civilserviceworld.com/interview-mark-russell/>

149. We would argue that if the position was straightforward and clear cut, Land Registry would have been privatised already and the issue would not be under consideration yet again.

150. The limited contents of the consultation paper do not persuade us that an SDC should be set up.

## **Conclusion**

151. The broad statements set out in the consultation paper are insufficient to make a compelling, or even a cogent case, for what is proposed.

152. Whilst there have been some improvements in the delivery of public functions by private bodies over the last few years, the recent high profile failures (such as GS4 and Serco) involving fraud and other criminal behaviours have damaged public perception and public confidence in this manner of dealing. The Cabinet Office has acknowledged to the PAC *“that government has a long way to go before it has the skills required to manage contracts properly”*.

153. We agree that it is more difficult for Land Registry to bring in inward investment or borrow under the current governance structure and legislative restrictions, which may indicate that some changes may be useful. However, the fundamental question is whether Land Registry, or the majority of it, needs to remain a part of Government.

154. The decision as to whether certain Government operations should be held inside or outside government is a matter for Ministers, who must decide if there are sufficient policy reasons to retain the holding within Government.

155. We would suggest that the decision making process should focus on the long term policy and public interest reasons for retaining or disposing of the interest. In particular, it will be necessary to fully consider the long term and exceptional risks of any structural change, rather than short term, political or fund-raising concerns.

156. Land Registry is seeking, under its own consultation on wider powers and taking on responsibility for maintaining the Local Land Charges Register, to take on additional

functions.<sup>21</sup> Whilst we agree that there is scope for the Land Registry to investigate whether any wider powers may be desirable for it to perform more effectively, and have agreed in response to the Law Commission's 12th Reform Programme that this is something that the Law Commission should investigate.

157. Users of Land Registry are looking for a quality service, operated by knowledgeable staff, backed by the guarantee of the state with a Register that has integrity, can be relied upon, and is at minimal risk of fraud and corruption. This is, on the whole, what is being delivered at present.

158. If Ministers do decide to proceed with a change away from trading fund status we would welcome being involved in some detailed discussions following the provision of more information.

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<sup>21</sup> Land Registry: Wider Powers and Local Land Charges consultation:  
<http://consultations.landregistry.gov.uk/consult.ti/LLC1/consultationHome>