



BIRMINGHAM LAW SOCIETY

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**Consultation on moving the Land Registry operations
to the private sector**

Department for Business, Innovation & Skills

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Introduction

- Birmingham Law Society is the largest local Law Society outside London with over 4500 members. We are an extremely active local law society. We take an active interest in the profession and the manner in which real estate services are provided to the general public, hence our interest in responding to this Consultation Paper, as we did previously on the government's proposals in 2014.
- In 2014 we made clear our concerns about the privatisation of the Land Registry. Our comments and replies to this Consultation reiterate our concerns and our overwhelming view is that the Land Registry provides a unique service that is best continued under the state's ownership rather than being sold off to the private sector in return for a capital sum.
- The Consultation is couched in terms that strongly suggest that government has already made up its mind that the country's land registration process can only develop and exploit the advantages offered by the data it holds through a privatised system. That assumption is reinforced by the inclusion of such privatisation under the Infrastructure Bill within the recent Queen's Speech and the avowed intention that such a system must be driven through by 2017. We believe that such presumption fails properly to address or appreciate the function which the Land Registry performs : it holds and manages the land ownership details in the UK, excluding unregistered land, and it does so in a monopoly situation; it already generates significant revenue for the exchequer; it is efficient and effective in its operation; it has been committed to digitisation for many years and, with appropriate permissions to utilise the revenue it generates, it could develop such digitisation further; it offers an independent and fair registration and dispute resolution process in conjunction with the First Tier Tribunal that is admired and which is immune from the vested interests that privatisation might bring; and, crucially, it provides a state backed indemnity which is not subject to the vagaries of vested interest or diminution of profits that drive a private business.
- In addition we have the following specific concerns :
 - The tenor of the Consultation is that the drive for a capital receipt in the hands of government is the principal driver of this Paper, not that the private sector will deliver an improved, more cost-effective and efficient, digitised service. The latter might be a consequence of privatisation but is not necessarily the case, given the government's own priorities. This does not provide confidence that a privatised service will be better, quite the reverse :
 - *A changed Land Registry would need to ensure continuity of an appropriate service* - note there is no intention to improve on the existing high levels of service rather that "a" service will be offered;
 - *Any future model should improve the services offered to the customer* - again there is no compelling drive to improve services, merely a wish that privatisation might do so; and
 - *Government's objectives to 1 maximise upfront proceeds for the Exchequer 2. Allow classification of the new service delivery organisation to the private sector 3. Deliver a modern digitally based service that benefits Land Registry customers as well as taxpayers as a whole* - the government's stated aims are made fundamentally clear and delivering a new digitised service is at the bottom of the list.
 - As a corollary, there is an assumption that the current model is so broken and can only be cured by privatisation i.e. only the private sector can deliver electronic benefits and improvements. This analysis is flawed. The Land Registry currently enjoys a 98% satisfaction rating. It fails to allow for the Land Registry re-investing some of its £297m revenue in making improvements to IT. Even if amendments to

the way funds are utilised had to be made, what cost-benefit analysis has been done which shows passing primary legislation and fundamentally introducing a brand new system will deliver a better system in a more cost effective way for the tax payer?

- The language utilised in the Paper is predicated on privatisation being fundamentally better than public ownership. It fails, too, to fully appreciate the importance of independence provided by state ownership and the benefits which naturally accrue therefrom, such as ownership of data and the state backed indemnity. In contrast, while government talks of the benefits that it anticipates arising from private sector ownership, there is a worrying lack of detail of how it proposes to manage that ownership and its consequences. For example there is no assessment of how a private sector company which might own land will address issues arising out of its own land holdings; nor is there much detail in connection with how the state backed indemnity will work where it will be in the newco's interests to maximise profit and therefore seek to avoid, if possible, paying out on such a guarantee. Similarly there is no detail of how data will be protected. This is vital if the tax payer is to have confidence that its own data will not be exposed to potential misuse or even fraud. The property industry is already facing a large issue and a new system that emphasises the sale and accessibility of data with little reference to protections does not inspire confidence. Finally, there would be no ability for government to vet the identity and details of Directors in a private sector company, save for reliance on the existing general law. Given the monopoly situation and the sensitivity of the Land Registry's unique position, we are concerned at the inability of government to properly manage this working relationship.
- The paper perpetually talks of instituting a new system "with the right protections in place.." but provides little or no detail as to what those protections might be. It is not good enough to propose selling off such a fundamentally important part of UK's business to an unknown private party without having a cogent and well-understood methodology of how the integrity of the Land Registry will be maintained. - KPIs/step in/cost to the taxpayer of over-seeing the new model - worrying lack of Government supervision?
- Managing the private sector relationship through a small number of civil servants does not inspire confidence that a privatised Land Registry would be managed effectively. In addition, whatever KPIs are introduced within the contract, we remain concerned that, in reality, government will have little appetite to enforce those terms because ultimately if the system is failing, the government will need to re-nationalise or go to the expense of finding a new private sector partner. A contractual right of step-in is fine in theory but we strongly suspect, of little use or comfort in reality. Either will be expensive in reputational and financial terms.
- Moreover there is a dichotomy between a private sector business looking to maximise profit against ensuring the quality of service delivery, where the technical skills required to make sure land is properly registered or dealt with is not something that naturally fits into a commodity driven exercise with an emphasis on driving down the cost of staff at the expense of loss of experience. There are no details to provide assurances that the quality of the service will be enhanced. This is a theme that the Competition and Markets Authority have taken up: a private sector company has a vested interest to drive up prices and restrict competition; and operating in a monopoly, as it will be, gives it ample opportunity to do so.

Consultation Questions

Q1. Do you agree that ownership of the Register should remain in government?

Yes. We certainly agree that the registers should remain in government, but we would go further than that. Not only the registers themselves, but also the statutory functions of maintaining them and recording changes must also remain as a government function. Keeping the registers under government control goes a very long way towards keeping them secure against fraud and misuse, but we believe that an equally essential safeguard is that changes in the registers and their secure maintenance can only be made by trusted, experienced, employees of government rather those of a private company that may well have different considerations and conflicting interests, such as a drive to make profit or utilise data for their own ends. The management and processing of data by the Land Registry is a unique process which requires a sophisticated and experienced workforce; it should not be dumbed-down to a tick box exercise designed to be carried out as swiftly as possible. The state backed indemnity is a fundamental benefit to the users of the Land Registry and will not be confused by issues of independence and partiality which may arise on privatisation.

Q2. What steps should government take and what safeguards should it put in place to ensure continued and improved access to high-quality and reliable Land Registry data?

We believe that the current safeguards are sufficient to ensure continued and improved access. We do not believe that the quality and reliability of the data can be significantly improved by moving operations to the private sector. Where there are problems with access to data, and we believe these problems are very limited, then some simple changes could be made at minimal cost by the existing workforce having taken soundings from its customers. Steps should also be taken to utilise some of the undistributed profits to fund improvements to staffing levels and investment in IT generally. These simple measures could then help improve the quality and accessibility of data without necessarily having to pass primary legislation to introduce such a fundamental change to the Land Registry.

We also believe that maintaining, and indeed extending, the range of open data products that the consultation document refers to would act as a disincentive to commercial firms seeking to operate the land registration system, or would lead to charging for these services as the operating company sought to maximise profits. We are concerned that, in pre-tendering exercises, if the view of interested organisations was that the operation of the service was not viable without a wider income stream, then the government would be forced to change its mind on this point. We are also concerned that the government would change its mind anyway if it meant that a much higher capital receipt was likely. There is potentially a very real tension/conflict between maximising the use of data and generating a capital receipt and ensuring appropriate safeguards are included to protect that data.

Government will need to impose tightly worded conditions in relation to the ability of the private sector to ensure that the integrity and security of the data is maintained. This is because, once privatised, government will have no idea how the privatised Land Registry or third parties to whom they sell on the data will actively use it.

Even with the passing of primary legislation to authorise the privatisation of the Land Registry, the government will still need to be absolutely clear about the minimum safeguards it must impose as part of its public procurement to attract best quality bids from private sector interested in running the Land Registry.

The likely capital receipt for government will be driven by a number of factors including: cost of staff and future staffing needs; investment in IT and likely returns; and the ability to make money through release of data on a wider scale. The private sector bidders will price their bids accordingly and there seems to be a very real prospect that the drive to maximise a capital receipt in the hands of government is not compatible with ensuring the security of data, protection against identity and other frauds and the ability of the private sector to exploit the same for commercial gain.

Q3. How could government use this opportunity to improve the quality and accessibility of data produced by Land Registry for all sectors of the economy?

We are concerned that this question seems to indicate that the government has no ideas on how quality and accessibility of data can be improved. We are also very concerned that this question misses the fundamental point that the further integrity and security of the data must be paramount before such data is processed and made more widely available for commercial gain. The property sector is facing ever more challenges with fraud and the re-direction of funds (according to figures produced by the National Fraud Intelligence Bureau between March 2015 and March 2016 there was a 77% year on year rise in fraudulent transactions and over £19m has been lost to criminals since 2013 with the average amount lost as over £102,000). Anything which makes data more widely available must only be done so with appropriate safeguards in place. The Paper talks much about appropriate safeguards but provides few clues as to what those should be in practice.

As the Land Registry has an exceptionally high satisfaction rating (currently 98%) then this is proof itself that there is not a great deal to improve on quality. From the profitability side of matters, Land Registry could also make profit if government's stance was changed on the way income from Land Registry was viewed. As for accessibility, it is already the case that Land Registry information has public access. The Government only therefore has the area of digitalisation to be concerned about. If the issue of Land Registry being asked to take control of Local Land Charges was removed then it would free up finances and staff to pursue other areas. There is a very strong case by the Legal sector that Local Land Charges should stay very firmly in the hands of the Local Authority. How can an organisation outside of the area know all that there is to know when a wealth of local expertise is sometimes not part of a standardised search form but, can be handled by speaking on the telephone with a person familiar with the local area? The Land Registry by the government's own admission can improve digitalisation were they allowed to do. This has already been proved with electronic registration applications and the introduction of the award winning Map search and Property Alert service.

Otherwise please see our response to Q2: a release of some of the undistributed profit could help improve services and upgrade IT. We are aware that the Land Registry is not entitled to make a profit but it seems perverse that some of the surpluses it generates are seemingly not entitled to be re-invested on making improvements to its own systems. We struggle to understand how improvements to services can only be secured by means of privatisation. It is telling, in paragraphs 39-41 that, the privatisation would only need to ensure an appropriate level of service, as opposed to delivering an improved service, and that any change needs to be delivered in the short term (from 2017). This strongly suggests the privatisation is being forced through in an unseemly rush to generate a capital receipt before the next General Election, at the risk of ensuring any new system is appropriate and can deliver an improved service. That is reinforced by the explicit inclusion within the Queen's Speech of Land Registry privatisation. Paragraph 41 reinforces our concerns that the service will not be improved, nor is the protection of data being prioritised. The government's own agenda is to maximise upfront proceeds for the Exchequer...allow classification of the new

service delivery organisation to the private sector...deliver a modern digitally based service that benefits... customers as well as taxpayers. The order of the government's priorities is as telling as it is concerning.

Q4. On what basis should government manage the relationship with a privately owned Land Registry to ensure Land Registry meets, as far as is reasonable, the data quality and availability requirements of all stakeholders?

Obviously, the ideal solution is that there should be no relationship to manage. This is solved by keeping the Land Registry as a government agency. Please can the government state the basis upon which such management has been costed to ensure that the tax payer receives good value for money? Please can the government also state that the costs of such management will not be passed onto the tax payer/users of Land Registry services through higher costs?

We are also concerned that government only wishes to ensure that a privately owned Land Registry meets, *so far as is reasonable*, data quality and availability. Reasonableness is a highly subjective concept and may well differ in a private commercial organisation from that of a government department. For the reasons we mention in relation to data security and fraud, those concerns must be a priority, rather than maximising the capital receipt for government.

We remain to be convinced that a contractual relationship will provide the right sort of management for such an important relationship. It is one thing to include all sorts of clauses within a contract but it is an entirely different thing to be able to enforce those measures effectively so as to ensure the quality of the overall service and not just the data quality and availability requirements of all stakeholders. We can see the need for the following measures (within the government's preferred model):

- Strict performance measures/KPIs - the difficulty of course is that these requirements are likely to change over such a long term so they are likely to need regular review by government. They must be accompanied by financial consequences for the private sector if those are not adhered to. We remain concerned that any private sector provider will be in a monopolistic situation so the ability of government to truly take action will require a robust and consistent approach to contract management and oversight. We remain concerned about a lack of partiality, especially if, as you would expect, the privatised Land Registry would be expected to be measured, in part, on number of and resolution of disputes. How would that work in practice when it might be in the privatised company's interests to resolve issues without a formal dispute or reference to the First Tier Tribunal?
- An obligation for continuous improvement.
- Guarantees of technical excellence - privatisation must not solely be about the size of the capital receipt government receives; the statements included within the Paper about performance being better within a privatised model are subjective, self-serving and totally untested.
- An obligation of positive investment in IT at the outset of the contract, in order to justify one of the primary rationale for the need for privatisation. This should be specified within the public procurement process which the government will be running to find a private sector partner.
- A right of step in - while this is a regular feature of PFI/PPP contracts where there are cumulative or one-off catastrophic failures (including insolvency), we strongly question the government's ability effectively to be able to enforce such a provision in reality. It would invariably mean either having to re-nationalise the Land Registry (and the cost,

financial and reputational, and disruption of so doing) or having to force some form of re-tender process to find a new private sector partner, although we would query how the latter would lawfully be managed if the government's preferred model of privatisation is adopted and the private sector partner is truly private. In addition to the government's appetite or capability to step in, we would also query how such step-in might operate without infringing a myriad of rules, including state aid.

It should also be borne in mind that if the government wishes to introduce such management requirements into the relationship, private sector bidders will price their bids accordingly, to reflect the level of "management" by government. What advice has government taken on the likely capital receipt it is likely to generate with the management safeguards that need or should be put in place to preserve the integrity of the service?

Q5. Do you agree that the suggested safeguards should be included in any model?

There is no need for these "safeguards" if the Land Registry remains in the public sector and, in any case we are not convinced the suggestions in 6.4.9 are explicitly stated as safeguards. The ability of the government organisation set up to manage the contract and agree changes in the scope and standards originally set might well be used to change the original requirements of the contract to the detriment of customers if the operating company found itself in difficulty meeting its originally agreed terms. Indeed, the new company might argue that it was "reasonable" to change the original terms of the contract because of, for example, changes to the economic climate.

If by safeguards, the Paper is referring to the state-backed guarantee of ownership, then that is a fundamental tenet of the Land Registry which cannot be compromised. It does, however, provide what is effectively after the event insurance and does not operate as a pre-emptive "safeguard" in the conventional sense. Any private newco must comply, as an absolute minimum with the ICT security provisions referred to in paragraph 55. However, what steps will government take to ensure there is no compromise on data integrity or any breach relating to loss of data? It is one thing to have a contractual provision, but far different to ensure no inadvertent breaches that might expose the data to exploitation by fraudsters that might, for example, utilise information concerning the imposition of certain notices on the register to contact insurance companies.

Q6. Are there any other safeguards that you think should be included?

We do not believe that any safeguards will have the desired effect, which is why we recommend that the Land Registry remains as a government agency. We are concerned that government is unclear about what safeguards it should put in place. This does not fill us with confidence that practitioners are being asked to help design a fundamental change to such a sensitive and key aspect of the Land Registry's operation. Government must surely have a clear idea of how it is to implement such a change with the appropriate security in place.

We remain concerned that the government has not clearly identified how a privatised Land Registry would interact with the First Trier Tribunal. Paragraph 53 does not address how a privatised Land Registry would operate to resolve disputes. There must be a clear mechanism which measures number and type of disputes as part of the KPI process. However, we would have concerns about measuring those disputes and their resolution if the Land Registry is its own judge as to how those are resolved, prior to any escalation to the

First Tier Tribunal. Impartiality and fairness and openness must be maintained if the public are to have confidence in the system.

Moreover, there is no mention in the Paper of how the Land Registry would work with practitioners and the industry generally to help combat fraud. This is a serious issue which, in our view, is better tackled with the force of a truly independent Land Registry, backed by government. We would wish to see some priority given to protect the integrity and security of data, above and beyond the drive to sell that data more widely, with the consequent risks that poses for individuals' data and the confidence that practitioners would have in the integrity and performance of the Land Registry.

Q7. Do you agree with the preferred option?

No. Neither of these suggestions is acceptable. With regard to the preferred model we cannot see how the government can control ownership of the new company, purely through a contractual mechanism, given the concerns we have raised above as to ability of government effectively to enforce contractual terms. In addition there is a strong possibility, actually an inevitability if the privatised company is truly independent, that original shareholders in the new company might sell shares to an organisation that is solely concerned with maximising profits and with little experience of operating a public service, which lies at the heart of the UK economy. This is too high a stakes game to get wrong, with the consequences that poses for the £4 trillion worth of property ownership, that is held in high regard around the world and £1trillion of mortgages which help drive economic activity in the UK. If the privatisation is the success it is intended to be then we would expect that to be a natural consequence of a truly privatised model with the consequent risk for government.

It might be possible in any contract to insert that government has a right/obligation to carry out due diligence checks on the director of any newco. However, if the newco is truly independent of government we do not have confidence that government can manage/control the quality of subsequent directors or prevent the sale by that newco to a second company. To reserve that power would fly against government rationale for sale and would not, in our view, find favour with the private sector. It is a big risk that would need to be addressed.

As we have made clear in our answers above, we have very serious doubts of the effectiveness of government to be able to truly manage and supervise such an important contract when the privatised owner will operate in an exclusive monopoly. Whether the preferred option is a contract or overseen by a regulator or a concession, once the Land Registry is in private ownership, we struggle to see how the government could have the appetite or even the finance to take it back into state hands. This would be exacerbated by the drive for the Land Registry to make profit, thereby increasing the share value for shareholders, without necessarily obliging those funds to be ploughed back into improving the quality of the service or the effectiveness of IT. If government do decide to ring-fence certain functions and oblige those financial investments to be made, the bidders will price their bids accordingly and the alleged £1billion windfall may not be as great as anticipated. The private sector will understand all of these issues and where the balance of commercial power will really lie.

Q8. What are your reasons for your answer to question 7?

Please see answers above. The Land Registry currently provides an excellent service, as admitted by the government's own advisers and the quality ratings it currently obtains (in the region of 98%). It is difficult to see how privatising the service will genuinely add such significant value that merits the cost of promulgating primary legislation and introducing a whole new regime. There may be some room for improvement but the old adage "if it ain't broke.." applies.

From a practitioners' perspective, we are impressed with the quality of responsiveness, especially where complex first registrations are concerned. The integrity of the technical expertise within Land Registry staff must not be compromised for the sake of speed and a large capital receipt. Without building in protections, there is a risk that a drive for costs savings/profit will mean further experienced staff are lost. The *continued uncertainty* to which the Paper alludes as a reason to privatise the Land Registry quickly, is an uncertainty that has been created by government, not anything to do with the way in which the Land Registry has continued to conduct its business. The property industry has already rejected the idea of privatisation once but this Paper strongly suggests that government has not taken on board the comments that were previously made and the reasons why we believe maintenance of the Land Registry as an independent function of the state should remain as it is, rather than being sold off.

Q9. Do you think an alternative model would be better and why?

We do not support the models suggested by this Paper. The reason for changing from a public organisation to a private one is clearly based on the need for capital receipts, but the Paper does not provide any idea on how much the sale of the operating organisation would bring to government coffers.

We also believe that the proposal is short sighted. We have no idea how much the government would receive if it proceeds with the establishment of a new company, but we do know from the Land Registry's annual reports that for several years now it has generated a large annual "surplus" (apparently they cannot be called "profits"). This has enabled it not only to send to government a "dividend" of over £26 million in 2014 and a further £19 million in 2015 (we do not yet have the 2016 figures), but also a "special dividend" of £100 million was paid to government in both those years, while the Land Registry still maintained a total reserve of £360 million at the end of the 2014/15 financial year. It may well be that the Land Registry will soon bring its fees more into line with the government's rules on charging so that it no longer makes such large surpluses, but there is a suspicion that the fees will be kept at their current level as an incentive for interested parties to make higher offers for the new company and thus increase the capital receipt.

Q10. Are there other key costs and benefits that you think we have missed?

The key cost which should not be under-estimated is the confidence that tax payers, practitioners, and major institutions (domestic and foreign) have in an independent, state backed Land Registry which has high approval ratings and whose integrity is beyond question. We fail to see how the sale to what is very likely to be a major commercial institution will address those concerns about independence and integrity.

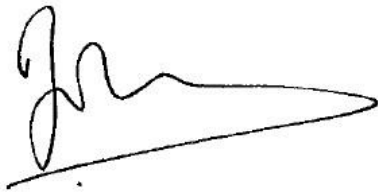
The Paper continually predicates the drive for sale with the phrase *with the right protections in place* but then offers little or no comfort that it has any real insight into what those

protections should be. On the contrary, the inclusion within the Queen's Speech of the privatisation of the Land Registry within the Infrastructure Bill strongly suggests government has already made its mind up. We remain very concerned that the proposal does not provide the assurances you would expect to see - a contractual mechanism is only as robust as the terms which delivers the Land Registry's core functions, protects the integrity and security and the commitment of the body, the government, seeking to enforce those terms.

Moreover, there is nothing within the Paper which quantifies the benefits to the tax payer of privatisation, either in the form of the capital receipt or the accrued benefits of aspects such as gainshare. Equally there is nothing about the cost to the taxpayer of running this Consultation and the likely cost of disposal.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply **X**

A handwritten signature in black ink, appearing to read 'John Hughes', with a long horizontal flourish extending to the right.

John Hughes
President
Birmingham Law Society