



Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Report

Land Law

NILC 8 (2010)

REPORT

LAND LAW

NILC 8 (2010)

Laid before the Northern Ireland Assembly by the Department of Justice under
Section 52 of the Justice (Northern Ireland) Act 2002 (as amended by
paragraph 10 of Schedule 13 to the Northern Ireland Act 1998 (Devolution of
Policing and Justice Functions) Order 2010)

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NORTHERN IRELAND LAW COMMISSION

BACKGROUND

The Northern Ireland Law Commission (“the Commission”) is an independent body which was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act requires the Commission to consider any proposals for the reform of the law of Northern Ireland referred to it. The Commission must also submit to the Department of Justice for approval (after consultation) of programmes for the examination of different branches of the law with a view to reform.

MEMBERSHIP

The Northern Ireland Law Commission consists of a Chairman, who must hold the office of judge of the High Court, and four Commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis. There is also a Chief Executive, who is appointed from the legal professions.

These positions are currently held by:

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THE NORTHERN IRELAND LAW COMMISSION

LAND LAW REFORM

CONTENTS

FOREWORD	X
EXECUTIVE SUMMARY	XII
CHAPTER 1. INTRODUCTION	1
A time for Change	1
Background to the Project	2
Scope of The Land Law Reform Project	2
Other aspects of The Reform Process	3
A Balancing Act	4
Land Law Reform Project	5
Equality Impact Assessment	7
Regulatory Impact Assessment	7
List of individuals and organisations responding to the Consultation Paper	7
List of individuals and organisations responding to the Supplementary Consultation Paper	8
CHAPTER 2. FEUDAL TENURE	9
Introduction	9
Escheat	10
CHAPTER 3. ESTATES IN LAND	13
Reduction of Legal Estates	13
Fee Simple to be regarded as ownership	13
Freehold Estates – Modified Fees	14
Freehold Estate – A Minor’s Interest	15
Freehold Estates – Fee Tail	16
Freehold Estates – Life Estate	16
Overreaching of Equitable Interests	17

Leasehold Estates	17
CHAPTER 4. EASEMENTS AND OTHER RIGHTS OVER LAND	19
Introduction	19
Periodic Rents	19
Franchises	19
Titles and Offices	20
Licences and similar interests	20
Rights of Residence	20
Agistment and Conacre	21
Land Obligations	21
Easements and profits <i>à prendre</i> - prescription	21
Implied rights	25
Party Structures	25
Access to Neighbouring Land	27
CHAPTER 5. FUTURE INTERESTS	29
Introduction	29
Common Law Contingent Remainder Rules	29
Rule Against Accumulations	29
Rule Against Inalienability	29
Reform	30
Rule Against Perpetuities	30
CHAPTER 6. SETTLEMENTS AND TRUSTS	32
Unitary Trusts of Land	32
CHAPTER 7. CONCURRENT OWNERSHIP OF LAND	33
Introduction	33
Co-Parcenary	33
Tenancies in Common	33
Severance of a Joint Tenancy	34

Partition	34
Commorientes	35
Common Land	35
Cohabitants	36
CHAPTER 8. MORTGAGES	37
Introduction	37
Creation of Mortgages	37
Mortgagee Remedies	38
Other Mortgagee Rights	41
CHAPTER 9. CONTRACTS FOR THE SALE OF LAND	44
Introduction	44
Statute of Frauds (Ireland) 1695 (C. 12)	44
Sale of Land by Auctions Act 1867 (C. 48)	45
Repayment of Deposit	45
Vendor and Purchaser Act 1874 (C. 78)	45
CHAPTER 10. CONVEYANCES	46
Introduction	46
Title to be deduced	46
Deeds and their operation	47
CHAPTER 11. LEGISLATION	51
Introduction	51
Review of Legislation	51
Repeal without replacement	51
Replace with substantial amendment	52
Replace without substantial amendment	53
Miscellaneous	55
Powers of appointment	55
Conclusion	56

CHAPTER 12. ADVERSE POSSESSION	57
Introduction	57
Abolition or retention of the Doctrine	57
Possible restriction of the Doctrine	57
Requirements for adverse possession	59
Parliamentary conveyance	60
Limitation periods	60
Mortgagees in possession	61
Unincorporated associations	61
Encroachment	61
Purchasers in possession	62
CHAPTER 13. GROUND RENTS	63
Introduction	63
Ground Rents Act (Northern Ireland) 2001 (C. 5)	64
Applicability of the scheme	65
Provisions for increase in Ground Rent	65
Right of Re-Entry	66
Smaller Ground Rents	66
Automatic Extinguishment	68
Raising amount of Automatic Extinguishment	69
Compensation for Smaller and Larger Ground Rents	69
Compensation for Smaller Ground Rents	70
Compensation for Larger Ground Rents	71
Trigger points for Redemption of both Small and Large Rents	72
Intermediate Interests	74
Non-Payment of Ground Rent	75
CHAPTER 14. COVENANTS AFTER REDEMPTION	76
Introduction	76

Difficulties with the Current Position	76
Purpose of Covenants	76
Types of Covenant	77
Land Benefited	78
Neighbours	79
Former Freeholder	81
General	82
Enforcement	83
Conclusion	84
APPENDIX A	85
Equality of Opportunity Screening Analysis form	85
APPENDIX B	95
Regulatory Impact Assessment (RIA) Screening Analysis Form	95
APPENDIX C	114
General sources of information	114
DRAFT LAND LAW REFORM BILL (NORTHERN IRELAND) 201[]	141
EXPLANATORY NOTES TO THE DRAFT LAND LAW REFORM BILL (NORTHERN IRELAND) 201[]	245
DRAFT GROUND RENTS (AMENDMENT) BILL (NORTHERN IRELAND) 201[]	320
EXPLANATORY NOTES TO THE DRAFT GROUND RENTS (AMENDMENTS) BILL (NORTHERN IRELAND) 201[]	326

FOREWORD

As Chairman of the Northern Ireland Law Commission, it is my pleasure to present this landmark report to the Government and public of Northern Ireland.

The Northern Ireland Law Commission is established and governed by the Justice (Northern Ireland) Act 2002. Its creation represents one of the important recent reforms in the constitutional legal order of this jurisdiction. The Law Commission's overarching statutory duty is to keep under review the law of Northern Ireland with a view to its systematic development and reform. This entails formulating proposals for the simplification and modernisation of the laws of this country.

Simplification and modernisation are key elements of this report and its accompanying draft legislation. There has been widespread and longstanding acceptance that the land law of Northern Ireland is outdated, opaque and unjustifiably complex. Reform of this area of the law has been actively considered and debated for a period in excess of four decades. These activities began with the Report of the Committee on the Registration of Title to Land in 1967 ("The Lowry Report"), followed by the Survey of the Land Law of Northern Ireland in 1971 and the Final Report of the Land Law Working Group in 1990. These three reports gave rise to some piecemeal statutory reforms such as the Property (Northern Ireland) Orders 1978 and 1997. In some respects, the fragmented and scattered nature of these statutory interventions accentuated the need for a single, comprehensive legislative measure. Many of the basic concepts of existing land law derive from the eleventh century English feudal system which was exported to Ireland subsequently. Much of the extant statute law is archaic and there are several hundred different pieces of legislation. This statistic speaks for itself.

Northern Ireland finds itself out of step with other common law countries, including sister jurisdictions, where extensive legislative reforms in land law have been completed. It is time to rectify this anomaly and to provide the citizens of Northern Ireland with new laws which are modern, simplified, fairer and more accessible. Reforms in other jurisdictions have been carefully monitored in the compilation of this report. In implementing this report, Government can seize an ideal opportunity to narrow the gap which sometimes exists between the law and the public. In this respect, the Law Commission is mindful that it exists to serve all citizens.

The land law reform proposals contained in this report and reflected in the accompanying draft legislation are the product of an extensive and robust consultation exercise. The Law Commission has taken steps to ensure that all potentially interested and affected citizens, groups, organisations and professions have had the opportunity to ventilate their views and suggestions and, hence, influence the shape and content of this report. This should provide significant reassurance to the local legislators who will make final decisions. Throughout the process culminating in this report, care has been taken to ensure that the executive has been periodically informed of the progress of the project, its evolving orientation and its possible outcomes. Thus the report will not take legislators by surprise.

This is a historic report for the reasons already explained. It is historic for the further and separate reason that it represents the Law Commission's first report to

Government. The Law Commission inherited this project from its predecessor, the Office of Law Reform and, in consequence, has had the invaluable benefit of the skills, expertise and industry of Sarah Witchell, Diane Drennan and Leigh McDowell. The considerable talents of Professor John Wylie were also recruited. This formidable team has worked tirelessly and enthusiastically to compile a product of the highest quality. I have viewed their endeavours with a mixture of admiration and awe. I compliment and thank each of them and all support staff for their inestimable contributions to this major project and law reform in Northern Ireland generally

Finally, I strongly commend this report to Government. The report is blessed with the strengths, virtues and qualities already highlighted. It is further enhanced by the accompanying draft legislation, consisting of a comprehensive and modern statutory model. The process of law reform in Northern Ireland will be barren indeed if reports of this nature do not culminate in legislation. The thorough and comprehensive process preceding this report should ensure that there will be no good reason for failing to legislate in its wake. The Law Commission looks forward to seeing the ensuing draft legislation on the agenda of the Executive Committee and the Northern Ireland Assembly in the very near future. The population of this country awaits, and deserves, the legislation which we earnestly recommend to Government.

The Honourable Mr Justice McCloskey,
Chairman,
Northern Ireland Law Commission.

EXECUTIVE SUMMARY

CHAPTER 1. INTRODUCTION

Chapter 1 explains the background and sets the context for the proposed reforms. The Commission believes it is now time to modernise land law and conveyancing law in Northern Ireland because the system is both outdated and outmoded. There is no doubt that land law is long overdue for reform and that there is an urgent need for modernisation.

CHAPTER 2. FEUDAL TENURE

In Chapter 2 the Commission considers the concept of tenure which was a key feature of the feudal system. All land is owned ultimately by the Crown and until now, the greatest interest that anyone can have is an estate in fee simple which is held from the Crown. Most people, other than lawyers currently think that a freehold estate is ownership and are not aware that it is only ownership of an estate, rather than of the land itself. The Commission recommends that a straightforward concept of ownership should be introduced to align the law with public perception. In many ways, this reform is a legal technicality and is a conceptual modernisation which is not of any great practical significance.

It is specifically stated that the reform does not affect the right of the Crown to own land in its own right, including demesne land. Nor does it affect the vesting of ownerless or unclaimed land in the Crown as at present.

CHAPTER 3. ESTATES IN LAND

In Chapter 3 the Commission considers the doctrine of estates in the light of its recommendation to abolish tenure and to introduce a simple concept of ownership. It recommends that a fee simple absolute or freehold estate should confer ownership. The Commission also makes recommendations in relation to other existing forms of estate (such as modified fees and fees tail) and the manner in which they should be converted. Although only a freehold will confer ownership, the owner of land will still be able to create leases and other legal interests less than ownership in favour of other persons. It will only be possible to create those legal interests in land which are specified and any other interest will take effect as an equitable interest only. For example, a life estate will be preserved as an equitable interest. The Commission recommends that such equitable interests would be overreached i.e. that they would be transferred from attaching to the land and instead attach to the capital money.

CHAPTER 4. EASEMENTS AND OTHER RIGHTS OVER LAND

In Chapter 4 the Commission addresses the subject of easements and other rights over land, with a particular focus on easements and profits *à prendre*. The Commission is not attempting to define easements or profits *à prendre* because it considers that this matter should be left for the courts to develop.

However it is of the view that there is a need for statutory reform of the acquisition of easements by prescription through which a person can acquire a right over someone else's land by long user. It recommends the introduction of provisions that would reform the position but would restrict their operation to easements and not extend them to profits *à prendre*.

In relation to rights of residence, the Commission recommends that the position on

unregistered land should be clarified so that it accords with the position in relation to registered land. In both cases, a right of residence would be protected by a person being in occupation and would be registrable.

The Commission also recommends the introduction of statutory provisions relating to party structures and access to neighbouring land where required to undertake works.

CHAPTER 5. FUTURE INTERESTS

Chapter 5 considers the law of future interests which is an arcane and complex area of law that has little relevance to modern life. The Commission recommends repeal of many of the old rules which have no relevance to modern life. However, it recognises that there is still merit in seeking to exert a degree of control over those who might otherwise wish to set up indefinite trusts of property and that it would not be appropriate to recommend any departure from the law of England and Wales in relation to the rule against perpetuities. Therefore the Commission has drafted legislative provisions broadly similar to the Perpetuities and Accumulations Act 2009.

CHAPTER 6. SETTLEMENTS AND TRUSTS

Chapter 6 is concerned with dispositions of land which create a succession of interests. The Commission recommends that a unitary trust of land scheme be introduced which would simplify this complex area of law. The legal title would be vested in the trustees who would be given full power to deal with the land as if they were absolute owners. The exercise of the powers by the trustees would be for the general benefit of the beneficiaries and the general law of trusts would be applicable.

CHAPTER 7. CONCURRENT OWNERSHIP

Chapter 7 examines the law of concurrent ownership where several persons own or have interests in land at the same time. The only new provisions that the Commission recommends are in relation to severance of a joint tenancy. It has drafted provisions requiring a notice of severance to be served and registered before unilateral severance can take effect. It also recommends that the courts should be given wider powers to make an appropriate order on partition of property which is owned by more than one person. Where two or more people who hold property as joint tenants die simultaneously, the Commission recommends that this should operate as an act of severance and that the joint tenancy would become a tenancy in common so that the shares could devolve separately.

The Commission does not consider that it is appropriate for it to make any recommendation in relation to cohabitation because this goes far beyond the boundaries of the present exercise, but it recognises that it is undoubtedly an area which is at present unsatisfactory.

CHAPTER 8. MORTGAGES

Chapter 8 relates to mortgages. The recommendations for reform are confined to technical and conveyancing issues because consumer and regulatory matters are considered to be outside the scope of the current project. The recommendations made are intended to provide default provisions only which operate subject to the mortgage deed, as under the current law. One of the most important provisions is the recommendation that all mortgages, whether on registered or unregistered land, would be created by way of charge. The Commission also proposes that a lender's powers and rights should only be exercised for the purposes of protecting the property or realising the security. There would be a requirement that, in the case of a mortgage of a private dwelling house taken out by individuals, it would be necessary for the lender

to obtain a court order before taking possession, except where the borrower gave up possession voluntarily.

CHAPTER 9. CONTRACTS FOR THE SALE OF LAND

Chapter 9 turns to the question of formalities for contracts for the sale of land. After considering the arguments for different options, the Commission recommends that for the time being no substantive changes should be made. The statutory requirement that a contract for the sale of land should be evidenced in writing should be updated and, when electronic conveyancing processes are further developed, the position should be reconsidered.

CHAPTER 10. CONVEYANCES

Chapter 10 is of more practical application because it relates to deeds of conveyance and is mostly concerned with unregistered land. The Commission recommends that certain technical provisions should be clarified and updated. For example, the ancient methods of conveying title, such as feoffment with livery of seisin, should be abolished and it should only be possible to convey land by deed. The length of title to be deduced on sale should be reduced in general to 15 years and the absence of particular words of limitation should not be fatal for a deed to convey land as intended by the parties.

CHAPTER 11. LEGISLATION

Chapter 11 looks at the legislation governing the land law and conveyancing system of Northern Ireland. It points out that the current law is especially complex both because of its antiquity and because of the number of sources from which it is derived. One of the primary aims of reform has to be the modernisation of legislation. Consequently, following a comprehensive review of the legislation, the Commission recommends that some statutes should be repealed without replacement, some should be replaced without substantial amendment and some should be replaced with substantial amendment. The Commission has found that, although true consolidation would be an ideal solution, it is not possible to achieve in its purest sense because of the complexities and cumbersome nature of the legislation. However, the Commission has tried to construct a draft legislation which is workable and effective, comprehensible and clear, so that the law becomes both more up to date and more accessible. The draft Land Law Reform Bill ("the LLR Bill") sets out the new provisions as recommended. Ground rent reform has been dealt with separately by way of amendment to the Ground Rents Act (Northern Ireland) 2001 (N.I. 5). This allows the two pieces of legislation to be introduced at different times if that is considered more appropriate.

CHAPTER 12. ADVERSE POSSESSION

Chapter 12 examines the doctrine of adverse possession which has been controversial in recent times. Adverse possession concerns actions to recover land from someone who has been in possession of it (the squatter) by the dispossessed owner (the owner of the paper title) after the expiration of a time limit.

The Commission considers that it would not be appropriate to recommend that the principles of adverse possession should be set out in legislation, because the fundamental features of the doctrine have been clearly laid down by the courts. The main justification for adverse possession is to resolve conveyancing problems and there does not appear to be any justification for incorporating ethical considerations, such as good faith, into the operation of the doctrine. Nor does there appear to be a strong argument in favour of introducing a veto scheme whereby a dispossessed owner is given a specified period in which to object to the claim of the squatter and

bring proceedings to recover the land.

The Commission recommends that legislation should stipulate that the squatter will acquire the title of the dispossessed owner of the land. However, it does not consider that it is necessary to consider the issues of human rights or payment of compensation, following the outcome of the *Pye* case in the Grand Chamber of the European Court of Human Rights.

CHAPTER 13. GROUND RENTS

A review of the law relating to ground rent redemption and covenants was referred to the Commission in May 2008 by the Minister of Finance and Personnel. Chapter 3 of the Supplementary Consultation Paper was concerned with the first part of the referral which is a review of the scheme for redemption of ground rents. In the Supplementary Consultation Paper the Commission made proposals for a radical approach to redemption, but the formal responses to the consultation indicate that there is only support for a very limited degree of reform. Although the Commission is aware from informal discussions and anecdotal evidence that this may not reflect more widely held views, it can only react to those responses which have been formally made. In these circumstances, the Commission is not proposing a major overhaul of the system. Instead, it is recommending that more limited changes should be implemented by way of amendment to the Ground Rents Act (Northern Ireland) 2001 (c. 5) rather than by the introduction of a completely new legislative framework. Accordingly, the existing system would continue to operate simultaneously alongside the new arrangements.

The reforms suggested involve the automatic redemption of small ground rents of £10 or less on an appointed day. On that day the ground rent and any superior estates in the land would be extinguished. The rent owner would be entitled to collect compensation for the loss of the ground rent from the rent payer, in the same amount as is currently permitted (which is 9 times the annual ground rent, with the result that the maximum compensation would be £90). The process would be administered by the parties themselves and not involve the Land Registry. If the compensation was not paid, interest would accrue from the date on which the compensation was claimed. The unpaid sum could be registered as a lien on the title and paid out of the sale proceeds in due course. The covenants on the title would not be affected.

Before the appointed day on which automatic redemption of all small ground rents takes place, the Commission proposes that there should be an interim period during which compulsory redemption would take place on the trigger point of sale where there is a conveyance of land subject to a ground rent of £10 or less. This will ensure that there is some experience of compulsory redemption before all the small rents are automatically extinguished.

CHAPTER 14. COVENANTS AFTER REDEMPTION

Chapter 4 of the Supplementary Consultation Paper was concerned with the second part of the referral from the Minister for Finance and Personnel, which is a review of the covenants that affect the title after redemption. The Commission had a number of ideas on this subject and made proposals as to ways in which the position of covenants could be addressed. However, the responses to the consultation expressed considerable opposition and clearly demonstrated that there is no appetite for change. Therefore the Commission has confined itself to recommending only that there should be a minor amendment to existing legislation to clarify the situation where a building scheme exists after redemption of ground rent and that there can be reciprocal enforcement of covenants.

VARIATIONS FROM THE CONSULTATION PAPER

The individuals and organisations responding to the Consultation Paper were generally very supportive of the suggestions made by the Commission. Therefore, after consideration of the responses, the drafting of the LLR Bill to implement the recommendations broadly involved the making of only minor adjustments to the original proposals. However, there are two areas in which more substantial variation is required. One area concerns the law dealing with disputes relating to party structures and the other area concerns modernisation of the rule against perpetuities.

As a result of responses to the consultation exercise, the draft legislation includes provisions to introduce a statutory framework for dealing with disputes relating to party structures and to carry out access to neighbouring land where required to carry out works to specified structures.

The legislation also contains provisions to modernise the rule against perpetuities similar to those in the English Perpetuities and Accumulations Act 2009 to create a new perpetuity period of 125 years during which all interests created by a particular document must vest.

PRINCIPAL VARIATIONS FROM THE SUPPLEMENTARY CONSULTATION PAPER

The individuals and organisations responding to the Supplementary Consultation Paper were also broadly in agreement with the Commission's proposals for reform in principle. In relation to adverse possession the consultees who responded were almost unanimous in expressing their approval for the views of the Commission and there was a very high level of support for each of the proposals made. However, as anticipated, the detail in the ideas for reform of ground rents and covenants after redemption proved to be more controversial.

The Commission has taken the views of the consultees into account and, as a result, has reviewed its position on reform of the redemption of ground rents and the covenants which survive redemption. In summary, it recommends that the scheme which currently operates under the Ground Rents Act (Northern Ireland) 2001 should continue alongside the new proposals. It also recommends that on an appointed day there should be compulsory extinguishment of all small ground rents of £10 or less per annum. The compensation payable to the ground rent owner on extinguishment will be secured against the land if the rent payer fails to pay it when it becomes due.

The Commission recognises that there is insufficient support at the present time for further reform but that it may be possible to roll out the provisions further at a future date, when the proposals for the small rents have been in force for a while and have become accepted. Therefore it is not presently making any recommendation in relation to the redemption of rents above £10 per annum.

In relation to covenants, the Commission is recommending very limited amendments to the existing legislation and is not proposing any major reforms. It has confined itself to recommending only that there should be a minor amendment to existing legislation to clarify the situation where a building scheme exists after redemption of ground rent and there can be reciprocal enforcement of covenants.

The Commission is aware from the consultees' responses to the questions on covenants that there is considerable opposition to any plans for fundamental change. Although the rent payers had expressed concern about the number of covenants which survive redemption of the ground rent and the fact that buying out the freehold does not

confer a title free from the rights of the rent owners to continue to own and enforce the covenants, there is no appetite for addressing the problem.

The Commission still believes that fundamental reform should be undertaken in order to make progress with the general policy of simplification of titles and making ownership of land a more straightforward concept. It also considers that the value which is attached to restrictive covenants in Northern Ireland is disproportionate and out of line with the position in other jurisdictions. However, it has to accept, for the time being at least, that there is no support for major reform. It hopes that the recommendations which it is making now will be seen as a first step along the road to further reform and that they will pave the way for greater changes to take place at some point in the future.

CHAPTER 1. INTRODUCTION

A TIME FOR CHANGE

- 1.1 It has long been recognised that the land law of Northern Ireland is complex, outdated and opaque. Although reform of land law has been on the agenda since the late 1960s, a major reform programme has still to be undertaken and the law has become increasingly out of touch with contemporary needs. The Northern Ireland Law Commission (“the Commission”) believes that it is time to focus on modernisation of land law. A systematic rationalisation of both legislation and the general law will be necessary in order to achieve a modern and relevant framework for land law and the conveyancing process.
- 1.2 Many of the basic concepts derive from the feudal system introduced to England in the 11th century and exported to Ireland in the late 12th century. Much of the legislation relating to the subject was enacted centuries ago and, as is explained in Chapter 11, since the 13th century there have been at least seven different legislative regimes enacting legislation for Northern Ireland.
- 1.3 Although at one time similar systems would have existed throughout the common law world, extensive reforms have taken place in most other jurisdictions. In England and Wales, sweeping legislative changes took place in 1925 which have been followed by further updates, most recently in 2002 by legislation which has provided for modernisation of land registration. Extensive reforms have also now taken place in Scotland following devolution in 1998 and more recently in 2009 in the Republic of Ireland.
- 1.4 The Commission acknowledges that reform of the law which underpins the conveyancing process is only one part of the wider development of modern systems, which will update and improve the transfer of property in general. The move towards more straightforward concepts of land law together with an improved conveyancing process may also help to generate inward investment and to encourage diversification of land use. This is particularly important in the purchase of commercial property which tends to be more valuable but is also structured in a more complex fashion. Currently, any large national or international companies interested in coming to Northern Ireland are surprised to find that the law in this jurisdiction remains so antiquated and has not been modernised.
- 1.5 Now that there is a devolved administration in Northern Ireland again, there is an opportunity to create an agenda and to deal with matters which are of particular concern to this jurisdiction. The Commission should endeavour to bring the law into line with both economic reality and popular perception. Uniquely, there is the chance to make a difference and it should be grasped.

BACKGROUND TO THE PROJECT

- 1.6 There have already been three major reports reviewing the substantive law of Northern Ireland and making proposals for reform:
- (1) Report of the Committee on the Registration of Title to Land (1967) (the “**1967 Lowry Report**”).
 - (2) Survey of the Land Law of Northern Ireland (1971) (the “**1971 Survey**”).
 - (3) Final Report of the Land Law Working Group (1990) (the “**1990 Final Report**”).
- 1.7 Following the **1971 Survey** and the **1990 Final Report** some new legislative provisions were introduced in a piecemeal fashion but there have been no comprehensive measures.
- 1.8 That legislation includes:
- (1) Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971
 - (2) Property (Northern Ireland) Order 1978
 - (3) Registration (Land and Deeds) (Northern Ireland) Order 1992
 - (4) Property (Northern Ireland) Order 1997
 - (5) Ground Rents Act (Northern Ireland) 2001
 - (6) Compulsory Registration of Title (Northern Ireland) Orders 1995 – 2002
 - (7) Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005

SCOPE OF THE LAND LAW REFORM PROJECT

- 1.9 This is the first major reform project for the Commission. The land law reform project was referred to the Northern Ireland Law Commission in April 2007 by the Department of Finance and Personnel. The Land & Property Services Agency funded two of the legal posts within the project. The Commission gratefully acknowledges this support.
- 1.10 The project was originally set up in the Office of Law Reform before being transferred to the Commission on its establishment. After the project was transferred, the Commission subsequently received a reference from the Minister of Finance and Personnel to undertake a review of the law of ground rent redemption and related covenants as part of the project.

- 1.11 There are many aspects to Northern Ireland's land law but, as will be explained at several points in this Report, the Commission takes the view that some limits be imposed on the Project. This is not because the Commission considers that certain areas of land law do not merit reform, but rather that resources are finite. Although it is difficult to define precisely the boundaries of land law or conveyancing law, the Commission has had to work out its priorities. This Report concentrates on the basic structure of the land law and conveyancing system.
- 1.12 There are other restrictions which the Commission considers had to be imposed on the Project. One is where land law impinges on major areas of social policy. For instance, the Commission has concluded that the law relating to cohabitation is outside the scope of the Project. The Commission considers that it involves major issues going well beyond the scope of land law reform as such and so merits its own specific treatment. Particular case law issues, unless they relate directly to the basic structure of the land law and conveyancing system, are not dealt with by the Project.

OTHER ASPECTS OF THE REFORM PROCESS

- 1.13 It is clear to the Commission that land law should be as clear and comprehensible as possible; in line with the principle of the rule of law. For this reason the Commission believes thorough reform is necessary rather than further selective amendment of the existing framework of law. As a first step towards this goal, the Commission has undertaken a comprehensive analysis of the current law, so that it can justify all of its proposals for reform on appropriate grounds.
- 1.14 Land law and the conveyancing process depend on more than the reform of land law itself. The integrity of the system is reliant on fundamental and effective processes for the registration of the title to land. The completion of any dealing with land, whatever its nature (for example a sale, purchase, mortgage or gift) is dependent on effective procedures being in place. Accordingly, the Commission recognises that other organisations also have a vital role to play in the reform of Northern Ireland's land law and conveyancing processes. In particular, the Commission recognises the importance of:
- (1) The work of the Land Registers of Northern Ireland in developing e-registration and the technical requirements for the introduction of electronic procedures;
 - (2) The work of the Land Registers of Northern Ireland in extending the requirement for compulsory first registration of titles with the ultimate aim that the title to all land in Northern Ireland should be registered in the Land Registry;
 - (3) The fundamental role that other bodies, such as the Law Society of Northern Ireland, have in instigating and implementing reform. For example, through its Home Charter Scheme, the Law Society of Northern Ireland has already achieved much needed co-ordination of conveyancing

practices and procedures throughout Northern Ireland. In its regulatory role, the Law Society of Northern Ireland has also laid down procedures and set out standards of good practice;

- (4) The work of conveyancing and other property professionals, especially solicitors, in promoting and operating efficient transfers and conveyancing practices.

1.15 Although every aspect is important in its own right, each of these may have to be dependent on the others if Northern Ireland is to have a modern and effective land law and conveyancing process.

1.16 The Commission has been engaging in close consultation with both the Land Registers of Northern Ireland and the Law Society of Northern Ireland. It has also had discussions with solicitors experienced in conveyancing about its proposals for reform. In addition, preliminary meetings have been held with representatives of other organisations involved in conveyancing, such as the lending institutions and the chartered surveyors. Their input, and that of others interested in land law (including members of the Judiciary, Bar of Northern Ireland, academics, the Royal Institute of Chartered Surveyors and the Lands Tribunal of Northern Ireland) have greatly assisted the Commission in formulating the proposals set out in this Report.

A BALANCING ACT

1.17 The Commission considers that there are two underlying principles in the Project:

- (1) Simplicity, clarity and certainty
- (2) Freedom of contract

1.18 It is plain that Northern Ireland's land law should be simplified and clarified into a coherent, clear and certain set of principles enshrined in legislation. However, the principle of freedom of contract is also a fundamental feature of land ownership. Every owner should have the freedom to own, use and dispose of the land as he or she pleases, so long as it does not impinge substantially on the interests of other members of society (including other landowners). For decades, legislation such as planning and environmental statutes have sought to achieve a balance between these competing tensions. In more recent times, the advent of human rights legislation has resulted in the conflict between individual rights and the public interest being tested further.

1.19 Dealings in property require a law of considerable sophistication. The Commission acknowledges that land law does require a high degree of technicality and it recognises that lawyers and other specialists will remain indispensable to all but the simplest transactions with valuable property. There is no advantage in the law being comprehensible and unambiguous if it is not sufficiently flexible to allow people to reach agreement on terms that are commercially acceptable to them.

LAND LAW REFORM PROJECT

- 1.20 Publication of this Report with draft legislation marks the completion of the final phase of the Project. The primary aim of the Project was to modernise and reform the land law of Northern Ireland. To this end, and in order to achieve a modern relevant framework for land law and the conveyancing process, the Commission undertook a systematic rationalisation of both legislation and the general law.

It seems clear to the Commission that reform of land law is within the competence of the Northern Ireland Assembly and that the legislation which implements the recommendations in this Report should take the form of an Act of the Northern Ireland Assembly. The issues with which this Report is concerned are technical legal concepts and not matters which fall within the definition of excepted matters in schedule 2 of the Northern Ireland Act 1998 (c. 47). Although the Crown is such an excepted matter, schedule 2 specifically excludes property belonging to Her Majesty in right of the Crown or belonging to a government department. Accordingly the Commission takes the view that feudal tenure relating to land in Northern Ireland is within the competence of the Northern Ireland Assembly.

- 1.21 The Project is divided into five phases:

- (1) Publication of the Consultation Paper on Land Law (NILC 2 (2009, June 2009)
 - (a) Feudal tenure
 - (b) Estates in land
 - (c) Easements and other rights over land
 - (d) Future interests
 - (e) Settlements and trusts
 - (f) Concurrent interests
 - (g) Mortgages
 - (h) Contracts for the sale of land
 - (i) Conveyances

It also contained a chapter on the legislation which governs land law and the conveyancing system of Northern Ireland.

- (2) A consultation process on the questions raised and the proposals made by the Consultation Paper on Land Law (June 2009 – September 2009). It included:
 - (a) Review of the substantive law relating to land law and the conveyancing process with regard to its need for reform;

- (b) Topic by topic approach to the subject;
 - (c) Identification of anomalies and anachronisms;
 - (d) Screening of all statutes currently in force affecting land law and the conveyancing process.
- (3) Publication of the Supplementary Consultation Paper on Land Law (NILC 3 (2010)) (February 2010). This covered the following topics:
 - (a) Adverse possession;
 - (b) Ground rents;
 - (c) Covenants after redemption.
- (4) A consultation process on the questions raised and the proposals made by the Supplementary Consultation Paper on Land Law (February 2010 – April 2010).
- (5) Publication of this Report containing recommendations on the issues raised by both the Consultation Paper and the Supplementary Consultation Paper. It also includes draft legislation with accompanying explanatory notes to implement the recommendations, taking into account the various comments and submissions received from individuals and organisations.

1.22 The Commission is most grateful to the bodies and individuals who responded to the proposals contained in the Consultation Paper and the Supplementary Consultation Paper. These responses have greatly assisted the Commission in coming to a final view on its recommendations with respect to a highly complex area of law. Notwithstanding its technical nature it is an area of law which impacts substantially on the private and commercial world.

In addition to the individuals and organisations listed below, who provided formal written responses or comments to the Consultation Paper and the Supplementary Consultation Paper, the Commission wishes to acknowledge the comments made more informally and views expressed either at the discussion stage of the process or in response to having sight of the early drafts of the proposals. These include individual members of the judiciary, practising lawyers, academics, legal departments of the lending institutions and other interested parties.

EQUALITY IMPACT ASSESSMENT

- 1.23 The Commission, in having regard for its statutory duties contained within Section 75 of the Northern Ireland Act 1998, has carried out an Equality of Opportunity Screening Analysis (Appendix A) to assess if the policy proposals for land law reform in Northern Ireland potentially impact on equality of opportunity and/or good relations obligations. There was no evidence to suggest that any one section 75 group would be more affected than any other vis à vis the policy. The outcome of this screening exercise indicated that the policy is unlikely to have any significant adverse implications for equality of opportunity and/or good relations and that none of the proposals within this Report require further consideration and impact assessment.

REGULATORY IMPACT ASSESSMENT

- 1.24 The Commission has also carried out a Regulatory Impact Assessment Screening Analysis (Appendix B) to assess if the policy proposals for land law reform in Northern Ireland potentially impact on businesses, charities and community bodies. There was no evidence to suggest that businesses, charities and community bodies would be affected more than any other sector of the community vis à vis the policy. Furthermore, it was difficult to quantify any costs and or savings which would arise from the policy proposals. When viewed as a whole, the policy proposals will have a major positive benefit for the conveyancing process and will contribute greatly to its clarity, efficiency and modernisation. This considerable positive benefit will outweigh any perceived negative impacts. The outcome of this screening exercise indicated that the policy is unlikely to have any significant implications for these sectors of the community and that none of the proposals within this Report require further consideration and impact assessment.

LIST OF INDIVIDUALS AND ORGANISATIONS RESPONDING TO THE CONSULTATION PAPER

Belfast Solicitors Association

Chancery Liaison Committee

Crown Estate Commissioners, London

Invest Northern Ireland

Representative Body of the Church of Ireland

Cleaver Fulton Rankin, Solicitors

The Law Society of Northern Ireland

Land Registers of Northern Ireland

Lands Tribunal for Northern Ireland

Northern Bank Limited

Royal Institution of Chartered Surveyors

Treasury Solicitor's Office, London

Dr Heather Conway – Queen's University Belfast

Professor Elizabeth Cooke – University of Reading

W H Crawford and D R Porter

Gerry King

JW Russell – Solicitor

**LIST OF INDIVIDUALS AND ORGANISATIONS RESPONDING TO
THE SUPPLEMENTARY CONSULTATION PAPER**

Belfast City Council, Department of Property and Projects

Blakiston Houston Estate Company Limited

Capstone Trust Limited

Chancery and Probate Liaison Committee

Grent Trust Limited

The Law Society of Northern Ireland

Northern Ireland Co-Ownership Housing Association

Northern Ireland Federation of Housing Associations

Northern Bank Limited

Royal Institution of Chartered Surveyors

John Frazer FRICS

Arthur Moir – Consultant, Land Registers of Northern Ireland

Patricia Montgomery – Registrar of Titles, Land Registers of Northern
Ireland

Sir Donald Murray

John Neill – Solicitor

David Thompson – Brown McConnell Clark Ltd

CHAPTER 2. FEUDAL TENURE

INTRODUCTION

- 2.1 Chapter 2 of the Consultation Paper considered the concept of tenure which was a key feature of the feudal system. It explained that the feudal system, which originated in continental Europe, was adopted first in England and then later in other common law countries. All land is ultimately owned by the Crown and the greatest interest that anyone can have in land is an estate in fee simple which is held from the Crown. Although the owner of an estate is technically a tenant of the Crown, nowadays an estate in fee simple is considered by everyone, except lawyers, as equivalent to absolute ownership. It is generally accepted that tenure is outmoded and is of only technical significance today. There are no longer any duties or services to be performed by the tenant to a lord of the manor or to the Crown. However, it is important to be aware that in law the owner of land owns an estate in land and not the land itself. The doctrine of estates is inextricably linked to the doctrine of tenure and is examined in chapter 3 of the Consultation Paper.
- 2.2 The Consultation Paper traced the decline of the feudal system and looked at the measures introduced in other common law jurisdictions to abolish or modernise the ancient concept of tenure of land. The fundamental issue of whether the legal concept of ownership can now be aligned with the public perception of ownership is raised in Question 2 of the Consultation Paper and because of its importance it is considered here before Question 1 which relates to escheat, one of the aspects of the feudal system that still retains some significance. **Question 2** presented three possible ways forward in relation to feudal tenure:
- (1) Preserve the status quo, retaining the concepts of both feudal tenure and estates;
 - (2) Abolish feudal tenure but retain the concept of estates;
 - (3) Abolish both feudal tenure and the concept of estates. In the light of the move towards a universal registration of title, the Commission was inclined to recommend that both feudal tenure and the doctrine of estates should be abolished and asked if consultees would agree with that proposal (CP para. 2.56).

- 2.3 Of the consultees who specifically answered this question, a significant majority supported the inclination of the Commission to adopt Option (3) and to abolish both feudal tenure and the concept of estates. It is interesting to note that some of those in favour, who included practitioners and professional organisations, expressed their views in strong terms and were unequivocal in their support for radical modernisation. On the other hand, it appeared from some of the minority responses in which a preference for Option (2) was expressed, and the single consultee who selected Option (1) supporting preservation of the status quo, that there was some misunderstanding about the nature and extent of the provisions which the Commission was proposing. In the light of the responses and after due consideration, the Commission has no hesitation in recommending the implementation of Option (3) to abolish both feudal tenure and estates.
- 2.4 The Commission further recommends the introduction of a straightforward concept of ownership to align the law with public perception. Most people, other than lawyers, currently think that a freehold estate is ownership and are not aware that it is only ownership of an estate, rather than of the land itself. The Commission takes the view that this issue is of the utmost importance and firmly provides a modern foundation for property law in Northern Ireland.
- 2.5 In many respects the move away from tenure and estates to ownership deals with a legal technicality which has very little or no practical significance. The introduction of a concept of ownership does not affect the sovereignty of the Crown. It is specifically stated that the reform does not affect the vesting of ownerless or unclaimed land in the Crown as at present.
- 2.6 A reading of sections 1 - 4 of the draft Land Law Reform Bill ("the LLR Bill") and the accompanying Explanatory Notes provides further clarification of the provisions.

ESCHEAT

- 2.7 In a feudal system, the land escheats to the Crown when a freehold estate determines. Section 1(5) of the Administration of Estates Act (Northern Ireland) 1955 (c. 24) abolished the principal form of escheat under which real property reverted to the Crown on the death of the landowner intestate without heirs (following section 45 of the Administration of Estates Act 1925 (c. 23)). This was part of the general scheme for simplifying devolution on intestacy and assimilating real property with personal property. Now when a landowner dies intestate leaving no successors, the Crown has a statutory right under section 16 of the 1955 Act to take the land as *bona vacantia* instead.
- 2.8 With the abolition of escheat on intestacy the concept of tenure was deprived of most of its practical significance but the possibility of other forms of escheat remains in specified circumstances to ensure that land will never be without an owner. For example, escheat to the Crown may still occur where the trustee in bankruptcy of a landowner,

or the liquidator on the winding up of a company, exercises the right of the statutory owner to disclaim the land. (Such statutory power is conferred by the Insolvency (Northern Ireland) Order 1989 (No. 2405 N.I. 19) articles 152 & 288.)

- 2.9 The Commission was of the view that those forms of escheat which still remain ought to be removed. In circumstances where escheat can still arise, it ought to be replaced by a statutory provision for the ownerless property to pass to the Crown as *bona vacantia*. **Question 1** asked if consultees agreed (CP para. 2.16).
- 2.10 The consultees who responded to this question were almost unanimous in supporting the proposal to replace escheat. However the Treasury Solicitor's Office, which is the Crown's nominee for dealing with and collecting *bona vacantia*, expressed some concerns about the detail of the proposed statutory provisions. It pointed out that "the proposal to abolish escheat would seem to have the effect of transferring jurisdiction over this category of land from the Crown Estate to the Treasury Solicitor. This would represent a transfer of a stream of potential revenue, but also a transfer of certain liabilities because escheat land is often onerous. In particular land which has been disclaimed by the liquidator of a company is currently subject to escheat, and under the new proposals would pass to the Treasury Solicitor. By definition such land is likely to be either of very low value or onerous."
- 2.11 In the light of this, the Treasury Solicitor asked whether it is envisaged that the proposed statutory provisions will include a power of disclaimer in respect of *bona vacantia* assets. It explained that "the ability to execute a notice of disclaimer is of great operational significance to Treasury Solicitor, particularly in relation to land, which is often onerous. The Treasury Solicitor would suggest that the proposed new provisions, which will in effect create a new source of statutory *bona vacantia*, should also include a statutory power of disclaimer."
- 2.12 When a disclaimer of a freehold estate which has vested in the Crown as *bona vacantia* causes the determination of the freehold estate it renders the underlying land subject to escheat. The practice of the Treasury Solicitor in such cases is to notify the solicitors acting for the Crown Estate who then deal with the asset on behalf of the Crown Estate. The Treasury Solicitor drew attention to the possibility that, if all remaining forms of escheat are abolished "it appears that this system will be disrupted because a disclaimer by the Treasury solicitor of a *bona vacantia* freehold estate situated in Northern Ireland could not then be subject to escheat and might even be passed back to the Treasury Solicitor under the new statutory provisions. That would be a very strange result and would have the inadvertent effect of, in practical terms, nullifying the power of disclaimer contained in the Companies Acts 1985 and 2006 insofar as it is exercisable over assets located in Northern Ireland. The Treasury Solicitor therefore believes that it is essential to make clear that the proposed new legislation will not alter the effect of Notice of

Disclaimer executed under the Companies Acts 1985 or 2006 in respect of freehold estates in land, or indeed of common law notices of disclaimer relating to freehold estates.”

- 2.13 In consequence of these helpful comments the Commission has clarified its proposals in relation to the abolition of feudal tenure. Although section 1 of the LLR Bill provides for the abolition of feudal tenure, section 2(1) confirms that this does not affect the position of the Crown as regards demesne land. Section 2(2) confirms that the position of the Crown to succeed to ownerless or unclaimed land and for land to vest in the Crown as *bona vacantia*. Section 2(3) provides that land may vest in the Crown in the same manner as it always has done. The Crown has power to disclaim the land and incurs no liability until it has taken possession or control of such land or entered into occupation of it as provided by section 2(4).

CHAPTER 3. ESTATES IN LAND

REDUCTION OF LEGAL ESTATES

- 3.1 In Chapter 3 of the Consultation Paper the different types of estate were examined in more detail. The Commission believed that if the concept of estates was to be retained, it was clear that it should be simplified. Accordingly, it proposed that there should only be two possible legal estates in land – the fee simple absolute in possession and the term of years absolute. Further, it suggested that there should be a “curtain” between those legal estates and the various equitable “family” interests which would be overreached. The Commission emphasised that in this context it was important to consider which rights and interests should appear on the title, which rights and interests should affect a purchaser and how much protection should be given to any equitable rights of occupation. The issue of the position of equitable rights and the manner in which they are dealt with is a matter of striking a proper balance between the public interest in having an efficient and understandable system of property ownership and the rights of the family or any other occupiers of the property.
- 3.2 **Question 3** explained that in the event it was decided that the concept of estates would be retained, the Commission would take the view that the number of legal estates in land should be reduced. In particular it would consider that the fee simple estate should become the sole estate conferring legal title to freehold and any other freehold estate should create an equitable interest only. Such an equitable interest would be overreached on a conveyance of the fee simple and would thereafter attach to the capital money raised on the sale or other conveyance. The Commission asked if consultees agreed with that proposal (CP para. 3.9).
- 3.3 The consultees who responded directly to this question were unanimous in their support for simplification and the benefits which they perceived would follow from adopting this approach if the concept of estates was to remain. One indirect answer provided a slightly qualified approval for reduction in the legal estates that can exist but that may have been based on a misconception of the current position and of the consequences of the new proposals.

FEE SIMPLE TO BE REGARDED AS OWNERSHIP

- 3.4 However, Question 3 becomes irrelevant if the suggestion mooted in Question 2 (that the concept of estates should be abolished along with the concept of tenure) is adopted, which it is now intended should be the case.
- 3.5 **Question 4** raised the issue of introducing a concept of ownership of land in place of ownership of an estate if the concept of estates can no longer exist. The Commission took the view that a fee simple should, in future, be regarded as conferring “ownership” of the land,

with the holder of that estate being the owner with legal title to the land and, in the case of registered land, registered as “owner”. The current Land Registry system of registering a person as “full owner” would seem to be easily adaptable to such a concept. Question 4 asked if consultees agreed with that view (CP para. 3.11).

- 3.6 Again, those consultees who responded to the question were almost unanimous in expressing their approval for straightforward ownership and also for adapting the current Land Registry system to enable registration of a person as the owner of land. The Commission considers that it is eminently sensible to replace the concept of estates with legal ownership of land and recommends that this course of action should be adopted. The new ownership would be equivalent to a fee simple absolute in possession and the owner of land would have all the powers of the holder of a fee simple estate.
- 3.7 **Question 5** proposed that only a fee simple in possession should confer legal title and asked if consultees agreed with that suggestion. As with the earlier questions, the consultees were practically unanimous in supporting the proposal, and some made additional comments to draw attention to points that they wished the Commission to take into consideration when drafting the provision to give effect to the proposal. However, because it is recommended that the concept of estates should disappear, another way in which this question could be approached would be to ask whether only a fee simple in possession should confer legal ownership.
- 3.8 The Commission has developed its thinking on the introduction of a straightforward concept of ownership in consequence of the very positive responses and general agreement with the proposals to abolish the outmoded concepts of tenure and estate. This forms the central foundation of a modern system of landholding. Due to its importance, the definition of ownership is set out in section 1 of the LLR Bill while section 3 identifies the owner as the person holding legal title to the land and entitled to dispose of it on that basis. There are consequential provisions in section 4. Further details in relation to these principal sections are set out and clarified in the Explanatory Notes.

FREEHOLD ESTATES – MODIFIED FEES

- 3.9 **Question 6** raised the issue of the best way to deal with modified fees which do not confer an absolute interest on the grantee (CP paras. 3.24 – 3.25). It seemed to the Commission that the main options for dealing with modified fees were as follows.
- (1) To treat them all as a fee simple absolute;
 - (2) To treat them all as settlements;
 - (3) To treat some modified fees as conferring legal title and the others as involving a settlement;

- (4) To add interests like a possibility of reverter and right of entry or re-entry attached to modified fees to the list of “impediments” contained in the Property (Northern Ireland) Order 1978 and enable the holders of existing modified fees to apply to the Lands Tribunal for orders under Part II of that Order modifying or extinguishing such impediments;
 - (5) To prohibit the creation of any further modified fees and to convert existing ones into a fee simple absolute, allowing any claimant to a reversion or remainder to register that right in the Registry of Deeds or the Land Registry as appropriate within a set time limit, for example three years.
- 3.10 On balance, the Commission was inclined to adopt a combination of Option (1) and Option (4), on the basis that the combination of the effect of the relevant section 13 of the Perpetuities Act (Northern Ireland) 1966 and such a jurisdiction given to the Lands Tribunal to deal with possibilities of reverter and rights of re-entry which survive, would result in modified fees ceasing to be a problem in the near future. Any holder of a modified fee who experiences difficulties in dealing with it would be able to invoke the Tribunal’s jurisdiction. This would avoid any doubts about unfair treatment of existing holders of such rights. The Question asked whether consultees agreed and if not, what other option did they consider should be adopted? (CP paras. 3.24 - 3.25).
- 3.11 In general the overwhelming majority of the consultees who responded to this question was in agreement with the Commission’s proposals and some made additional comments. However, the Commission has some difficulty in making a proper analysis of the views expressed on this question in the absence of any reasoning in some of the responses received
- 3.12 The Commission therefore recommends that modified fees should be treated like a fee simple absolute for the purpose of holding legal title to land and being able to dispose of it. Section 3(2) of the LLR Bill gives effect to this recommendation. This means that such fees simple would confer legal ownership and would not involve the creation of a trust. However, the possibility of reverter and right of entry or re-entry, to which modified fees may be subject, should continue to be legal interests held by another person. Power should be conferred on the Lands Tribunal to modify or extinguish these interests on the application of the owner of the modified fee, should the requirement arise.

FREEHOLD ESTATE – A MINOR’S INTEREST

- 3.13 **Question 7** asked whether consultees agreed with the proposal that in future, a minor’s interest in land would be equitable only and the legal title would be vested in trustees who would be able to deal with it on behalf of the minor (CP para. 3.27)
- 3.14 The consultees who responded to this question were almost unanimous in their approval of this proposal and accordingly the

Commission recommends that it should be adopted. The proposal is implemented by section 7 of the LLR Bill which provides that a minor is not capable of owning land or a legal interest in land. The minor will have an equitable interest only; the legal title will be vested in the trustees and there will be a trust of land. (See part 4 of the LLR Bill)

FREEHOLD ESTATES – FEE TAIL

- 3.15 **Question 8** asked if consultees agreed with the proposal to prohibit the creation of a fee tail estate in future (CP para. 3.31). In addition, **Question 9** asked if all existing fee tail estates should be converted into a fee simple in most cases where there is currently no protectorship, unless there is a reversionary or remainder interest which has already vested and which could not be divested by a disentailing assurance or by possibility of issue extinct (CP para. 3.33).
- 3.16 There was no dissent amongst the consultees in response to Question 8 or Question 9 and virtually all expressed their agreement in terms that commended the proposals. Therefore the Commission recommends that they should be implemented and section 6 of the LLR Bill sets out the provisions that would bring them into effect. The creation of any new fee tail estate would be prohibited and most such existing estates would be converted into ownership equivalent to a fee simple absolute in possession.
- 3.17 Two of the respondents to Question 9 mentioned the possible implications of human rights legislation in this context. However, as is more fully explained in the Explanatory Notes to section 6, if there is any question of another person having an interest in the land of which they ought not to be deprived, a trust of land will arise until the time when the fee tail falls into possession

FREEHOLD ESTATES – LIFE ESTATE

- 3.18 **Question 10** asked if consultees agreed that the life estate should be retained as an equitable estate only (CP para. 3.34).
- 3.19 The consultees who responded to this question were strongly in agreement with the proposal. It is possible that the one respondent not in agreement may have been under a misapprehension as to its precise effect, but no detailed reasoning was given for the reply.
- 3.20 The Commission does not propose to abolish the life estate but to preserve it as an equitable interest. The proposal recognises the utility of the life interest but by a different mechanism from the current one. At present rights and powers attach to the life estate under the Settled Land Acts 1882 - 1890. The new proposals would provide that a life interest would instead operate under a trust for land (see Part 4 of the LLR Bill). The trustees would be the legal owners and the life tenant would have an equitable interest.
- 3.21 During the transitional period, any existing life owner would be a trustee of the property. For a new life interest created after an

appointed day trustees would be appointed, including the life tenant if the testator or grantor so wishes.

OVERREACHING OF EQUITABLE INTERESTS

3.22 **Question 11** noted that the Commission had not reached a conclusion on this difficult issue but it seemed that broadly, there were four possible options (CP para. 3.45).

- (1) To give a purchaser a clean title free of equitable interests as long as the property is sold by at least two trustees and the purchaser had made proper enquires as to any occupiers;
- (2) To increase protection for occupiers and provide that their interests should not be overreached unless they consented to the sale – this would correspondingly increase the burden on a purchaser to obtain their consent to the sale;
- (3) To extend the principle of overreaching to sales by a single owner and to require an occupier to register his or her interest in order to protect it – this would facilitate conveyancing and alleviate the burden on the purchaser to make enquiries, but might potentially cause injustice to the occupier whose rights would be reduced;
- (4) To couple an extended principle of overreaching with reform of the law of cohabitants – this seems to raise substantial issues which go beyond the scope of the Consultation Paper.

3.23 It is evident from the responses to this question that there is no clear way forward on this issue. The respondents clearly gave thought to the different options but did not specifically agree or disagree with the Commission's views to any degree. Some of them provided comments about the possible consequences of particular options but did not demonstrate an inclination towards any one solution. The complexity of the problem is illustrated by an element of slight confusion shown by the consultees and some difficulty in envisaging the outworking of the different scenarios.

3.24 In the light of this the Commission is inclined to persevere with the view that it expressed in the Consultation Paper and to recommend that where there are two or more legal owners, the interests of equitable owners would be overreached. The equitable interests would be transferred from the land to the capital money. Where there is a single legal owner a purchaser or mortgagee would take subject to any equitable interest as long as that was specified or alternatively is protected by deposit of documents or is reasonably discoverable by inspection. An appropriate provision is set out in section 47 of the LLR Bill and more detail is given in the Explanatory Notes.

LEASEHOLD ESTATES

3.25 **Question 12** asked if consultees agreed with the view that the leasehold estate should also confer legal title but that this principle

would not extend to include a tenancy at will or a tenancy at sufferance (CP para. 3.47).

- 3.26 The responses indicated almost unanimous agreement in principle; the one dissenting response made a comment that did not relate directly to the question posed. Therefore the Commission recommends that this proposal should be adopted. In section 5(1) of the LLR Bill a tenancy is specified as one of the legal interests in land which an owner may create out of the land or dispose of. As is explained in the Explanatory Notes, under the new concept of ownership, the owner who has the legal title will still be able to create legal interests less than ownership in favour of other persons. The term “tenancy” is used in place of “lease” because it covers all situations where the relationship of landlord and tenant can be created, including oral tenancies. (See section 116 of the LLR Bill, General Interpretation).
- 3.27 In **Question 13** the Commission drew attention to the point that there are several other issues relating to leasehold estates which have proved to be controversial in recent times. For example, leases for periods of uncertain duration, leases for discontinuous periods, and non-proprietary leases. Notwithstanding the connection such issues have with the law of estates, the Commission took the view that they raise matters of a wider scope, especially in relation to the general law of landlord and tenant. It concluded that such issues should be considered as part of a review of that law and so should not form part of the present project. It asked if consultees agreed with that view (CP para. 3.49).
- 3.28 There was no dissent amongst the consultees in their agreement to this uncontroversial proposal. Accordingly, the Commission recommends that issues which relate to the law of landlord and tenant should not be considered as part of the present reforms.

CHAPTER 4. EASEMENTS AND OTHER RIGHTS OVER LAND

INTRODUCTION

- 4.1 Chapter 4 is concerned with interests and rights affecting land which can be owned but which are of a lesser nature than estates. Generally such interests confer on the holder limited rights in respect of someone else's land. One major category of such interests are incorporeal hereditaments which confer rights such as the rights to do something on or take or receive something from the land. The common law recognised a wide range of incorporeal hereditaments, but many are no longer of any relevance. Easements and profits *à prendre* are by far the most common incorporeal hereditaments and the ones which operate the most extensively nowadays.

PERIODIC RENTS

- 4.2 Another important category of incorporeal hereditaments which was formerly very common was that of periodic rents issuing out of land. Most of these have disappeared as a consequence of legislation such as the Land Purchase Acts and more recently, the Property (Northern Ireland) Order 1997 (N.I. 8). Surviving examples of periodic rents include ground rents and these are dealt with in Chapter 13. A number of different types of rentcharge also survive. These can take various forms such as annuities, indemnity rentcharges and rentcharges arising under a statute or court order.
- 4.3 **Question 14** asked whether consultees agreed that there is no need for further legislation relating to periodic rents, apart from a review of the redemption scheme operating under the Ground Rents Act (Northern Ireland) 2001 (c. 5) (CP para. 4.8).
- 4.4 The consultees who responded directly to this question unanimously agreed with this uncontroversial proposition and some made additional comments about the desirability of reviewing the 2001 Act. Consequently, the Commission recommends that no further action is taken in relation to periodic rents except as part of the exercise to frame a new redemption scheme for ground rents

FRANCHISES

- 4.5 A franchise is a right or privilege granted by the Crown to a subject, and will usually have been granted several hundred years ago. For example the right to hold fairs and markets or to run ferries. Such Crown franchises, which will usually have been granted centuries ago, should not be confused with modern private commercial franchise arrangements, such as relate to well-known, often international, food café, restaurant and retail operations.
- 4.6 Although some franchise rights may still survive, the Commission asked in **Question 15** whether consultees agree with its view that

there is no need to deal with franchise rights in the new legislation, other than to recognise their existence (CP para. 4.10).

- 4.7 Again the consultees who responded directly to this question unanimously agreed with the Commission and accordingly the Commission recommends that franchise rights need not be considered any further at present.

TITLES AND OFFICES

- 4.8 Titles of honour, such as peerages and offices, were by tradition classified as incorporeal hereditaments, but this has been a matter of some controversy.
- 4.9 In **Question 16** the Commission takes the view that there is no need for any new proposed legislation to deal with titles and offices divorced from ownership of an estate or interest in land (connected with, but separate from the title or office) (CP para. 4.11).
- 4.10 All the consultees who responded directly to this question were in agreement with the proposal and so the Commission recommends that the new legislation does not include any provision in relation to titles and offices.

LICENCES AND SIMILAR INTERESTS

- 4.11 The judicial recognition of licences as having at least some of the attributes of an interest in land is a comparatively modern development. One of the most litigated issues is whether in a particular case the arrangement made between the owner of the land and the occupier has created a tenancy or a licence. In relation to the more general law of licences, most of the recent case law concerns the remedies for enforcement of licence arrangements and the application of equitable principles like the law of estoppel
- 4.12 **Question 17** asked whether consultees agree with the Commission that it would not be appropriate to interfere with the development by the courts of the general law of licences, especially where this involves the application of equitable principles (CP para. 4.15).
- 4.13 All the consultees who responded directly to this question were in agreement with the proposal and so the Commission recommends that the new legislation does not include any provision in relation to the general law of licences.

RIGHTS OF RESIDENCE

- 4.14 A right of residence is a particular form of an occupation arrangement which is relatively common. Frequently a male farmer's will provides that the farm is left to one of his children subject to a right of the widow to reside on the farm or in the farmhouse "for the rest of her day". It is clear from the extensive case law on the subject that a right of residence may be construed as creating quite different rights. The Commission takes the view that the position of the holder of a right of residence in relation to unregistered land should be clarified along the lines of section 47 of the Land Registration Act (Northern Ireland)

1970 c. 18), so that in relation to unregistered land, a right would be protected by a person being in occupation and would be registrable. **Question 18** asked if consultees agree with this suggestion (CP para. 4.17).

- 4.15 The consultees were all unanimous in expressing their support for this proposal and accordingly the Commission recommends that it should be implemented. Section 18 of the LLR Bill provides that a right of residence on unregistered land, like a right on registered land, is deemed to be personal and does not confer any right of ownership.

AGISTMENT AND CONACRE

- 4.16 Agistment and conacre “lettings” have long been a feature of agriculture in Ireland. Agistment is the right to graze livestock on someone else’s land and conacre is the right to enter into someone else’s land in order to till it, sow crops on it and in due course harvest the crops. The Commission recognises that the system of agistment and conacre lettings should be reviewed. However, the Commission considers that it raises issues which are outside the scope of this Consultation Paper and **Question 19** asked if consultees agree (CP para. 4.19).
- 4.17 The consultees were unanimous in their agreement and the Commission therefore recommends that this proposal should be adopted.

LAND OBLIGATIONS

- 4.18 **Question 20** asked whether consultees agree with the Commission’s conclusion that further reform of the law concerning obligations relating to land should concentrate not on a scheme for covenants as had been proposed previously, but on other areas of the law such as that relating to easements and profits *à prendre* (CP para. 4.22).
- 4.19 All the consultees who specifically responded to this question agreed with the conclusion and consequently the Commission recommends that this approach should be followed. Part 2 of the LLR Bill which deals with easements and other rights over land, sets out the Commission’s stance on this matter.

Easements and profits *à prendre* - prescription

- 4.20 The law of easements and profits has long been recognised as unsatisfactory in several respects. In particular, the law relating to prescription, whereby a person may acquire an easement or profit over someone else’s land by long user, is extremely complicated. However, the Commission inclines to the view that the doctrine of prescription can still serve a useful function and should not be abolished altogether and **Question 21** asked if consultees agree with that view (para. 4.28).
- 4.21 The consultees who responded unanimously agreed that there would be merit in introducing a simple statutory scheme of prescription. Therefore the Commission proceeds to consider prescription. The

scheme which it recommends is set out in sections 8 – 17 of the LLR Bill.

- 4.22 The Commission is inclined to the view that operation of the doctrine of prescription should not extend to profits *à prendre* and in **Question 22** asked whether consultees share that view (CP para. 4.29).
- 4.23 There was no consensus amongst the consultees who responded to this question. Views were expressed both in favour of and against there being no prescription for profits *à prendre*. Some of the respondents considered that the principle of affording legal formality to long standing practical arrangements should continue to apply to profits *à prendre* as it does to easements.
- 4.24 In the light of the responses, the Commission has reflected further on this point. It takes the view that a person who acquires a profit by prescription is acquiring rights to take something from the land of the servient owner without payment in such a manner that may cause detriment, loss or inconvenience to that owner. Profits are more likely to arise on rural or agricultural land which, by its very nature, is more difficult for the owner to oversee. For these reasons, the Commission is inclined to take the view that an express grant should be necessary to create a profit. Accordingly, the Commission would make a recommendation to that effect. Therefore the provisions in Section 9 of the LLR Bill relate only to acquisition of easements by prescription.
- 4.25 As regards easements, the Commission recognised that in practice much reliance is placed on the doctrine of prescription for the acquisition of positive easements such as rights of way which provide access to land. **Question 23** asked if consultees agree that prescription should be retained for positive easements (CP para. 4.30). The responses to this question expressed universal approval for prescription to continue to apply to positive easements.
- 4.26 The Commission is also inclined to retain prescription for negative easements, such as a right of support or a right of light and in **Question 24** asked if consultees agreed (CP para. 4.31). The responses to this question were also unanimous in supporting the view of the Commission.
- 4.27 The Commission considers that the law of prescription should be considerably simplified and that the Prescription Act 1832 (c. 71) (applied to Ireland by the Prescription (Ireland) Act 1858 (c. 42)) should be repealed and replaced by a much simpler statutory scheme. **Question 25** asked whether consultees agreed (CP para. 4.32). Universal support for this proposal was expressed by the consultees who answered this question.
- 4.28 As regards the details of a new statutory scheme to replace the 1832 Act, the Commission was inclined to propose that:
- (1) The statutory prescription period should be 20 years (not 12 years as had previously been suggested);

- (2) The right claimed should be one that is capable of subsisting as an easement;
- (3) The right should be enjoyed openly and peaceably;
- (4) The running of the prescriptive period should be terminated by interruption of enjoyment of the right claimed for a continuous period of 12 months or by registration of a notice by the owner of the servient land;
- (5) The prescriptive easement should be commensurate in extent with the right enjoyed during the prescriptive period.

4.29 **Question 26** asked if consultees agreed (CP para. 4.33). More than half of the consultees who responded to this question provided short answers agreeing with the Commission's proposals for the new statutory scheme. The remainder gave more detailed responses. Overall, there was overwhelming support, with only one exception, for a prescription period of 20 years. There was also general approval for the proposal that the right claimed should be capable of subsisting as an easement, although it was pointed out that this should not take away from the flexibility of court decisions. There were no objections to the suggestion that the right should be enjoyed openly and peaceably. However, queries were raised and indications were given that the consultees would need to have more details in relation to termination by interruption of enjoyment. More particularly, in relation to the proposal for registration of a notice by the owner of the servient land. One respondent expressed the view that proposal (4) was not practicable and that a number of issues surrounding it would need to be resolved.

4.30 Section 9 of the LLR Bill sets out the details of a new statutory scheme for the acquisition of easements by prescription.

4.31 The Commission was also inclined to recommend that provisions should be implemented to cover situations where the dominant or servient owner is a tenant (section 11) or beneficiary of a trust (section 10) or suffers from some incapacity (section 13) and provisions to govern interference by third parties (section 15), enabling the servient owner to interrupt enjoyment by the dominant owner by registration of a notice (section 14) (extending the provisions of the Rights of Light Act (Northern Ireland) 1961 (c. 18) to all easements) and abandonment as a result of 20 years' non user (section 16). Section 12 contains provisions for a corporation or other body with limited powers to own or deal with land. **Question 27** asked whether consultees would agree with the proposal to implement such provisions (CP para. 4.34).

4.32 The consultees who responded to the question were almost unanimous in their approval of the suggestion put forward. Accordingly, sections 10 to 16 of the LLR Bill deal with the above situations where the enjoyment of an easement is interrupted.

- 4.33 To complete the acquisition of an easement by prescription it seemed to the Commission that there are three possible options for the way in which a new, much simplified scheme might operate:
- (1) Upon completion of the requisite prescriptive period and satisfaction of other conditions, the easement would automatically vest in the dominant owner;
 - (2) The dominant owner would be required to obtain a court order confirming the prescriptive claim and that order would have to be registered in the Land Registry or the Registry of Deeds as appropriate;
 - (3) The dominant owner could apply directly (without a court order) for registration of the prescriptive easement, with the right to register being an interest binding a purchaser. Any dispute would have to be referred to the court.
- 4.34 The Commission was undecided as to which option to recommend. It took the view that further discussion should take place with Land Registers of Northern Ireland in order to work out how registration requirements might operate and consider all the implications. In the meantime, it indicated that it would be interested to receive the views of consultees on the various options. **Question 28** asked for the views of consultees on these options and whether some other alternative might be preferable? (CP paras. 4.37 – 4.38).
- 4.35 Differing views were expressed in the responses to this question and no clear consensus emerged. There was some support for automatic vesting of an easement on completion of the prescription period, as in Option (1) and some interest in registration of the easement without the necessity of obtaining a court order as in Option (3). One consultee made a further suggestion of registration in the Statutory Charges register and one consultee recommended that any dispute concerning easements acquired by prescription should fall within the jurisdiction of the county court. After a careful consideration of all the views expressed, the Commission ultimately concluded that it should recommend that in future claims for the acquisition of easements by prescription should be based on the provisions set out in sections 8 – 17 of the LLR Bill (i.e. automatic vesting). The proposals are based on a 20 year prescription period for easements which are recognised by the general law. There is no requirement to register the easement in order to acquire legal title to it – an easement acquired by prescription will continue to be a burden affecting registered land without registration. After expiration of the 20 year period it is not necessary to perfect the acquisition of the easement by registration or by obtaining a court order. A more detailed description is set out in the Explanatory Notes.

Implied rights

- 4.36 In relation to the acquisition of implied rights by prescription, the Commission took the view that there should be a new statutory scheme to replace the rule in *Wheeldon v Burrows* (1879) 12 ChD 31). It considered that there should be a single provision for the reciprocal rights and obligations which continue or accrue when land is divided. **Question 29** asked whether consultees agreed with that view (CP para. 4.39). There was general agreement to the proposal in response to this question. Accordingly, section 17 of the LLR Bill sets out the requirements for implying the creation of easements where land is subdivided or disposed of in parts.
- 4.37 In **Question 30** the Commission asked whether consultees agree with the view that a provision should be introduced to replace section 6 of the Conveyancing Act 1881(c. 41) to ensure that only existing rights pass with a conveyance of the land and that any precarious rights should not be upgraded or transformed into more extensive rights (CP para. 4.40). There was almost universal approval of this suggestion from the consultees. The Commission therefore recommends that section 6 of the 1881 Act should be replaced. Section 95(3) (features and rights conveyed with land) of the LLR Bill implements that recommendation and clarifies that only existing rights pass with a conveyance.
- 4.38 **Question 31** asked if consultees agree with the view of the Commission that a replacement of section 6 of the Conveyancing Act 1881 should make clear that on a conveyance of land it does not create any new interest or right or convert any quasi-interest or right existing prior to the conveyance with a full interest or right (CP para. 4.41). Again, there is a general agreement to this proposal in the responses. The Commission therefore recommends that this should be clarified and section 95(3) of the LLR Bill provides that no new right is created or quasi right converted into a full interest or right. Further details are provided in the Explanatory Notes.
- 4.39 The Commission takes the view that the issue of what constitutes an easement or profit *à prendre* has always been a matter for the courts, which have made it clear that they will adopt a flexible approach – the categories are not closed. The courts should be left to develop the concepts and to adapt them to changing conditions in society. **Question 32** asked if consultees agree (CP para. 4.43). The responses indicate general agreement with the proposition that the Commission should not attempt to define easements or profits *à prendre* and that the matter should be left to the courts. Therefore the Commission recommends that this approach is followed and the draft legislation does not include any definition of an easement or a profit *à prendre*.

PARTY STRUCTURES

- 4.40 In the Consultation Paper (para. 4.44) the Commission drew attention to the fact that, because of the problems that can arise for adjoining landowners where building work may affect a party structure which

separates their properties, it has long been suggested that party structure legislation should be introduced to deal with disputes that may arise. Such legislation already applies in England and Wales under the Party Wall etc Act 1996 (c.40), and in the Republic of Ireland under sections 43 – 47 of the Land and Conveyancing Law Reform Act 2009 (c. 27). The Commission indicated that it would be interested to receive any evidence on the subject from consultees because it was not aware of whether there were problems in practice relating to party structures. **Question 33** asked whether consultees agreed with the inclination of the Commission not to recommend legislation on party structures (CP para. 4.44).

- 4.41 Only one consultee who responded to this question agreed that there should not be any legislation on this matter. The majority considered that it would be useful to have such provisions and that there should be some mechanism in place for dealing with disputes. Some were in favour of legislation along the lines of the Party Wall etc Act 1996 (c. 40) in England and Wales, although the limited nature of that Act was recognised. There was one very detailed response to the consultation providing case studies giving evidence of situations where disputes were experienced and arguing persuasively for the introduction of a legislative framework that would deliver clarity, consistency and accountability for the parties involved.
- 4.42 At all times the Commission emphasised that it was keeping an open mind on the subject. Although it was aware that the provisions in neighbouring jurisdictions relating to party structures were fairly limited both procedurally and in terms of the remedies available, it also considered that there was a need to introduce legislation so that disputes could be resolved. The Commission took into account the possibility that any statutory provisions might be used by developers to force neighbouring landowners to agree to works under the threat of an application for an access order. However, having considered the matter at length and engaged in further consultation with interested parties, the Commission has reached the conclusion that it would be beneficial have legislation to deal with disputes relating to party structures.
- 4.43 Sarah Witchell wrote two articles on the subject of party structures which were published in the Law Society of Northern Ireland's journal, *The Writ*. The first article (September 2009) set out the current law and summarised the position in adjoining jurisdictions. The article invited solicitors and other property professionals to give evidence as to their experience in practice. The second article (Summer 2010) outlined the Commission's revised proposals for introducing provisions and also asked for readers to submit any comments or queries on them to the Commission.
- 4.44 The question of provisions relating to party structures is linked to the issue of access to neighbouring land which is considered in Question 34. In England and Wales there is the Access to Neighbouring Land Act 1992 (c. 23) as well as the Party Walls, etc Act 1996 (c. 40) but it is not entirely clear how those two Acts interact. Therefore, in order to

avoid potential problems of overlapping provisions or a lack of clarity in this jurisdiction, the Commission recommends that there should be one unified set of statutory provisions in Northern Ireland for party structures and access to neighbouring land. Accordingly proposed provisions are set out in sections 19-24 of the LLR Bill.

- 4.45 The LLR Bill provides a new statutory entitlement for a building owner to carry out works to a party structure and contains provisions to deal with the difficulties and disputes which may arise between neighbouring landowners. It covers works to party structures or works to land and buildings which can only be carried out by having access to neighbouring land. The rights conferred are in addition to those which the building owner may already have by agreement or under the general law and are subject to compliance with specified conditions.
- 4.46 It is only necessary to invoke the procedure if there is no consent between the parties. In such a case, the building owner would serve a party structure notice on the adjoining owner before exercising any rights to carry out building works. Before commencing any works a surveyor would have to be appointed. The surveyor would be engaged to act as an independent expert and would have a duty to be impartial. He or she would not be representing the views of the party which was intending to do the work. It is envisaged that the statutory provisions will be supplemented by regulations which will set out the details of the procedure and the requirements as to the contents of the party structure notice as well as other technical details.

ACCESS TO NEIGHBOURING LAND

- 4.47 As with party structures, the Commission was not inclined to recommend legislation on access to neighbouring land. It was concerned about the danger of any such legislative provisions being used by developers who have acquired land to force neighbouring landowners to agree to works under the threat of an application for an access order. Again the Commission was not aware whether this matter was a problem and sought evidence from consultees. **Question 34** asked whether Consultees agreed with the proposal not to recommend legislation on this issue (CP para. 4.46).
- 4.48 The overwhelming majority of respondents disagreed with the Commission and considered that legislation would be desirable because of the frequency of disputes between neighbours and that this opportunity for dealing with the problem should not be missed. One detailed response indicated a preference for legislation covering both party structures and access to neighbouring land.
- 4.49 The subject of party structures and access to neighbouring land are linked together because it is often necessary to have access to neighbouring land in order to do work to a party structure. With specific reference to access to neighbouring land, the Commission found that the argument of the consultee which submitted the detailed response on this issue in favour of the legislation was persuasive.

Accordingly, as referred to above (see para. 4.44), sections 19 - 24 of the LLR Bill includes provisions dealing with difficulties and disputes that may arise as between neighbouring landowners both over works to party structures and concerning access to neighbouring land.

- 4.50 Although the Commission was initially inclined not to recommend legislation on party structures or access to neighbouring land, it took the view that if ultimately the conclusion was reached that legislation relating to the provision of access to neighbouring land should be introduced, jurisdiction should be conferred on the Lands Tribunal to deal with neighbour disputes involving both party structures and access to carry out works to buildings which may not be party structures. **Question 35** asked whether consultees agreed (CP para. 4.47).
- 4.51 The consultees who responded to this question were generally in agreement with the proposal. Therefore, because the Commission is now recommending the introduction of legislative provisions, it also recommends conferring jurisdiction on the Lands Tribunal to deal with disputes. Section 23 of the LLR Bill provides that, in the event of a dispute between the parties about an award made by a surveyor, any of the parties may appeal to the Land Tribunal against the award.

CHAPTER 5. FUTURE INTERESTS

INTRODUCTION

- 5.1 Chapter 5 of the Consultation Paper considered the modernisation of the law relating to future interests which is currently one of the most difficult to understand and apply. This law is concerned with interests in property which will vest at some time in the future and is governed by a myriad of complex archaic rules. The Consultation Paper outlines the various rules and explains their application before setting out the reasons for its proposals to reform the law.

COMMON LAW CONTINGENT REMAINDER RULES

- 5.2 These rules are a throwback to the feudal system of land tenure (CP 5.2 – 5.3). **Question 36** asked whether consultees agreed with the Commission's view that legal remainder interests should be abolished, that the Statute of Uses (Ireland) 1634 (c. 1) should be repealed and that most future interests in land should be converted into equitable interests (CP para. 5.3).
- 5.3 The consultees who responded to this question were almost universal in confirming their agreement to the proposal for abolition and accordingly the Commission recommends that it is implemented. Part 3, Chapter 1 of the LLR Bill which relates to future interests proceeds to abolish the common law contingent remainder rules. The conversion of most future interests in land into equitable ownership is achieved by a combination of Part 3, the new concept of legal ownership introduced by Part 1 and the new provisions governing settlements and trusts of land in Part 4 of the LLR Bill.

RULE AGAINST ACCUMULATIONS

- 5.4 This is a rule designed to prevent a disposition or settlement of property tying up the income for too long a time, i.e., requiring it to be accumulated rather than spent (CP para. 5.6). In **Question 37** the Commission asked whether consultees agreed with its view that no special accumulations rule should be enacted in Northern Ireland and that the Accumulations Act 1892 (c. 58) should be repealed. Further the Commission was not convinced of any need for a special rule for charities in that respect (CP para. 5.7).
- 5.5 Apart from one fairly strongly worded dissenting opinion, there was general agreement that there is no need for a rule against accumulations in Northern Ireland. The Commission recommends that this approach should be adopted and consequently there is no provision in the LLR Bill for a separate rule governing accumulations.

RULE AGAINST INALIENABILITY

- 5.6 This is a rule which seeks to restrict dispositions or settlements of property which unduly tie up the land or the capital or income of property (CP para. 5.8). The Commission took the view that the rule against inalienability was one feature of the feudal system which

would remain of practical relevance, even if a new concept of ownership is adopted and **Question 38** asked whether consultees agreed (CP para. 5.9).

- 5.7 The consultees who responded to the question were almost unanimous in their support for retention of the rule. Therefore section 1(3) of the LLR Bill, which relates to ownership of land, includes a provision for the owner of land to dispose of it.

REFORM

- 5.8 After outlining the law relating to future interests, the Commission concluded that there were two further areas which required to be reviewed (CP paras. 5.13 to 5.22). These were the rule against perpetuities (in its strict sense) where the rule operated to confine any settlement from reaching too far into the future and the rule against inalienability as it applied to gifts or trusts for non-charitable purposes or in favour of non-charitable bodies. This was in addition to the proposal that no vestiges of the rule against accumulations should remain. **Question 39** asked if consultees agreed with that proposition (CP para. 5.12).
- 5.9 The consultees were virtually unanimous in expressing their agreement with this proposal and accordingly the Commission recommends reform of the rule against perpetuities and the rule against inalienability as it applies to gifts or trusts for non-charitable purposes or in favour of non-charitable bodies.

RULE AGAINST PERPETUITIES

- 5.10 The common law rule against perpetuities was reformed substantially by the Perpetuities Act (Northern Ireland) 1966 (c. 2) but it has come to be recognised that the statutory reforms are not entirely satisfactory and probably did not go far enough. In **Question 40** the Commission asked if consultees agreed that the case for abolition should prevail in the interest of simplification of the law and on the basis that there should be less complicated methods of deterring settlors or testators tempted to control future devolution of property (CP para. 5.19).
- 5.11 Although one consultee was not persuaded that any change to the present law is required, the overwhelming majority expressed views strongly in favour of reform.
- 5.12 However, the Commission recognised the conclusion might be ultimately reached that the rule against perpetuities should be retained rather than abolished altogether. As such, the Commission sought the views of consultees as to whether it should be reformed to follow the English Perpetuities and Accumulations Act 2009 (c. 18). In the 2009 Act the rule is restricted in its application to successive estates and interests in property and to powers of appointment and there is a single perpetuity period of 125 years. **Question 41** asked whether consultees agreed with that proposition (CP para. 5.22).

- 5.13 Amongst the consultees supporting reform of the rule there was general approval for a single perpetuity period and a replication of the legislation that has been enacted for England and Wales. One consultee queried whether 80 years would not be an adequate perpetuity period, but all others were in favour of 125 years.
- 5.14 On a broader point, as a result of wider consultation and discussions with HM Revenue and Customs, it became clear that any departure from the law of England and Wales on this matter would be not appropriate. Accordingly, Part 3 chapter 2 of the LLR Bill which deals with the rule against perpetuities, is very similar to the Perpetuities and Accumulations Act 2009, but without reference to estates and without any provisions relating to accumulations or any special rule for charities operating in Northern Ireland.
- 5.15 The Commission was inclined to recommend abolition of the rule against perpetual trusts, which applies to non-charitable gifts or trusts, if the rule against perpetuities was also to be abolished. However, if the rule against perpetuities was to be retained, the Commission would be inclined to retain the rule against perpetual trusts with appropriate modification. **Question 42** asked whether consultees would agree with that suggestion (CP para. 5.25).
- 5.16 The consultees indicated general agreement and accordingly section 41 of the LLR Bill confirms that the period permitted for the duration of non-charitable purpose trusts is not affected by the LLR Bill. The period will continue to be a life or lives in being plus 21 years, or 21 years if there is no relevant life in being.

CHAPTER 6. SETTLEMENTS AND TRUSTS

UNITARY TRUSTS OF LAND

- 6.1 Chapter 6 of the Consultation Paper is concerned with dispositions of land which create a succession of interests. Such a disposition may operate by way of a trust with a power of sale or by way of a trust for sale, where there is an obligation to sell. Alternatively, it may operate by way of a settlement.
- 6.2 The Commission proposes that a unitary trust of land scheme should be introduced, which would encompass both the traditional settlement and the trust for sale. It would always be a holding trust by default and the legal title would be vested in the trustees. The trustees would be given full power to deal with the land as if they were the absolute owners, the exercise of the powers by the trustees would be for the general benefit of the beneficiaries and the general law of trust would be applicable. **Question 43** asked whether consultees agreed that there should be a single statutory trust of land.
- 6.3 With one exception, the consultees who responded were in favour of having a single unitary trust which would do much to simplify this complex area of law. Accordingly, the Commission recommends that this should be implemented and Part 4 of the LLR Bill, sections 44 – 48, introduces provisions for a new statutory trust of land and sets out the manner in which it will operate.

CHAPTER 7. CONCURRENT OWNERSHIP OF LAND

INTRODUCTION

- 7.1 Chapter 7 of the Consultation Paper is concerned with the situation where several persons own estates or interests in the same land at the same time. The law has developed several forms of concurrent ownership, some of which have ceased to be of practical significance.

CO-PARCENARY

- 7.2 One form of concurrent ownership that is virtually obsolete is co-parcenary which governed succession to land when the owner died intestate before the Administration of Estates Act (Northern Ireland) 1955 (c. 24). In view of the rarity of such cases, **Question 44** asked consultees to confirm whether they agreed that there was no point in considering reform of the law of co-parcenary (CP para. 7.2).
- 7.3 The consultees who responded to this question were almost unanimous in agreeing with the Commission which accordingly recommends that no further action be taken in relation to the law of co-parcenary.

TENANCIES IN COMMON

- 7.4 A tenancy in common arises where the parties are regarded as holding separate undivided shares which can pass on the death of any of the tenants in common to his or her testate or intestate successors. Although reform of tenancies in common took place in England and Wales in 1925, the Commission considers that it is not now appropriate to abolish legal tenancies in common. At present the Commission is inclined not to interfere with the existing freedom of the parties to devise their own methods of holding land, which allows both joint tenancies and tenancies in common to continue to exist in law. **Question 45** asked if consultees agreed with that position (CP para. 7.10).
- 7.5 The consultees were virtually unanimous in expressing their agreement that there is no need to alter the existing law. Therefore, the Commission recommends that no action be taken.
- 7.6 The Commission noted further that there may be issues concerning aspects of a legal tenancy in common in relation to undivided grazing land held in common and the common parts of flat developments, but was inclined to leave those matters for consideration at a later stage. The Commission took the view that it should not make any recommendations concerning either common land or multi-unit developments as part of the present project and in **Question 46** asked if consultees agreed (CP para. 7.11).
- 7.7 Again the agreement with the proposal was almost unanimous and accordingly the Commission recommends that no further action is

taken on this issue for the present. The law in relation to multi-unit developments is under consideration by the Commission as a separate project.

- 7.8 As the Commission could not anticipate the agreement of consultees to its question on retaining legal tenancies in common, it asked in **Question 47** whether, if legal tenancies in common were abolished, severance of a legal joint tenancy should also be prohibited but allowed in equity only. It is submitted that there is no need to consider the responses to this question because the Commission is not suggesting that legal tenancies in common be abolished (CP para. 7.13).
- 7.9 **Question 48** asked whether consultees agree that there is no need to introduce a provision requiring a surviving joint tenant to prove that the joint tenancy has not been severed. The consultees agreed so this will not be taken any further (CP para. 7.14).

SEVERANCE OF A JOINT TENANCY

- 7.10 A joint tenancy arises where the undivided shares of the parties are regarded as being indivisible so that there is a right of survivorship which cannot be abrogated by any will made by one of the joint tenants. The Commission has been considering statutory provisions in relation to the methods of severance of a joint tenancy. In particular, it now considers that a provision for service of a simple notice in writing might be useful. **Question 49** asked if consultees agreed (CP para. 7.15). The consultees who responded generally expressed agreement with this proposal.
- 7.11 The Commission reiterates that one of the main aims of the project is to facilitate conveyancing. In order to preserve the current freedom of a joint tenant to sever unilaterally because of a change of circumstances affecting the joint tenancy, the Commission takes the view that unilateral severance should not take effect until a notice or declaration of severance is registered in the Land Registry or Registry of Deeds as appropriate. **Question 50** asked whether consultees agreed with that proposal (CP para. 7.18).
- 7.12 The consultees were in favour of registration of a notice of severance. Some gave reasoned responses on this point, detailing particular situations and drawing attention to specific aspects of severance in practice. The Commission therefore recommends that it should be necessary to register a notice of severance before unilateral severance can take effect. Part 5 of the LLR Bill, sections 49 – 52, relate to concurrent ownership and section 49 introduces detailed provisions to implement changes to the law of severance, converting a joint tenancy into a tenancy in common.

PARTITION

- 7.13 One of the more difficult aspects of concurrent ownership is the law of partition of the interests when the property has to be divided between the co-owners. The Commission takes the view that the Partition Act 1868(c. 40) and the Partition Act 1876 (c. 17) should be replaced and

that a broad discretion should be given to the courts to make an appropriate order. **Question 51** asked if consultees agreed (CP para. 7.21).

- 7.14 The overwhelming majority of the responses submitted on this point, which are from practitioners and professional organisations, agree with the suggestion of the Commission. There is one academic response which favours a slightly different approach but agrees that some reform is required. On balance, the Commission favours the introduction of a broad discretion for the courts and, taking into account the academic view, further recommends that guidance be provided as to how the discretion should be exercised. Accordingly, section 52 of the LLR Bill implements the proposal and sets out the powers of the court in some detail.

COMMORIENTES

- 7.15 Where two or more people die together in circumstances in which it is not possible to determine which predeceased the other(s), problems arise with the operation of the right of survivorship. Under the common law there is a presumption of simultaneous death but the Commission is inclined to adopt a provision whereby commorientes is treated as an event which severs a joint tenancy. In that case the deceased persons would be treated as holding their jointly owned land as tenants in common at the time of their death. **Question 52** asked whether consultees agreed with that proposition (CP para. 7.23).
- 7.16 There is almost unanimous support for this proposal and accordingly the Commission recommends that it should be adopted. Section 50 of the LLR Bill provides for severance of a joint tenancy in the case of simultaneous death.

COMMON LAND

- 7.17 Although traditional rights of neighbouring farmers to share the use of common land have largely disappeared, it is clear that some rights involving shared ownership have survived the operation of the 19th and 20th centuries' land purchase scheme. In the light of this, **Question 53** asked consultees whether they agreed that, if the general prohibition of legal tenancies in common is implemented, contrary to the Commission's inclination, any common rights noted on the folios of neighbouring farms should be excepted from the proposed prohibition of legal tenancies in common (CP para. 7.25).
- 7.18 The consultees were generally in agreement with the suggestion. Since it is not proposed to prohibit legal tenancies in common, there is no need to consider this matter any further.
- 7.19 While recognising that there are matters in relation to shared use of common land which may require urgent investigation and reform (which may need new legislation), the Commission is inclined to the view that they are too divorced from land law and conveyancing matters which are the subject of the present project to justify their

inclusion in it. **Question 54** asked if consultees agreed with that view (CP para. 7.29).

- 7.20 The majority of consultees who responded to this question agreed with the Commission's view, but a significant minority considered that the matter needs to be investigated in the near future. For the time being and due to the limitations of its resources for the current project, the Commission remains inclined to recommend that the issue of shared use of common land be set aside for the present.

COHABITANTS

- 7.21 The Commission indicated that it considered a review of the law relating to cohabitants was also outside the scope of the current project. It recognised that this may have to be reconsidered in the light of recent developments in other jurisdictions. In any event, such reconsideration, like any more general review, raises much wider issues involving other areas of law, in particular family law, and so should be regarded as outside the scope of this project. **Question 55** asked if consultees agreed (CP para. 7.35).
- 7.22 Apart from one dissenting view, the consultees who responded to this question were strongly in agreement with the Commission that the law relating to cohabitants is beyond the scope of the current project. However, it was generally recognised that there is a need for a review of the whole position of common occupiers of property.

CHAPTER 8. MORTGAGES

INTRODUCTION

- 8.1 Chapter 8 of the Consultation Paper relates to mortgages. It recognises that the law of mortgages is a very wide subject but confines itself to an examination of the technical and conveyancing aspects of loans on the security of land. The reason for this is that the Commission took the view that consumer and regulatory matters are outside the scope of the current project and **Question 56** asked whether consultees agreed with adopting that stance (CP para. 8.1).
- 8.2 The consultees who responded to this question were almost unanimous in expressing their agreement. One consultee confirmed that whilst an examination of the issues as they relate to Northern Ireland would be of benefit, the focus of this project is not suited to dealing with consumer and regulatory matters. Accordingly the Commission recommends that the present reforms in relation to mortgages should concentrate on technical and conveyancing matters.
- 8.3 The Commission took the view that, because the Consumer Credit Act 1974 (c. 39) has recently been updated, it is probably not appropriate to recommend a new jurisdiction to replace the one conferred by that Act. It also suggested that the equitable jurisdiction should be left to be developed by the courts and that the current reforms should concentrate on other matters. **Question 57** asked whether consultees agreed with those views (CP para. 8.4).
- 8.4 In response to this question, unanimous agreement was expressed with these views. One consultee made an additional comment to the effect that the Commission should monitor the development of the equitable jurisdiction. However, as the present project will end with the publication of the Report, the Commission will not be in a position to undertake any further monitoring of the approach taken by the courts. The Commission recommends that consumer credit law should not be touched for the time being and that there should be no interference with the equitable jurisdiction of the courts.

CREATION OF MORTGAGES

- 8.5 The Commission has made proposals to make changes to the law governing the creation of mortgages. These are designed largely to ensure that the law and legal documentation reflect the true nature of a mortgage. It is essentially a secured loan transaction and the mortgage is simply the method of providing security.
- 8.6 One of the most important changes that the Commission considers should be made to the law of mortgages is to extend to unregistered land the charge system used for registered land. For this reason, it takes the view that mortgages by conveyance or assignment should

be abolished and **Question 58** asked whether consultees agreed with that proposition (CP para. 8.7).

- 8.7 Almost all the consultees who answered this question agreed that the charge system should apply to unregistered land and that other methods of creating a legal mortgage should be abolished. Comments were made by the consultees that the different treatments afforded to mortgages of registered land and of unregistered land distort the boundary between security and ownership and that the law should be simplified to reflect the true nature of a mortgage. However, two consultees pointed out that most mortgages of unregistered land are by way of sub-demise regardless of whether the title is freehold or leasehold. Of those two consultees, one (a lending institution) opposed the abolition of mortgage by way of sub-demise which it considered should be retained alongside and as an alternative to the use of legal charge. It did not provide any reasons for this view and the other consultee did not answer the question at all.
- 8.8 The overwhelming majority of respondents agreed with the Commission, and it therefore recommends that in future a legal mortgage of land should be created only by way of a charge by deed. Section 58 of the LLR Bill makes provision for this to take effect and for such a charge to be expressed as a charge by way of legal mortgage. It also makes clear that any other form of conveying land by way of mortgage otherwise than by a charge by deed will operate as if it creates such a charge.
- 8.9 **Question 59** asked consultees whether they agreed with the inclination of the Commission to preserve the means of creating equitable mortgages by deposit for the time being (CP para. 8.8).
- 8.10 The consultees who responded to this question, with one exception, agreed that mortgages by deposit are very useful in specific circumstances and that the mechanism should be retained because there are a large number presently in existence. However, there is a general policy of dematerialisation which involves the replacement of documents and paper copies with digital or electronic copies of documents which will reduce the value of paper documents. Therefore it is inevitable that the number of mortgages by deposit will decrease over time and this means of creating mortgages will become less significant. In these circumstances, the Commission recommends that no steps be taken at this stage to prohibit the creation of equitable mortgages by deposit of title deeds. Section 58(5) of the LLR Bill affirms this.
- 8.11 After consideration of these general questions, the Commission turned to more specific issues of the law of mortgages.

MORTGAGEE REMEDIES

- 8.12 **Question 60** asked whether consultees agreed with the inclination of the Commission to recommend that in future, when the mortgagor defaults on the mortgage payments, the mortgagee's remedies

should be exercisable only for the purposes of protecting or enforcing its security (CP para. 8.10).

- 8.13 The consultees who responded to this question were broadly in agreement with the Commission on this point so the Commission recommends that a mortgagee should not exercise its powers except for the purpose of protecting the mortgaged property or realising the mortgagee's security. Section 64(2)(b) of the LLR Bill makes provision to this effect.
- 8.14 **Question 61** asked whether consultees agreed with the inclination of the Commission that mortgagors of residential property are best protected by specific legislation aimed at consumer protection, such as the Consumer Credit Acts (CP para. 8.12). Otherwise, it is of the view that, for the most part, the statutory provisions replacing the Conveyancing Acts 1881 – 1911 should retain their approach of providing default provisions which only operate subject to the terms of the mortgage deed.
- 8.15 The consultees who responded to this question were almost unanimous in supporting the proposal. Therefore the Commission proposes to provide default provisions of general application rather than to focus on protection of mortgagors in residential property. It recommends that this is the approach which should be followed and these are set out in Chapters 2 and 3 of Part 7 of the LLR Bill.
- 8.16 **Question 62** asked whether consultees agreed with the view of the Commission that the requirement to obtain a court order for possession should be confined to mortgages of dwelling houses taken out by individuals (CP para. 8.16). The majority of consultees who responded to this question were in agreement with the view of the Commission, and those who disagreed may not have appreciated that the Commission's proposal would confer additional protection on mortgagors of dwelling houses.
- 8.17 In practice the proposal would not be creating a distinction between properties in Northern Ireland and those in England & Wales, because of the existence of protocols in both jurisdictions requiring institutional lenders to abide by codes of practice when seeking to enforce their security in the current economic climate. Accordingly, the Commission recommends that, where the mortgaged property involves a dwelling house, the mortgagee should not be able to take possession of the mortgaged property without a court order. A court order would not be required where the mortgagor gave up possession voluntarily. Section 66 of the LLR Bill proposes that where the mortgage of a dwelling house comes within the jurisdiction of the Administration of Justice Acts 1970 (c. 31) and 1973 (c. 15), the mortgagee shall take possession of land only under a court order for possession, except where the mortgagor surrenders possession voluntarily.
- 8.18 On balance, the Commission is inclined not to recommend any alteration to Articles 34 & 35 of the Limitation (Northern Ireland) Order

1989 (N.I. 11) which currently provide that the mortgagor is barred from bringing an action to redeem the mortgage after the mortgagee has been in possession for 12 years and **Question 63** asked whether consultees agreed with that view. In general the consultees who responded to this question were in agreement with the proposal and accordingly the Commission does not recommend that there should be any alteration to the existing law.

- 8.19 **Question 64** asked consultees if they agreed that the remedy of foreclosure should be formally abolished (CP para. 8.18). Foreclosure is the right to obtain a court order declaring that the mortgagor's right of redemption is barred. This is potentially unfair because it may mean that the mortgagee will end up as owner of the property which is worth more than the debt owed. The consultees were almost unanimous in confirming that they did agree with the proposal for abolition because foreclosure is an archaic remedy which has not been used in modern times.
- 8.20 **Question 65** went on to ask whether consultees also agreed on balance with the inclination of the Commission not to retain the jurisdiction of the courts to order foreclosure (CP para. 8.19). Again, the consultees were almost unanimous in expressing their support for this proposal. One respondent commented that the standard practice of selling the property is the fairer option because it protects the rights of subsequent mortgagees and allows the mortgagor to retain any remaining equity. Accordingly, section 65 of the LLR Bill provides that the jurisdiction to make a foreclosure order is abolished.
- 8.21 **Question 66** indicated that the Commission proposed to retain the provisions in the Conveyancing Acts 1881 - 1911 relating to the mortgagee's power of sale (without obtaining a court order), subject to the addition of a statutory duty on all mortgagees to obtain the best price possible (CP para. 8.20). It asked whether consultees agreed with that proposal and their responses unanimously confirmed that they did. Consequently, the Commission recommends that the substance of the provisions relating to a mortgagee's power of sale comprised in the Conveyancing Acts 1881 - 1911 should be re-enacted and there should be an additional obligation to obtain the best price possible for the property.
- 8.22 Section 68 of the LLR Bill confers power on the mortgagee to sell when the mortgagor defaults in making payments or otherwise breaches the terms of the mortgage. Section 69 confers incidental powers and section 70 implements the recommendation to obtain the best price possible. Sections 71 – 75 re-enact provisions for the mortgagee, when exercising the power of sale, to sell the land and convey title to it to a purchaser. This protects the purchaser who need not be concerned regarding matters between the mortgagor and the mortgagee, and can accept the mortgagee's receipt for the sale proceeds as sufficient discharge, without making enquiries as to what was due under the mortgage.

- 8.23 The Commission also took the view that the powers and rights of a mortgagee should vest as soon as the mortgage is created but should not become exercisable unless it is to protect the mortgaged property or to realise the mortgagee's security. **Question 67** asked consultees if they agreed (CP para. 8.21). The consultees who responded to this question were unanimous in expressing their agreement and therefore the Commission recommends that the powers and rights of a mortgagee should vest as soon as the mortgage is created instead of on the date expressed for redemption, which is somewhat artificial. Section 64(2)(a) of the LLR Bill creates a provision to this effect and section 64(2)(b) provides that the powers do not become exercisable except to protect the mortgaged property or realise the security (see Question 60).
- 8.24 At this stage the Commission is not inclined to propose any further restriction on the mortgagee's statutory power of sale and **Question 68** asked whether consultees agreed (CP para. 8.22). The consultees who responded to this question were all in agreement with the Commission on this point. Consequently, the Commission recommends that no further restrictions should be placed on the exercise of the mortgagee's power of sale.

OTHER MORTGAGEE RIGHTS

- 8.25 In **Question 69** the Commission asked if consultees agreed that the reform suggested in Question 67 for powers and rights to vest on creation of the mortgage should also apply equally to the power to appoint a receiver (CP para. 8.23). The consultees who responded to this, with one exception, were unequivocal in expressing their support for the Commission's proposal. The Commission therefore recommends that it should be put into effect. Section 76 of the LLR Bill provides that where the power of sale has become exercisable under section 68(2) the power to appoint a receiver arises and that section also confers powers under which the receiver may act.
- 8.26 In relation to the right of the mortgagee to consolidate all the mortgages due by the same mortgagor, the Commission was inclined to recommend that it should be abolished and **Question 70** asked whether consultees agreed with that proposal (CP para. 8.26). Those who responded were divided in their views. Reasons for disagreeing with the Commission were provided in the dissenting views and a variety of points were made in favour of preservation of the right to consolidate loans. A compromise that was suggested was that there might be a provision in the legislation, such as is now comprised in section 17 of the Conveyancing Act 1881 (c. 41), that there is no automatic right to consolidate but that it could be expressly allowed in the mortgage deed.
- 8.27 In the light of these responses the Commission has reflected further on the matter. On balance it has concluded that the status quo should be preserved and accordingly section 61 of the LLR Bill provides that a mortgagor may redeem one mortgage with a mortgagee without

other mortgages with the same mortgagee being consolidated, subject to the provisions of the mortgage deed.

- 8.28 On the question of insurance of the mortgaged property, the Commission notes the modifications made by section 110 of the Land and Conveyancing Law Reform Act 2009 in the Republic of Ireland and is inclined to propose similar provisions. Section 110 modifies the provisions in the Conveyancing Act 1881 section 23, under which the permitted amount of insurance (unless varied by agreement) is two-thirds of the cost of reinstatement. Section 110 of the 2009 Act provides that the property should be insured for the full reinstatement value and the mortgagee should be able either to apply the insurance money in discharge of the debt or require its use in repairing or reinstating the property. **Question 71** asked whether consultees agreed with the inclination of the Commission to introduce similar provisions (CP para. 8.27).
- 8.29 Almost all the respondents to this question agreed with the inclination of the Commission and accordingly the Commission recommends that there should be a statutory provision imposing an obligation on the mortgagee to insure the property in the full reinstatement value and to apply the proceeds towards discharge of the debt, or towards the repair or reinstatement of the property. Section 78 of the LLR Bill makes provision to this effect.
- 8.30 In view of the increasing regulation and supervision of mortgage lenders the Commission is not convinced that it is necessary to provide by statute that all mortgagees of dwelling houses should allow borrowers some choice of insurer. **Question 72** asked if consultees agreed and the majority of responses confirmed that the consultees were in agreement with the proposal (CP para. 8.28). Accordingly the Commission does not recommend that there be a statutory provision requiring a mortgagee to allow the borrower some choice of insurer.
- 8.31 Where there is more than one mortgage, a subsequent mortgagee may secure priority over an earlier mortgagee by purchasing a prior interest in the land. The Commission was inclined to abolish this method of tacking known as *tabula in naufragio* and **Question 73** asked whether consultees would be in agreement with this proposal (para. 8.29). Almost all of the consultees who responded to the question did agree with the proposal and consequently the Commission recommends that tacking of mortgages by means of the *tabula in naufragio* method should be abolished. Accordingly, section 79(3) of the LLR Bill abolishes the right to tack in any form except in relation to future advances which is the issue with which Question 74 is concerned.
- 8.32 Following on from the previous question, **Question 74** asked consultees whether they would agree to rationalisation of the other more common form of tacking by way of adding further advances to the original mortgage (CP para. 8.30). Almost all of the consultees who responded to this question were in agreement with the

Commission on this point and accordingly the Commission recommends that tacking by way of adding further advances should be rationalised. Section 79(1) and (2) of the LLR Bill clarify that when further advances are made on a mortgage, the mortgagee is entitled to payment of those further advances in priority to any subsequent mortgagees.

CHAPTER 9. CONTRACTS FOR THE SALE OF LAND

INTRODUCTION

- 9.1 A contract for the sale or other disposition of land must comply with the usual requirements of the general law relating to contracts. In addition, contracts relating to land must be sufficiently evidenced by writing to satisfy the Statute of Frauds (Ireland) 1695 (c. 12) if that Statute is pleaded by the defendant in an action to enforce the contract. The Commission considers this fundamental issue before looking at any other matters relating to such contracts.

STATUTE OF FRAUDS (IRELAND) 1695 (C. 12)

- 9.2 Chapter 9 of the Consultation Paper deals with the question of the formalities required for contracts relating to the sale of land. The fundamental issue is whether the current statutory requirement for a contract to be evidenced in writing should be recast in more modern language or whether a provision should be introduced for the contract itself to be in writing. After considering the arguments for both options the Commission was inclined towards postponing consideration of substantive changes to the law governing formalities until technological advances, such as digital signatures, are more developed and the way forward is clearer.
- 9.3 **Question 75** asked whether consultees agreed that substantive changes to the law governing the formalities for contracts for the sale of land should be postponed until development of e-conveyancing is further advanced (CP para. 9.12). In the interim, the Commission considered that reform should be confined to amending the wording of section 2 of the Statute of Frauds (Ireland) 1695 by repealing it and including a new provision in the LLR Bill. The great majority of consultees agreed with the proposal of the Commission on this point. The remainder expressed views inclining towards a full review of the law being carried out at this stage or at least entering into a dialogue for discussion.
- 9.4 On balance, due to the considerable uncertainty surrounding the elements of e-conveyancing and the development of secure electronic processes, the Commission recommends that, for the time being, the only reform should be to recast the substance of section 2 of the Statute of Frauds (Ireland) 1695, which is now set out in section 82 of the LLR Bill. It provides that no action shall be brought to enforce a contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is evidenced in writing and signed by the person against whom the action is brought or their agent.

SALE OF LAND BY AUCTIONS ACT 1867 (C. 48)

- 9.5 On balance, the Commission was inclined to regard reform of the law relating to auctions as outside the scope of the present Project and **Question 76** asked consultees whether they agreed (CP para. 9.16). The consultees who responded to this question were divided in their views. Those who disagreed expressed their views in strong terms on the basis that they considered this matter to be important and should be considered at this stage. However, the Commission has very limited resources and was of the view that the subject of auctions is fairly wide and sits on the edge of the area of land law that is presently under consideration. In these circumstances, it may be more appropriate to deal with the subject of the sale of land by auction as part of a separate project. After further reflection, and taking the views of the consultees into account, the Commission confirms it is not persuaded that auctions relating to the sale of land can be satisfactorily separated from other types of auctions and included in the LLR Bill. It therefore recommends that the subject be excluded at this stage.

REPAYMENT OF DEPOSIT

- 9.6 The Commission considered that, where a court refuses to grant specific performance of a contract for the sale of land, it should be able to order repayment of the whole or any part of a deposit where it is just and equitable to do so. **Question 77** asked whether consultees agreed and the responses on this point were unanimous in expressing their agreement with the Commission (CP para. 9.20). Accordingly, the Commission recommends that this proposal be adopted. Section 83 of the LLR Bill provides that the court has power to order repayment of the deposit where it is just and equitable to do so. This might occur, for example where the vendor has not established sufficiently good title to be granted specific performance of the contract.

VENDOR AND PURCHASER ACT 1874 (C. 78)

- 9.7 The Commission proposed to re-enact the provision in section 9 of the Vendor and Purchaser Act 1874 to enable the parties to a contract for the sale of land to apply to the court to resolve a dispute relating to the contract. **Question 78** asked whether consultees agreed with that proposition (CP para. 9.22). In the light of the fact that the consultees were again unanimous in agreeing with the Commission, it has no hesitation in recommending that this proposal should be implemented. Under section 84 of the LLR Bill any party to a contract for the sale of land may apply to the court in a summary manner for an order determining a question relating to the contract. This would include matters of interpretation of the contract, such as whether the vendor has made out a good title in accordance with the contract.

CHAPTER 10. CONVEYANCES

INTRODUCTION

- 10.1 Chapter 10 of the Consultation Paper is concerned with various aspects of the law and documentation relating to conveyances of land – the process of transferring ownership from one person to another. It is normally concerned with unregistered land which has not yet been registered in the Land Registry and so is not registered land. Although almost all land in Northern Ireland is now subject to compulsory first registration on sale, it will be some considerable time before the title to every parcel of land will become registered. In the meantime, the Commission takes the view that there remains a need for provisions to govern the conveyancing process as it applies to unregistered land. **Question 79** asked whether consultees agreed with that conclusion. Those who replied on this point were unanimous in agreeing with that view. Therefore the Commission recommends that provisions should be introduced to clarify and simplify the requirements for deeds of conveyance so far as it is possible to do so. In Part 8 of the LLR Bill, chapter 2, (sections 85 – 90) relates to title, chapter 3 (sections 91 – 99) relates to deeds and their operation and chapter 4 (sections 100 – 109) relates to the contents of deeds.

TITLE TO BE DEDUCED

- 10.2 **Question 80** asked whether consultees agreed with the inclination of the Commission to recommend that the statutory period for title to be deduced by a vendor under an open contract should be reduced from 40 years to 15 years. With one exception, the consultees who responded to this question agreed with the view of the Commission. The dissenting consultee agreed that it was difficult to continue to justify the requirement for 40 years of title to be deduced, but on balance considered that a period of 20 years would be more appropriate. After taking this view into account and reconsidering the matter, the Commission is nevertheless inclined to recommend reduction of the statutory period of title to be deduced to 15 years, which is supported by the majority of respondents and accords more closely with the requirements in other jurisdictions. Section 85 of the LLR Bill introduces an appropriate provision.
- 10.3 The conveyance or other document with which the title to a particular property commences is known as the root of title. The Commission considers that the question of which pre-root deeds and searches should be provided by the vendor is more of a matter of contract between the parties than a matter which should be covered by legislation. In practice, if clients suffer loss as a result of failing to trace a pre-root deed which has an effect on the title, they may have a claim in contract or negligence against their solicitor. The solicitor's professional indemnity insurance may then cover the claim. On that basis the Commission was not inclined to recommend any provision

for compensation and **Question 82** asked whether consultees agreed with that view.

- 10.4 All of the consultees who responded to this question were in agreement with the proposal of the Commission except for one which did not reach a firm conclusion as to its view. Accordingly, the Commission does not recommend the introduction of a statutory provision for compensation, where a party suffers loss as a result of a solicitor failing to note the existence of a pre-root deed or incumbrance, which has an adverse effect because it considers that this can be dealt with by alternative means.
- 10.5 Where the title to be acquired is leasehold, the Commission was inclined to the view that the question of calling for title to the freehold is again a matter of contract which should be left to be determined by the parties themselves and their solicitors. **Question 83** asked whether consultees agreed with that view. The consultees who responded to this question were of the same mind as the Commission on this point
- 10.6 The rule in the case of *Patman v Harland* (1881) 17 Ch D 353 fixes a grantee with constructive notice of any adverse interest affecting the superior title even though the grantee is prohibited from calling for deduction of that title. The Commission considers that that rule is unfair to grantees and forces the grantee's solicitor to advise that the contract should specify that the superior title should be deduced, which is contrary to the current statutory provisions. **Question 84** asked whether consultees would agree with the inclination of the Commission to recommend abrogation of that rule and the consultees were almost unanimous in expressing similar views to those of the Commission. Accordingly, the Commission recommends abrogation of the rule in *Patman v Harland* and section 86(3) of the LLR Bill provides that a grantee is not entitled to call for the title of the owner and is not affected with notice of any matter in such title even if the title had been referred to in the purchase contract.
- 10.7 **Question 85** asked whether consultees agreed with the view of the Commission to recommend that various statutory provisions relating to production of title documents by the vendor contained in section 2 of the Vendor and Purchaser Act 1874 (c. 78) and section 3 of the Conveyancing Act 1881 (c. 41) should be re-enacted, subject to some modifications. The responses of the consultees on this point were completely in agreement with the Commission and the Commission therefore recommends that the statutory provisions relating to the production of title documents by the vendor should be re-cast. Section 87 of the LLR Bill details the documents and information which a purchaser is not entitled to require, following the substance of the previous legislative provisions.

DEEDS AND THEIR OPERATION

- 10.8 The Commission is strongly of the view that archaic methods of conveying title to land which still exist should be abolished so that the modern deed would become the sole method of conveying title to

freehold land. **Question 86** asked whether consultees would agree with that proposal which is relatively uncontroversial. The responses of the consultees confirmed that they all were of one mind in expressing their agreement. Accordingly, the Commission has no hesitation in recommending that ancient methods of conveying title, such as feoffment with livery of seisin, should be abolished and that it should only be possible to convey land by the modern form of deed. Section 91 of the LLR Bill provides for abolition of any surviving old forms of conveying title and provides that a conveyance can now only operate by way of deed.

- 10.9 Another of the remaining vestiges of the feudal system that survives is the Statute of Uses (Ireland) 1634 (c. 1) which was designed to prevent loss of feudal dues when land was conveyed. This Statute has long been redundant and is often seen as creating a trap for the unwary by requiring freehold land to be conveyed “unto and to the use of” to be effective as intended. **Question 87** asked consultees if they agreed with the recommendation of the Commission to repeal the Statute of Uses (Ireland) 1634 and there was no dissent on that point. The Commission recommends that the Statute of Uses (Ireland) 1634 should be repealed. Accordingly, the Statute of Uses (Ireland) 1634 is included in Schedule 4 of the LLR Bill for repeal. Section 91(2) confirms that a deed executed after the appointed day is fully effective for such purposes without the need for any conveyance to uses and passes possession or the right to possession of the land, unless subject to some prior right to possession.
- 10.10 **Question 88** asked consultees if they agreed with the recommendation of the Commission that in future no resulting trust should be implied in a voluntary conveyance merely because it was not expressed to convey the land “unto and to the use of” the grantee. The consultees again unanimously agreed with this proposal, one consultee adding the qualification that there should be no adverse effect on the law of trusts and that there should be a provision to clarify the title which is being transferred. The Commission therefore recommends that a statutory provision should be introduced. Section 91(3) of the LLR Bill provides that in the case of a voluntary conveyance after the appointed day, a resulting use for the grantor is not implied merely because the land is not expressed to be conveyed for the use or benefit of the grantee.
- 10.11 **Question 89** also related to the words required in a deed of conveyance and asked whether consultees agreed with the proposal that in future the need to include words of limitation to indicate the freehold estate being conveyed should be abolished. This was agreed by all the consultees who responded to the question. Therefore, the Commission recommends that it should be implemented. Section 92 of the LLR Bill provides that a conveyance of unregistered land passes the ownership of the land or other interest, unless a contrary intention appears in the conveyance. This provision is expressed to operate regardless of whether or not the conveyance uses words of limitation.

- 10.12 On a more general point, the Commission recommends that there should be a set of statutory definitions of words commonly used in deeds (such as “month” and “person”) and other meanings (such as the singular including the plural, the masculine the feminine and vice versa), similar to those provided for statutes by the Interpretation Act (Northern Ireland) 1954 (c. 33). **Question 90** asked whether consultees were in agreement with that suggestion and the responses were unanimous in expressing approval for the suggestion. Accordingly, the Commission recommends that the legislation should include a set of statutory definitions of words commonly used in deeds. Section 99 of the LLR Bill confirms that the Interpretation Act (Northern Ireland) 1954 applies to the construction and meaning of words and phrases in the LLR Bill. Section 116 of the LLR Bill is a general interpretation section.
- 10.13 Section 6 of the Conveyancing Act 1881 is designed to reduce the wording of conveyances by providing that a conveyance passes to the grantee, without having to specify them in detail, all physical features which make up the land and all rights which attach to the land. An unintended consequence of section 6 is that the provision may operate to upgrade rights and this can be a substantial trap for an unwary grantor. The Commission took the view that section 6 should not operate to upgrade rights and that it should be made clear that it only passes existing rights. **Question 91** asked whether consultees agreed with that proposal. The responses were unanimously in agreement and the Commission therefore recommends that it should be adopted. Section 95 of the LLR Bill re-enacts section 6 of the Conveyancing Act 1881 but makes it clear that a conveyance of land does not create any new interest or right or extend the scope of, or convert into a new interest or right, any licence or other right existing before the conveyance.
- 10.14 Where easements are concerned, the Commission reiterated the view that section 6 of the Conveyancing Act 1881 should not apply to the typical situation which arose in the case of *Wheeldon v Burrows* ((1879) 12 Ch D 31). In that case section 6 was held to operate to convert a quasi-easement into a full easement when land previously in the ownership of one person was subdivided by conveying part of it to another person. **Question 92** asked whether consultees agreed that a quasi-easement should not be converted into a full easement on subdivision of land and the all the consultees who responded, with one exception, agreed with the proposal. The Commission recommends that a quasi-easement should not be converted into a full easement on sub-division of land. Section 95(3) of the LLR Bill confirms that a conveyance does not convert a quasi-easement into a full easement on sub-division of the land.
- 10.15 The Commission recommends re-enactment of the provisions relating to voluntary conveyances intended to defraud subsequent purchasers currently set out in sections 1 and 3 of the Conveyancing Act (Ireland) 1634 (c. 3)(as amended by the Voluntary Conveyances Act 1893) (c. 21). **Question 93** asked whether consultees agreed and all the

consultees who responded were in total agreement with the Commission on this point. Accordingly, Section 98(1) of the LLR Bill recasts in a much simpler form, the earlier provisions confirming that any voluntary disposition of land made with the intention of defrauding a purchaser is voidable by the purchaser. Section 98(2) provides that a voluntary disposition is not to be read as intended to defraud merely because a subsequent disposition of the same land was made for valuable consideration.

- 10.16 The Commission was inclined to recommend repeal of the Sale of Reversions Act 1867 (c. 4) without replacement. The 1867 Act was designed to counter judicial suspicion of sales of reversionary interests by providing that such a sale should not be voidable merely because the sale seemed to be at an undervalue. The Commission took the view that this situation is covered by the equitable jurisdiction to set aside improvident bargains and transactions vitiated by improper conduct such as fraud, duress, undue influence or other unconscionable conduct. **Question 94** asked whether consultees agreed with the proposal to repeal the 1867 Act and all those who responded were of the same mind as the Commission on that point. Schedule 4 of the LLR Bill provides for the repeal of the Sale of Reversions Act 1867.
- 10.17 In relation to the covenants for title which are implied by section 7 of the Conveyancing Act 1881, the Commission proposed to recommend a complete recasting of the statutory provision in a much clearer and understandable format. **Question 95** asked whether consultees agreed with that suggestion and their responses gave it unanimous endorsement. Therefore, the Commission recommends that section 7 of the Conveyancing Act 1881 should be recast in clearer language. Sections 104 and 105 of the LLR Bill, together with schedule 1, implement the recasting and clarify the position in relation to covenants implied in conveyances. Schedule 1, Part 1 sets out the extent of the burden of covenants and Part 2 provides the details of the extent of the covenants for title which are implied in particular classes of conveyances.

CHAPTER 11. LEGISLATION

INTRODUCTION

- 11.1 Chapter 11 of the Consultation Paper looks at the legislation governing the land law and conveyancing system of Northern Ireland. It is particularly striking on two fronts, firstly because of its antiquity and secondly because it is derived from a wide range of sources. The existence of such a bewildering range of legislation clearly creates difficulties for practitioners who have to keep abreast of it. It makes the law extremely complex and inaccessible.
- 11.2 One of the primary aims of reform has to be the modernisation of legislation and **Question 96** asked consultees if they agreed with the Commission's aim to modernise the statute book. The consultees who responded to this question were in general agreement with the proposal for modernisation of the legislation which governs land law and the conveyancing system and the Commission therefore recommends that this should be done.

REVIEW OF LEGISLATION

- 11.3 As part of the current project a review of all the legislation relating to land law and the conveyancing system was undertaken.
- 11.4 The review envisaged three possible options as to what should be done with respect to particular statutes or to particular provisions within statutes

Repeal without replacement

- 11.5 The first option was to repeal legislation without replacement, either because it has ceased to have any practical function in modern times or because the Commission's proposed new legislation renders it redundant.
- 11.6 The Consultation Paper lists the main statutes that would come within this category (see para. 11.8) and **Question 97** asked consultees if they agreed with the proposal to repeal these statutes without replacement. In general the consultees who responded to this question were in agreement with the proposal for repeal although one or two remarks were made urging a note of caution in relation to possible adverse consequences. Consequently the Commission recommends that the statutes listed in para. 11.8 of the Consultation Paper should be repealed.
- 11.7 Section 118 and Schedule 4 of the LLR Bill implement the repeal of those statutes listed within this category. However, there are some statutes on the list which the Commission has revisited and which, on reflection, ought to remain:

- (1) **Tithe Rentcharge (Ireland) Act 1838** (1 & 2 Vict.) (c.109) and **Tithe Arrears (Ireland) Act 1839** (2 & 3 Vict.) (c. 3) should

remain because there may still be some private tithe rentcharges in existence which would need the statutory enforcement powers contained in those Acts;

- (2) **Perpetuities Act (Northern Ireland) 1966** (c. 2) which, given the retention of the rule against perpetuities and the revised reforms recommended by the Commission similar to those that are contained in the English Perpetuities and Accumulations Act 2009 (c. 18), will remain.

Replace with substantial amendment

- 11.8 The second option set out in the Consultation Paper was to replace certain statutes or statutory provisions with substantial amendment and these statutes are listed (see para. 11.10). **Question 98** asked consultees if they agreed with this list. The consultees who responded to this question were in general agreement with the proposal and an additional comment was made about the importance of using modern language. Accordingly the Commission recommends that the specific statutes and statutory provisions listed in this category are replaced and substantially amended.
- 11.9 The statutes within this category are set out below with short details of the corresponding legislative amendment:
 - (1) **Statutes of Westminster, the Third 1289–1290 (*Quia Emptores*) (8 Edw.1) (cc. 1, 2, 3)**: This legislation is repealed by section 118 and Schedule 4 of the LLR Bill as provisions relating to subinfeudation and the apportionment of feudal services are now obsolete. However, the rule against inalienability which the Statute established in respect of freehold land has been preserved in section 1(3) of the LLR Bill.
 - (2) **Prescription Act 1832** (2 & 3 Will. 4) (c. 71) and **Prescription (Ireland) Act 1858** (21 & 22 Vict.) (c. 42): The Commission recommended (CP para. 4.32) that the existing law of prescription, including the exceptionally complicated regime introduced by the 1832 Act (which was applied to Ireland by the 1858 Act) should be overhauled by a completely new statutory scheme to replace it (see CP paras. 4.25 – 4.38). Part 2, Chapter 1 of the LLR Bill sets out this new statutory scheme and section 118 and Schedule 4 repeals the Acts of 1832 and 1858.
 - (3) **Section 6 of the Conveyancing Act 1881 (c. 41)**: The Commission recommended substantial amendment to the operation of this section in the context of acquisition of easements by implication (see CP paras. 4.40 – 4.41 and 10.20 – 10.21). Section 95 of the LLR Bill re-enacts section 6 and Section 118 and Schedule 4 deal with its repeal.
 - (4) **Settled Land Acts 1882–1890**: The Commission recommended that the statutory regime governed by these five

Acts (of 1882, 1884, 1887, 1889 and 1890) should be replaced by a completely new regime to govern all settlements and trusts of land. This new regime is crafted in Part 4 of the LLR Bill and the Settlement legislation is dealt with by section 118 and Schedule 4.

- (5) **Partition Acts 1868** (31 & 32 Vict.) (c. 40) and **1876** (39 & 40 Vict.) (c. 17): The Commission recommended that the provisions of these Acts should be replaced by a new discretionary jurisdiction conferred on the courts (see CP paras. 7.19 – 7.21). As chapter 7 sets out above, this new discretionary jurisdiction is provided for in section 52 of the LLR Bill and the Acts themselves are repealed by section 118 and Schedule 4.
- (6) **Conveyancing Act 1881 Parts IV and V**: The Commission recommended that the provisions in the 1881 Act relating to mortgages should be amended in several respects (see CP paras. 8.20 – 8.27). Chapter 8 above sets out the new position under Part 7 the LLR Bill. Part IV of the 1881 Act is re-enacted while Part V, relating to statutory mortgages is repealed. Section 118 and Schedule 4 effect the repeal of the 1881 provisions.
- (7) **Conveyancing Act (Ireland) 1634** (10 Chas. 1 sess. 2) (c. 3) (as amended by the Voluntary Conveyances Act 1893 (56 & 57 Vict) (c. 21): The Commission recommended a recasting of the provisions in these Acts, including some substantial amendments (see CP para. 10.22). Section 118 and Schedule 4 repeal sections I – V of the 1634 Act and the remaining provisions of the 1893 Act which are re-enacted by section 98 of the LLR Bill.
- (8) **Vendor and Purchaser Act 1874** (37 & 38 Vict.) (c. 78) (as amended by sections 3 and 13 of the Conveyancing Act 1881): The Commission recommended that the provisions in these Acts relating to deduction of title should be amended substantially (see CP paras. 10.5 – 10.13). The 1874 Act and the two sections of the 1881 are repealed by section 118 and Schedule 4. They are re-enacted by sections 84 – 88 of the LLR Bill.

Replace without substantial amendment

- 11.10 The third option arising from the legislative review was to update and replace certain statutes or statutory provisions without substantial amendment. **Question 99** asked consultees if, in order to make the law more accessible, the new legislation to implement the Commission's recommendations should consolidate, in one Act, all existing statutory provisions relating to land law and the conveyancing system. The consultees, with one exception, agreed with the proposal.

- 11.11 However, this exercise was never intended to be a pure consolidation in the strictest sense. It was acknowledged that the substance of many of the statutes would be worth preserving and that it would be beneficial to replace them in the new legislation. The primary aim of the re-enactment would be to express the statutory provisions in more modern legislative language because the archaic and convoluted style of the older statutes is difficult to interpret and apply. **Section 7** of the **Conveyancing Act 1881**, which relates to covenants for title, was used as an illustration of this (see CP paras. 10.25 – 10.27). It has been re-enacted by section 104 and 105 of the LLR Bill with Schedule 1 setting out the covenants to be implied in Conveyances. Again, section 118 and Schedule 4 deal with its repeal.
- 11.12 Following on from the question of consolidation was the question of the extent of the process of updating and re-enactment without substantial amendment. In particular the question arose as to whether the new legislation should consolidate comparatively recent statutes, such as those implementing some of the recommendations of the 1971 Survey, the 1990 Final Report and the Law Reform Advisory Committee for Northern Ireland. The Consultation Paper provided examples of candidates for this category (see. para. 11.12), such as the **Property (Northern Ireland) Orders 1978** (No. 459 N.I. 4) and **1997** (No. 1179 N.I. 8). The Commission also considered that the **Ground Rents Act (Northern Ireland) 2001 (N.I. 5)** would be incorporated into the new legislation.
- 11.13 In summary, the Commission was inclined to the view that the need for accessibility of the law suggested that the new legislation should consolidate all statutory provisions, including recently enacted ones, which came within the scope of the subject matter of the Consultation Paper. **Question 100** asked the consultees if they agreed. The consultees were all in agreement with the proposal, some making additional comments about improved accessibility, clarity and certainty.
- 11.14 However, as the work on the Project has progressed, the complexity of that task has become more apparent. It has become evident that the number of statutes involved and the amount of the statutory provisions that would require to be assimilated would result in a complex and unwieldy piece of legislation. There is also the point that, because the separate legislative provisions were introduced at different times, the commencement and transitional provisions would be impossibly convoluted. The Commission has given this matter great consideration and, with regret, has reached the conclusion that although it was a laudable aspiration to seek to achieve a single piece of legislation, it is not realistically achievable.
- 11.15 However, whilst the Commission considers that it is unable to pursue the consolidation and replacement without substantial amendment of recent legislation, it has been able to implement its recommendation in relation to older legislation. The Consultation Paper lists (at para. 11.13) statutes falling into this category and they are also listed below

with a brief comment on how they have been dealt with in the LLR Bill. The Commission recommends proceeding accordingly:

- (1) **Statute of Frauds (Ireland) 1695** (7 Will. 3) (c. 12) (**section 2**): As was recommended by the Commission in the Consultation Paper (paras 9.6-9.12) the substance of section 2 remains, so far as it relates to land transactions, but is replaced by section 82 of the LLR Bill. In effect section 82 retains the substance of the 1695 provision that contracts relating to land need only be *evidenced* in writing. The specific amendment to section 2 itself is dealt with in section 118 and Schedule 4 of the LLR Bill.
- (2) **Real Property Act 1845**: sections 2 – 6 and 8 are repealed by section 118 and Schedule 4. However, the substance of sections 4, 5 and 8 are preserved, being re-enacted in sections 102, 91(5), 94 and 26 respectively of the LLR Bill.
- (3) Much of the **Conveyancing Acts 1881 – 1911** are repealed by section 118 and Schedule 4 but some provisions were considered worth preserving and are re-enacted in the LLR Bill; for example, the substance of section 9 dealing with the production and safe custody of title deeds is now within section 106 of the LLR Bill and sections 54 – 56 dealing with receipts in deeds is now within section 101 of the LLR Bill.
- (4) **Bodies Corporate (Joint Tenancy) Act 1899 (62 & 63 Vict.) (c. 20)**: This Act is repealed by section 118 and Schedule 4 of the LLR Bill with the substance of the Act being re-enacted in section 51. It preserves the position that corporations (particularly those providing trust and executorship services) are able to act as joint tenants with others, thus treating them just like individuals.

MISCELLANEOUS

- 11.16 Due to the fundamental importance of the **Land Registration Act (Northern Ireland) 1970 (c. 18)** and the impact of the introduction of the concept of ownership on conveyancing practice, the Commission recommends that the specific textual amendments which it is proposing should be adopted. Suggested amendments to the 1970 Act are set out in Schedule 2 to the LRA Bill.
- 11.17 During the course of the consultations with stakeholders, the Land Registry suggested to the Commission that, in light of the changes taking place in Land Registry practice as result of the introduction of electronic procedures, it would be helpful to incorporate further amendments in to the 1970 Act. These are also incorporated in the amended 1970 Act as it appears in Parts II and IV of Schedule 2 to the LRA Bill and made operative by section 115.

POWERS OF APPOINTMENT

- 11.18 Provisions relating to powers of appointment are comprised in various pieces of 19th Century legislation. The substance of these are re-

enacted in Part 6 of the LLR Bill (Powers), which is linked with Part 4 (Trusts of Land). This subject was not referred to specifically in the Consultation Paper as the provisions are largely a consolidation of existing legislation. Such consolidation was recommended by both the 1971 Survey and the 1990 Final Report and accords with the objectives set out in Chapter 11 of the Consultation Paper.

CONCLUSION

- 11.19 Following a review of all legislation relating to land law and the conveyancing system the Commission has concluded that there are some statutes which should be repealed without replacement, some that should be replaced without substantial amendment and some that should be replaced with substantial amendment. The Commission has reached a conclusion in respect of each statute, and accordingly recommends that the appropriate action be taken as required. It has found that, although true consolidation would be an ideal solution, it is not possible to achieve in its purest sense because of the complexities and cumbersome nature of the legislation.
- 11.20 However, the Commission has tried to construct a single piece of draft legislation which is workable and effective, comprehensible and clear, so that the law becomes both more up to date and more accessible. The LLR Bill sets out the new provisions as recommended and replaces the previous law as described in the Report as far as the Commission considers is practicable in the circumstances.
- 11.21 The issue of ground rents reform has been dealt with separately, first because it was the subject of a separate initial referral from the Minister and secondly because it is a subject which can stand alone. As the ground rent reforms are more limited than was originally envisaged, it has become clear that the most straightforward way of drafting the new provisions is by way of amendment to the Ground Rents Act (Northern Ireland) 2001 (N.I.5). Consequently, the two pieces of legislation may be introduced at different times if that is considered more appropriate.

CHAPTER 12. ADVERSE POSSESSION

INTRODUCTION

- 12.1 Chapter 2 of the Supplementary Consultation Paper considered the doctrine of adverse possession which in recent times has become one of the most controversial aspects of land law and the conveyancing system. Adverse possession is concerned with actions to recover land from someone who has been in possession of it (the squatter) by the dispossessed owner (the owner of the paper title) after the expiry of a time-limit. It also arises where the squatter is trying to establish title. The doctrine is governed by the Limitation (Northern Ireland) Order 1989 (No. 1339 (N.I. 11) and, where the land is registered, by provisions in the Land Registration Act (Northern Ireland 1970 (c. 18). Upon expiry of the time-limit, the right of the owner of the paper title to bring an action to recover it is barred and the title is extinguished.
- 12.2 After examining the various debates surrounding the doctrine, the Commission concluded that the main justification for the doctrine of adverse possession was its function in dealing with conveyancing problems. The Commission believes that the doctrine has an equally important role to play with respect to both registered and unregistered land and that it would be preferable to have the doctrine apply to both in basically the same way (with technical adjustments only, to take account of the formal requirements of the registration of title system). **Question 1** asked whether consultees agreed with that proposition.
- 12.3 The consultees who responded to this question were unanimously in agreement with the Commission on this point. Accordingly, the provisions of Part 9 of the LLR Bill, which relate to adverse possession, apply to unregistered land as well as to registered land.

ABOLITION OR RETENTION OF THE DOCTRINE

- 12.4 In the light of the decision of the Grand Chamber of the European Court of Human Rights in the case of *J A Pye (Oxford) Ltd. V UK* (2006) 43 EHRR 43 the Commission was of the view that human rights issues relating to the doctrine of adverse possession have been put to rest for the time being and should not be pursued further. **Question 2** asked whether consultees agreed with that proposal.
- 12.5 The consultees who responded to this question were unanimously in agreement with the Commission and therefore the Commission recommends that the doctrine of adverse possession should be retained to enable a squatter to acquire the title of a dispossessed owner after the expiration of the specified period of limitation.

POSSIBLE RESTRICTION OF THE DOCTRINE

- 12.6 The Commission considered whether the doctrine should be restricted in its scope or operation. For example, a number of other

jurisdictions have introduced concepts such as good faith, so that the doctrine will operate only in favour of a squatter who can show this or has otherwise behaved in an ethical manner. One of the major concerns about such an approach is that it is very difficult to know where to draw the line in ascertaining the motives of the squatter. The Commission concluded from its examination of the issues that any attempt to import ethical considerations into the doctrine of adverse possession would be very contentious and would militate against the aims of clarity and certainty which the Commission is trying to promote.

- 12.7 The Commission was not convinced that the fundamental features of the doctrine are sufficiently inappropriate to justify interference with them. **Question 3** asked whether consultees agreed and those who responded to this question were unanimous in expressing their agreement with the Commission on this point. The Commission therefore believes that it would not be appropriate to recommend any interference with the features of the doctrine in this respect.
- 12.8 The Commission was inclined to take the same view in relation to the possibility of using other doctrines as a substitute in certain circumstances, such as equitable estoppel, where the squatter was acting to his or her detriment. (SCP para. 2.18). The Commission considered that equitable estoppel could only be invoked in very limited situations and is better used as an alternative in particular cases as the parties choose, rather than as a substitute for adverse possession. **Question 4** asked whether consultees agreed and the responses to this question were unanimously of the same view as the Commission. The Commission therefore recommends that no alteration should be made to the doctrine of adverse possession in this respect because it would not generally be helpful to adapt the alternative remedy of equitable estoppel to deny the title of the dispossessed owner.
- 12.9 The Commission also considered the option of taking an alternative approach in particular situations, such as boundary disputes, where in certain other jurisdictions there is encroachment legislation or a jurisdiction for the court to resolve a dispute on the basis of improvement made under a mistake. However, the Commission was not convinced of the merits of trying to transport such elements of other conveyancing systems to Northern Ireland. In particular it had doubts about introducing a new scheme for unregistered conveyancing when there is a clear policy to move towards registered conveyancing. **Question 5** asked whether consultees agreed with that conclusion. The responses on this point were again unanimous in supporting the inclination of the Commission not to import hitherto unknown concepts into the law of adverse possession in order to resolve disputes.
- 12.10 The Commission also has considerable reservations about introducing a veto scheme into Northern Ireland, as is the case in England. The veto scheme allows the owner of registered land a period of two years in which to bring proceedings to retrieve his or her

position after being put on notice by a squatter who has completed a period of ten years occupation. This greatly increases the protection of the owner of the land from being dispossessed and involves a considerable shift in the balance between the interests of the parties towards the owner of the land. The Commission has considerable reservations about proposing such a scheme for Northern Ireland and has concluded that it is not appropriate to recommend making such a substantial change to the operation of the registration of title system at this stage. The Commission takes the view that this matter should be dealt with as part of any review of land registration which may take place in the future, but not as part of the current project for the reform of land law.

- 12.11 **Question 6** asked whether consultees agreed and those who responded confirmed that it would not be helpful to seek to include a veto scheme into the operation of adverse possession in respect of registered land. Therefore the Commission has no hesitation in recommending that the present system should not be altered to introduce a veto for the owner of registered land to recover the ownership of land when he or she is in danger of losing it to a squatter in possession.
- 12.12 The ultimate decision by the Grand Chamber in the *Pye* case, to regard adverse possession as a control of use rather than a deprivation of land has, in the view of the Commission, removed both the human rights issues and the issue of compensation from the need for further consideration. Adverse possession involves so many different scenarios and so many squatters and landowners of such different ethical status, that it would be too complex to introduce criteria by which an owner would qualify for compensation and too controversial to attempt to assess such compensation. On that basis, the Commission is not inclined to propose that a dispossessed landowner should be compensated for loss of the land. **Question 7** asked whether consultees agreed and, with one exception, the responses indicate that they are fully in agreement with the Commission on this point. Therefore the Commission recommends that the issues of human rights and payment of compensation should not be considered any further for the time being.

REQUIREMENTS FOR ADVERSE POSSESSION

- 12.13 There is currently no statutory definition of adverse possession so it has been left to the courts to work out its meaning. Case law has established that both factual possession and intention to possess the land to the exclusion of all others are essential to establish adverse possession. The House of Lords has confirmed that these requirements are fundamental and the principles have also been applied by the courts in Northern Ireland. It seems to the Commission that it would be inappropriate to interfere with this aspect of the law by legislation and **Question 8** asked if consultees agreed. All of the consultees who responded on this point, with one exception, agreed that the matter should rest with the courts and not be incorporated in any new legislation. Accordingly, the Commission recommends that

the courts should be left to settle the fundamental requirements of adverse possession.

PARLIAMENTARY CONVEYANCE

- 12.14 The current position is that the doctrine of adverse possession operates in a negative way only, because the title of the dispossessed owner is extinguished under the Limitation (Northern Ireland) Order 1989 (N.I. 11). The courts have held that there is no parliamentary conveyance or transfer of that title to the squatter, but that the squatter obtains a new independent title. This principle is unsatisfactory in respect of leasehold land, where the squatter bars only the title of the lessee, but not that of the lessor. It is also problematic in relation to registered land, where in practice the Land Registry treats the squatter as the new owner of the dispossessed owner's folio.
- 12.15 On previous occasions it has been proposed that legislation should make provision for there to be a parliamentary conveyance of the dispossessed owner's title and that the title should vest in favour of the squatter at the end of the limitation period. The Commission sees no reason to depart from that position and **Question 9** asked whether consultees agreed that such legislation should be introduced. The consultees who responded to this question were unanimously in favour of such legislation, subject to clarification on points of detail and in relation to any superior interests. The Commission therefore recommends that legislation should stipulate the nature of the title which the squatter will acquire. Section 110 of the LLR Bill provides for the vesting of the title in the person in favour of whom the limitation period has run. Sections 111 -112 deal with the position where the title is held under a tenancy and section 113 where the land is mortgaged.

LIMITATION PERIODS

- 12.16 Under the Limitation (Northern Ireland) Order 1989, the general period of adverse possession a squatter must establish in order to succeed in a claim to ownership of the land is 12 years, although it is 30 years in respect of the Crown and 60 years where the claim relates to foreshore. After considering possible alterations to the limitation periods, in particular those recently made in England and Wales, **Question 10** asked consultees if they agreed with the inclination of the Commission not to make any changes to the current time limits. The consultees who responded to this question, with one exception, were in agreement with the view that it would not be appropriate at this time to modify the existing provisions. The dissenting response was in favour of adopting a scheme along the lines of that in England and Wales. However, the Commission remains inclined not to recommend any changes to the limitation periods for the vesting of title in a squatter.
- 12.17 Further, the Commission was not inclined to introduce different limitation periods for different categories of squatters because this would complicate the law without securing any real benefits.

Question 11 asked whether consultees agreed with that stance and the responses received indicated unanimous agreement on this point. Accordingly, the Commission recommends that the existing situation should remain unchanged and that it is not warranted to make any distinction on perceived merit according to the circumstances of the squatter.

- 12.18 In relation to the detail as it would affect periodic tenancies, there is at present a distinction between oral and written tenancies. An oral tenancy is treated as determining at the end of its first year or other period, after which the limitation period can commence; whereas a written tenancy is determined by notice. On balance, the Commission was not inclined to recommend altering the present position with regard to oral tenancies. **Question 12** asked whether consultees agreed with that suggestion. All the respondents did agree, with one exception. Therefore the Commission recommends that the present position should not be changed.

MORTGAGEES IN POSSESSION

- 12.19 On balance the Commission is inclined not to recommend any change in the law which currently provides that the mortgagor is barred from bringing an action to redeem the mortgage after the mortgagee has been in possession for 12 years.

UNINCORPORATED ASSOCIATIONS

- 12.20 The Commission recognises that there are difficulties in applying the law of adverse possession to unincorporated associations because it may be uncertain against whom the adverse possession is operating. However, it takes the view that reform should be not be dealt with as part of the present land law project but as part of a general review of the law as it affects unincorporated associations. **Question 13** asked whether consultees agreed and the responses were unanimous in doing so. The Commission therefore recommends that the position of unincorporated associations should be dealt with as part of a general review of the status of such bodies. This would form the subject of a separate project and would not be pursued any further in the current proposals.

ENCROACHMENT

- 12.21 Difficulties arise where a tenant encroaches on neighbouring land and ultimately acquires title to it by adverse possession. Basically, the tenant is presumed to acquire the title to the neighbouring land for the benefit of the landlord, so that on the expiry of the tenancy it passes to the landlord. However, the Commission is not convinced that it would be appropriate to recommend legislative reform and considers that this is a matter which is best left to the courts to develop. **Question 14** asked whether consultees agreed. The responses were mixed, with some views being expressed in favour of further consideration of the issue. However, on further reflection, the Commission remains inclined not to make any recommendation that encroachment by a tenant on neighbouring land should be addressed in legislation.

PURCHASERS IN POSSESSION

- 12.22 Although it does not happen very frequently, the situation may occasionally arise that a purchaser takes possession of land under a contract for sale which is never formally completed by a conveyance or transfer of the title from the vendor. In such a situation, the purchaser can claim that the title of the paper owner is extinguished after the expiration of the relevant time limit. In view of the time, trouble and expense which it saves the purchaser, the Commission is not inclined to recommend that the application of the doctrine of adverse possession should be restricted or abolished in these circumstances. **Question 15** asked whether consultees agreed and their responses unanimously confirmed that they did. Accordingly, the Commission recommends that no amendment be made to the doctrine of adverse possession as it applies to purchasers in possession.
- 12.23 However, there are particular instances where the doctrine requires some clarification. One is the question as to when time begins to run in favour of a purchaser in possession when it may not be clear, as for example, after the determination of a tenancy at will. It has been suggested that where a purchaser is allowed into possession before obtaining legal title, time runs in his or her favour when the vendor's licence permitting this ends or the purchaser pays the full purchase price, whichever is the earlier. An exception would be made where the purchaser had entered into a contract for the grant of a lease. In such a case, time would not begin to run against a landlord because the landlord's right to the benefit of the covenants in the intended lease should be preserved. **Question 16** asked whether it could be agreed that some clarification of the operation of the doctrine of adverse possession was appropriate in the circumstances outlined and the consultees who responded to this question were unanimous in expressing their agreement on this point. Therefore the Commission recommends that the position of a purchaser in possession should be clarified as set out in section 114 of the LLR Bill.

CHAPTER 13. GROUND RENTS

INTRODUCTION

- 13.1 Chapter 3 of the Supplementary Consultation Paper is concerned with proposals for the reform and extinguishment of ground rents. A review of the law relating to ground rent redemption and covenants was referred to the Commission in May 2008 by the Minister for Finance and Personnel.
- 13.2 The Commission is strongly of the view that it is of primary importance to deal with the issue of ground rents in order to accelerate the simplification of titles and actively encourage the move towards unencumbered freehold ownership. It is also important that any new provisions should meet the expectations of the parties and produce an outcome that is satisfactory both to the rent payer and to the rent owner. The end result should be that the rent payer obtains a fee simple interest in possession or ownership, free from any ground rent and the rent owner is adequately compensated both for the loss of income and the interest in the land.
- 13.3 The Commission made fairly radical and far-reaching proposals for reform in the Supplementary Consultation Paper and asked the consultees for their views on a series of proposals. The consultees who responded recorded varying degrees of support for the range of options suggested. Many expressed their views in strong terms and some of those who responded commented at length on the potential adverse affect of radical reform. Although, on an informal basis, the Commission is aware of much wider support for reform, those holding such proactive views did not respond in writing to the consultation. On a number of the questions, the Commission was unable to discern a common thread in the written replies and no consensus emerged. However, it is clear from those who felt sufficiently concerned to respond in writing, that there is little support from them for more thorough reform.
- 13.4 It is incumbent on the Commission to take the views expressed by the consultees into account and to recognise their importance. As a result the Commission will now take a more moderate approach to reform and will make less radical proposals than it had originally envisaged. It hopes that the present recommendations will be seen as a first step towards resolution of the ground rent problem and not a panacea which addresses all its shortcomings. The recommendations that it is now making are limited in their extent because there was insufficient support for more extensive reform from the consultees and stakeholders who formally responded to the consultation exercise.
- 13.5 The Commission recommends implementing the reforms by amendment to the Ground Rents Act (Northern Ireland) (c. 5) so that the new provisions can take effect alongside the existing arrangements. The principal reforms are confined to recommending

the introduction of automatic redemption of small ground rents of £10 or less. Before the appointed day on which automatic redemption of all small ground rents takes place, there is provision to introduce compulsory redemption where there is a conveyance of land subject to a ground rent of £10 or less. This will ensure that there is some experience of compulsory redemption before all the small rents are automatically extinguished. Thus the lowest rents will be completely removed by this means, and the former rent payers will become the statutory owners of the land. Compensation for the lost rent will be payable to the rent owner in every case, but there will be no requirement for the process to be administered through the Land Registry. The exercise can be undertaken by the parties between themselves, thus avoiding any element of delay or unnecessary expense. It is anticipated that these arrangements will go part of the way to meet some of the criticisms of the present redemption system.

GROUND RENTS ACT (NORTHERN IRELAND) 2001 (C. 5)

- 13.6 The first matter that the Commission considered was the redemption scheme currently operating under the Ground Rents Act (Northern Ireland) 2001. **Question 17** asked whether consultees agreed that the present redemption scheme should end when the new proposals are implemented and whether there should be appropriate transitional arrangements for applicants already involved in the process (SCP para. 3.75).
- 13.7 Although the consultees who responded to this question were almost unanimous in agreeing with the Commission, the Commission has reflected further and has reconsidered the position of the existing legislation in the context of the proposed reforms. The Commission now believes that the current scheme should remain in place and that it can continue to operate alongside the reforms for anyone who wishes to avail themselves of it. Accordingly, it recommends that the Ground Rents Act (Northern Ireland) 2001 should not be repealed.
- 13.8 As the responses in general were not sufficiently supportive of any radical changes or the introduction of a completely new scheme, the Commission recommends that more limited reforms should be made by way of amendment to the Ground Rents Act (Northern Ireland) 2001. The proposed provisions are set out in the draft Ground Rents (Amendment) Bill ("the GRA Bill").
- 13.9 **Question 18** indicated that the inclination of the Commission was that the new scheme should apply only to ground rents of dwelling houses, as is the case under the present scheme and asked whether consultees agreed (SCP para. 3.78). Approximately one half of the consultees who responded to this question agreed that the redemption scheme should apply only to dwelling houses. Others considered that it should extend to flats and to residential property with some commercial element or at least be capable of extension. Those who dissented were in favour of a scheme of wider application. It has been brought to the attention of the Commission that there are a number of commercial leases in particular locations reserving a

ground rent which contain rent review clauses that could lead to substantial increases in rent. Concern has been expressed about the effect of such clauses but it is not possible for the Commission, as part of the present project, to make recommendations for leases currently in existence.

- 13.10 On balance, the Commission considers that as a starting point the new redemption scheme should apply to dwelling houses only, but that the scheme should contain provision for extension more widely at a later date. Therefore, although the Commission is not recommending that any change be made to the existing arrangements under which the scheme currently applies to dwelling houses, it has included in the draft legislation, (section 2A(2)), a provision for the Department of Finance and Personnel to extend the scheme to other ground rents not currently coming within the provisions. This would enable the Minister, for example, to extend the scheme to commercial property at a future date.

- 13.11 **Question 19** asked whether the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 should be repealed and replaced by a new statutory provision conferring similar powers on those who were able to take advantage of it (SCP para. 3.78(12)). The responses to this question were mixed and there was no clear consensus as to repeal and replacement. Therefore the Commission makes no recommendation for any change to the current position, except in relation to a minor point which has specifically been brought to the attention of the Commission. A person is entitled to make an application under the 1971 Act if he or she can comply with criteria set out, which the Commission recommends should be amended so that the requirement for occupation permits an applicant to qualify, notwithstanding that he or she is prevented from living in the property by reason of disability. Schedule 2 of the GRA Bill makes the appropriate amendment to section 1(3) of the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 (c. 7).

APPLICABILITY OF THE SCHEME

- 13.12 **Question 20** invited consultees to express their views on the application of the definitions used in the Ground Rents Act (Northern Ireland) 2001 in practice (para. 3.75 – 3.79). The responses to this question indicated such a wide range of views that it is not possible to draw any conclusions from them as to preferences. Accordingly the Commission makes no recommendation for any alteration to the existing definitions.

PROVISIONS FOR INCREASE IN GROUND RENT

- 13.13 Article 31(4) of the Property (Northern Ireland) Order 1997 permits increases of ground rent to be made in the case of a building lease where such increase is related to progress in the building and **Question 21** asked consultees whether they consider that this exception to the general prohibition on increases in ground rent continues to be valid (SCP para. 3.80). Almost all of the consultees who responded to the question made comments supporting the

repeal of Article 31(4). Consequently the Commission recommends that Article 31(4) should be repealed and not replaced. The repeal is comprised in Schedule 3 of the GRA Bill.

RIGHT OF RE-ENTRY

- 13.14 A fee farm grant or a lease of land reserving a ground rent is usually subject to a right of re-entry or forfeiture in the event of the rent remaining unpaid for a stipulated period (commonly 21 days). In theory, if the rent payer does not pay the rent before the period expires, the rent owner can take possession of the land to the entire exclusion of the defaulting rent payer and of any sub-tenants who hold title from him or her.
- 13.15 **Question 22** asked if consultees agreed that section 44 of the Conveyancing Act 1881 (c. 41), which provides remedies for the recovery of land where an annual sum is charged on the land or the income of the land, should be repealed and not replaced (SCP para. 3.85). Although the responses to the question were almost unanimous in agreeing with the proposal to repeal section 44, this does not accord with the responses to question 23 which relates to the removal of the security which would be a necessary consequence of the repeal. In these circumstances, the Commission is not minded to recommend the repeal of section 44.
- 13.16 The Commission believes that it is quite disproportionate that a rent owner or superior landlord should have a right of re-entry or forfeiture over a house with a substantial capital value in order to protect a small ground rent. For this reason it proposed that the ground rent should no longer be secured on the land and that it should become a contract debt. As such, the debt would become a personal matter between the rent payer and the rent owner. **Question 23** asked if consultees agreed that the ground rent should cease to be secured on the land and should become a contract debt (SCP para. 3.86).
- 13.17 The consultees who responded to this question were equally divided between those who supported the proposal and those who opposed it. In the light of the comments made and the views expressed by the consultees, the Commission has reflected on the matter and considered the issue further. It recognises that there is insufficient support for reform and it is now inclined to recommend that there should be no departure from the present position. The right of re-entry for non-payment of ground rent is considered to be of some value to rent owners and the Commission accordingly accepts that ground rent should continue to be secured on the land.
- 13.18 The position of unpaid compensation money, as opposed to unpaid ground rent, is considered separately in para. 13.36. (SCP para. 3.93).

SMALLER GROUND RENTS

- 13.19 The Commission proposed that a distinction should be drawn between small ground rents and larger ones because of the wide variation in the amount of rents and the belief that it was not easy to

devise a 'one size fits all' scheme for redemption. **Question 24** asked if consultees agreed that there should be a distinction between smaller ground rents and larger ones (SCP para. 3.87). The vast majority of the consultees who responded to this question were in full agreement with the proposal and the remainder expressed views which were broadly in agreement but subject to some reservations or conditions.

- 13.20 In the light of these responses which support its own views and underline the belief that dealing with the smaller ground rents is relatively uncontroversial, the Commission recommends the introduction of a scheme that will apply to rents below a specified amount.
- 13.21 The Commission recognises that any dividing line between large and small is by its very nature arbitrary, but **Question 25** asked consultees which amount they would prefer as the appropriate maximum for the smaller rents provisions: £10, £20, £50 or a different amount (SCP para. 3.87). The consultees who responded to the question expressed a range of views, some being in favour of amounts higher than £50, but no consensus emerged.
- 13.22 The Commission has taken all the comments into account and has reached the conclusion that it would be advisable to take a cautious approach initially. For that reason, it recommends the upper limit for the scheme which it will be proposing for small rents should be £10. Therefore, the new provisions recommended by the Commission set out in the GRA Bill, apply to ground rents of a yearly amount of £10 or less than £10.
- 13.23 Up until now there has been a special procedure under article 35A of the Property (Northern Ireland) Order 1997 (No. 1179 (N.I. 8)) for nominal ground rents to be discharged by a deed of declaration which may then be the subject of an application to the Land Registry for registration of the title to the fee simple estate. The Land Registry has confirmed that this procedure has never been used and that there are no records of any applications for such registration. It seems to the Commission, that where there is a nominal rent, the cost of instructing a solicitor and availing of the procedure are disproportionate to the benefit perceived to be gained from enlargement in such circumstances.
- 13.24 A nominal rent is defined as being in Article 35 as being a yearly amount of less than £1 or a peppercorn or other rent having no money value. On considering reform in the present context, because the enlargement procedure is not used, and because there does not seem to be either merit or need in excluding the very small nominal rents from the compulsory extinguishment provisions, the Commission has concluded that nominal rents should be brought within the provisions which relate to annual ground rents of £10 or less. Accordingly the Commission recommends that article 35A of the 1997 Order should be repealed and has included that provision in Schedule 3, Repeals of the GRA Bill. However, as the maximum

compensation that would be paid for a nominal ground rent would be £9 (9 x £1) the Commission proposes that the rent payer of a nominal rent should be exempt from the requirement to pay redemption money to the rent owner. See section 1 of the GRA Bill inserting section 2B into the 2001 Act.

AUTOMATIC EXTINGUISHMENT

- 13.25 The Commission believes that, in order to achieve any degree of success with elimination of ground rents, there must be a compulsory or automatic element to the redemption scheme. As a starting point, the Commission recommends that the smaller rents should be automatically extinguished across the board, after a sort interim period during which such rents would be automatically redeemed on the trigger point of sale. In the Supplementary Consultation Paper, the Commission set out its proposals for all rents below £10, £20, £50, or such other amount as agreed, to be automatically extinguished by statutory provision.
- 13.26 It was explained that compensation would be due by the rent payer to the rent owner, but the ground rent would be extinguished whether or not the compensation was paid. As this was a fairly radical proposal, the Commission considered that there should be a lead-in period of sufficient time to enable the parties to make the necessary arrangements between themselves in advance for payment of the compensation. **Question 26** asked if consultees agreed that the appointed day for the provisions to become operative should be three years from the date on which the legislation comes into effect. If they disagreed, the consultees were asked to specify a preferred alternative period (SCP para. 3.88).
- 13.27 Once again, the consultees expressed a wide range of views and no consensus emerged. The Commission has decided to leave it as a matter for the Department to commence as it sees appropriate. In the meantime, in order to advance redemption as a whole, the Commission is recommending that automatic redemption of small rents on sale should be introduced at an earlier date. This would enable experience to be gained of the new system in advance of universal automatic redemption and also to reduce the numbers that would be affected on that date. Accordingly, draft provisions are set out in section 1 of the GRA Bill, inserting section 2A(1) into the 2001 Act, which provides for automatic redemption on sale, in respect of ground rents of £10 or less.
- 13.28 On the date on which the ground rent is extinguished, the rent payer would acquire statutory ownership equivalent to the fee simple absolute and the estate of the rent owner would be discharged. Further, any other superior interests would be extinguished. The estate of the rent payer would be converted automatically into a statutory freehold or absolute ownership. **Question 27** asked if consultees agreed that the rent payer should automatically acquire statutory ownership and that all the superior estates should also be automatically extinguished (SCP para. 3.89).

- 13.29 The consultees who responded were in general agreement in principle with this proposal. Accordingly, the Commission recommends that this should be implemented. However, it should be noted that statutory ownership can only be acquired if the LLR Bill is brought into effect. If it is not, the suggested amendment set out in section 1 of the GRA Bill inserting sections 2A and 2B into the 2001 Act, makes provision for automatic redemption of certain ground rents and ties in the consequences of the extinguishment of the rent with current provisions.
- 13.30 In response to question 27, some of the consultees made additional comments expressing concern in relation to the continuing survival of valuable covenants and the right of the rent owner to any unpaid compensation due for the redemption of the ground rent. The matter of surviving covenants is considered in chapter 14 and compensation is addressed by the provisions of the new section 2B which the Commission recommends inserting into the 2001 Act. (para. 13.28 above).

RAISING AMOUNT OF AUTOMATIC EXTINGUISHMENT

- 13.31 The Commission believes that it is necessary to ensure that all rent owners realise that there is limited life in income from ground rents. Accordingly, it is hopeful that if the provisions that it recommends are implemented and prove to be successful, they can be rolled out at a future date, in tranches if necessary, to extend to larger ground rents. **Question 28** asked whether consultees agreed that there should be provision at a future date for larger ground rents to be automatically extinguished. Although it may be difficult to say at this early stage, it further asked up to what amount might this be extended and approximately how far ahead this provision might be made (SCP para. 3.90).
- 13.32 The consultees who responded to the question were broadly in agreement with the suggestion that the provisions for compulsory extinguishment of ground rents would be extended at some time in the future to larger amounts. However, many differing views were expressed as to the amount and no consensus emerged on the detail.
- 13.33 Accordingly, the Commission recommends that the situation be reviewed after such period of time that the Department of Finance and Personnel considers appropriate. Section 1 of the GRA Bill, inserting section 2A(3) into the 2001 Act, enables the Department to fix a different limit for automatic redemption.

COMPENSATION FOR SMALLER AND LARGER GROUND RENTS

- 13.34 The Commission recognises that it is of great importance for the rent owner to be properly compensated by the rent payer for the loss of the income from the ground rent and the superior interest in the land. In the Supplementary Consultation Paper, it was proposed that the onus would be placed on the rent owner to request and obtain the

compensation from the rent payer. If he or she failed to do so by a specified date after the automatic extinguishment comes into effect, it was suggested that the right to payment of the compensation might be lost. In that event, the rent payer would be under no continuing obligation and the debt would effectively become statute barred. **Question 29** asked if consultees agreed that the responsibility for obtaining the compensation should lie with the rent owner (SCP para. 3.93). Following this, **Question 30** asked whether consultees accepted that the rent owner would lose the right to the compensation if it was not obtained when the ground rent was extinguished (SCP para. 3.93). The Commission was aware that these suggestions would be fairly controversial.

- 13.35 Although some of the consultees clearly agreed with the proposal for obtaining compensation as it stood, the rent owners who responded voiced concerns about the practical difficulties of extracting payment from the rent payers. Others made comments about the status of the debt and suggested that it should crystallise in some way or be registered on the title to be paid out of the sale proceeds in due course.
- 13.36 The consultees in their responses have drawn to the attention of the Commission important factors that would affect the operation of the provisions in practice and which may have the potential to render them ineffective. The Commission appreciates the validity of the points made and the fact that the proposals lack appeal from the perspective of the rent owner. Therefore it has revised its position and is not recommending that the opportunity for the rent owner to obtain payment of the compensation from the rent payer should be lost after the expiration of a specified period.
- 13.37 Instead, taking into account the views expressed, the Commission has come to the conclusion that, although it will still recommend that it should be the responsibility of the rent owner to obtain the compensation from the rent payer, there should be a degree of protection for the rent owner. It now proposes that, if the redemption money is not paid, the debt would become a lien on the land, whether the title is registered or unregistered. Accordingly, section 1 of the GRA Bill, inserting section 2B(6) into the 2001 Act, makes provision for any unpaid redemption money, plus interest accruing, so long as it is unpaid, to be a lien on the land. However, when automatic redemption of all the remaining small rents occurs, the rent payer will not be required to pay the redemption money until it has been claimed by the rent owner and an appropriate claim notice has been served.

COMPENSATION FOR SMALLER GROUND RENTS

- 13.38 When considering the issue of compensation, the Commission also considered the matter of calculating the amount that should be paid, although this has been debated at length on many previous occasions and differing opinions have been expressed. After much deliberation and an examination of various options, the Commission

indicated in the Supplementary Consultation Paper that it was inclined to revert to the principle of using a simple multiplier. It believes that this will ensure that the redemption process remains as straightforward and uncomplicated as possible.

- 13.39 **Question 31** asked if consultees agreed that the compensation for smaller rents should be calculated by using a simple multiplier. If so, it asked whether consultees considered that the compensation should be nine times the annual ground rent or whether 12 would be a more acceptable multiplier. If neither, consultees were invited to suggest a multiplier that would be preferable. As an alternative, would they consider that the calculation should be made on a different basis such as the investment of a capital sum in government stock? (SCP para. 3.95).
- 13.40 The consultees who responded to this question expressed a wide range of views and many made additional comments which were of interest to the Commission. However, given that there was support in principle for a single multiplier for smaller rents and the fact that the current scheme operates with a single multiplier, the Commission has concluded that it would be acceptable to proceed on this basis and recommends accordingly. Further, as the present multiplier is 9, the Commission considers that this is as good an amount as any to apply.
- 13.41 **Question 32** asked whether, given that it is accepted that any arrears of ground rent due to the rent owner should be paid, consultees agreed with the proposal that interest should also be charged? (SCP para. 3.96). The responses from the consultees were mixed. However, on further reflection, the Commission has come to the view that it cannot legislate to retrospectively charge interest on outstanding arrears of ground rent where there was no provision to do so under the original terms of the lease. In these circumstances, it is not recommending any amendment to the current legislation and the status quo will be preserved in this respect.

COMPENSATION FOR LARGER GROUND RENTS

- 13.42 In the case of the larger ground rents, the Commission had an open mind in relation to the calculation of compensation and sought the views of the consultees as to how the compensation should be calculated. **Question 33** asked on what basis the consultees considered that the compensation for larger rents over £10, £20 or £50 should be calculated: a simple multiplier, investment in government stock or a completely different option? If a simple multiplier, should that multiplier be 9, 12, or a different amount? Should the multiplier vary according to the size of the rent and if so, how would this be done? Again, should interest be charged on the arrears? (SCP para. 3.97).
- 13.43 Although the responses to this question expressed a range of views, one half of the consultees who commented were in favour of a simple multiplier. No clear preference emerged as to a specific figure for the multiplier but the point was made by several consultees that it would

be more sensible to have the same multiplier for the redemption of both large and small ground rents and that the same provisions should apply across the board.

- 13.44 The Commission notes the comments that have been made on this point and more generally in response to the later questions as to the means of redeeming larger ground rents. It is aware that there is little support for adopting a radical solution to deal with the problems posed by the larger ground rents. It is also mindful of the current economic climate in which it would be imposing a considerable burden on rent payers and purchasers if it were required for them to raise a substantial capital sum to redeem a ground rent of several hundred pounds at a time when they were financially stretched. In these circumstances, the Commission has concluded that it should not make any recommendations in relation to compulsory redemption of larger rents.

TRIGGER POINTS FOR REDEMPTION OF BOTH SMALL AND LARGE RENTS

- 13.45 The Commission had considered whether there should be trigger points for small rents within the three year lead-in period on the occurrence of which the ground rent would be extinguished, and requested the views of consultees on this point. **Question 34** asked if consultees thought that a small ground rent under £10, £20 or £50 should be extinguished on the sale or transfer of the land and also on the occurrence of other events, such as on voluntary transfer, mortgage / charge, transmission on death or any other change of ownership. The question further asked, if on the occurrence of a triggering event, which party should be responsible for the redemption of the ground rent – the previous rent payer or the new rent payer? (SCP para. 3.98).
- 13.46 The consultees made extensive comments in response to this question. Approximately one half answered the specific queries and all of those consultees agreed that there should be redemption on the trigger points suggested. Of those who did not answer the specific queries, there was also general support in principle for redemption on sale, if not the other trigger points suggested. However, the Commission has taken into account all the specific comments made by the consultees. It has reviewed its position in the light of both the current economic climate and the difficulties in arriving at a suitable redemption formula for the larger rents. In these circumstances, the Commission takes the view that it would not be appropriate at this time to recommend compulsory redemption for larger rents on the trigger of sale or transfer of the land. Accordingly, the Commission will confine itself to making recommendations for the time being only in relation to smaller ground rents.
- 13.47 It recommends that compulsory redemption should be introduced for smaller ground rents on sale, before the appointed day on which there will be automatic redemption of all the smaller ground rents which remain. Provision for redemption on the trigger point of sale is

set out in section 1 of the Ground Rent Amendment Bill, inserting section 2A(1)(i) into the 2001 Act. The redemption could be done as part of the normal conveyancing process and the redemption money paid out of the sale proceeds to the rent owner. The Commission is of the view that, as a matter of practice, it would be the vendor who would be responsible for paying the redemption money to the rent owner, but it does not consider this issue should be addressed in the primary legislation. It is more a matter of practice which can be dealt with as part of the sale process. The capital sum involved will not be large and it is hoped that it would not be onerous for the vendor to discharge the redemption money out of the sale proceeds to ensure that no lien was registered against the title.

- 13.48 In relation to the larger rents, the Commission had proposed that there should be specified triggering events upon the occurrence of which ground rent redemption would be compulsory. In the Supplementary Consultation Paper it was suggested that the triggering events for larger rents should be the sale of the land and any other change of ownership including voluntary transfers, transmission on death and mortgage / re-mortgage / charge of the land.
- 13.49 **Question 35** asked whether consultees agreed and if not, what other triggering events they would consider to be more appropriate. The question also asked which party should be responsible for the redemption of the ground rent on the occurrence of a triggering event – the previous rent payer or the new rent payer (SCP para. 3.99).
- 13.50 In response, the consultees expressed the same views and made the same comments as in their answers to question 34. The Commission has given considerable thought to the question of compulsory redemption of larger ground rents on the occurrence of trigger points. It has taken note of all the comments made and the views expressed by the consultees. It is also mindful of the current state of the market and the prevailing economic climate. Taking all the factors into account it has reached the conclusion that this is not the time to propose compulsory redemption of larger rents. As a consequence of having adopted this position, it is not necessary to address the issue of potential triggering events.
- 13.51 **Question 36** asked whether consultees would agree with the suggestion that the lead-in period for introduction of the triggering events should be six months. If not, what alternative period would consultees suggest? (SCP para. 3.100). Although the majority of consultees were of the opinion that a period of six months would be sufficient, there were suggestions for longer periods. However, because the Commission is not recommending the introduction of any provisions for compulsory redemption of larger rents, the question of the length of the lead-in period is no longer relevant.
- 13.52 **Question 37** also related to extinguishment of larger rents. It explained that on a triggering event it was proposed that the ground rent would be extinguished automatically and that it would become

the responsibility of the rent owner to obtain the compensation from the rent payer. The question asked if consultees agreed with that proposal (SCP para. 3.101).

- 13.53 The responses indicated that there was little support for the suggestion that the rent owner should be responsible for collecting the compensation from the rent payer in these circumstances. Strong opposition was expressed by the rent owners to this proposal because of the practical difficulties that can be experienced in demanding and collecting ground rents. This issue is contentious but need not be pursued any further in the light of the Commission's position in not making any recommendations for redemption of the larger ground rents.
- 13.54 Under the original proposals there was a possibility that the capital sum required to redeem the larger rents may have been quite substantial. Consequently **question 38** asked if consultees agreed that the rent payer should be given the option to pay it to the rent owner by instalments. If so, it asked above what capital value should the option to pay by instalments be available and should interest be due on the capital value until all instalments have been paid (SCP para. 3.102)?
- 13.55 The responses indicated that the majority of consultees were opposed to payment by instalments, but again, this question requires no further consideration as the Commission has decided not to make any recommendations in respect of the compulsory redemption of larger rents.

INTERMEDIATE INTERESTS

- 13.56 The Commission has proposed that on redemption of a ground rent the rent payer would be awarded statutory ownership equivalent to a fee simple. That ownership would be registered in the Land Registry and all superior interests would be extinguished. This leads to the question whether the entirety of the intermediate interests above the occupational ground rent and any intermediate rents attached would also be extinguished. **Question 39** asked whether consultees considered that compulsory redemption of smaller ground rents in possession should extend to intermediate rents as well (SCP para. 3.103).
- 13.57 The responses confirmed that almost all the consultees agreed with the Commission that intermediate rents should be included in the redemption scheme. Therefore, the Commission recommends that compulsory redemption should extend to intermediate rents where such rents are superior to those small rents which are extinguished. This requires no amendment to the existing provisions for superior rents, which are set out in section 11 of the Ground Rents Act (Northern Ireland) 2001.
- 13.58 **Question 40** asked consultees if they agreed that the compensation due for intermediate interests should also be on the basis of the same simple multiplier as that used for the small rents and if not, how the

compensation would be calculated. Further, if the multiplier used produced a large capital sum, should there be an option to pay it by instalments over a specified period and above what level should the option to pay by instalments be introduced? (SCP para. 3.103).

- 13.59 The consultees who responded to this question were virtually unanimous in agreeing that the compensation for intermediate rents should be the same as that employed for the redemption of small rents and that it should be assessed by using a simple multiplier. However, the consultees were not in favour of an option for payment by instalments. Therefore, the Commission recommends that the same basis should apply to the calculation of compensation of intermediate rents as for small rents and that means using a simple multiplier. This requires no amendment to the existing legislation.

NON-PAYMENT OF GROUND RENT

- 13.60 In many cases, particularly where the amounts are small, ground rent may not have been demanded or collected for several years. Where a rent due under a lease has not been paid or demanded for 6 years or more, under Article 30 of the Limitation (Northern Ireland) Order 1989, only the right to the arrears of rent for that period is extinguished and not the title. A fresh right of action accrues on each occasion that the lessee defaults and the rent never becomes statute barred. On the other hand, in the case of a fee farm rent, the title of the rent owner can be extinguished after 12 years non-payment under Article 2(8)(a) and schedule 1, para. 8(4)(a) of the Limitation (Northern Ireland) Order 1989.
- 13.61 The Commission took the view that it would facilitate the elimination of ground rents if, where the rent had not been demanded or paid for six years, the title of the rent owner, as well as the right to demand the rent, was extinguished. It proposed that this provision would apply to all ground rents regardless of size, and whether the rent in question was reserved by a lease or by a fee farm grant. **Question 41** asked whether consultees agreed with that proposal (SCP para. 3.105).
- 13.62 The responses clearly showed that there was almost no support for extinguishing title where the ground rent was not demanded or paid. The rent owners again drew attention to the practical difficulties which they often encounter in obtaining payments of ground rent and confirmed the importance of retaining their estate or interest in the land, despite the fact that the ground rent has not been paid. In the circumstances and taking these views into account, the Commission has decided not to recommend any alteration to the present position.

CHAPTER 14. COVENANTS AFTER REDEMPTION

INTRODUCTION

- 14.1 Following the Review of the Operation of the Ground Rents Act (Northern Ireland) 2001 in the Department of Finance and Personnel, Discussion Paper 1/05 November 2005 and the Analysis of Responses to Discussion Paper on the Ground Rents Act (Northern Ireland) 2001 (Department of Finance and Personnel), (SCP. 3.25 – 3.35), the Minister for Finance and Personnel referred to the Commission the issue of the law relating to ground rent redemption and covenants.
- 14.2 Chapter 4 of the Supplementary Consultation Paper considers the position of covenants affecting title to land after redemption of ground rent. This is the second strand of the review of the law which was referred to the Commission in May 2008 by the Minister for Finance and Personnel, the first being in relation to ground rents. The Commission has only reviewed the position of covenants in the narrow context of their position after redemption of the ground rent.
- 14.3 After outlining the general law relating to covenants, the previous proposals for reform and the current legislative provisions, as well as looking briefly at the position in other jurisdictions, the Supplementary Consultation Paper raised questions in relation to possible reform.

DIFFICULTIES WITH THE CURRENT POSITION

- 14.4 The fact that so many covenants survived redemption was one of the criticisms made of the operation of the redemption scheme introduced by the Ground Rents Act (Northern Ireland) 2001 (c. 5). The Commission has to bear in mind that the position of enforceability of covenants is already very complex and that it must be careful not to superimpose another layer of rules on top of a system that lacks clarity and is overburdened with difficulty.
- 14.5 In the light of this **Question 43** asked whether the consultees considered that the matter of covenants should or should not be addressed at the same time as ground rents (SCP para. 4.81)? All of the consultees who responded to this question, with one exception, were in general agreement with the proposal to address the matter of covenants along with ground rents. The view expressed by the dissenting consultee was that covenants should continue to be dealt with on an *ad hoc* basis by the Lands Tribunal. Since it had the support of the overwhelming majority, the Commission proceeded to consider the question of covenants.

PURPOSE OF COVENANTS

- 14.6 The Supplementary Consultation Paper (paras. 4.79 – 4.84) considered the purpose of covenants affecting land. Generally, restrictive covenants were designed to preserve the character and

amenity of the locality for the mutual benefit of the inhabitants and their landlord. Restrictive covenants have a function similar to planning control, in that both control the use of land and impose constraints in the interests of the community. However, there are also tensions and conflicts, because covenants are of a private contractual nature and protect individual interests, whilst planning law is a form of public control based on the interests of the wider community.

- 14.7 A balance has to be achieved between the interests of the owners in being able to tie up and control the land as they please against the interests of the community in having land freely marketable and transferable. Although ideally the planning system should be sufficiently robust to protect the character of a locality by its control of use, the reality is that it does not do so. That is one of the reasons why restrictive covenants are still important and can continue to serve a useful purpose, albeit on a narrower basis than planning control.

TYPES OF COVENANT

- 14.8 In order to make progress with the general policy of simplification of titles and of making ownership of land a more straightforward concept, the Commission examined the extensive range of restrictive covenants which continue to survive after redemption of the ground rent. Although section 16(1) of the Ground Rents Act (Northern Ireland) 2001 (c.5) provides that all covenants concerning the land cease to have effect after redemption, that provision creates a very misleading impression because section 16(2) goes on to list comprehensively those which continue to benefit or burden the land as the case may be.
- 14.9 After looking at each of the categories of covenant set out in section 16(2) of the 2001 Act, the Commission asked in **Question 44** whether consultees agreed with its proposal to limit the covenants that survive to those which are considered to be of “practical benefit” or those which “protect the amenity” of the land (SCP para. 4.94). It was envisaged that the definition would be sufficiently broad to encompass the type of obligations currently set out in section 16(2) (c) – (e) which are practical in nature and involve issues such as repair and maintenance of party walls.
- 14.10 The responses indicate that the majority of the consultees who answered to this question were in general agreement with the proposal to confine covenants to those which would broadly be considered to be of “practical benefit.” The remainder, who did not expressly agree, made comments regarding the nature of covenants, without specifically answering the question posed. After reconsidering the issue in the light of these responses, the Commission has reached the conclusion that it would not be able to define “practical benefit” in such a way that would be satisfactory or acceptable to all parties and therefore recommends that its original proposal should not be pursued any further.

- 14.11 **Question 45** followed on from the previous question and put forward an alternative form of words to restrict the types of covenant which survive redemption. It stated that it was difficult to generalise but, when considering a covenant, it may be easier to determine whether it is of “practical benefit” rather than whether it “protects or enhances the amenity” of land. The Commission did not reach a conclusion on this difficult issue and recognised that there may be some merit in both tests. It asked whether consultees considered that the statutory provisions should be recast so that there is consistency of application in all circumstances? If so, which test would be preferred: “practical benefit”, “protect or enhance amenity”, or a new suggestion - “protect amenity land” (such land to be defined) (SCP para. 4.95)?
- 14.12 Of the consultees who responded to this question, only one specifically expressed a preference for one of the alternatives and that was in favour of practical benefit. The remainder did not incline particularly towards either one of the other, but commented on the difficulty of making the decision. In these circumstances, the Commission has reflected further on the issue and has reached the same conclusion as in relation to question 44. If none of the suggested definitions are satisfactory or acceptable to a significant majority and there is no appetite for change, the Commission is inclined to recommend that this matter is not pursued any further for the time being.
- 14.13 **Question 46** pointed out that it is possible that there may be other types of covenant which are not included in section 16(2) but which should survive redemption of the ground rent and asked the consultees for their views on this point. For example, covenants relating to financial obligations. In particular it asked **(a)** if consultees considered that there are other types of covenants which should be preserved, notwithstanding that they may not be of practical benefit or protect or enhance amenity? **(b)** In relation to those set out in section 16(2), it asked whether consultees agreed that any covenants which cannot be brought within the chosen general definition should be automatically extinguished (SCP para. 4.96).
- 14.14 Only one of the consultees who responded to this question answered it specifically and was in favour of the general proposal to extinguish covenants which cannot be brought within the general definition. Most of the others suggested types of covenant which they considered ought to survive, but there was no clear consensus on this point. Therefore, following on from its conclusions stated above (in relation to questions 44 and 45) the Commission does not propose to make any recommendation in relation to other types of covenants which ought to survive redemption, particularly because it is not pursuing the proposal for confining the covenants which survive within a general definition.

LAND BENEFITED

- 14.15 Another question considered by the Commission in the Supplementary Consultation Paper (paras. 4.97 – 4.99) was

ownership of the land which is benefited by covenants and the basis on which a person should continue to have the benefit of any covenants. Historically, covenants developed and were used principally to benefit land retained by the ground landlord or superior owner of the property, whether or not that person continued to live in the vicinity. Later, the desirability for reciprocity of obligations between neighbours was recognised (SCP paras. 4.25 – 4.27). However, the Commission was cautious in seeking to ensure that it did not propose to confer new rights on anyone who would not have had rights under the existing law.

14.16 The Commission was inclined to the view that the way forward may be to move towards benefit and enforceability for those living nearby who would be affected by a breach of a restrictive covenant (SCP para. 4.99). Accordingly, it asked for the views of consultees on the following:

14.17 Questions 47 – 62 are all set out in para. 4.99 of the Supplementary Consultation Paper.

NEIGHBOURS

14.18 **Question 47:** Do consultees agree that there are some types of covenant which should continue to be enforceable by neighbours for the benefit of adjoining land? The vast majority of the consultees who responded were generally in favour of certain covenants being enforceable by neighbours or owners of adjoining land. Therefore there is no difficulty in principle in accepting that neighbours can have such enforceable rights, which requires no change to the law.

14.19 **Question 48:** The Commission believes that it is important to define the proximity of the benefited land in relation to the burdened land. For this purpose, how should the vicinity, locality or neighbourhood be defined?

14.20 A range of views were expressed in response to this question but there was almost no support for the proposal for a definition of proximity. The comments made by the consultees serve to highlight the difficulty the Commission has encountered in working to find an acceptable solution to the problems surrounding the issues of enforceability of covenants.

14.21 **Question 49:** On the question of measurement of the physical proximity to the burdened land, is 100m attractive as a rule of thumb (as in Scotland, see SCP. 4.72)? Alternatively, would 500m or another measurement be considered more appropriate?

14.22 The majority of consultees who responded to this question were in favour of a distance of 100m, whilst the minority considered that a measurement of physical proximity would not be of assistance and would be entirely arbitrary. In view of the fact that there was little enthusiasm for any definition of proximity (as evidenced by the responses to Question 48), it is not possible to attach any weight to the views of those who expressed a preference for a 100m

measurement. In the circumstances the Commission is unable to make any recommendation for reform.

- 14.23 **Question 50: (a)** Should the criteria for qualification as a building or development scheme be statutorily defined? If so, should there be a requirement that the neighbours originally derived their title from a common vendor in “substantially similar terms” (2001 Act, s. 17(6)), or “enjoy a degree of uniformity with some possible variation” (*Elliston v Reacher*) and be “consistent only with a general scheme of development”? **(b)** Should it also be necessary to prove that the restrictions imposed “were intended to be and were for the benefit of all the sites sold”?
- 14.24 The responses from the consultees, with one exception, were in general agreement that a statutory definition would be helpful but there was no common thread as to the detail.
- 14.25 In considering the covenants which should survive redemption in the context of a building or development scheme the Commission is conscious of the complexities and uncertainties which currently surround this area. The present state of the law is unclear and difficult to apply which causes problems in practice. Where properties are held under a common title and there is a building or estate scheme in operation, it is beneficial for the parties to enjoy reciprocity of obligation (SCP paras. 4.24 – 4.27).
- 14.26 The rules for enforceability were first devised in the case of *Elliston v Reacher* [1908] 2 Ch 374, although it is recognised that the scope for establishing a building scheme is fairly narrow and the criteria for qualification are strictly interpreted. The situation has not been assisted by section 17(6) of the Ground Rents Act (Northern Ireland) 2001, (SCP paras. 4.49-4.51), which may potentially give enforcement rights after redemption to owners of other parcels of land held under substantially similar terms, and may introduce a statutory building scheme where one had not been in existence before the redemption. It is suggested that this could not have been the intended consequence of that provision.
- 14.27 The problems of defining a building or development scheme were highlighted by the Lands Tribunal in the “Cleaver” case (*Hewitt and others (applicants), O’Neill and another (first and second respondents) and Thompson (third respondent)*) (Lands Tribunal R/17/2006). The issues in that case arose on the question as to whether the applicants as neighbours were able to enforce certain covenants which restricted building against the first and second respondents (separately). In order to do so, the applicants put forward an argument in favour of the existence of an ordinary building scheme. The Lands Tribunal accepted that section 17(6) introduces a statutory building scheme which is separate and distinct from an *Elliston v Reacher* contractual building scheme. It was also agreed that substantially similar terms (section 17(6)) was a broader concept than uniformity with some possible variation (*Elliston v Reacher*). However, the Tribunal concluded on the facts of the case that there

was not a relevant contractual building scheme and none of the parties to the proceedings was entitled to enforce the covenants for the protection of amenities because there was no section 17(6) building scheme.

- 14.28 In the light of this confusion, the Commission has taken the view that it is important to clarify the circumstances in which a building scheme exists and when restrictive covenants may be enforced between the participants in such a scheme. The potential for enforcement must not be any wider than was originally intended when the title was created and the participants must all hold under the same common title. Accordingly it recommends that the definition of a relevant building scheme in section 17(6) of the 2001 be amended to make it clearer that the covenants can only be enforced after redemption to the same extent as they were before that event. A new form of wording is proposed in the GRA Bill for section 17(6) and suggested amendments are also made to the definition of a building scheme in section 16(7). These appear in the GRA Bill, schedule 1, paragraphs 6 and 7.
- 14.29 **Question 51:** Is it important that the land to which the benefit of the covenant is attached should have on it a permanent building which is in use as a place of human habitation or resort and that the neighbour should actually (or mainly?) live there?
- 14.30 The consultees who responded to this question were almost unanimous in their opposition to the proposal for the benefit of a covenant to be tied to residence in any respect. Accordingly the Commission will not be making any recommendation that this option should be explored further.
- 14.31 **Question 52:** When a ground rent is redeemed should the former rent owner be required to register the neighbour covenants in a register of covenants in the Land Registry?
- 14.32 The majority of the consultees who responded to this question made comments broadly supportive of the proposal for covenants to be registered. However, in the light of the responses to the earlier questions which do not support proposals for limiting or clarifying the surviving covenants, the Commission is not inclined to pursue this proposal.

FORMER FREEHOLDER

- 14.33 **Question 53:** Is it justified for a former ground landlord or superior owner to continue to enjoy the benefit of a covenant and to have rights of enforcement of that benefit?
- 14.34 The responses submitted in reply to this question were unanimous in agreeing that a former landlord should continue to enjoy the benefit of a covenant after redemption and to be able to enforce it. The responses to the next two questions have to be considered in the light of that view.

- 14.35 **Question 54:** If so, should the rights depend on whether that person continues to actually (or mainly?) live near to the burdened land?
- 14.36 The majority of the consultees who answered this question were against any suggestion that the rights should be dependent on the person continuing to live near the burdened land.
- 14.37 **Question 55:** If so, should there be the same qualification as for a neighbour (above)?
- 14.38 Similarly, almost all of the consultees were against any proposal for a qualification or restriction on the right to the benefit of the covenant.
- 14.39 **Question 56:** Would the same definition of proximity be appropriate?
- 14.40 Following on from their responses to the previous questions, the majority of the consultees were also against a definition of proximity.
- 14.41 As a result of the responses to questions 53 - 56, the Commission is unable to take forward any idea that might limit or remove any rights of former rent owners to retain their interest in the covenants after redemption.
- 14.42 **Question 57:** Should the benefit of the covenant attach to the person instead of to the land.
- 14.43 All the consultees responding to this question preferred that the covenant should continue to attach to the land and not to the person. Consequently the Commission will not make any recommendation for alteration of the present position in this respect.
- 14.44 **Question 58:** On redemption of a ground rent should the onus be placed on the former superior owner to register the benefit of the surviving covenants in a register of covenants in the Land Registry?
- 14.45 A series of comments were made in response to this question expressing a range of views both for and against the proposal for the former rent payer to register the covenants. Those who answered the question directly were not in favour of the proposal. Therefore the Commission is not making any recommendation to pursue this proposal.

GENERAL

- 14.46 **Question 59:** Should redemption of ground rent be designated an event which triggers compulsory first registration in the Land Registry so that it is not necessary to consider the position of registering surviving covenants in respect of unregistered land?
- 14.47 Although some of the consultees did not answer this question directly, it is possible to discern a level of support for the proposal from the comments made and the majority of the consultees could be considered to be in favour of it. However, because the Commission has limited its proposals for ground rent redemption (see Chapter 13)

it is no longer necessary to consider compulsory first registration of title as a possible consequence of ground rent redemption with any resulting impact on the surviving covenants.

- 14.48 **Question 60:** Should it be possible for the benefit of a covenant to be enforceable by both a neighbour and by a former freeholder if it is registered separately by both?
- 14.49 The majority of the consultees replying to this question agreed with the proposal without further comment. However, as the possibility of registration of covenants is not being taken forward, no recommendation will be made on foot of these responses.
- 14.50 **Question 61:** Should surviving covenants be classified according to type under different headings (as in Scotland), such as neighbour covenants and community covenants?
- 14.51 A small majority of the consultees were in favour of classification according to type but this could only be taken forward in the event that the proposals for registration of covenants were being pursued (see Question 52). Accordingly, the Commission is not inclined to make any recommendation for classification of covenants.
- 14.52 **Question 62:** In many cases the wording of a covenant created by a lease or deed is not absolute, but confers a discretion on the covenantee to consent to a release or partial release of the covenant if requested, such consent not be unreasonably withheld or delayed. In the event of a dispute, the matter can be referred to the Lands Tribunal under Article 5 of the Property (Northern Ireland) Order 1978 (N.I. 4). Do consultees consider that such discretion should continue in respect of those covenants which survive redemption?
- 14.53 The overwhelming majority of the responses to this question were in favour of retaining the discretion for the covenantee to consent and therefore the Commission will not be recommending any alteration to the present law in this respect.

ENFORCEMENT

- 14.54 On the question of enforcement of breach of covenants, the Commission was inclined to suggest in principle that there should be a procedure for enforcing covenants through the Lands Tribunal. **Question 63** asked if consultees agreed (SCP para. 4.103). The consultees who responded to this question were almost unanimous in agreeing that there should be a procedure for enforcing covenants through the Lands Tribunal. However, as the Commission is not making any far reaching recommendations in relation to covenants in general, it will not be recommending that this option be pursued at this particular time. Nevertheless, it is a point which might be borne in mind in future if the subject of reform of covenants is addressed on a wider basis at a later date.
- 14.55 **Question 64** asked what remedies consultees considered would be appropriate for breach of covenant (for example damages or an

injunction)? In addition, would it be appropriate to propose that the jurisdiction of the Lands Tribunal be extended for this purpose? (para. 4.104). Almost all of the consultees who responded to this question were in favour of the Lands Tribunal having power to grant remedies for breach of covenant. Other than general remarks about damages and injunctions, there were no comments about particular remedies. As with the previous question, the Commission is not inclined to make any recommendation on foot of the responses from the consultees because any such proposal would have to take place in the context of a wider reform of the general law of covenants. It would not be of any benefit to consider it at present when the Commission is confining itself to recommending very modest changes to the law.

CONCLUSION

- 14.56 In conclusion, following the consultation on the question of covenants which survive redemption of ground rent, the Commission has taken into account the views expressed by the consultees who responded to the questions raised. In view of the fact that those responding have shown very little support for radical change or reform, the Commission has confined itself to recommending a very limited amendment to the 2001 Act as it applies to covenants in a building scheme. There was a clear need to clarify the position of reciprocal enforcement of covenants in a building scheme and this has been done, but the Commission has not received sufficient approval of its proposals for any further reform.
- 14.57 In general, the Commission has concluded that, without the endorsement of stakeholders to its proposals, it is unable to develop its ideas any further. From informal discussions it is aware that there may be a grater level of support for reform than has been formally communicated to the Commission. However, in the absence of agreement in writing and positive responses to the consultation, the Commission cannot take such views into account. It is not in a position to infer support or assume implied approval for its proposals the absence of a submission. In these circumstances, the Commission is not in a position to make recommendations on any of the wider issues to classify or restrict the covenants which survive redemption.

APPENDIX A

EQUALITY OF OPPORTUNITY SCREENING ANALYSIS FORM

A.1 Policy scoping

The first stage of the screening process involves scoping the policy under consideration. The purpose of policy scoping is to help prepare the background and context and set out the aims and objectives for the policy, being screened. At this stage, scoping the policy will help identify potential constraints as well as opportunities and will help the policy maker work through the screening process on a step by step basis.

Public authorities should remember that the Section 75 statutory duties apply to internal policies (relating to people who work for the authority), as well as external policies (relating to those who are, or could be, served by the authority).

Information about the policy

(1) Name of the Policy.

Proposals for land law reform in Northern Ireland: Report.

(2) Is this an existing, revised or new policy?

The policy is a revision of policies formulated and set out in the Law Commission's Land Law Consultation papers NILC 2 (2009) and NILC 3 (2010) which takes into account consultation responses.

(3) What is it trying to achieve? (intended aims/outcomes)

Aims: To reform, modernise and clarify existing land law in Northern Ireland.

Objectives: To make recommendations to DFP to reform, modernise and simplify existing land law, both common law principles and statutes that relate to land law.

Context: This policy is one of the policies/projects contained within the Northern Ireland Law Commission's (NILC) First Programme of reform (2009 – 2011). The policy is being taken forward by the Land Law Project team, within the Northern Ireland Law Commission. The proposal relating to ground rent redemption and related covenants comes from a reference dated May 2008 by the then Minister for Finance and Personnel, the Rt. Hon. Peter Robinson MLA.

There are no EU obligations specifically relating to land law (see Treaty of Amsterdam 1997, Article 295 - "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.").

Desired outcomes: To create a legal framework of land law for the 21st century that is responsive to legal obligations and yet accommodates personal and commercial requirements, needs and circumstances.

- (4) Are there any Section 75 categories which might be expected to benefit from the intended policy? If so, explain how.

The policy will benefit the general population and especially any member of a s. 75 category who holds or deals with land and also on service providers (e.g. Solicitors; Land and Property Services; other property professionals e.g. surveyors, estate agents; mortgage lenders; academics, barristers and the judiciary).

- (5) Who initiated or wrote the policy?

NILC is responsible for devising the policy, although, as stated above, the proposal relating to ground rent redemption and related covenants comes from a reference dated May 2008 by the then Minister for Finance and Personnel, the Rt. Hon. Peter Robinson MLA.

- (6) Who owns and who implements the policy?

The Northern Ireland Executive and DFP are responsible for the implementation of the policy.

NILC sits within the Department of Justice (DOJ) and is jointly sponsored by DFP and DOJ. DFP will be presented with recommendations emanating from the policy and will consider taking these forward through the legislative process.

Implementation factors

Are there any factors which could contribute to/detract from the intended aim/outcome of the policy/decision? If yes, are they:

Financial – Government budget and cost cutting requirements.

Legislative – Timetable and legislative process, prioritisation.

Other, please specify – Resource constraints, Assembly timetable.

Main stakeholders affected

Who are the internal and external stakeholders (actual or potential) that the policy will impact upon?

Staff – In so far as NILC staff form part of the general population as stated in (4) above, the policy will have an impact.

Service users – those involved in dealings with land will be affected as at (4) above.

Other public sector organisations – those involved in dealings with land will be affected as at (4) above e.g. DOJ (as sponsoring body), DFP (as sponsoring body, author of reference in relation to ground rent redemption and related covenants and leading department), Land Registers (Northern Ireland) within the Land and Property Services (key stakeholder involved in the registration of land and the conveyancing process).

Voluntary/community/trade unions - those involved in dealings with land will be affected as at (4) above.

Other, please specify - those involved in dealings with land will be affected as at (4) above.

Other policies with a bearing on this policy

What are they and who owns them?

NILC – First Programme of Law Reform

DOJ – Justice Act (Northern Ireland) 2002, general policies in relation to the sponsoring of NILC

DFP - as sponsoring body, author of reference in relation to ground rent redemption and related covenants and leading department

Land Registers (Northern Ireland) within the Land and Property Services - key stakeholder involved in the registration of land and the modernisation and rationalisation of the conveyancing process

RICS – strategic policy in relation to party structures

Available evidence

Evidence to help inform the screening process may take many forms. Public authorities should ensure that their screening decision is informed by relevant data. What evidence/information (both qualitative and quantitative) have you gathered to inform this policy? Specify details for each of the Section 75 Categories.

Section 75 Category	Details of evidence/information
Religious belief	See (a) – (m) below
Political opinion	See (a) – (m) below
Racial group	See (a) – (m) below
Age	See (a) – (m) below
Marital status	See (a) – (m) below
Sexual orientation	See (a) – (m) below
Men and women generally	See (a) – (m) below

Disability See (a) – (m) below

Dependants See (a) – (m) below

- (a) Report of the Committee on the Registration of Title to Land (1967).
- (b) Survey of the Land Law of Northern Ireland (1971).
- (c) Final Report of the Land Law Working Group (1990).
- (d) The Reform and Modernisation of Land Law and Conveyancing Law, Law Reform Commission, Republic of Ireland, Consultation Paper 34 – 2004.
- (e) Reform and Modernisation of Land Law and Conveyancing Law, Law Reform Commission, Republic of Ireland, Report 74 – 2005.
- (f) Consultation Paper: Land Law, NILC 2 (2009) and consultee responses.
- (g) Supplementary Consultation Paper: Land Law, NILC 3 (2010) and consultee responses.
- (h) Information and data on relevant transactions which relate to the policy from the Land Registers of Northern Ireland i.e. the number of applications received by Land Registry and Registry of Deeds from 2002 to date.
- (i) A detailed list of all sources used in developing the land law proposals is contained in Appendix C.
- (j) Data obtained from NISRA in relation to 'overreaching' options.
- (k) Data obtained from the Lands Tribunal in relation to applications for modification or extinguishment of impediments under the Property (Northern Ireland) Order 1978.
- (l) Equality Impact Assessment on Proposals for Land Law Reform (September 2009).
- (m) Equality Impact Assessment on Proposals for Land Law Reform Monitoring Report (May 2010).

Needs, experiences and priorities

Taking into account the information referred to above, what are the different needs, experiences and priorities of each of the following categories, in relation to the particular policy/decision? Specify details for each of the Section 75 categories (religious belief, political

opinion, racial group, age, marital status, sexual orientation, men and women generally, disability, dependants).

The policy has an entirely positive impact on the needs, experiences and priorities of each of the s. 75 categories.

A.2 Screening questions

Introduction

In making a decision as to whether or not there is a need to carry out an equality impact assessment, the public authority should consider its answers to the screening questions (1) – (4), below.

If the public authority's conclusion is **none** in respect of all of the Section 75 equality of opportunity and/or good relations categories, then the public authority may decide to screen the policy out. If a policy is 'screened out' as having no relevance to equality of opportunity or good relations, a public authority should give details of the reasons for the decision taken.

If the public authority's conclusion is **major** in respect of one or more of the Section 75 equality of opportunity and/or good relations categories, then consideration should be given to subjecting the policy to the equality impact assessment procedure.

If the public authority's conclusion is **minor** in respect of one or more of the Section 75 equality categories and/or good relations categories, then consideration should still be given to proceeding with an equality impact assessment, or to:

- measures to mitigate the adverse impact; or
- the introduction of an alternative policy to better promote equality of opportunity and/or good relations.

In favour of a 'major' impact

- a) The policy is significant in terms of its strategic importance;
- b) Potential equality impacts are unknown, because, for example, there is insufficient data upon which to make an assessment or because they are complex, and it would be appropriate to conduct an equality impact assessment in order to better assess them;
- c) Potential equality and/or good relations impacts are likely to be adverse or are likely to be experienced disproportionately by groups of people including those who are marginalised or disadvantaged;
- d) Further assessment offers a valuable way to examine the evidence and develop recommendations in respect of a policy about which there are concerns amongst affected individuals and representative groups, for example in respect of multiple identities;

- e) The policy is likely to be challenged by way of judicial review;
- f) The policy is significant in terms of expenditure.

In favour of 'minor' impact

- a) The policy is not unlawfully discriminatory and any residual potential impacts on people are judged to be negligible;
- b) The policy, or certain proposals within it, are potentially unlawfully discriminatory, but this possibility can readily and easily be eliminated by making appropriate changes to the policy or by adopting appropriate mitigating measures;
- c) Any asymmetrical equality impacts caused by the policy are intentional because they are specifically designed to promote equality of opportunity for particular groups of disadvantaged people;
- d) By amending the policy there are better opportunities to better promote equality of opportunity and/or good relations.

In favour of none

- a) The policy has no relevance to equality of opportunity or good relations.
- b) The policy is purely technical in nature and will have no bearing in terms of its likely impact on equality of opportunity or good relations for people within the equality and good relations categories.

Taking into account the evidence presented above, consider and comment on the likely impact on equality of opportunity and good relations for those affected by this policy, in any way, for each of the equality and good relations categories, by applying the screening questions given overleaf and indicate the level of impact on the group i.e. minor, major or none.

Screening Questions

- (1) What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 equality categories? Minor/major/none?

Section 75 Category	Details of policy impact	Level of impact? Minor/major/none
Religious belief	None	None
Political opinion	The proposals in relation to 'feudal tenure' (abolition of feudal tenure) have been the subject of a full EQIA Consultation Report. The outcome of the report	None

	concluded that no adverse impact was envisaged.	
Racial group	None	None
Age	The proposals in relation to entitlement to make an application under the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971, which amend the Act so that the requirement for occupation now permits an applicant to qualify, notwithstanding he or she is prevented from living in the property by reason of disability.	Minor positive impact
Marital status	The proposals in relation to 'estates in land' ('overreaching of equitable interests') has been the subject of a full EQIA Consultation Report. The outcome of the report concluded that no evidence of such an adverse impact was received	None
Sexual orientation	None	None
Men and women generally	None	None
Disability	The proposals in relation to entitlement to make an application under the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971, which amend the Act so that the requirement for occupation now permits an applicant to qualify notwithstanding he or she is prevented from living in the property by reason of disability.	Minor positive impact
Dependants	None	None

- (2) Are there opportunities to better promote equality of opportunity for people within the Section 75 equality categories?

No, the policy has no relevance to equality of opportunity or good relations. Being land law reform, the policy is of a technical nature and will have no bearing in terms of its likely impact on equality of opportunity or good relations categories

- (3) To what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group? Minor/major/none?

Good relations category	Details of policy impact	Level of impact? Minor/major/none
Religious belief	None, pre-publication consultation with key stakeholders has taken place. These stakeholders were not consulted on the basis of their affiliation to the s. 75 groups but there was no indication that the policy would create problems specific to the s. 75 groups.	None
Political opinion	The proposals in relation to 'feudal tenure' (abolition of feudal tenure) have been the subject of a full EQIA Consultation Report. The outcome of the report concluded that no adverse impact was envisaged.	None
Racial group	None, pre-publication consultation with key stakeholders has taken place. These stakeholders were not consulted on the basis of their affiliation to the s. 75 groups but there was no indication that the policy would create problems specific to the s. 75 groups.	None

- (4) Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group?

No, pre-publication consultation with key stakeholders has taken place. These stakeholders were not consulted on the basis of their affiliation to the s. 75 categories but there was no indication that the

policy would create problems specific to the s. 75 categories. The policy has no relevance to equality of opportunity or good relations. The policy is of a technical nature and will have no bearing upon the promotion of such good relations between people of different religious belief, political opinion or racial group.

Additional considerations

Multiple identities

Generally speaking, people can fall into more than one Section 75 category. Taking this into consideration, are there any potential impacts of the policy/decision on people with multiple identities? (For example; disabled minority ethnic people; disabled women; young Protestant men; and young lesbians, gay and bisexual people).

None, the policy has no relevance to equality of opportunity or good relations. The policy is of a technical nature and will have no bearing in terms of its likely impact on equality of opportunity or good relations categories in relation to those of multiple identity.

Provide details of data on the impact of the policy on people with multiple identities. Specify relevant Section 75 categories concerned – not applicable.

A.3 Screening Decision.

- If the decision is not to conduct an equality impact assessment, please provide details of the reasons.

Having regard to considerations in A.1 and A.2 above, the Commission does not consider that the policy should be subject to a full equality impact assessment. There is no evidence to suggest that one s. 75 category will be affected more than another.

- If the decision is not to conduct an equality impact assessment the public authority should consider if the policy should be mitigated or an alternative policy be introduced.

Given that the policy will benefit all those having dealings with land, it is not necessary to mitigate this policy or provide an alternative.

- If the decision is to subject the policy to an equality impact assessment, please provide details of the reasons.

Not applicable.

All public authorities' equality schemes must state the authority's arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity. The Equality Commission recommends screening and equality impact assessment as the tools to be utilised for such assessments. Further advice on equality

impact assessment may be found in a separate Equality Commission publication: *Practical Guidance on Equality Impact Assessment*.

A.4 Monitoring

Public authorities should consider the guidance contained in the Equality Commission's *Monitoring Guidance for Use by Public Authorities* (July 2007).

The Equality Commission recommends that where the policy has been amended or an alternative policy introduced, the public authority should monitor more broadly than for adverse impact (See Benefits, P.9-10, paras. 2.13 – 2.20 of the *Monitoring Guidance*).

Effective monitoring will help the public authority identify any future adverse impact arising from the policy which may lead the public authority to conduct an equality impact assessment, as well as help with future planning and policy development.

APPENDIX B

REGULATORY IMPACT ASSESSMENT (RIA) SCREENING ANALYSIS FORM

B.1 Policy to be screened

(1) Title

Proposals for Land Law Reform in Northern Ireland.

(2) Aims of the policy to be screened

Aims: To reform, modernise and clarify existing land law in Northern Ireland

Objectives: To make recommendations to DFP to reform, modernise and simplify existing common law principles and statutes that relate to land law.

Context: This policy is one of the policies/projects contained within the Northern Ireland Law Commission's (NILC) First Programme of reform (2009 – 2011). The policy is being taken forward by the Land Law Project team, within the Northern Ireland Law Commission. The proposal relating to ground rent redemption and related covenants comes from a reference dated May 2008 by the then Minister for Finance and Personnel, the Rt. Hon. Peter Robinson MLA.

There are no EU obligations specifically relating to land law (see Treaty of Amsterdam 1997, Article 295 - "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.")

Desired outcomes: To create a legal framework of land law for the 21st century that is responsive to legal obligations and yet accommodates personal and commercial requirements, needs and circumstances. This reform of land law will provide a firm foundation for the streamlining and efficiency of the whole conveyancing process, potentially benefiting all who deal with property including the business, voluntary and community sector. The proposed clarification and simplification of the law should result in significant economic benefits. Part of the process of simplification would be the repeal and amendment of numerous ancient statutes, with the re-enactment of any provisions which remain relevant to land ownership and transactions. This will render the law much more accessible to those who want to understand it and those who need to use it. The more complicated the law, the more time it takes professional advisers to carry out transactions and to explain to clients what is being done. That complexity also means that client understanding and satisfaction tends to be low. Clarification and simplification are also necessary groundwork for streamlining the conveyancing process (the buying and selling of land, mortgaging it as security, creating minor interests

like rights of way and so on). That in turn promotes computerisation of the registration of title system and development of a paperless, electronic system of conveyancing. Such a system would be much speedier and cheaper than the current system. It would bring substantial benefits to land owners, lending institutions, registration authorities, professional advisers and the general public, which includes the business, voluntary and community sector.

Clarification and simplification should also result in significant social benefits. It should render the law more understandable by landowners and transactions more easily explainable by professional advisers. Removal of archaic concepts and language stemming from social and economic conditions which have not existed for centuries should make the law conform to the realities of ownership of land in the 21st century. Reform of the law will also cure defects in the current law which prevent or inhibit landowners from legitimate exploitation of the land. It would also remove aspects of the law which operate in an inefficient and uneconomic way.

The policy will be achieved through a Report with draft legislation and accompanying explanatory notes. While the Report deals with all the proposals put forward by the Land Law Consultation Paper NILC 2 (2009) and the Land Law Supplementary Consultation Paper NILC 3 (2009), there will be two pieces of legislation, firstly the Land Law Reform (Northern Ireland) Bill ("the LLR Bill") and secondly the Ground Rents (Amendment) Bill ("the GRA Bill").

(3) On whom will the policy impact? Please specify.

The policy will impact on the general population i.e. anyone who holds or deals with land and specifically on service providers (e.g. mortgage lenders; solicitors; Land and Property Services; other property professionals e.g. surveyors, estate agents; academics, barristers and the judiciary).

(4) Who is responsible for (a) devising and (b) delivering the policy? What is the relationship and have they considered this issue and any equality issues?

- (a) NILC is responsible for devising the policy, although, as stated above, the proposal relating to ground rent redemption and related covenants comes from a reference dated May 2008 by the then Minister for Finance and Personnel, the Rt. Hon. Peter Robinson MLA.
- (b) The Northern Ireland Executive and DFP are responsible for the implementation of the policy.

DFP is a joint sponsoring body of NILC with the Department of Justice (DOJ). DFP will be presented with recommendations emanating from the policy and will consider taking these forward through the legislative process.

- (5) What linkages are there to other Northern Ireland Departments/NDPBs in relation to this policy?

DOJ (as sponsoring body), DFP (as sponsoring body, author of reference in relation to ground rent redemption and related covenants and leading department), Land Registers (Northern Ireland) within the Land and Property Services (key stakeholder involved in the registration of land and the conveyancing process).

- (6) What data is available to facilitate the screening of this policy?
- (a) Report of the Committee on the Registration of Title to Land (1967).
 - (b) Survey of the Land Law of Northern Ireland (1971).
 - (c) Final Report of the Land Law Working Group (1990).
 - (d) The Reform and Modernisation of Land Law and Conveyancing Law, Law Reform Commission, Republic of Ireland, Consultation Paper 34 – 2004.
 - (e) Consultation Paper: Land Law, NILC 2 (2009).
 - (f) Supplementary Consultation Paper: Land Law, NILC 3 (2010).
 - (g) Consultee responses to both the Consultation and Supplementary Consultation Papers.
 - (h) Reform and Modernisation of Land Law and Conveyancing Law, Law Reform Commission, Republic of Ireland, Report 74 – 2005.
 - (i) Information and data on relevant transactions which relate to the policy from the Land Registers of Northern Ireland i.e. the number of applications received by Land Registry and Registry of Deeds from 2002 to date.
 - (j) A detailed list of all sources used in developing the land law proposals is contained in Appendix C.
 - (k) Data obtained from NISRA in relation to 'overreaching' options.
 - (l) Data obtained from the Lands Tribunal in relation to applications for modification or extinguishment of impediments under the Property (Northern Ireland) Order 1978.
 - (m) Regulatory Impact Assessment on Proposals for Land Law Reform (February 2010).

- (7) Is additional data required to facilitate screening? If so, give details of how and when it will be obtained.

No.

B.2 Screening Analysis

- (1) Is the policy or amendment to the policy likely to have a direct or indirect impact on businesses, voluntary / community sector (this includes charities and the social economy sector)?

The Commission has examined all the proposals contained in the Consultation and Supplementary Papers but has only included those which will be taken forward by the draft legislation and are considered relevant for the purposes of regulatory impact assessment.

Feudal Tenure

CP - Q2 *Feudal Tenure – Options for reform.* Option (3) (Consultation Report (CP) para. 3.24), to abolish Feudal Tenure and the concept of Estates will get rid of an archaic concept and as such will have a positive impact on the conveyancing process and will benefit all users of the system. A significant majority of consultees supported the adoption of this option. This is embodied in section 1 of the LLR Bill which contains the fundamental provision of land ownership and abolishes the concepts of tenure and estates, providing that in future what is owned is the land itself. The legal concept of ownership can now be aligned with the public perception of ownership.

Estates in land

CP - Q4 *Freehold estates – fee simple.* It is proposed that the concept of ownership will replace ownership of an estate. This will clarify and simplify the law in relation to freehold estates and will have a positive impact on the conveyancing process, thus benefiting all users of the system. Those consultees who responded to the question were almost unanimous in expressing their approval for straightforward ownership. This proposal is embodied in sections 1 & 3 of the LLR Bill which, as stated above, introduce the concept of ownership (section 1) and identify the legal owner (section 3).

CP - Q5 *Freehold estates – fee simple in possession.* It is proposed that in future the holding of a fee simple estate in possession will be regarded as the only estate conferring ownership. This will clarify and simplify the law in relation to freehold estates and will have a positive impact on the conveyancing process, thus benefiting all users of the system. Those consultees who responded to the question were almost unanimous in expressing their approval. This proposal is embodied in section 3 of the LLR Bill.

CP - Q6 *Freehold estates – modified fees.* It is proposed that

modified fees be treated as fees simple absolute conferring title on the owner (option 1), subject to the modification attaching to the fee simple in question and the modification attaching to the fee simple will be added to the list of impediments contained in section 3 of the Property (Northern Ireland) Order 1978 (option 4). This will clarify and simplify the law in relation to modified fees. Charities, businesses and community bodies could possibly be affected by this proposal because a combination of these options could affect the original grantors of any modified fee, in that they may lose rights they originally had (e.g. rights of reverter, rights of entry, rights of re-entry or powers of revocation). However, they could possibly obtain compensation from the Lands Tribunal. Conversely, this proposal could have a positive impact where a charity, business or community body was the holder of a modified fee.

Sources indicate that such modified fees are extremely rare in general terms rendering any impact negligible. Moreover, the effect on charities, businesses and community bodies would be of even less effect. In relation to the administrative costs associated with the adoption of option 4 above, the impact on the Lands Tribunal of increased applications in respect of this is likely to be low as systems are already in place. Such costs would also be impossible to quantify prior to implementation of the proposal.

In general the majority of consultees who responded to this question were in agreement with the adoption of a combination of options (1) and (4). Section 3(2) of the LLR Bill gives effect to this recommendation whereby modified fees confer legal ownership.

CP - Q7 *Freehold estates - A Minor's interest*. It is proposed that a minor's interest in land would be equitable and legal title would be vested in trustees. This proposal will clarify and simplify the law in relation to how minors hold and deal with land. As such, it will have a positive impact on the whole conveyancing process. Those consultees who responded to the question were almost unanimous in expressing their approval. This proposal is embodied in section 7 of the LLR Bill.

CP - Q8 & Q9 *Freehold estates – Fee tail*. It is proposed that in future fees tail should be prohibited and existing ones should be converted into a fee simple (ownership under section 1 of the LLR Bill). These proposals will get rid of an archaic concept and will have a positive impact on the whole conveyancing process. There was no dissent amongst the consultees in response to these questions. Section 6 of the LLR Bill sets out the provisions that would bring them into effect.

Easements and other rights over land

CP - Q21 – Q28 *Reform – Easements and profits – Prescription*. It is proposed that the law of prescription should be repealed and replaced by a much simpler statutory scheme. These proposals will clarify and simplify the law in relation to the doctrine of prescription

and as such will have a positive impact on the whole conveyancing process. The consultees who responded to these proposals unanimously agreed that a simple statutory scheme should be introduced. Sections 8 – 17 set out the proposed provisions for acquisition by prescription. By section 8 the old common law methods of prescription are abolished and section 9(2) introduces a new statutory regime for acquisition of an easement by prescription. The prescriptive period is changed from 40 years user to 20 years.

CP - Q29 *Reform - Easements and profits à prendre – Implied rights.* It is proposed that a new statutory scheme replace the rule in *Wheeldon v Burrows*, which states that on a sale of part of the land, the purchaser may acquire an easement over the portion retained by the vendor. This proposal will cure defects and undesirable aspects of the current system. The new statutory scheme deals with rights and obligations continuing or accruing when land is divided into parcels for sale. This will have a positive impact on all holders of land by clarifying the law relating to acquisition of easements and profits à prendre by implication. (Also see Q92 below).

However, although this proposal has an indirect impact, a proportionate response may indicate that no full or partial RIA is required. The impact on the conveyancing system on setting up such a statutory scheme is likely to be low. There was general agreement to this proposal by consultees. Section 17 of the LLR Bill sets out the requirements for implying the creation of easements where land is sub-divided or disposed of in parts.

CP - Q30 & Q31 *Reform - Easements and profits à prendre – implied rights.* It is proposed that a statutory provision replace s. 6 of the Conveyancing Act 1881. This will ensure that only existing rights pass with a conveyance of land and no new interest or right is created nor is any quasi interest or right converted into a full interest or right. This proposal will cure defects and undesirable aspects of the current system. This will have a positive impact on all holders of land by clarifying the law relating to acquisition of easements and profits à prendre by implication.

However, although this proposal has an indirect impact, a proportionate response may indicate that no full or partial RIA is required. The consultees approved this proposal and this has been carried into effect by section 95 of the LLR Bill.

CP - Q33 *Reform – Party Structures.* The consultation paper recommended that legislation on party structures was not necessary. Only one consultee agreed with this proposal, with the majority considering that there should be legislation to deal with disputes, therefore, it was decided to recommend legislation on party structures and this was carried through in Chapter 3 of Part 2 of the LLR Bill.

This will have a positive impact on all holders of land by clarifying the law in relation to the rights of a 'building owner' and 'adjoining owner' and providing a framework for the resolution of any disputes including

the right, as a final resort, to have the matter dealt with by the Lands Tribunal.

CP - Q34 & 35 *Reform - Access to neighbouring land*. Question 34 recommended that legislation on access to neighbouring lands was not necessary. However, consultees disagreed and thought legislation was desirable. Therefore sections 19 – 24 of the LLR Bill include provisions which deal with access to neighbouring land as well as works to party structures. It is also proposed that where legislation was to be introduced in the event of a neighbour dispute, jurisdiction may be given to the Lands Tribunal to deal with both party structures and access to carry out works to buildings. This may have a positive impact on all holders of land. This has been embodied in section 23 of the LLR Bill. Administrative costs associated with this are likely to be low as systems are already in place within the Lands Tribunal.

Future Interests

CP - Q36 *Common law contingent remainder rules*. It is proposed that the Statute of Uses (Ireland) 1634 (c. 1) should be repealed and that most future interests would be converted into equitable interests. This proposal will get rid of archaic concepts. Consultees were almost universal in their agreement with this proposal. This has been effected by sections 25 and 26(a) of the LLR Bill. This would have a positive impact on the holders of legal remainder interests.

However, sources indicate that these rules represent extremely antiquated law which has little relevance to 21st century life. Moreover, the effect on charities, businesses and community bodies would be of even less effect.

CP - Q37 *Rules against accumulations*. It is proposed there should be no accumulation restrictions and the Accumulations Act 1892 should be repealed. There was general agreement that there is no need for an accumulation rule in Northern Ireland. This has been achieved by section 26(b). This provision clarifies the law but is of no practical effect.

CP - Q40 & 41 *Reform – Rule against perpetuities*. The consultation paper proposed that the rule against perpetuities should be abolished in the interest of simplification of the law. The overwhelming majority of consultees were strongly in favour of abolition. However, it became clear following discussions with HM Revenue and Customs that a departure from the law of England and Wales would not be appropriate and could have tax implications for charities, businesses and the voluntary sector.

It was proposed that if the rule against perpetuities was retained rather than abolished, it should be reformed, as in the English Perpetuities and Accumulations Act 2009 (c. 18). This Act restricted the rule's application and created a single perpetuity period of 125 years. There was general approval for a single perpetuity period of

125 years and for following the 2009 Act. This is embodied in Part 3, chapter 2 of the LLR Bill. This reform constitutes a positive impact, in that the law is consistent with that of England and Wales, where many businesses and charities have national links. It also simplifies and clarifies the law in relation to the time in which a gift must vest.

Settlements and Trusts

CP - Q43 *Reform - Unitary Trusts of land.* It proposes a new statutory scheme for “trusts of land,” which covers all trusts relating to land, including implied and constructive trusts, bare trusts and trusts for sale. In other words, it consolidates existing trusts in relation to land and brings it in line with general trust law. This proposal gets rid of archaic concepts and clarifies and simplifies the law on settlements and trusts.

The majority of consultees who responded were in favour of having a single unitary trust of land and this was implemented in Part 4 of the LLR Bill sections 44 – 48. This will have a positive impact on beneficiaries of land under a trust and trustees, which will affect charities, businesses and community bodies.

However, as this proposal represents a consolidation exercise, it will involve negligible costs. Savings may be made in that this type of trust may be simpler to administer. However, such savings would be impossible to quantify prior to implementation of the proposal.

Concurrent ownership of land

CP - Q49 *Reform - Severance of a joint tenancy – a notice in writing.* It is proposed that a provision for service of a simple notice in writing on the other joint tenant or tenants might be useful. Consultees generally expressed agreement to this proposal and this was introduced by section 49 of the LLR Bill. It is considered that this proposal will cure defects and undesirable aspects of the current system. This will have a positive impact as the parties would know when severance is proposed. The service of a simple written notice would attract negligible costs in respect of postal charges and registration fees. Such costs would be impossible to quantify prior to implementation of the proposal as the precise nature of the notice is unknown.

CP - Q50 *Reform - Unilateral severance of a joint tenancy.* It is proposed that a notice of severance be registered in the Land Registry or Registry of Deeds to give effect to the unilateral severance of the joint tenancy. Consultees were in favour of this registration requirement and the proposal was brought into effect by section 49(2) of the LLR Bill. It is considered that this proposal will cure defects and undesirable aspects of the current system. This will have a positive impact as the parties would know when severance is effected. The registration of a simple written notice would attract negligible costs in respect of postal charges and registration fees. Such costs would be impossible to quantify prior to implementation of

the proposal as the precise nature of the notice is unknown.

CP - Q51 *Reform – Partition*. It is proposed that the Partition Acts be replaced with a broad discretion to be given to the courts to make the appropriate order. The overwhelming majority of consultees agreed with this and this is embodied in section 52 of the LLR Bill which also sets out the powers of the court. This proposal will clarify and simplify the law in relation to Partition. This is a positive impact with social and administrative benefits which would build on the system already in place.

CP - Q52 *Commorientes*. It is proposed that Commorientes be treated as an event which severs a joint tenancy. Consultees agreed and section 50 of the LLR Bill provides for severance of a joint tenancy in the event of simultaneous death. This proposal will clarify and simplify the law in relation to Commorientes. This is a positive impact, with social and administrative benefits.

Mortgages

CP - Q58 *Reform – Creation of Mortgages*. It is proposed that the charge system should be extended to unregistered land and the creation of mortgages by conveyance and assignment should be abolished. The overwhelming majority of consultees agreed that in future, a legal mortgage of land should only be created by way of a charge by deed. Section 58 of the LLR Bill makes provision for this and for such a charge to be expressed as a 'charge by way of legal mortgage'. This proposal will clarify and simplify the law in relation to mortgages. This is a positive impact, with social and administrative benefits which would build on the system already in place.

CP - Q60 *Reform – Mortgagee remedies*. It is proposed that mortgagees' remedies should be exercisable only for the purposes of protecting or enforcing the security. The consultees were broadly in agreement with this proposal and section 64(2)(b) makes provision for this. This proposal will cure defects and undesirable aspects of the current system. This is a positive impact, with social and administrative benefits, which would build on the system already in place.

CP - Q62 *Reform – Mortgagee remedies – taking possession*. It is proposed that a mortgagee should obtain a court order for possession only where the mortgages relate to dwelling houses taken out by individuals. The consultees broadly agreed and section 66 makes provision for this. This sections adapts the provisions in the Administration of Justice Acts 1970 & 1973. This proposal will cure defects and undesirable aspects of the current system. This is a positive impact with social and administrative benefits which would build on the system already in place.

CP - Q64 & Q65 *Reform – Mortgagee remedies – foreclosure*. It is proposed that the remedy of foreclosure should be formally abolished. These proposals will get rid of an archaic concept and

would have a positive impact in making the law simpler and clearer. Consultees were almost unanimous in their agreement and also agreed with the proposal that the jurisdiction of the courts to order foreclosure should not be retained. Section 65 provides for this abolition.

CP - Q66 *Mortgagees remedies – sale*. It is proposed that a mortgagee should obtain the best price possible when exercising its power of sale (without obtaining a court order), which endorses the common law position. Consultees unanimously agreed with this proposal. Section 68 of the LLR Bill gives power to the mortgagee to sell when the mortgagor defaults or breaches the terms of the mortgage. Section 70 requires the mortgagee to obtain the best price possible. This will clarify and simplify the law and cure defects and undesirable aspects of the current system. This undoubtedly will have a positive impact on all mortgagors.

CP - Q67 *Mortgagee's remedies – sale*. It is proposed that a mortgagee's rights should vest, as soon as the mortgage is created, but should not be exercised unless for the purposes of protecting the property or realising the mortgagee's security. The consultees were unanimous in expressing their agreement to this proposal and section 64(2)(a) of the LLR Bill creates the provision together with section 64(2)(b) which provides that the powers do not become exercisable, except to protect the mortgaged property or realise the security. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. This is a positive impact on holders of a mortgage, due to the provision of greater security for mortgagees and mortgagors. This proposal will not generate any costs, as systems in relation to the exercise of the power of sale are already in place.

CP - Q69 *Reform – Mortgagee remedies - Appointment of Receiver*. This proposal is linked to Q67 and the mortgagee exercising their rights to appoint a receiver. Consultees were unequivocal in expressing their support for this proposal and it has been embodied in section 76 of the LLR Bill. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. This is a positive impact on holders of a mortgage. See comments in relation to Q67 above.

CP - Q71 *Reform - Mortgagee Rights – Insurance*. It is proposed that a property should be insured for the full re-instatement value and the mortgagee should be able to apply the insurance money in discharge of the debt, or require its use in repairing or reinstating the property. Consultees agreed with the proposal and therefore section 78 of the LLR Bill provides for this. The proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. While this proposal may involve a cost to the Mortgagor in relation to higher premiums, it would also incorporate benefits, thus having a positive impact, in that greater flexibility would mean that the mortgagor could have the property fully reinstated or

the debt discharged. Therefore, economic costs (of possible higher premiums) are outweighed by increased choice in the application of the insurance money. Such costs would be impossible to quantify prior to implementation of the proposal.

CP - Q73 & Q74 *Reform – Other Mortgagee Rights – Tacking*. It is proposed that the method of tacking known as “*tabula in naufragio*” should be abolished and the other, more common form of tacking, by way of adding further advances to the original mortgage, should be rationalised. Consultees agreed with these proposals and section 79(3) abolishes the right to tack in any form except in relation to future advances and sections 79(1) & (2) provide that when further advances are made on a mortgage the mortgagee is entitled to payment of those further advances in priority to any subsequent mortgagees. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system and will thus have a positive impact on all users of mortgage procedures.

Contracts for the sale of land

CP - Q77 *Other contract matters – specific performance*. At present there is some doubt about the discretion of the court to order return of the deposit where an order for specific performance is not granted. It is proposed that where a court refuses to grant specific performance of a contract for the sale of land it should be able to order repayment of the whole or any part of the deposit where it is just and equitable to do so. Consultees were unanimous in their agreement to this proposal and section 83 of the LLR Bill provides for this. This proposal will cure defects and undesirable aspects of the current system. This situation arises rarely, but is fairer. In relation to costs, a court case will be already proceeding (i.e. systems and procedures are already in place) and therefore this proposal will add no significant costs for either party.

Conveyances

CP - Q79 *The conveyancing process*. It is proposed that provisions are needed to govern the conveyancing process as it applies to unregistered land. Consultees were in agreement with this proposal. Provisions are introduced to deal with title (sections 85 - 90), deeds and their operation (91 – 99) and the contents of deeds (100 – 107). This proposal will clarify and simplify the law, cure defects and undesirable aspects of the current system and constitutes a positive impact on all holders of land.

CP - Q80 *Title to be deduced – length of title*. It is proposed that the period for title to be deduced by a vendor under an open contract should be reduced from 40 to 15 years. Most consultees agreed with the proposal and section 85 of the LLR Bill introduces this reduced length of title. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. This will have a positive impact on prospective vendors, in that the investigation of title by conveyancers will be speeded up and this will have a ‘knock-

on' effect on the efficiency of the whole conveyancing process and may thereby involve a saving in costs.

CP - Q81 *Title to be deduced – length of title – the presumed truth of statement in deeds.* It is proposed that the 20 year period for presumed truth of statements in title deeds be reduced to 15 years; in line with the period for title deduction at Q80 above. All consultees agreed and section 88(1) makes provision for this. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. For impact see comments in relation to Q80 above.

CP - Q84 *Title to be deduced – Rule in Patman v Harland.* It is proposed that the rule in *Patman v Harland* be abolished. The rule states that where a grantee of a leasehold interest is fixed with constructive notice of any adverse interest affecting the superior title even though the grantee is prohibited from calling for deduction of that title. This rule ran counter to the statutory provisions and caused confusion. The consultees were almost unanimous in approving this proposal and therefore section 86(3) provides for abolition of the rule. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. This would have a positive impact on prospective grantees of a leasehold interest as it will provide one clear statutory provision.

It is of limited application and would therefore have minimal affect on businesses, charities or community bodies.

CP - Q85 *Title to be deduced – Other conditions of title.* It is proposed that various statutory provisions relating to production of title documents by the vendor contained in section 2 of the Vendor and Purchaser Act 1874 and section 3 of the Conveyancing Act 1881 be re-enacted subject to some modifications. Consultees were completely in agreement with this proposal. Section 87 details the documents and information which a purchaser is not entitled to require. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. It will thus involve a positive impact on all users of the conveyancing system.

CP - Q86 *Deeds and their operation.* It is proposed that ancient methods of conveyancing such as 'feoffment with livery of seisin' be removed and the modern deed would become the sole means of conveying land. Consultees were of one mind in expressing their agreement and section 91 of the LLR Bill provides for abolition of any surviving old forms of conveying title and provides that a conveyance can only operate by way of deed. These ancient methods of conveyancing have not been used in practice for many years and the impact would be a positive one. It would modernise conveyancing and be unlikely to have cost implications.

CP - Q87 *Deeds and their operation.* It was proposed to abolish the Statute of Uses (Ireland) Act 1634. Consultees agreed and section 91(2) provides that a deed executed after the appointed day is fully

effective without the need for any conveyance to uses and passes possession or the right to possession of the land unless subject to some prior right. These proposals will get rid of an archaic concept. It will thus involve a positive impact on all users of the conveyancing system.

CP - Q88 *Deeds and their operation*. It was proposed that no resulting use should be implied in a voluntary conveyance merely because it was not expressed to convey the land “unto and to the use” of the grantee. The consultees unanimously agreed with this proposal and section 91(3) of the LLR Bill provides for this. These proposals will get rid of an archaic concept. It will thus involve a positive impact on all users of the conveyancing system.

CP - Q89 *Deeds and their operation – Words of limitation*. It is proposed that the need to include words of limitation (to indicate the freehold estate being conveyed) in deeds relating to unregistered land should be abolished. This is in line with what has been the case for a long time with transfers of registered land. Consultees agreed to the proposal and section 92 of the LLR Bill provides that a conveyance of unregistered land passes the ownership of the land or other interest unless a contrary intention appears in the conveyance, whether or not the conveyance uses words of limitation. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. This will have a positive impact on all holders of unregistered land in that failure to include such words of limitation will not cause the conveyance to be defective.

The removal of this formality would save possible costs of rectification. The costs in relation to businesses, charities and community bodies will be negligible and balanced by the benefits outlined above.

CP - Q90 *Deeds and their operation – Statutory definitions of words commonly used in deeds*. It is proposed that a statutory definition of words commonly used in deeds similar to that provided for statutes by the Interpretation Act (Northern Ireland) 1954 be adopted. Consultees agreed with this proposal and the general interpretation section deals with this. The proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. It will thus involve a positive impact on all users of the conveyancing system.

CP - Q91 *Deeds and their operation – General word-saving provision*. Section 6 of the Conveyancing Act 1881 - It is proposed that the word-saving provision in s. 6 of the Conveyancing Act 1881 will not operate to upgrade rights and should pass only existing rights. (See also Q30 – Q31 above). This will ensure that only existing rights pass with a conveyance of land and no new interest or right is created nor is any quasi interest or right converted into a full interest or right. Consultees unanimously agreed and section 95 of the LLR Bill re-enacts section 6 of the Conveyancing Act 1881 and makes it clear

that a conveyance of land does not create any new interest or right or extend the scope of or convert into a new interest or right anything before the conveyance. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. This will have a positive impact on all holders of land by clarifying the law relating to acquisition of easements and profits à *prendre* by implication. As this proposal is merely clarifying the law there are no cost implications.

CP - Q92 *Deeds and their operation – Wheeldon v Burrows*. It is proposed that section 6 of the Conveyancing Act 1881 should not apply to convert a quasi-easement into a full easement when land previously in sole ownership is sub-divided. Consultees agreed with the proposal and section 95(3) of the LLR Bill gives effect to this. The proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. (This is similar to Q29 above – positive impact).

CP - Q93 *Deeds and their operation – voluntary conveyances*. It is proposed that provisions relating to voluntary conveyances intended to defraud subsequent purchasers currently in sections 1 & 3 in the Conveyancing Act (Ireland) 1634 (as amended by the Voluntary Conveyances Act 1893) be re-enacted in a simpler form. Consultees were in total agreement and section 98(1) & (2) of the LLR Bill deals with this proposal. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. It will thus have a positive impact on all those who would use voluntary conveyances.

CP - Q94 *Deeds and their operation – repeal of Sales of Reversions Act 1867*. It is proposed that the Sales of Reversions Act 1867 is repealed without replacement. All consultees agree and Schedule 4 deals with this. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system and would thus have a positive impact on all those users affected by this statute.

CP - Q95 *Contents of Deeds – implied covenants for title*. It is proposed that section 7 of the Conveyancing Act 1881 be re-enacted in a clearer and more comprehensible format. Consultees unanimously endorsed this and sections 104 & 105 of the LLR Bill together with Schedule 1 implement the re-casting and clarify the position in relation to covenants implied in conveyances. This proposal will clarify and simplify the law and cure defects and undesirable aspects of the current system. It will thus involve a positive impact on all users of the conveyancing system.

Legislation

CP - Q96 - Q99 *Modernisation of the Statute Book*. It is proposed that the statute book be modernised. Consultees were broadly in agreement and would welcome this proposal. Schedule 2, 3 and 4 of the LLR Bill set out repeals and minor and consequential amendments. Any modernisation and review of legislation would

have a positive impact on all holders of land and those who provide services in relation to property matters. This will improve access to land law and will thus have a positive effect on efficiency and costs in relation to property transactions. This proposal will remove archaic concepts and cure defects and undesirable aspects of the current system.

Adverse possession

SCP – Q1 *Fundamental features – conveyancing problems - Application of doctrine to both registered and unregistered land.* The Commission concludes that the main justification for the doctrine of adverse possession is its function in dealing with conveyancing problems. The Commission believes that the doctrine has an equally important role to play with respect to both registered and unregistered land and that it would be preferable to have the doctrine apply to both basically in the same way. Consultees were unanimous in their agreement. Part 9 of the LLR Bill deals with this proposal. Bringing both modes of registration into line in this area will provide clarity and have a positive impact on all holders of land and those who provide services in relation to property matters. This will improve access to land law and will thus have a positive effect on efficiency, costs and consistency in relation to property transactions.

SCP – Q9 *Parliamentary Conveyance.* The Commission recommends following the proposals for reform of this aspect of the doctrine of adverse possession consistently made both in Northern Ireland and in the Republic of Ireland in recent decades. The most important proposal is for the dispossessed owner's title to pass to the squatter; by way of a parliamentary conveyance in respect of unregistered land and a statutory transfer of title in respect of registered land. This has the merit of simplifying the law, rendering it more certain and, in the case of registered land, confirming what has long been the practice of the Land Registry. It would also ensure that the law relating to unregistered land accords with the practice in registered land. The Commission recommends that legislation along the lines previously drafted for Northern Ireland and the Republic of Ireland should now be implemented and it should stipulate the nature of the title which the squatter will acquire. The consultees who responded to this question were unanimously in favour of such legislation, subject to clarification on points of detail and in relation to any superior interests. Section 110 of the LLR Bill provides for the vesting of the title in the person in favour of whom the limitation period has run. Sections 111 -112 deal with the position where the title is held under a tenancy and section 113 where the land is mortgaged. This proposal will clarify and simplify the law. It will have a positive impact on all holders of land by clarifying the law relating to the nature of title that is acquired. Where service of a notice and its advertisement is required this would attract negligible costs in respect of same. Such costs would be impossible to quantify prior to implementation of the proposal as the precise nature of the notice and advert is unknown.

SCP – Q15 & 16 *Purchasers in possession*. The Commission takes the view that it would be appropriate to clarify the position in relation to adverse possession in favour of a purchaser in possession after payment of the full purchase price but without completion of a formal conveyance. In this case a purchaser does not include a lessee. The Commission asked consultees whether it could be agreed that some clarification of the operation of the doctrine of adverse possession was appropriate in the circumstances outlined and the consultees who responded to this question were unanimous in expressing their agreement on this point. Therefore the Commission recommends that the position of a purchaser in possession should be clarified as set out in section 114 of the LLR Bill. This proposal will clarify and simplify the law. It will have a positive impact on all holders of land by clarifying the law relating to the nature of title that is acquired. There are no costs issues here as it simply clarifies the legal position. It may therefore potentially save litigation costs. Of course, such costs would be impossible to quantify prior to implementation of the proposal as the precise nature of the notice is unknown.

Ground rents

SCP – Q21. *Provision for increase of ground rent*. Article 31 of the Property (Northern Ireland) Order 1997 provides that any provision for the increase or review of a ground rent on one or more than one occasion is of no effect. However this provision does not apply to a building lease or to a fee farm grant where provision is made for increases in the ground rent which are related to periods or events in the progress of building or related activities. Consultees were asked if they considered that this exception continues to be valid and if not, should the Commission recommend that Article 31(4) be repealed. Consultees were almost unanimous in agreeing that building leases should not be exempt from the provision that ground rent cannot be increased. The Commission proposes to repeal Article 31(4). This proposal will have a positive impact on all rent payers in that the exception outlined above will no longer apply and the system will be simplified and made consistent. The rent owner under building leases will also benefit and the new ground rent charged can take this into consideration. The repeal schedule of the Ground Rents (Amendment) Bill (“the GRA Bill”) deals with this proposal.

SCP – Q24 & 25 *Proposals for reform – smaller ground rents*. It is proposed that there should be a distinction between smaller ground rents and larger ones and that any ground rents of £10 or less (or £20, or £50) would come within a scheme for small ground rents. There was overwhelming support for this proposal, that there should be a distinction between rents based on size but no consensus as to what size. Section 1 of the GRA Bill (in particular the insertion of 2A(1)(b)) provides that £10 is the dividing line. This could have a positive benefit for the rent payer in that the rent will be extinguished and the property will be made more marketable.

SCP – Q26. *Proposals for reform – automatic extinguishment*. It is

proposed that on an appointed day all ground rents of £10 or less per annum should be extinguished and compensation would be due. It is proposed that there should be a lead in period of three years to enable the parties to arrange between themselves for payment of the compensation. There was no consensus from consultee responses. Section 1 of the GRA Bill provides that automatic redemption will take place on “the appointed day or days” and “is deemed to have been redeemed automatically on that day or days”. It is envisaged that this would be some time after enactment of the GRA Bill, so as to allow rent-payers and rent-owners to prepare for it. It is likely to be at least 1 year after such commencement. This will have a positive benefit, in that the process will be taken out of the Land Registry, it will be simpler, involving no bureaucratic procedures or Land Registry costs. It will also make the property more marketable. There is some qualitative evidence from rent owners holding large portfolios to suggest that small ground rents are uneconomic and difficult to recover. Therefore, any impact will be balanced by the considerable benefits of having fair compensation and the decreased costs of collecting ground rents.

SCP – Q27. *Proposals for reform – automatic extinguishment.* Following on from Q24, on extinguishment, the rent payer would acquire ownership of the land equivalent to the fee simple absolute and the estate of the rent owner would be discharged; any other superior interest would also be extinguished. The estate of the rent payer would be converted automatically into statutory ownership. There was general agreement with this proposal. However, statutory ownership will only be achieved if the proposals in relation to “ownership” are taken up. The GRA Bill as drafted does not rely on the take up of this proposal and makes it clear that while rents of £10 or less are automatically extinguished, the consequences of extinguishment tie in with current provisions under the Ground Rents Act (Northern Ireland) 2001. If statutory ownership was achieved this would constitute a major positive benefit in that the rent payer would become unequivocally the owner occupier and no one else would have any estate in the land. The importance of this perception should not be underestimated. This proposal will endeavour to bring the law into line with both economic reality and popular perception. It will also assist in simplifying the conveyancing process and the property will become more marketable. There will be no Land Registry costs in this process.

SCP - Q28. *Proposals for reform – raising amount of automatic extinguishment.* It is proposed that the scheme for the redemption of small rents might be extended or rolled out further in due course to include larger ground rents. There was general agreement with this proposal. Section 1 of the GRA Bill, in particular new section 2A(3), provides for the scheme to be rolled out further in future to cover larger amounts. This proposal will have a positive benefit in that the process will make the property more marketable.

SCP - Q29 & 30 *Proposals for reform – compensation.* It is proposed

that the responsibility for requesting and obtaining compensation should lie with the rent owner and if not sought by the appointed day the right to payment of the compensation would be lost.

On the issue of rent owner responsibility consultees provided no consensus. However, section 1 of the GRA Bill, in particular section 2B, provides that the rent owner is entitled to claim the compensation from the rent payer in cases where the ground rent is £10 or less and is compulsorily extinguished. This provision constitutes a positive benefit on those rent-owners who are businesses, or form part of the voluntary/community sector.

There was insufficient support from consultees on the issue of losing the right to compensation. The new section 2B(5) provides that the right to compensation is subject to Article 4(d) of the Limitation (Northern Ireland) Order 1989. Section 2B(6) of the LLR Bill provides that compensation remains secured against the land, becoming a Schedule 5 burden under the Land Registration Act (Northern Ireland) 1970 in the case of registered land and a lien or charge in the case of unregistered land. This may have a positive benefit for the rent owner, as it secures the compensation as a debt attached to the land, which must be paid out of the sale proceeds in due course.

The new provisions of the GRA Bill provide the rent-payer with clarity on the law on automatic redemption of ground rent and consequences of extinguishment. It provides the rent-payer with an increasingly marketable property and freedom from the obligation to pay future ground rent.

Although this proposal may be perceived as an impact on rent owners, a proportionate response may indicate that no full or partial RIA is required, as it is envisaged that any change in the law will be adequately advertised and that appropriate notification procedures will be in place. These should be utilised by rent owners, especially those from the business, voluntary and community sectors who have the benefit of professional advice.

Covenants after redemption

SCP - Q50(a)&(b) *Covenants – land benefited - neighbours – criteria for “building or development scheme” statutorily defined.* It is proposed that there should be criteria for qualification as a building or development scheme. Consultees were in general agreement with this proposal. Schedule 1, paragraphs 6 and 7 of the GRA Bill deal with this. Paragraph 6(b) suggests that amendments are made to the definition of a building scheme in section 16(7) of the 2001 Act. Paragraph 7 amends section 17(6) of the Ground Rents Act (Northern Ireland) 2001 to make it clearer that the covenants can only be enforced after redemption to the same extent as they were before that event. In the context of the new redemption scheme this proposal represents a positive benefit in that it provides clarity, contributes to the practicalities in dealing with surviving covenants in

relation to building or development schemes and will provide mutual benefit for both the rent payer and neighbours in a building or development scheme.

B.3 RIA Recommendation

- (1) Full RIA procedures should be carried out on policies considered to have **significant costs or savings on business, charities and the social economy sector**. Please fill in the following grid in relation to the policy.

Prioritisation Factors	Significant Impact	Moderate Impact	Low Impact
Social Need			yes
Effect on people's daily lives			yes
Effect on economic, social and human rights			yes
Strategic significance			yes
Financial significance			yes

Please give details: not applicable

- (2) In view of the considerations above do you consider that this policy should be subject to a full RIA? Please give reasons for your considerations. If you are unsure, please consult with affected groups and revisit the screening analysis accordingly.

We do not think that the land law reform proposals should be subject to an RIA. There is no evidence to suggest that businesses, charities and community bodies will be affected more than any other holder of land; the policy will have a low impact on the prioritisation factors listed in B.3.

- (3) If an RIA is considered necessary please comment on the priority and timing in light of the factors in the table at B.3.

Not applicable

- (4) If an RIA is considered necessary is any data required to carry it out/ensure effective monitoring?

Not applicable

APPENDIX C

GENERAL SOURCES OF INFORMATION:

Online Legal subscription services:

Westlaw.ie. and Westlaw.co.uk online legal information service.
(www.westlaw.ie and www.westlaw.co.uk)

LexisNexis www.lexisnexis.com

Justis www.justis.com and Justcite www.justcite.com

Lawtel www.lawtel.com

Reports and Consultations:

British Columbia Law Reform Commission, Canada

English Law Reform Committee

Land Law Working Group, Northern Ireland

Law Commission, England and Wales

Law Reform Advisory Committee, Northern Ireland

Law Reform Commission, Australia

Law Reform Commission, Ireland

Manitoba Law Reform Commission, Canada

New Zealand Law Commission

Northern Ireland law Commission

Ontario Law Reform Commission, Canada

Parliament of Victoria, Australia

Scottish Law Commission

Sources of Articles:

Anglo-American Law Review

APLJ – Australian Property Law Journal

CLJ – Commonwealth Law Journal

CLWR – Common Law World Review

Conv – Conveyancer and Property Lawyer

CPLJ - Conveyancing and Property Law Journal

DULJ – Dublin University Law Journal

EG – Estates Gazette

IJFL- Irish Journal of Family Law

LQR – Law Quarterly Review

LS – Legal Studies

MLR – Modern Law Review

MULR – Melbourne University Law Review

NILQ – Northern Ireland Legal Quarterly

NLJ – New Law Journal

OUCLJ – Oxford University Commonwealth Law Journal

Real Property, Probate and Trusts Journal

Stair Society

Yale LJ – Yale Law Journal

Sources of Case Law:

AC – Law Reports, Appeal Cases

AILR - (Malaysia)

All ER - All England Law Reports

BCC – British Company Cases

Beav - Beavan's Rolls Court Reports

CA – Commonwealth Appeals

Ch - Law Reports, Chancery Division (3rd Series)

Ch App - Law Reports, Chancery Appeal Cases

ChD – Chancery Division (2nd Series)

CLR – Commonwealth Law Reports

ECHR Grand Chamber – European Court of Human Right, Grand Chamber

EWHC (Ch) – England and Wales High Court (Chancery Division)

HCA – High Court of Australia

IEHC – High Court of Ireland

IR - Irish Reports

KB – Law Reports, Kings Bench

Lloyd's Rep Bank

LR – Law Reports (1st Series)

NI – Northern Ireland Law Reports

NICA - Northern Ireland court of Appeal

NICH - High Court of Justice Northern Ireland: Chancery Division

NIFam - High Court of Justice Northern Ireland: Family Division

Ph - Phillips' Chancery Reports

QB – Law Reports, Queen's Bench (3rd Series)

UKHL - United Kingdom House of Lords

Ves - Vesey Junior's Chancery Reports

WLR – Weekly Law Reports

Wms Saund - Saunders' King's Bench Reports

Sources of Statute Law:

Chronological Table of the Statutes for Northern Ireland (33rd ed.)
Published by Authority, Belfast: The Stationary Office

Office of public sector information www.opsi.gov.uk

Statute Law Database www.statutelaw.gov.uk

The Northern Ireland Statutes, Belfast, Her Majesty's Stationary office

The Statutes Revised Northern Ireland (2nd ed.) Published by
Authority, Belfast, Her Majesty's Stationary office

Stakeholders

Academics from Queen's University, Belfast (QUB) & University of
Ulster, Jordanstown (UUJ)

Barristers

Judiciary

Lands Tribunal, DFP

Lending Institutions

Royal Institute of Chartered Surveyors (RICS)

Solicitors

The Land Registers of Northern Ireland, DFP

The Law Society of Northern Ireland

Beneficiaries

All Stakeholders as above

The General public

LEGISLATION

Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp. 5)

Access to Neighbouring Land Act 1992 (c. 23)

Accumulations Act 1800 (39 & 40 Geo. 3) (c. 98)

Accumulations Act 1892 (55 & 56 Vict.) (c. 58)

Administration of Estates Act (Northern Ireland) 1955 (c. 24)

Administration of Estates Act 1925 (15 & 16 Geo. 5) (c. 23)

Administration of Justice Act 1970 (c. 31)

Administration of Justice Act 1973 (c. 15)

Article 1, Protocol 1 of the European Convention on Human Rights

Article 6, Protocol 1 of the European Convention on Human Rights

Australian Courts Act 1828 (c. 33)

Bodies Corporate (Joint Tenancy) Act 1899 (62 & 63 Vict.) (c. 20)

Building Societies Act (Northern Ireland) 1967 (c. 31)

Building Societies Act 1986 (c. 53)

Charities Act (Northern Ireland) 1964 (c. 33)

Charities Act (Northern Ireland) 2008 (c. 12)

Civil Law (Miscellaneous Provisions) Act 2008 (Ireland)

Clandestine Mortgages Act (Ireland) 1697 (9 Will 3) (c. 11)

Commission on Disposal of Lands (Northern Ireland) Order 1986 (No. 767 N.I. 5)

Commission on Sales of Land Act (Northern Ireland) 1972 (c. 12)

Commonhold and Leasehold Reform Act 2002 (c. 15) [England and

Wales]

Commonhold and Leasehold Reform Act 2002 (Commencement No. 4) Order 2004 (SI/1832)

Companies (Northern Ireland) Order 1986 (No. 1032 N.I. 6)

Companies Act 1985 (c. 6)

Consumer Credit Act 1974 (c. 39)

Consumer Credit Act 2006 (c. 14)

Contingent Remainders Act 1877 (40 & 41 Vict.) (c. 33)

Conveyancing Act (Ireland) 1634 (10 Chas. 1 sess. 2) (c. 3)

Conveyancing Act 1881 (44 & 45 Vict.) (c. 41)

Conveyancing Act 1911 (1 & 2 Geo. 5) (c. 37)

Conveyancing Acts 1881 – 1911

Crown Lands Act 1702 (1 Ann.) (c.1)

Departments (Northern Ireland) Order 1982 (SR 1999 No. 481)

Entail (Scotland) Act 1914 (4 & 5 Geo. 5) (c. 43)

European Unfair Terms Directive 1993 (93/13)

Evidence Act (Northern Ireland) 1939 (2 & 3 Geo. 6) (c. 12)

Evidence Act 1938 (1 & 2 Geo. 6) (c. 28)

Family Home Protection Act 1976 (No. 27) (Ireland)

Family Homes and Domestic Violence (Northern Ireland) Order 1998 (No. 1071 N.I. 6)

Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 (No. 1984 N.I. 14)

Financial Services and Markets Act 2000 (c. 8)

Fines and Recoveries (Ireland) Act 1834 (4 & 5 Will. 4) (c. 92)

Forcible Entries Act 1429,

Forcible Entries Acts

Forcible Entries and Riots 1391,

Forcible Entry Act (Ireland) 1634

Forcible Entry Act (Ireland) 1786)

Forcible Entry Act 1381,

Forfeiture Act (Ireland) 1639 (15 Chas. 1 sess. 2) (c. 3)

Ground Rents (Multiplier) Order (Northern Ireland) 2002 (S.R. 2002 No. 228)

Ground Rents Act (Northern Ireland) 2001 (Chapter 5)

Human Rights Act 1998 (c. 42)

Insolvency (Northern Ireland) Order 1989 (No. 2/405 N.I. 19)

Interpretation Act (Northern Ireland) 1954 (c. 33)

Irish Church Act 1869 (32 & 33 Vict.) (c. 42)

Irish Land Act 1903 (3 Edw. 7) (c. 37)

Judgments (Ireland) Act 1844 (7 & 8 Vict.) (c. 90)

Judicature (Northern Ireland) Order 1978 (c. 23)

Land and Conveyancing Law Reform Act 2009 [Republic of Ireland]

Land and Conveyancing Law Reform Bill 2006 [Republic of Ireland]

Land Charges Act 1925 (c. 22)

Land Purchase (Winding-up) Act (Northern Ireland) 1935 (26 Geo. 5 & Edw. 8) (c. 21)

Land Purchase Acts 1869 - 1935

Land Registration (Amendment) Rules (Northern Ireland) 2002 (S.R. 2002 No. 229)

Land Registration Act (Northern Ireland) 1970 (c. 18)

Land Registration Act 1925 (15 & 16 Geo. 5) (c. 21)

Land Registration Act 2002 (c. 9) [England and Wales]

Land Registration Rules (Northern Ireland) 1994 (No. 424)

Land Registry (Fees) Order (Northern Ireland) 2007 (S.R. 2007 No. 6)

Land Tenure Reform (Scotland) Act 1974 (c. 38)

Landed Estates Court (Ireland) 1858 (21 & 22 Vict.) (c. 72)

Landlord and Tenant (Amendment) Act 1984 (No. 4/1984) [Republic of Ireland]

Landlord and Tenant (Covenants) Act 1995 (c. 30) [England and Wales]

Landlord and Tenant (Ground Rents) (No. 2) Act 1978 (No. 16/1978) [Republic of Ireland]

Landlord and Tenant (Ground Rents) Act 1978 (No. 7/1978) [Republic of Ireland]

Landlord and Tenant Law Amendment (Ireland) Act 1860 (23 & 24 Vict.) (c. 154) (Deasy's Act)

Law of Property (Amendment) Act 1926 (16 & 17 Geo. 5) (c. 11)

Law of Property (Joint Tenants) Act 1964 (c. 63)

Law of Property (Miscellaneous Provisions) Act 1989 (c. 34)

Law of Property (Miscellaneous Provisions) Act 1994 (c. 36)

Law of Property Act 1925 (16 & 1 Geo. 5) (c. 20)

Law of Property Act 1936 (South Australia)

Law of Property Act 1969 (c. 59) [England and Wales]

Law of Property Act 2007 (New Zealand)

Law of Property Amendment Act 1859 (22 & 23 Vict.) (c. 35)

Law of Property Amendment Act 1860 (23 & 24 Vict.) (c. 38)

Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 (No. 1452 N.I. 7)

Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 (c. 7)

Leasehold Reform Act 1967 (c. 88) [England and Wales]

Leases for Schools (Ireland) Act 1881 (44 & 45 Vict.) (c. 65)

Leasing Powers Amendment Act for Religious Worship (Ireland) Act 1875 (38 & 39 Vict.) (c. 11)

Leasing Powers for Religious Worship (Ireland) Act 1855 (18 & 19 Vict.) (c. 39)

Limitation (Northern Ireland) Order 1989 (No. 1339 N.I. 11)

Limitation Act 1980 (c. 58) [England and Wales]

Limitation Amendment (Northern Ireland) Order 1982 (No. 339 (N.I. 7))

Literary and Scientific Institutions Act 1854 (17 & 18 Vict.) (c. 112)

London Buildings Acts (Amendment) Act 1939 (c. xcvi)

Married Women's Property Act 1882 (45 & 46 Vict.) (c. 75)

Ministries of Northern Ireland (Transfer of Functions) Regulations 1968 (SR & O No. 88)

Mortgagees Legal Costs Act 1895 (58 & 59 Vict.) (c. 25)

Nitrates Action Programme Regulations (Northern Ireland) 2006 (No. 489)

Partition Act 1868 (31 & 32 Vict.) (c. 40)

Partition Act 1876 (39 & 40 Vict.) (c. 17)

Party Wall etc. Act 1996 (c. 40)

Perpetuities Act (Northern Ireland) 1966 (Chapter 2)

Perpetuities and Accumulations Act 1964 (c. 55)

Perpetuities and Accumulations Bill 2009 (HL Bill 35)

Places of Worship Sites Act 1873 (36 & 37 Vict.) (c. 50)

Prescription (Ireland) Act 1858 (21 & 22 Vict.) (c. 42)

Prescription Act 1832 (2 & 3 Will. 4) (c. 71)

Property (Discharge of Mortgage by Receipt) (Northern Ireland) Order 1983 (No. 766 N.I. 9)

Property (Northern Ireland) Order 1978 (No. 459 N.I. 4)

Property (Northern Ireland) Order 1997 (No. 1179 N.I. 8)

Property Law Act 1952 (No. 51) (New Zealand)

Property Law Act 2007 (No. 91) (New Zealand)

Real Property Act 1845 (8 & 9 Vict.) (c. 106)

Real Property Article of the Maryland Code

Registration (Land and Deeds) (Northern Ireland) Order 1992 (No. 811 N.I. 7)

Registration of Deeds (Amendment) Act (Northern Ireland) 1967 (c. 30)

Registration of Deeds Act (Ireland) Act 1707 (c. 2)

Renewable Leasehold Conversion Act 1849 (12 & 13 Vict.) (c. 105)

Rentcharges Act 1977 (c. 30) [England and Wales]

Residential Tenancies Act 2004 (No. 27) (Ireland)

Reverter of Sites Act 1987 (c. 15)

Rights of Light Act (Northern Ireland) 1961 (c. 18)

Sale of Land by Auctions Act 1867 (30 & 31 Vict.) (c. 48)

Sales of Reversions Act 1867 (30 & 31 Vict.) (c. 4)

Satisfied Terms Act 1845 (8 & 9 Vict.) (c. 112)

School Sites (Ireland) Act 1810 (50 Geo. 3) (c. 33)

School Sites Act (Northern Ireland) 1928 (18 & 19 Geo. 5) (c. 8)

School Sites Act 1841 (4 & 5 Vict.) (c. 38)

Settled Estates Act 1877 (40 & 41 Vict.) (c. 18)

Settled Land (Ireland) Act 1847 (10 & 11 Vict.) (c. 46)

Settled Land Act 1882 (c. 38)

Settled Land Act 1925 (15 & 16 Geo. 5) (c. 18)

Settled Land Acts 1882 – 1890

State Property Act 1954 (No. 51) (New Zealand)

Statute Law Revision Acts (1875 (c. 66), 1892 (c.19), 1893 (c. 54), 1953 (c.5) and 1963 (c. 30)

Statute of Frauds (Ireland) 1695 (7 Will. 3) (c. 12)

Statute of Frauds 1677 (29 Cha 2) (c. 3)

Statute of Limitations (Northern Ireland) 1958 (c. 10)

Statute of Uses (Ireland) 1634 (10 Chas. 1 sess. 2) (c. 1)

Statute of Uses 1535 (27 Hen. 8) (c. 10)

Statute of Westminster the Second 1285 (*De Donis Conditionalibus*) (13 Edw. I) (c. 1)

Statutes of Westminster the Third 1289 – 1290 (*Quia Emptores*) (18 Edw. I) (cc. 1, 2, 3)

Succession Act 1965 (No. 27) (Ireland)

Tenures Abolition Act (Ireland) 1662 (14 & 15 Chas. 2 sess. 4) (c. 19)

Tenures Abolition Act 1660 (12 Chas. 2) (c. 24)

Tithe Arrears (Ireland) Act 1839 (2 & 3 Vict.) (c. 3)

Tithe Rentcharge (Ireland) Act 1838 (1 & 2 Vict.) (c. 109)

Title Conditions (Scotland) Act 2003 (asp 9)

Treasure Act 1996 (c. 24)

Trustee Act (Northern Ireland) 1958 (c. 23)

Trustee Act 1925 (c. 19)

Trusts of Land and Appointment of Trustees Act 1996 (c. 47)

Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)

Vendor and Purchaser Act 1874 (37 & 38 Vict.) (c. 78) [England and Wales]

Voluntary Conveyances Act 1893 (56 & 57 Vict) (c. 21)

Wills and Administration Proceedings (Northern Ireland) Order 1994 (No. 1899 N.I. 13)

CASELAW

A'Court v Cross (1825) 2 Bing 329

AGOSI v The United Kingdom – 9118/80 [1986] ECHR 13, 24 October 1986

Attorney General v Tomline (1877) 5 ChD 750

Aurelio Cal, et al. v Attorney General of Belize(Claim 121/2007) (18 October 2007) (Belize)

Bain v Fothergill (1874) LR 7 HL 158

Beaulane Properties Ltd. v Palmer [2006] Ch 79

Bridges v Mees [1957] Ch 475

Bruton v London & Quadrant Housing Trust [2000] 1 AC 406

Buckinghamshire County Council v Moran [1990] Ch 623

Castlereagh Borough Council (applicant) and the Northern Ireland Housing Executive (respondent) (Lands Tribunal R/30/2002 and R/32/2002)

Central London Commercial Estates Ltd. v Kato Kagaku Ltd. [1998] 4 All ER 948

Cholmondeley v Clinton (1820) 2 Jac & W 139

Chung Ping Kwan v Lam Island Development Co Ltd. [1997] AC 38

City of London Building Society v Flegg [1988] AC 54

Commission for the New Towns v Cooper (Great Britain) Ltd. [1995] 2 All ER 929

Commonwealth of Australia v Yarmirr (2001) 208 CLR 1)

Cork Corporation v Lynch [1995] 2 ILRM 598

Cottage Holiday Associates Ltd. v Customs and Excise Commissioners [1983] QB 735

Dimmock v Hallett (1866) 2 Ch App 21

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Land Law Reform Bill (Northern Ireland) 201[]

CHAPTER []

CONTENTS

PART 1

OWNERSHIP OF LAND

1. Ownership of land
2. Position of the Crown
3. Owners of land
4. Consequential provisions
5. Legal interests in land
6. Conversion of Fees tail
7. Minors

PART 2

EASEMENTS AND OTHER RIGHTS OVER LAND

CHAPTER 1

ACQUISITION OF EASEMENTS AND PROFITS

8. Restriction on prescription
9. Acquisition of easements by prescription
10. Trusts of land
11. Tenancies
12. Ultra vires
13. Mental disorder
14. Interruption by notice
15. Interference by third parties
16. Abandonment of easements and profits *à prendre*
17. Implied easements

CHAPTER 2

RIGHTS OF RESIDENCE

18. Rights in unregistered land

CHAPTER 3

PARTY STRUCTURES

19. Rights of building title holder
20. Party structure notices
21. Counter notices
22. Nominated surveyor

- 23. Lands tribunal
- 24. Interpretation of Chapter 3

PART 3

FUTURE INTERESTS

CHAPTER 1

OPERATION OF FUTURE INTERESTS

- 25. Equitable interests only
- 26. Abolition of rules

CHAPTER 2

RULE AGAINST PERPETUITIES

- 27. Application of the rule
- 28. Exceptions to rule's application
- 29. Power to specify exceptions
- 30. Abolition of existing exceptions
- 31. Perpetuity period
- 32. Start of perpetuity period
- 33. Wait and see rule
- 34. Exclusion of class members to avoid remoteness
- 35. Saving and acceleration of expectant interests
- 36. Powers of appointment
- 37. Pre-commencement instruments: period difficult to ascertain
- 38. Application of this Act
- 39. Limitation of 1966 Act to existing instruments
- 40. The Crown
- 41. Rule as to duration not affected
- 42. Provision made otherwise than by instrument
- 43. Interpretation of Chapter 2

PART 4

TRUSTS OF LAND

- 44. Trusts of land
- 45. Trustees of land
- 46. Powers of trustees of land
- 47. Overreaching of equitable interests
- 48. Resolution of disputes

PART 5

CONCURRENT TITLES

- 49. Severance of a joint tenancy
- 50. Commorientes
- 51. Bodies corporate
- 52. Court orders

PART 6

POWERS

- 53. Application of Part 6
- 54. Execution of non-testamentary powers of appointment
- 55. Release of powers
- 56. Disclaimer of powers
- 57. Validation of appointments

PART 7

MORTGAGES

CHAPTER 1

CREATION OF MORTGAGES OF LAND

- 58. Legal mortgages of land
- 59. Position of mortgagor and mortgagee

CHAPTER 2

POWERS AND RIGHTS OF MORTGAGOR

- 60. Title documents
- 61. Right of consolidation
- 62. Transfer in lieu of discharge
- 63. Advances on a joint account

CHAPTER 3

OBLIGATIONS, POWERS AND RIGHTS OF MORTGAGEE

- 64. Application of Chapter 3
- 65. Abolition of foreclosure
- 66. Taking possession of dwelling-houses
- 67. Abandoned property
- 68. Power of sale
- 69. Incidental powers
- 70. Obligations on selling
- 71. Conveyance on sale
- 72. Protection of purchaser
- 73. Mortgagee's receipts
- 74. Application of proceeds of sale
- 75. Realisation of equitable mortgages
- 76. Appointment of a receiver
- 77. Application of money received
- 78. Insurance
- 79. Tacking

CHAPTER 4

LEASES AND SURRENDER OF LEASES

- 80. Leasing powers

- 81. Surrenders

PART 8

CONTRACTS AND CONVEYANCES

CHAPTER 1

CONTRACTS RELATING TO LAND

- 82. Evidence in writing
- 83. Return of deposit
- 84. Vendor and purchaser summons

CHAPTER 2

TITLE

- 85. Root of title
- 86. Tenancies
- 87. Other conditions of title
- 88. Protection of purchasers
- 89. Fraudulent concealment and falsification
- 90. Notice on common title

CHAPTER 3

DEEDS AND THEIR OPERATION

- 91. Conveyances by deed only
- 92. Words of limitation
- 93. Reservations
- 94. Benefit of deeds
- 95. Features and rights conveyed with land
- 96. Supplemental instruments
- 97. Partial releases
- 98. Fraudulent dispositions
- 99. Construction of instruments

CHAPTER 4

CONTENTS OF DEEDS

- 100. All interest clause
- 101. Receipts in deeds
- 102. Conditions and covenants not implied
- 103. Scope of sections 104 and 105
- 104. Covenants for title
- 105. Additional covenants for land comprised in a lease
- 106. Production and safe custody of documents
- 107. Notices

CHAPTER 5

GENERAL PROVISIONS

- 108. Restrictions on constructive notice

109. Court orders conclusive

PART 9

ADVERSE POSSESSION

- 110. Vesting of title
- 111. Tenancies
- 112. Position of parties
- 113. Mortgaged land
- 114. Purchaser in possession

PART 10

MISCELLANEOUS AND SUPPLEMENTARY

- 115. Further amendments to and repeal of provisions in the Land Registration Act (Northern Ireland) 1970 (c. 18)
- 116. Orders and regulations
- 117. General interpretation
- 118. Application to the Crown
- 119. Amendments and repeals
- 120. Commencement
- 121. Short Title

SCHEDULES:

- Schedule 1 Covenants Implied in Conveyances
- Schedule 2 Land Registration Act (Northern Ireland) 1970 (c. 18)
 - Part I Minor and Consequential Amendments to the Land Registration Act (Northern Ireland) 1970 (c. 18)
 - Part II Further Amendments to the Land Registration Act (Northern Ireland) 1970 (c. 18)
 - Part III Repeals of provisions in the Land Registration Act (Northern Ireland) 1970 (c. 18)
 - Part IV Further repeals of provisions in the Land Registration Act (Northern Ireland) 1970 (c. 18)
- Schedule 3 Other Minor and Consequential Amendments
- Schedule 4 Repeals

DRAFT

Land Law Reform Bill (Northern Ireland) 201[]

201[] CHAPTER []

An Act to provide for the reform and modernisation of land law; and for connected purposes.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

PART 1

OWNERSHIP OF LAND

Ownership of land

1. (1) On or after the appointed day the concepts of tenure and estates in land are abolished and ownership of land relates to the physical entity of the land itself.

(2) The legal owner (in this Act referred to as “the owner”) of land is the person designated by section 3.

(3) The owner of land may dispose of it as such and the rule against inalienability continues to apply to land to the extent to which it applied prior to the appointed day.

(4) The owner of land may create in favour of other persons, and other persons may acquire, interests in land which, subject to section 2, may last for ever or may be limited in duration.

(5) The only legal interests in land which are capable of being created or acquired (apart from the ownership of the land) are specified by section 5.

(6) Nothing in this Part affects the creation or acquisition of equitable interests in land.

Position of Crown

2. (1) Section 1(1) does not affect –
 - (a) demesne land belonging to the Crown; or
 - (b) any power exercisable by or on behalf of the Crown by virtue of the royal prerogative.
(2) Without prejudice to the generality of subsection (1), section 1(1) does not affect the vesting of land in Northern Ireland –
 - (a) in the Crown as *bona vacantia* or affect any power to disclaim such land; or

(b) in the Crown in accordance with subsection (3).

(3) In circumstances in which, prior to the appointed day, land in Northern Ireland would have been subject to escheat, from that day such land vests in the Crown by virtue of this Act with the same effect as if it were subject to escheat.

(4) The Crown incurs no liability in respect of land vesting in it in accordance with subsections (2) and (3) unless it has in fact taken possession or control of it or entered into occupation of it.

(5) Nothing in this Act affects the enforceability of a right of re-entry relating to land in Northern Ireland disposed of before, on or after the appointed day in accordance with section 3(8) of the Crown Estate Act 1961 (c.55).

Owners of land

3. (1) Subject to section 2(2) and (3), on or after the appointed day the owner of land is –

(a) in the case of unregistered land, the person in whom the fee simple in possession or a fee tail converted into a fee simple in possession by section 6 is vested; and

(b) in the case of registered land, the person registered as full owner of the freehold estate.

(2) For the purposes of subsection (1)(a), a fee simple in possession includes –

(a) a determinable fee,

(b) a fee simple subject to a right of entry or re-entry (whether or not subject to a disposition over on the happening of a contingency), and

(c) a fee simple subject only to –

(i) a power of revocation; or

(ii) an annuity or other payment of capital or income for the advancement, maintenance or other benefit of any person; or

(iii) a right of residence within the meaning of section 18 or section 47 of the Land Registration Act (Northern Ireland) 1970 (c. 18),

and the owner of the land remains subject to the interests which attach to such a fee simple.

(3) Where the person registered as full owner of the freehold estate is not registered with an absolute title, the owner of the land is subject to any superior or adverse claim to ownership to which a registered owner is subject under sections 16 to 18 of the Land Registration Act (Northern Ireland) 1970 (c. 18).

Consequential provisions

4. (1) All instruments and statutory provisions executed, enacted or made before the appointed day –

(a) referring to a fee simple in possession, or such an estate or interest, in land,

(b) purporting to dispose of or vest a fee simple in possession, or such an estate or interest, in land, or

(c) referring to or using equivalent expressions,

shall be deemed on or after that day to refer to ownership or, as appropriate, the owner of land within the meaning of this Part or, as appropriate, to the disposition of or vesting of such ownership.

(2) All instruments and statutory provisions executed, enacted or made before the appointed day referring to an estate in land or to the freehold or a leasehold in land or using an equivalent expression shall be deemed on or after that day to refer to ownership within the meaning of this Part or, as appropriate, to the equivalent legal or equitable interest in the land within the meaning of section 5.

(3) The Land Registration Act (Northern Ireland) 1970 (c. 18) is amended as set out in Part I of Schedule 2.

Legal interests in land

5. (1) The only legal interests in land to which the owner of land may be subject and which the owner may create out of the land or dispose of are –

(a) a tenancy;

(b) an easement;

(c) a profit à *prendre*;

(d) a covenant coming within Article 34 of the Property (Northern Ireland) Order 1997 (NI 8);

(e) an incumbrance;

(f) a possibility of reverter;

(g) a right of entry or re-entry (including such a right attached to a legal interest);

(h) a rentcharge;

(i) a power of revocation, power of attorney, power of appointment or other power attached to or exercisable in respect of the ownership or a legal interest in land; and

(j) a wayleave or other legal interest created by statute.

(2) A legal interest has, subject to this Act, the same attributes as the corresponding legal interest subsisting immediately before the appointed day and may exist concurrently with, or be subject to, any other legal interest in the same land in the same manner as it could have done before that day.

(3) This section does not affect the operation of any fee farm rent created before 10th January 2000 or of any advowson, franchise, customary or public rights relating to land.

(4) Subject to this Act, any interest in land other than those referred to in subsections (1) and (3) takes effect as an equitable interest only, but this does not prevent an interest so referred to being created or taking effect as an equitable interest.

Abolition of Fees tail

6. (1) On or after the appointed day the creation of a fee tail of any kind at law or in equity is prohibited.

(2) Any instrument coming into operation on or after the appointed day which, but for this Act, would have created in favour of any person –

(a) a legal fee tail in possession in any land, renders that person the owner of the land; or

(b) any other fee tail, creates an equitable interest under a trust of land.

(3) Where, immediately before the appointed day, any person was entitled to –

(a) a legal fee tail in possession in any land not subject to a protectorship, that person becomes on that day the owner of the land; or

(b) any other fee tail, that person becomes entitled to an equitable interest under a trust of land.

(4) In subsection (3), a “fee tail” includes –

(a) a base fee (that is to say, the estate in fee into which a fee tail estate was converted where the issue in tail were barred, but the persons claiming estates by way of remainder were not barred), and

(b) a determinable base fee (that is to say, an estate in fee voidable or determinable by the entry of the issue in tail),

but does not include the estate of a tenant in tail after possibility of issue extinct.

(5) The person becoming the owner of land or entitled to an equitable interest under subsections (2) or (3) is –

(a) not subject to any interest limited to take effect after determination of the fee tail, and

(b) subject to any interest limited to take effect in defeasance of the fee tail which would be valid if limited to take effect in defeasance of ownership of land.

Minors

7. (1) A minor is not capable of owning land or a legal interest in land and on or after the appointed day any land vested in a minor is subject to a trust of land.
- (2) The parties to a conveyance of land are, until the contrary is proved, presumed to be of full age at the date of the conveyance.

PART 2

EASEMENTS AND OTHER RIGHTS OVER LAND

CHAPTER 1

ACQUISITION OF EASEMENTS AND PROFITS À *PRENDRE*

Restriction on prescription

8. (1) Subject to subsection (4), on or after the appointed day no easement or profit à *prendre* may be acquired by prescription at common law or under the doctrine of lost modern grant.
- (2) No profit à *prendre* may be acquired by prescription under this Chapter.
- (3) Subject to subsection (4), on or after the appointed day acquisition of an easement by prescription is not based on any presumption of a grant and is based exclusively on the provisions of this Chapter.
- (4) This section does not affect the acquisition of an easement or profit à *prendre* by prescription under the law applicable prior to the appointed day based upon a period of user which commenced before that day and the repeal of the Prescription Act 1832 (c.71) and Prescription (Ireland) Act 1858 (c.42) takes effect accordingly.

Acquisition of easements by prescription

9. (1) This section applies to any right of a kind recognised by law as capable of becoming or subsisting as an easement.
- (2) Subject to sections 10 to 13, immediately upon expiration of the prescriptive period the right which has been enjoyed for that period becomes an easement vested in the dominant title holder at that time and binding on the servient title holder at that time and their respective successors in title.
- (3) Enjoyment of a right for the prescriptive period under subsection (2) means enjoyment of such a kind and, where the enjoyment is intermittent, of such frequency and regularity as would be justified only by the existence of an easement such as that claimed to vest under that subsection.

(4) No easement vests under subsection (2) where the enjoyment of the right in question was –

(a) by means of force employed by or on behalf of the dominant title holder;

(b) not known to the servient title holder or not such that it ought in all the circumstances reasonably to have been known to that title holder;

(c) subject to subsection (5), with the consent of the servient title holder;

(d) interrupted for a continuous period of 12 months or more during the prescriptive period; or

(e) interrupted by registration of a notice under section 14.

(5) In subsection (4)(c), “consent” means consent, oral or written, to enjoyment of the right for a period of 12 months or more given at the request of or by agreement with, the dominant title holder; and for the purposes of this subsection a consent given without limitation to any period is to be taken to be a consent to enjoyment for 12 months.

(6) An easement vesting under subsection (2) is commensurate –

(a) in respect of its character with the right enjoyed during the prescriptive period; and

(b) in respect of its extent with the greatest extent to which it was enjoyed during that period except that, where during that period there was an increase in the intensity of its use which was such as, in the light of the circumstances obtaining at the time of the increase, to increase substantially the burden on the servient title holder’s enjoyment of the servient land, that increase shall be disregarded, unless enjoyment of the easement has continued for a period equal to the prescriptive period from the time of the increase.

(7) Any question arising under subsection (6) as to –

(a) the character of a right,

(b) the extent of a right, or

(c) the effect of an increase of the intensity of use of a right,

may be referred to and determined by the Lands Tribunal.

(8) In this section and sections 10 to 16, unless the context requires otherwise, –

“dominant land” means land in respect of which the benefit of a right to which this section applies has been enjoyed;

“dominant title holder” means the owner of, or holder of a tenancy in, dominant land and includes predecessors in title to such an owner or holder;

“prescriptive period” means any continuous period of 20 years during which a dominant title holder has enjoyed the benefit of a right to which this section applies over servient land;

“servient land” means land over which a dominant title holder has enjoyed the benefit of a right to which this section applies;

“servient title holder” means the owner of, or holder of a tenancy in, servient land and includes predecessors in title to such an owner or holder.

Trusts of land

- 10.** (1) Where the enjoyment of a right at the completion of the prescriptive period is by a beneficiary occupying the dominant land under a trust of land, the easement arising under section 9(2) vests in the trustees for the benefit of the trust.

(2) Where the servient land is occupied at the date of completion of the prescriptive period by a beneficiary under a trust of land, the easement arising under section 9(2) binds the trustees so long as the trust subsists.

Tenancies

- 11.** (1) Subject to subsections (2) to (4), section 9 applies as between a landlord and tenant and as between tenants of the same landlord in respect of dominant and servient lands (as the case may be) occupied by them, but without prejudice to extinguishment of an easement by virtue of unity of ownership and possession.

(2) Where the enjoyment of a right at the completion of the prescriptive period is by a tenant occupying the dominant land, the easement arising under section 9(2) vests in the landlord subject to the tenant’s and any superior tenant’s (where that tenant becomes entitled to occupy the dominant land) right to enjoy it so long as the tenancy or superior tenancy subsists.

(3) Where the servient land is occupied at the completion of the prescriptive period by a tenant, the easement vesting under section 9(2) binds only that tenant so long as that tenant and successors in title occupy the servient land, whether under the tenancy, any extension or renewal of the tenancy, any superior interest or ownership acquired by the tenant or by virtue of overholding that land.

(4) Nothing in subsection (3) prevents the acquisition of an easement under section 9(2) binding the servient landlord on the basis of enjoyment for a prescriptive period commencing after that landlord had resumed possession of that land on termination of a tenancy and continued in possession during that period.

Ultra vires

- 12.** (1) An easement may vest under section 9(2) notwithstanding that during the prescriptive period it was ultra vires the servient title holder to make an express grant of it.
- (2) An easement does not vest under section 9(2) where during the prescriptive period it was ultra vires the dominant title holder to acquire it by express grant or to exercise rights under it.
- (3) Subsection (2) does not prevent an easement vesting under section 9(2) in a successor in title of such a dominant title holder on the basis of a prescriptive period during part of which the right over the servient land was enjoyed by that dominant title holder.

Mental disorder

- 13.** (1) Subject to subsection (2), where the servient title holder is incapable, whether at the commencement of or during the prescriptive period, of managing and administering his or her property and affairs by reason of a mental disorder, the running of that period does not commence or is suspended until the disorder ceases.
- (2) Subsection (1) does not apply where –
- (a) it is reasonable, in the circumstances of the case, to have expected some other person, whether as a controller or guardian or in some other capacity, to have acted on behalf of the servient title holder during the prescriptive period; or
- (b) at least a period of 40 years has elapsed since the commencement of the prescriptive period.
- (3) In this section “mental disorder” has the meaning given by the Mental Health (Northern Ireland) Order 1986 (NI 4).

Interruption by notice

- 14.** (1) A servient title holder who wishes to interrupt the enjoyment of a specific right (to which section 9 applies) by the dominant title holder at any time during the prescriptive period may apply to the Registrar of Titles for registration in the Statutory Charges Register of a notice in the prescribed form under this section (“the notice”).
- (2) An application under subsection (1) shall be in the prescribed form and be accompanied by the prescribed fee.
- (3) At least 28 days before applying for registration of the notice the servient title holder shall serve on the dominant title holder a copy of the notice together with a statement confirming the intention to apply for registration.
- (4) An application under subsection (1) shall be accompanied by a statutory declaration by the servient title holder that subsection (3) has been complied with.
- (5) Before registering the notice, the Registrar of Titles may require –

- (a) notices to be served on persons or published as appropriate;
- (b) information to be furnished by the dominant title holder or other persons; and
- (c) such other steps to be taken as are thought necessary before the notice is registered, including amendments to the notice.

(6) On registration of the notice, the physical obstruction or other interruption of which particulars are given in the notice is deemed to take effect and to continue until –

- (a) the registration is cancelled, or
- (b) the expiration of a period of 12 months beginning with the date of registration,

whichever occurs first.

(7) A person who is aggrieved by registration of the notice on the grounds that –

- (a) he or she has an easement over the servient land, and
- (b) the physical obstruction or other interruption which is deemed to have effect on the registration would, if actually effected, have constituted an interference with the enjoyment of the easement for which an action in court could be brought,

has a like action in court in respect of the registration of the notice (unless the notice has ceased to have effect by the time of instituting the proceedings).

(8) In an action under subsection (7) the court may –

- (a) make such declaration as it thinks appropriate;
- (b) order the registration of the notice to be cancelled; or
- (c) order the notice to be modified.

Interference by third parties

15. (1) A person who is enjoying a right over servient land in circumstances which, if continued, would result in an easement vesting in that person under section 9(2), has a right of action against any person other than the servient title holder or any person acting on that title holder's authority who interferes with that enjoyment.

(2) A dominant title holder in whom an easement has vested under section 9(2) has a right of action, without proof of title, against any third party in respect of an act affecting that title holder's enjoyment of an easement which, if committed by the servient title holder, would confer a right of action against the servient title holder.

Abandonment of easements and profits à prendre

16. (1) Where there has been no enjoyment of an easement or profit à *prendre* for a continuous period of 20 years, it is presumed to be abandoned and to cease to have effect.

(2) Subsection (1) does not effect –

(a) any implication or presumption of release or abandonment of easements or profits à *prendre* arising from circumstances other than lack of enjoyment; or

(b) a dominant title holder's right to full enjoyment of an easement or profit à *prendre* merely because it has been enjoyed to less than its full extent for the period there mentioned.

Implied easements

17. (1) Where, by agreement or conveyance –

(a) the owner of, or holder of a tenancy in, land ("the disposing title holder") divides the land into two or more parcels and agrees to dispose or disposes of one or more of them, or

(b) the owner of, or holder of a tenancy in, two or more parcels ("the disposing title holder") agrees to dispose or disposes of one or more of them separately,

each parcel, including any parcel retained by the disposing title holder, becomes, by implication of law, subject to such of the obligations set out in subsection (2) as are necessary to ensure that the title holder or occupier of any other parcel, including any parcel retained by the disposing title holder, will have –

(i) all facilities which were previously available to the disposing title holder in respect of that other parcel and were actually enjoyed by that title holder immediately before the agreement to dispose or disposal (as the case may be), as regularly as their nature permitted and which in all the circumstances it is reasonable should continue to be available; and

(ii) any new facilities which are necessary for the reasonable enjoyment of that other parcel or which in all the circumstances it is reasonable to contemplate as having been intended by the parties to be available in respect of it on completion of the transaction in question.

(2) The obligations referred to in subsection (1) are –

(a) to allow the title holder or occupier of any such other parcel to pass and repass (with or without vehicles or animals) over roads, driveways, paths and other parts of the land;

(b) to allow the provision or passage of water, sewage, drainage, electricity, gas, telephone, radio, television and other services through or by means of pipes, wires, cables or other installations laid or to be laid in, on or over land and used or to be used in connection with enjoyment of any such other parcel of land; and to allow the title holder or occupier

of any other parcel personally or by servants or agents, or the servants or agents of any person with a statutory duty to effect repairs, to enter land in, on or over which the service passes, on giving reasonable notice, and to effect any necessary repairs to the pipes, wires, cables or other installations relating to the service to that other parcel, without doing any unnecessary damage to any property;

(c) to allow the title holder or occupier of any such other parcel to enter on or pass through the parcel for the purpose of exercising any right of pasturage, working minerals, cutting trees, hunting or fishing, or other similar right, vested in that person;

(d) to allow the title holder or occupier of any such other parcel to make use of any other facility capable of forming the subject matter of an easement which conduces to the reasonable enjoyment of that person's land; and

(e) where contiguous buildings are, or are to be, erected on contiguous parcels, not to withdraw the support or shelter which one building affords the other.

(3) A person effecting repairs under subsection (2)(b) may (subject to any statutory or other obligation imposed on any person to effect such repairs) recover a contribution from all title holders of other parcels for whose benefit the installation exists for the reasonable cost of the repairs and of making good any damage necessarily caused in connection with the repairs.

(4) The obligations implied under this section are easements and as such are enforceable by or against any title holder or occupier of the land to which they relate.

(5) All ancillary rights and obligations necessary to make easements effective apply in respect of any easement implied under this section.

(6) This section –

(a) takes effect subject to the terms of the disposition; and

(b) applies only to any agreement or disposition made on or after the appointed day.

(7) In this section –

(a) “title holder” includes the title holder of a legal or equitable interest in land or a parcel of land; or

(b) “occupier” means a lawful occupier.

(8) This section replaces the rule known as the Rule in *Wheeldon v Burrows* but does not otherwise affect –

(a) easements arising by implication as easements of necessity or in order to give effect to the common intention of the parties to a disposition; or

(b) the operation of the doctrine of non-derogation from grant.

CHAPTER 2

RIGHTS OF RESIDENCE

Rights in unregistered land

18. (1) Subject to subsection (2), where –

(a) a right of residence in or on any unregistered land, whether a general right of residence in or on that land or an exclusive right of residence in or on part of that land, or

(b) a right to use a specified part of that land in conjunction with a right of residence referred to in paragraph (a),

is granted by deed or by will, such right is to be deemed to be personal to the person beneficially entitled thereto and the grant does not confer any title in relation to the land upon such person which may be disposed of.

(2) Notwithstanding the personal nature of such a person's right of residence, it is enforceable against the owner of, or holder of any interest in, the land and, subject to subsection (3), that owner's or holder's successors in title.

(3) A right of residence is not enforceable against a successor in title unless it was registered in the Registry of Deeds before that person became a successor in title.

(4) Regulations may be made under section 19 of the Registration of Deeds Act (Northern Ireland) 1970 (c. 25) prescribing –

(a) the documents to be lodged in the Registry of Deeds for or in connection with registration of a right of residence;

(b) the form and contents of such documents and the number of copies to be furnished to the registrar; and

(c) the manner in which such documents are to be registered.

CHAPTER 3

PARTY STRUCTURES

Rights of building title holder

19. (1) Subject to subsection (2) and sections 20 to 23, a building title holder may carry out works to a party structure for the purpose of –

(a) compliance with any statutory provision or any notice or order under such a provision;

(b) carrying out development which is exempted development or development for which planning permission has been obtained or compliance with any condition attached to such permission;

(c) preservation of the party structure or of any building or unbuilt-on land of which it forms a part, including compliance with any obligation to repair or maintain such a structure or to carry out building works; or

(d) carrying out any other works which –

(i) will not cause substantial damage to the adjoining land or inconvenience to the adjoining title holder; or

(ii) if they may or will cause such damage or inconvenience, it is nevertheless reasonable to carry them out.

(2) Subject to subsection (3), in exercising any right under subsection (1) the building title holder shall –

(a) pay all the costs of the works (including any relating to certification of a party structure notice under section 20, nomination of the nominated surveyor under section 22 and consultation with the nominated surveyor by any adjoining title holder);

(b) make good all damage caused to any adjoining land (including internal furnishings and decorations) as a consequence of the works, or reimburse any adjoining title holder the reasonable costs of such making good; and

(c) pay any adjoining title holder reasonable compensation for any inconvenience caused by the works or, where it is not practical or economic to carry out remedial works, for any diminution in the value of any adjoining land which is a consequence of the works.

(3) The building title holder may –

(a) claim from any adjoining title holder as a contribution to the costs of the works;

(b) claim from any adjoining title holder as a contribution to, or deduct from any reimbursement of, the costs of making good such damage under subsection (2)(b), or

(c) deduct from compensation under subsection (2)(c),

such sum as will take into account the proportionate use or enjoyment of the party structure which any adjoining title holder makes or, it is reasonable to assume, is likely to make and any responsibility any adjoining title holder has for a defect or want of repair of the party structure.

(4) If –

(a) a building title holder fails within a reasonable time to –

(i) make good damage under subsection (2)(b), any adjoining title holder may apply to the court for an order requiring the damage to be made good and on such application the court may make such order as it thinks fit; or

(ii) reimburse costs under subsection (2)(b) or pay compensation under subsection (2)(c) any adjoining title holder may recover

such costs or compensation as a simple contract debt in a court of competent jurisdiction; and

(b) an adjoining title holder fails to meet a claim to a contribution under subsection (3)(a) or (b), the building title holder may recover such contribution as a simple contract debt in a court of competent jurisdiction.

(5) Nothing in this section affects any other right to carry out works on land under any agreement or the general law.

Party structure notices

20. (1) Before exercising any right under section 19 a building title holder shall serve on any adjoining title holder a notice in the prescribed form (in this Chapter referred to as a “party structure notice”) stating -

(a) the name and address of the building title holder and such other method of communication as may be specified in the party structure notice;

(b) in accordance with subsection (2) the nature and particulars of the proposed works;

(c) the date on which it is proposed that the works will begin;

(d) where applicable, the name and address of the nominated surveyor who has certified the party structure notice in accordance with subsection (3) and such other method of communication as may be specified in the party structure notice; and

(e) the right of any adjoining title holder to consult the nominated surveyor in relation to the proposed works.

(2) A party structure notice shall –

(a) contain a detailed description of the proposed works, including such maps and plans as are necessary to explain the works and such other information as may be prescribed according to the nature of the proposed works;

(b) specify the timescale for carrying out and completion of the works, including making good any damage to the adjoining land;

(c) specify the anticipated impact (if any) of the proposed works on the adjoining land and adjoining title holder;

(d) specify what provision (if any) will be made for making good damage or reimbursing costs in accordance with section 19(2)(b) and paying compensation in accordance with section 19(2)(c);

(e) specify what (if any) contribution will be claimed, or deduction made, under section 19(3); and

(f) contain such other information or particulars as may be prescribed.

(3) Except in the case of works coming within paragraph (d) of the definition of “works” in section 24, the contents of a party structure notice shall be certified as accurate and appropriate in relation to the proposed works by a nominated surveyor.

(4) Before certification of a party structure notice, the nominated surveyor shall serve on any adjoining title holder a notice in the prescribed form (in this Chapter referred to as a “warning notice”) –

(a) informing the adjoining title holder of the proposed works and the likelihood of certification of a party structure notice in relation to those works; and

(b) providing the adjoining title holder with the opportunity to make representations within the time specified in the warning notice with respect to those works or certification of a party structure notice.

(5) A party structure notice shall –

(a) be served at least two months before the date on which the proposed works are specified to begin;

(b) cease to have effect if the works to which it relates –

(i) have not begun within the period of twelve months beginning with the day on which the notice is served (or such later date as may be agreed by the building title holder and any adjoining title holders or determined by the Lands Tribunal under section 23); and

(ii) it is not prosecuted with due diligence.

(6) Nothing in this section –

(a) prevents a building title holder from exercising with the consent in writing of the adjoining title holder any right conferred by section 19 without the need to comply with this Chapter; or

(b) prevents a building title holder from serving a new party structure notice in relation to the same or similar works after a previous notice has ceased to have effect;

(c) requires a building title holder to serve any party structure notice before complying with any notice served under any statutory provision relating to dangerous or neglected structures; or

(d) prevents an adjoining title holder served with a warning or a party structure notice from consulting or obtaining advice from a surveyor other than the nominated surveyor or other professional advice in relation to the proposed works or such notices.

(7) An adjoining title holder who avails of the right referred to in subsection (6)(d) shall pay all the costs of such consultation or advice.

Counter notices

- 21.** (1) Any adjoining title holder served with a party structure notice under section 20 may serve a notice in the prescribed form (in this Chapter referred to as a “counter notice”) either -
- (a) consenting to the works specified in the party structure notice without any conditions;
 - (b) consenting to such works but subject to conditions specified in the counter notice; or
 - (c) refusing to consent to such works.
- (2) If any such adjoining title holder fails to serve a counter notice within one month (or such longer period as may be agreed between the building title holder and the adjoining title holder) of the party structure notice being served consent under section (1)(a) is deemed to have been given.
- (3) Where the counter notice specifies conditions which the building title holder is unable or unwilling to meet or refuses consent to the works, and the respective title holders do not come to an agreement otherwise, a dispute is deemed to arise which may be determined by the Lands Tribunal in accordance with section 23.
- (4) In this section “conditions” includes requiring the building title holder to give an indemnity or security for damage and costs caused by or arising from the proposed works or likely so to be caused or to arise.

Nominated surveyor

- 22.** (1) For the purposes of section 20(3) the nominated surveyor is the person nominated, on the application in writing of the building title holder, by the Chairman of the Royal Institution of Chartered Surveyors Northern Ireland (in this section referred to as “the Institution”) or other person temporarily performing the functions of that office (in this section referred to as “the Chairman”).
- (2) The Chairman shall select the nominee from the panel of surveyors, with the prescribed expertise and qualifications, established and maintained, as may be prescribed, by the Institution in consultation with the Department of the Environment and such other bodies as may be prescribed.
- (3) If the nominated surveyor –
- (a) refuses to perform functions under this Chapter,
 - (b) neglects to act for a period of ten days following a request served by the building title holder or, after consultation, by the adjoining title holder,
 - (c) dies before the completion of functions under this Chapter, or
 - (d) becomes or is deemed by the Chairman incapable of performing functions under this Chapter,

the Chairman shall appoint a replacement nominated surveyor to complete or recommence, as the Chairman specifies, performance of functions under this Chapter.

Lands tribunal

- 23.** (1) On the application of the building title holder or any adjoining title holder, or both, the Lands Tribunal may determine a dispute which has arisen under this Chapter.
- (2) On such an application the Lands Tribunal may determine –
- (a) the right to carry out any works;
 - (b) the time and manner of carrying out any works;
 - (c) the amount of any contribution payable under section 19(3); and
 - (d) any other matter arising out of or incidental to the dispute.
- (3) The Lands Tribunal may postpone making a determination on any application for such period as it thinks fit in order to facilitate mediation between the parties or other alternative resolution of the dispute.
- (4) Any period appointed by the determination for carrying out any works shall not, unless agreed between the parties to the dispute, begin to run until after expiration of the period prescribed by this Chapter for service of the party structure notice in respect of which the dispute is deemed to have arisen.
- (5) An award shall not –
- (a) authorise any permanent interference with an easement of light or other easement in or relating to a party structure; or
 - (b) prejudicially affect any right of any person to preserve or restore any right or thing in or connected with a party structure in case of it being pulled down or rebuilt.

Interpretation of Chapter 3

- 24.** In this Chapter, unless the context otherwise requires –
- “adjoining” includes adjacent;
- “adjoining land” means the building or unbuilt-on land owned by an adjoining title holder;
- “adjoining title holder” means the owner or holder of a tenancy for the time being of a building or unbuilt-on land adjoining that of the building title holder but does not include a tenant unless at least one year remains unexpired of the term of the tenancy under which the tenant occupies the building or unbuilt-on land;
- “building” includes part of a building;

“building title holder” means the owner or holder of a tenancy for the time being of a building or unbuilt-on land who wishes to carry out works to a party structure provided in the case of a tenancy, the tenant is entitled to carry out such works;

“nominated surveyor” means a surveyor nominated in accordance with section 22;

“party structure” means any arch, ceiling, ditch, fence, floor, hedge, partition, shrub, tree, wall or other structure which horizontally, vertically or in any other way –

- (a) divides adjoining and separately owned buildings, or

- (b) is situated alongside, astride, at or on or so close to the boundary line between adjoining and separately owned buildings or between such buildings and unbuilt-on lands that it is impossible or not reasonably practical to carry out works to the structure without access to the adjoining building or unbuilt-on land,

and includes any such structure which is –

- (i) situated entirely in or on one of the adjoining buildings or unbuilt-on lands, or

- (ii) straddles the boundary line between adjoining buildings or between such buildings and unbuilt-on lands and is either held concurrently by the respective title holders or subject to some division of ownership between them or occupied by tenants of such owners;

“works” include –

- (a) carrying out works of adjustment, alteration, cutting into or away, decoration, demolition, excavation, extending, improvement, lowering, maintenance, raising, rebuilding, renewal, repair, replacement, strengthening, taking down, thickening or underpinning;

- (b) building, erecting, extending, repairing, replacing or strengthening –

- (i) buttresses, footings, foundations or projections in, on, over or under land or buildings; or

- (ii) flashings or other weather proofing of buildings or structures;

- (c) erection of scaffolding and other equipment and creation of a safety exclusion zone necessary to carry out works;

- (d) cutting, treating or replacing any hedge, tree or shrub;

- (e) clearing or filling in ditches;

- (f) ascertaining the course of cables, drains, pipes, sewers, wires or other conduits and clearing, renewing, repairing or replacing them; and

(g) carrying out inspections, drawing up plans and performing other tasks requisite for, incidental to or consequential on any works falling within paragraphs (a) to (f).

PART 3

FUTURE INTERESTS

CHAPTER 1

OPERATION OF FUTURE INTERESTS

Equitable interests only

- 25.** (1) Subject to subsection (2), all future interests in land, whether vested or contingent, exist in equity only.
- (2) Subsection (1) does not apply to any legal interest specified in section 5(1).

Abolition of rules

- 26.** The following rules are abolished –
- (a) the rules known as the common law contingent remainder rules; and
 - (b) the rule against accumulations to the extent that it applied to Northern Ireland.

CHAPTER 2

RULE AGAINST PERPETUITIES

Application of the rule

- 27.** (1) The rule against perpetuities applies (and applies only) as provided by this section.
- (2) If an instrument limits property in trust so as to create successive interests the rule applies to each of the interests.
- (3) If an instrument limits property in trust so as to create an interest which is subject to a condition precedent and which is not one of successive interests, the rule applies to the interest.
- (4) If an instrument which is a will limits personal property so as to create successive interests under the doctrine of executory bequests, the rule applies to each of the interests.
- (5) If an instrument creates a power of appointment the rule applies to the power.
- (6) This section has effect subject to the exceptions made by section 28 and to any exceptions made under section 29.

Exceptions to rule's application

- 28.** (1) This section contains exceptions to the application of the rule against perpetuities.
- (2) The rule does not apply to an interest created so as to vest in a charity on the occurrence of an event if immediately before the occurrence an interest in the property concerned is vested in another charity.
- (3) The rule does not apply to a right exercisable by a charity on the occurrence of an event if immediately before the occurrence an interest in the property concerned is vested in another charity.
- (4) The rule does not apply to an interest or right arising under a relevant pension scheme.
- (5) The exception in subsection (4) does not apply if the interest or right arises under –
- (a) an instrument nominating benefits under the scheme; or
 - (b) an instrument made in the exercise of a power of advancement arising under the scheme.

Power to specify exceptions

- 29.** (1) The Department may by Order provide that the rule against perpetuities is not to apply –
- (a) in cases of a specified description; or
 - (b) if specified conditions are fulfilled.
- (2) Different descriptions and conditions may be specified for different purposes.

Abolition of existing exceptions

- 30.** These provisions cease to have effect –
- (a) section 9 of the Perpetuities Act (Northern Ireland) 1966 (c. 2) (declaration that rule does not apply to certain cases);
 - (b) section 163 of the Pension Schemes Act 1993 (c. 48) and section 159 of the Pension Schemes (Northern Ireland) Act 1993 (c. 49) (rule not to apply to trusts and dispositions concerning certain pension schemes).

Perpetuity period

- 31.** (1) The perpetuity period is 125 years (and no other period).
- (2) Subsection (1) applies whether or not the instrument referred to in section 27(2) to (5) specifies a perpetuity period; and a specification of a perpetuity period in that instrument is ineffective.

Start of perpetuity period

- 32.** (1) The perpetuity period starts when the instrument referred to in section 27(2) to (5) takes effect; but this is subject to subsections (2) and (3).
- (2) If section 27(2) or (3) applies and the instrument is made in the exercise of a special power of appointment the perpetuity period starts when the instrument creating the power takes effect; but this is subject to subsection (3).
- (3) If section 27(2) or (3) applies and –
- (a) the instrument nominates benefits under a relevant pension scheme, or
 - (b) the instrument is made in the exercise of a power of advancement arising under a relevant pension scheme,
- the perpetuity period starts when the member concerned became a member of the scheme.
- (4) The member concerned is the member in respect of whose interest in the scheme the instrument is made.

Wait and see rule

- 33.** (1) Subsection (2) applies if (apart from this section and section 34) an interest would be void on the ground that it might not become vested until too remote a time.
- (2) In such a case –
- (a) until such time (if any) as it becomes established that the vesting must occur (if at all) after the end of the perpetuity period the interest must be treated as if it were not subject to the rule against perpetuities; and
 - (b) if it becomes so established, that does not affect the validity of anything previously done (whether by way of advancement, application of intermediate income or otherwise) in relation to the interest.
- (3) Subsection (4) applies if (apart from this section) a special power of appointment would be void on the ground that it might be exercised at too remote a time.
- (4) In such a case –
- (a) the power must be treated as regards any exercise of it within the perpetuity period as if it were not subject to the rule against perpetuities; and
 - (b) the power must be treated as void for remoteness only if and so far as it is not fully exercised within the perpetuity period.
- (5) Subsection (6) applies if (apart from this section) a general power of appointment would be void on the ground that it might not become exercisable until too remote a time.

(6) Until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period, it must be treated as if it were not subject to the rule against perpetuities.

Exclusion of class members to avoid remoteness

34. (1) This section applies if –

(a) it is apparent at the time an instrument takes effect or becomes apparent at a later time that (apart from this section) the inclusion of certain persons as members of a class would cause an interest to be treated as void for remoteness; and

(b) those persons are potential members of the class or unborn persons who at birth would become members or potential members of the class.

(2) From the time it is or becomes so apparent those persons must be treated for all the purposes of the instrument as excluded from the class unless their exclusion would exhaust the class.

(3) If this section applies in relation to an interest to which section 33 applies, this section does not affect the validity of anything previously done (whether by way of advancement, application of intermediate income or otherwise) in relation to the interest.

(4) For the purposes of this section –

(a) a person is a member of a class if in that person's case all the conditions identifying a member of the class are satisfied; and

(b) a person is a potential member of a class if in that person's case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

Saving and acceleration of expectant interests

35. (1) An interest is not void for remoteness by reason only that it is ulterior to and dependent on an interest which is so void.

(2) The vesting of an interest is not prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness.

Powers of appointment

36. (1) Subsection (2) applies to a power of appointment exercisable otherwise than by will (whether or not it is also exercisable by will).

(2) For the purpose of the rule against perpetuities the power is a special power unless –

(a) the instrument creating it expresses it to be exercisable by one person only; and

(b) at all times during its currency when that person is of full age and capacity it could be exercised by that person so as immediately to transfer to that person the whole of the interest governed by the power

without the consent of any other person or compliance with any other condition (ignoring a formal condition relating only to the mode of exercise of power).

(3) Subsection (4) applies to a power of appointment exercisable by will (whether or not it is also exercisable otherwise than by will).

(4) For the purposes of the rule against perpetuities the power is a special power unless –

(a) the instrument creating it expresses it to be exercisable by one person only; and

(b) that person could exercise it so as to transfer to that person's personal representatives the whole of the interest to which it relates.

(5) Subsection (6) applies to a power of appointment exercisable by will or otherwise.

(6) If for the purposes of the rule against perpetuities the power would be a special power under one but not both of subsections (2) and (4), for the purposes of the rule it is a special power.

Pre-commencement instruments: period difficult to ascertain

37. (1) If –

(a) an instrument specifies for the purposes of property limited in trust a perpetuity period by reference to the lives of persons in being when the instrument takes effect,

(b) the trustees believe that it is difficult or not reasonably practicable for them to ascertain whether the lives have ended and therefore whether the perpetuity period has ended, and

(c) they execute a deed stating that they so believe and that subsection (2) is to apply to the instrument,

that subsection applies to the instrument.

(2) If this subsection applies to an instrument –

(a) the instrument has effect as if it specified a perpetuity period of 100 years (and no other period);

(b) the rule against perpetuities has effect as if the only perpetuity period applicable to the instrument were 100 years;

(c) sections 32 to 36 of this Act are to be treated as if they applied (and always applied) in relation to the instrument; and

(d) sections 1 to 14 of the Perpetuities Act (Northern Ireland) 1966 (c. 2) are to be treated as if they did not apply (and never applied) in relation to the instrument.

(3) A deed executed under this section cannot be revoked.

Application of this Act

- 38.** (1) Sections 27, 28 and 30 to 36 apply in relation to an instrument taking effect on or after the appointed day, except that –
- (a) those sections do not apply in relation to a will executed before that day; and
 - (b) those sections apply in relation to an instrument made in the exercise of a special power of appointment only if the instrument creating the power takes effect on or after that day.
- (2) Section 37 applies (except as provided by subsection (3)) in relation to –
- (a) a will executed before the appointed day (whether or not it takes effect before that day); and
 - (b) an instrument, other than a will, taking effect before that day.
- (3) Section 37 does not apply if –
- (a) the terms of the trust were exhausted before the appointed day; or
 - (b) before that day the property became held on trust for charitable purposes by way of a final disposition of the property.

Limitation of 1966 Act to existing instruments

- 39.** In section 16 of the Perpetuities Act (Northern Ireland) 1966 (c. 2) the following subsection is inserted after subsection (5) (which makes provision as to the instruments to which the Act applies) –
- “(5A) The foregoing sections of this Act do not apply in relation to an instrument taking effect on or after the day appointed under section 120 of the Land Law Reform Act (Northern Ireland) 201[] (commencement of Part 3 Chapter 2) but this does not prevent those sections applying in relation to an instrument so taking effect if –
- (a) it is a will executed before that day; or
 - (b) it is an instrument made in the exercise of a special power of appointment, and the instrument creating the power took effect before that day.”

The Crown

- 40.** This Act does not extend the application of the rule against perpetuities in relation to the Crown.

Rule as to duration not affected

- 41.** This Act does not affect the rule of law which limits the duration of non-charitable purpose trusts.

Provision made otherwise than by instrument

- 42.** If provision is made in relation to property otherwise than by an instrument, this Act applies as if the provision were contained in an instrument taking effect on the making of the provision.

Interpretation of Chapter 2

- 43.** (1) For the purposes of this Chapter this section contains provisions relating to the interpretation of these expressions –
- (a) power of appointment, general power of appointment and special power of appointment;
 - (b) relevant pension scheme; and
 - (c) taking effect (in relation to a will).
- (2) A power of appointment includes –
- (a) a discretionary power to create a beneficial interest in property without the provision of valuable consideration; and
 - (b) a discretionary power to transfer a beneficial interest in property without the provision of valuable consideration.
- (3) Section 36 applies to interpret references to a general or special power of appointment.
- (4) Each of these is a relevant pension scheme –
- (a) an occupational pension scheme;
 - (b) a personal pension scheme; and
 - (c) a public service pension scheme.
- (5) The expressions in subsection (4)(a) to (c) have the meanings given by sections 1 and 181(1) of the Pension Schemes Act 1993 (c. 48) and sections 1 and 176 of the Pension Schemes (Northern Ireland) Act 1993 (c. 49).
- (6) An instrument which is a will takes effect at the testator's death.

PART 4

TRUSTS OF LAND

Trusts of land

- 44.** (1) Subject to this Part, where land is –
- (a) for the time being limited by an instrument, whenever executed, to persons by way of succession without the interposition of a trust (in this Part referred to as a “strict settlement”),

(b) held, either with or without other property, on a trust whenever it arises and of whatever kind, or

(c) vested, whether before, on or after the appointed day, in a minor,

there is a trust of land for the purposes of this Part.

(2) For the purposes of –

(a) subsection (1)(a), a strict settlement exists where an interest in reversion or remainder is not disposed of and reverts to the settlor or the testator's successors in title, but does not exist where a person is the owner of the land; and

(b) subsection (1)(b), a trust includes an express, implied, resulting, constructive and bare trust and a trust for sale.

(3) Subject to this Part, a trust of land is governed by the general law of trusts.

(4) Conversion of a life estate into an equitable interest only does not affect the liability for waste of the holder of such an equitable interest.

(5) This Part does not apply to land held directly for a charitable purpose and not by way of a remainder.

(6) All instruments and statutory provisions executed, enacted or made before the appointed day referring to –

(a) the Settled Land Acts 1882 to 1890,

(b) a statutory provision included in that collective title, or

(c) any provision in such an Act,

shall be deemed on or after that day to refer to this Act or, as may be appropriate, to the equivalent or substituted provision of this Act.

(7) All instruments and statutory provisions executed, enacted or made before the appointed day referring to –

(a) a settlement of land,

(b) settled land, or

(c) any equivalent expression,

shall be deemed on or after that day to refer to a trust of land or, as appropriate, to the instrument creating the trust of land and any reference to trustees of the settlement or for the purposes of the Settled Land Acts 1882 to 1890 shall be construed accordingly.

(8) All instruments and statutory provisions executed, enacted or made before the appointed day referring to –

(a) a limited estate or limited owner,

- (b) capital money arising in respect of settled land, or
- (c) any equivalent expression,

shall be deemed on or after that day to refer to the interest of a beneficiary under a trust of land or, as may be appropriate, to money held by trustees of land.

Trustees of land

45. (1) The following persons are the trustees of a trust of land –

(a) in the case of a strict settlement where it -

- (i) exists on the appointed day, the tenant for life within the meaning of the Settled Land Act 1882 (c. 38) together with any trustees of the settlement for the purposes of that Act;
- (ii) is purported to be created on or after the appointed day, the persons who would fall within paragraph (b) if the instrument creating it were deemed to be an instrument creating a trust of land;

(b) in the case of a trust of land created expressly –

- (i) any trustee nominated by the trust instrument, but, if there is no such person, then,
- (ii) any person on whom the trust instrument confers a present or future power of sale of the land, or power of consent to or approval of the exercise of such a power of sale, but, if there is no such person, then,
- (iii) any person who, under either the trust instrument or the general law of trusts, has power to appoint a trustee of the land, but, if there is no such person, then,
- (iv) the settlor or, in the case of a trust created by will, the testator's personal representative or representatives;

(c) in the case of land vested in a minor before appointed day or purporting so to vest after such day, the persons who would fall within paragraph (b) if the instrument vesting the land were deemed to be an instrument creating a trust of land; and

(d) in the case of land the subject of an implied, resulting, constructive or bare trust, the person who is the owner of the land or holder of the legal interest subject to such a trust.

(2) For the purposes of –

(a) subsection (1)(a)(ii) and (1)(c), the references in subsection (1)(b) to “trustee” and “trustee of the land” include a trustee of the settlement; and

(b) subsection (1)(b)(iii), a power to appoint a trustee includes a power to appoint where no previous appointment has been made.

(3) Nothing in this section affects the right of any person to obtain an order of the court appointing a trustee of land or vesting land in a person as trustee.

Powers of trustees of land

46. Subject to –

(a) the duties of a trustee, and

(b) any restrictions imposed by any statutory provision (including this Act) or the general law of trusts or by any instrument or court order relating to the land,

a trustee of land has the full power of the owner or other title holder to convey or otherwise deal with it.

Overreaching of equitable interests

47. (1) Subject to subsection (3), a conveyance of land or of a legal interest in land to a purchaser by the person or persons specified in subsection (2) overreaches any equitable interest in the land so that it ceases to affect that land or legal interest, whether or not the purchaser has notice of the equitable interest.

(2) For the purposes of subsection (1), the “person or persons specified” –

(a) shall be at least two trustees or a trust corporation where the trust land comprises –

(i) a strict settlement;

(ii) a trust, including a trust for sale, of land held for persons by way of succession; or

(iii) land vested in or held on trust for a minor;

(b) may be single trustee or owner or other title holder of the land in the case of any other trust of land.

(3) Subsection (1) does not apply to –

(a) any conveyance made for fraudulent purposes of which the purchaser has actual knowledge at the date of the conveyance or to which the purchaser is a party; or

(b) any equitable interest –

(i) to which the conveyance is expressly made subject;

(ii) protected by deposit of documents of title relating to the land or legal interest; or

(iii) in the case of a trust coming within subsection (2)(b), protected by registration prior to the date of the conveyance or taking effect as a burden coming within Schedule 5 Part I paragraph 15 of the Land Registration Act (Northern Ireland)

1970 (c. 18) (or, in the case of unregistered land, would take effect as such a burden if the land were registered land).

(4) For the purposes of subsection (3)(b)(iii) –

(a) “registration” means, as appropriate, registration of a document referring to the equitable interest in the Registry of Deeds or lodgement of a caution under section 66 of the Land Registration Act (Northern Ireland) 1970 (c. 18);

(b) an equitable interest does not take effect as a burden if –

(i) it belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the conveyance, and

(ii) it is an interest of which the purchaser does not have actual knowledge at that time,

and accordingly Schedule 5 Part I paragraph 15 of the Land Registration Act (Northern Ireland) 1970 (c. 18) shall be amended as set out in Part I of Schedule 2 of this Act.

(5) Where an equitable interest is overreached under this section it attaches to the proceeds (if any) (including land or other property exchanged for the land or interest conveyed) arising from the conveyance and effect shall be given to it accordingly.

(6) Nothing in this section affects the overreaching of interests on a conveyance by a mortgagee or personal representative or under an order of court.

Resolution of disputes

48. (1) Any person having an interest in a trust of land, or a person acting on behalf of such a person, may apply to the court in a summary manner for an order to resolve a dispute between the –

(a) trustees themselves,

(b) beneficiaries themselves,

(c) trustees and beneficiaries, or

(d) trustees or beneficiaries and other persons interested,

in relation to any matter concerning the –

(i) performance of their functions by the trustees;

(ii) nature or extent of any beneficial or other interests in the land; or

(iii) other operation of the trust.

(2) Subject to subsection (3), in determining an application under subsection (1) the court may make whatever order and direct whatever inquiries it thinks fit in the circumstances of the case.

(3) In considering an application under subsection (1)(i) and (iii) the court shall have regard to the interests of the beneficiaries as a whole and, subject to these, to –

- (a) the purposes which the trust of land is intended to achieve;
- (b) the interests of any minor or other beneficiary subject to any incapacity;
- (c) the interests of any secured creditor of any beneficiary; and
- (d) any other matter which the court considers relevant.

(4) In subsection (1), “person having an interest” includes a mortgagee or other secured creditor, the holder of an order charging land (under Article 46 of the Judgments Enforcement (Northern Ireland) Order 1981 (NI 6)) or a trustee.

PART 5

CONCURRENT TITLES

Severance of a joint tenancy

49. (1) Subject to subsection (4), a joint tenant of property intending to sever the joint tenancy at law or in equity shall serve a notice in the prescribed form of such intention on the other joint tenant or each of the other joint tenants.

(2) Upon service of such a notice, severance shall not take effect at law or in equity in relation to any land held in the joint tenancy until –

- (a) in the case of unregistered land, a copy of the notice is registered in the Registry of Deeds as may be prescribed;
- (b) in the case of registered land, a note of service of the notice is entered in the register as may be prescribed;

(3) Subject to subsection (4), no severance of a joint tenancy of property shall take effect at law or in equity as a consequence of a joint tenant acquiring another interest in the property or purporting to convey, or contracting to convey, an interest in the property unless –

- (a) the other joint tenant or each of the other joint tenants of the property gives prior consent in writing to such acquisition, conveyance or contract; or
- (b) a prior notice is served under subsection (1).

(4) Nothing in this section affects the jurisdiction of the court to find that all the joint tenants by mutual agreement or by their conduct have severed the joint tenancy in equity.

(5) Subsections (1) to (3) apply only to severance of a joint tenancy on or after the appointed day.

Commorientes

50. (1) Where immediately prior to the death of two or more joint tenants they held any property as joint tenants and they died in circumstances rendering it uncertain which of them survived the other or others, they shall be deemed to have held the property immediately prior to their deaths as tenants in common in equal shares.

(2) Shares in property deemed under subsection (1) to have been held by persons as tenants in common form part of their respective estates.

(3) This section applies only in respect of deaths occurring on or after the appointed day.

Bodies corporate

51. (1) A body corporate may acquire and hold any property in a joint tenancy in the same manner as if it were an individual.

(2) Where a body corporate and an individual or two or more bodies corporate become entitled to any property in circumstances or by virtue of any instrument which would, if the body or bodies corporate had been an individual or individuals, have created a joint tenancy, they are entitled to the property as joint tenants.

(3) On the dissolution of a body corporate which is a joint tenant of any property, the property devolves on the other surviving joint tenant or joint tenants.

Court orders

52. (1) Any person having an interest in property which is held concurrently with another or others whether at law or in equity may apply to the court for an order under this section.

(2) An order under this section includes –

(a) an order for partition of the property amongst the concurrent title holders;

(b) an order for the taking of an account of incumbrances affecting the property, if any, and the making of inquiries as to the respective priorities of any such incumbrances;

(c) an order for sale of the property and distribution of the proceeds of sale as the court directs;

(d) an order directing that accounting adjustments be made as between the concurrent title holders; and

(e) such other order relating to the property as appears to the court to be just and equitable in the circumstances of the case.

(3) Subject to subsection (4), in dealing with an application for an order under subsection (1) the court may –

- (a) make an order with or without conditions or other requirements attached to it,
- (b) grant a stay or suspension of an order,
- (c) dismiss the application without making any order, or
- (d) combine more than one order under this section,

and may revoke or vary any such conditions, stay or suspension.

(4) Without prejudice to the generality of subsections (2) and (3), in determining what, if any, order to make under this section the court shall have regard to –

- (a) the purposes which the concurrent titles were intended to achieve;
- (b) the interests of any minor or other person subject to any incapacity in relation to the property held concurrently;
- (c) the interests of any secured creditor of any concurrent title holder;
and
- (d) any other matter which the court considers relevant.

(5) In this section –

(a) “person having an interest in property” includes a mortgagee or other secured creditor, the holder of an order charging land (under Article 46 of the Judgments Enforcement (Northern Ireland) Order 1981 (NI 6)) or a trustee;

(b) “accounting adjustments” include –

(i) payment of an occupation rent by a concurrent title holder who has enjoyed, or is continuing to enjoy, occupation of land to the exclusion of any other concurrent title holder;

(ii) compensation to be paid by a concurrent title holder to any other concurrent title holder who has incurred disproportionate expenditure in respect of the property (including its repair or improvement);

(iii) contributions by a concurrent title holder to disproportionate payments made by any other concurrent title holder in respect of the property (including payments in respect of charges, rates, rents, taxes and other outgoings payable in respect of it);

(iv) redistribution of rents and profits received by a concurrent title holder disproportionate to his or her interest in the property;
and

(v) any other adjustment necessary to achieve fairness between the concurrent title holders.

(6) The equitable jurisdiction of the court to make an order for partition of property which is held concurrently whether at law or in equity is replaced by this section.

PART 6

POWERS

Application of Part 6

- 53.** Except where stated otherwise, this Part applies to powers created or arising before, on or after the appointed day.

Execution on non-testamentary powers of appointment

- 54.** (1) Subject to subsection (2), an appointment made by deed on or after the appointed day under a power of appointment is valid provided the instrument making the appointment complies with Article 3 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 (NI 7).
- (2) Subsection (1) does not –
- (a) prevent a donee of a power of appointment from making a valid appointment in some other way expressly authorised by the instrument creating the power; or
 - (b) relieve such a donee from compliance with any direction in the instrument creating the power that –
 - (i) the consent of any person is necessary to a valid appointment; or
 - (ii) an act is to be performed having no relation to the mode of executing and attesting the deed of appointment in order to give validity to any appointment.

Release of powers

- 55.** (1) Subject to subsection (2), a person to whom any power, whether coupled with an interest or not, is given may release or contract not to exercise the power by deed.
- (2) Subsection (1) does not apply to a power in the nature of a trust or other fiduciary power.

Disclaimer of powers

- 56.** (1) A person to whom any power, whether coupled with an interest or not, is given may by deed disclaim the power and, after disclaimer, may not exercise or join in the exercise of the power.
- (2) On such a disclaimer, the power may be exercised by any other person or persons, or the survivor or survivors of any other persons, to whom the power is given, subject to the terms of the instrument creating the power.

Validation of appointments

- 57.** (1) No appointment made in exercise of any power to appoint any property among two or more persons is invalid on the ground that –
- (a) an insubstantial, illusory or nominal share only is appointed to or left unappointed to devolve on any one or more of those persons; or
 - (b) any such person is altogether excluded, whether by way of default of appointment or otherwise.
- (2) This section does not affect any provision in the instrument creating the power which specifies the amount of any share from which any such person is not to be excluded.

PART 7

MORTGAGES

CHAPTER 1

CREATION OF MORTGAGES OF LAND

Legal mortgages of land

- 58.** (1) A legal mortgage of land shall be created only by a charge by deed and such a mortgage shall be expressed to be a charge by way of legal mortgage.
- (2) On or after the appointed day any instrument or transaction effected under an instrument or statutory provision which, but for this section, would convey land by way of legal mortgage otherwise than by a charge by deed operates as if it creates a charge by way of legal mortgage.
- (3) On or after the appointed day any power, whenever created, to create a legal mortgage or lend money on the security of a legal mortgage of land operates as a power to mortgage the land by a charge by way of a legal mortgage.
- (4) This section applies to both unregistered and, subject to section 41 of the Land Registration Act (Northern Ireland) 1970 (c. 18), registered land.
- (5) Nothing in this section affects the creation of equitable mortgages.
- (6) In this Part, unless the context requires otherwise, “mortgage” includes a charge by way of legal mortgage and “mortgagor” and “mortgagee” shall be read accordingly.

Position of mortgagor and mortgagee

- 59.** (1) Subject to this Part, where a legal mortgage of land is created on or after the appointed day –
- (a) the mortgagor has the same powers and rights and the same protection at law and in equity as the mortgagor would have been entitled to, and

(b) the mortgagee has the same obligations, powers and rights as the mortgagee would have had, if the mortgagee's security had been created by a conveyance before that day otherwise than by a charge by way of legal mortgage.

(2) Without prejudice to the generality of subsection (1)(b) and subject to subsection (3), a first mortgagee has the same right to possession of documents of title as such mortgagee would have had if the security had been created by a conveyance otherwise than by a charge by deed before the appointed day.

(3) Notwithstanding any stipulation to the contrary, a mortgagee who retains possession or control of documents of title is, in addition to being subject to the mortgagor's rights under section 60, responsible for their safe custody as if an undertaking for this were given under section 106.

CHAPTER 2

POWERS AND RIGHTS OF MORTGAGOR

Title documents

60. (1) Subject to subsection (2), a mortgagor, as long as the right to redeem exists, may from time to time, at reasonable times, inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the possession or power of the mortgagee.

(2) Rights under subsection (1) are exercisable –

(a) on the request of the mortgagor; and

(b) on payment by the mortgagor of the mortgagee's reasonable costs and expenses in relation to the exercise.

(3) Subsection (1) has effect notwithstanding any stipulation to the contrary.

Right of consolidation

61. (1) A mortgagor seeking to redeem any one mortgage of property is entitled to do so without paying any money due under any separate mortgage made by that mortgagor, or by any person through whom that mortgagor claims, on property other than that comprised in the mortgage which the mortgagor seeks to redeem.

(2) Subsection (1) takes effect subject to the terms of the mortgages or any one of them.

Transfer in lieu of discharge

62. (1) A mortgagor who is entitled to redeem may, subject to compliance with the terms on which the mortgagor would be entitled to require a discharge, require the mortgagee, instead of discharging the mortgage, to assign the mortgage debt and transfer the mortgage to any third person, as the mortgagor directs, and on the mortgagor so directing, the mortgagee is bound to assign and transfer accordingly.

(2) The rights conferred by subsection (1) belong to and may be enforced by each incumbrancer or the mortgagor notwithstanding any intermediate incumbrance, but a requisition of an incumbrancer prevails over a requisition of the mortgagor and, as between incumbrancers, a requisition of a prior incumbrancer prevails over a requisition of a subsequent incumbrancer.

(3) This section –

(a) does not apply in the case of a mortgagee being or having been in possession; and

(b) applies notwithstanding any stipulation to the contrary.

Advances on a joint account

63. (1) Where –

(a) money advanced or owing under a mortgage, or any part of it, is expressed to be advanced by or owing to two or more persons out of money, or as money, belonging to them on a joint account, or

(b) such a mortgage is made to two or more persons jointly and not in shares,

the mortgage debt, or other money or money's worth for the time being due to those persons, shall, as between them and the mortgagor, be deemed to belong to them on a joint account.

(2) The receipt in writing of –

(a) the survivors or last survivor of those persons, or

(b) the personal representative of the last survivor,

is a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of such joint account.

(3) This section takes effect subject to the terms of the mortgage.

(4) In this section “mortgage” includes an obligation for payment of money and a transfer of a mortgage or of such an obligation; and “mortgagor” has a corresponding meaning.

CHAPTER 3

OBLIGATIONS, POWERS AND RIGHTS OF MORTGAGEE

Application of Chapter 3

64. (1) Except where provided otherwise, the provisions of this Chapter apply –

(a) to any legal mortgage created on or after the appointed day;

(b) in relation to mortgaged property, any part of that property; and

(c) subject to the terms of the mortgage.

(2) Notwithstanding any stipulation to the contrary, the powers and rights contained in this Chapter –

(a) vest in the mortgagee, subject to section 41 of the Land Registration Act (Northern Ireland) 1970 (c. 18), as soon as the mortgage is created; and

(b) do not become exercisable unless their exercise is for the purpose of protecting the mortgaged property or realising the mortgagee's security.

Abolition of foreclosure

65. (1) The jurisdiction to make a foreclosure order is abolished.

(2) Subsection (1) does not affect the court's jurisdiction to make an order for sale of mortgaged property.

Taking possession of dwelling-houses

66. (1) Notwithstanding any stipulation to the contrary, where mortgaged land comes within Part IV of the Administration of Justice Act 1970 (c. 31), as amended by section 8 of the Administration of Justice Act 1973 (c. 15), the mortgagee shall take possession of that land only under a court order for possession and those Acts apply accordingly to any application for such an order.

(2) Subsection (1) –

(a) applies to mortgages created before, on or after the appointed day;

(b) takes effect without prejudice to section 67; and

(c) does not affect the application to any mortgage of the Consumer Credit Act 1974 (c. 39) as amended by the Consumer Credit Act 2006 (c. 14); and

(d) does not prevent a mortgagee from accepting a voluntary surrender of possession by the mortgagor without a court order.

Abandoned property

67. (1) Where –

(a) a mortgagee believes on reasonable grounds that the mortgaged property has been abandoned by the mortgagor, and

(b) a sum in respect of interest on the principal sum secured by the mortgage (or a sum partly in respect of interest and partly in respect of principal) has been unpaid for at least four weeks,

the mortgagee may take such reasonable action as is considered necessary to prevent deterioration of, or damage to, the property or entry by trespassers or other unauthorised persons, using such force as is necessary (but no more), and is not accountable for doing so except to the extent (if any) that this action, or any subsequent act or omission by the

mortgagee, prevents or hinders the mortgagor from entering and enjoying the property.

(2) Where –

(a) subsection (1)(a) and (b) apply, and

(b) the mortgagee wishes to obtain possession of the property for the purpose of effecting a sale of it,

the mortgagee may serve on the mortgagor, and on every other person (“the third party”) who to the knowledge or belief of the mortgagee has or may have an interest in the property, a notice in the prescribed form stating –

(i) that the mortgagee believes the property to have been abandoned;

(ii) that the mortgagee is exercising the power under this section to take possession of the property for the purpose of sale; and

(iii) that, accordingly, the mortgagee will take possession of the property after the expiration of the period of eight weeks from the date of service of the notice, unless a notice of objection in the prescribed form is received within that period.

(3) If no notice of objection to the mortgagee’s taking possession of the property is served on the mortgagee by the mortgagor or the third party (if any) within the period mentioned in subsection (2)(iii), the mortgagee may, on the expiration of that period, take possession of the property, using such force as is necessary (but no more).

(4) If within the period mentioned in subsection (2)(iii) the mortgagor or the third party serves on the mortgagee a notice of objection to the mortgagee’s taking possession of the property, the mortgagee’s notice under subsection (2) ceases to have effect; but this provision does not preclude the mortgagee from applying to the court under section 66 or otherwise for an order for possession of the property.

(5) In the application of section 24(2)(c) of the Interpretation Act (Northern Ireland) 1954 (c. 33) to a notice served under this section, the words “with some person apparently over the age of sixteen” are omitted.

(6) This section does not prejudice any provision of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 (NI 6); and for the purpose of subsection (2) a spouse or civil partner who has made payments or a tender under Article 4(3) of that Order is a person who has an interest in the property.

Power of sale

68. (1) Subject to sections 69 to 74, a mortgagee has power, when the mortgage debt has become due, to sell or concur with any other person in selling the mortgaged property in accordance with this section.

(2) Notwithstanding any stipulation to the contrary, a mortgagee shall not exercise the power of sale conferred by this section unless and until –

(a) notice requiring payment of the mortgage debt has been served on the mortgagor, or one of two or more mortgagors, and default has been made in payment of the mortgage debt, or of part thereof, for three months after such service;

(b) some interest under the mortgage, or (in the case of mortgage debt repayable by instalments) some instalment representing partly interest and partly repayment of mortgage debt, is in arrear and unpaid for two months after becoming due; or

(c) there has been a breach of some provision contained in the mortgage deed or in this Part, or in a statutory provision replaced by this Part, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage debt or interest therein.

(3) The power of sale conferred by this section may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage debt.

(4) The mortgagee is not answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this section, of any trust connected therewith or of any power or provision contained in the mortgage deed.

(5) At any time after the power of sale conferred by this section has become exercisable, the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an interest in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover.

Incidental powers

69. Incidental to the power of sale are the powers to –

(a) sell the mortgaged property –

(i) subject to prior charges or not;

(ii) either together or in lots;

(iii) by public auction, tender or private contract; and

(iv) subject to such conditions respecting title, evidence of title, or other matters as the mortgagee or other person selling thinks fit;

(b) rescind any contract for sale and resell;

(c) impose or reserve or make binding by covenant or otherwise, on the sold part of the mortgaged land, or on the unsold part, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, for the purpose of their more beneficial working, or with respect to any other matter; and

(d) sell the mortgaged land, or all or any mines and minerals apart from the surface, with or without –

(i) any easement, right or privilege connected with building or other purposes on the sold part of the mortgaged land or the unsold part;

(ii) an exception or reservation of all or any of the mines and minerals in the mortgaged land and with or without a grant, reservation or imposition of powers of working, wayleaves, rights of way, rights of water and drainage and other powers, easements, rights and privileges for or connected with mining purposes, in relation to or on the sold part of the mortgaged land or the unsold part; and

(iii) covenants by the purchaser to expend money on the land sold.

Obligations on selling

70. (1) In the exercise on or after the appointed day of the power conferred by section 68 or an express power of sale, the mortgagee shall take reasonable care to ensure that the price at which the mortgaged property is sold is the best price that can reasonably be obtained.

(2) Where the court has made an order for possession of the mortgaged property by the mortgagee and the order has been granted on condition that the property is offered for sale, the mortgagee shall sell the property and complete the sale as soon as is reasonably practicable after possession is obtained (the onus of proving that reasonable steps have been taken to this end being on the mortgagee).

(3) Within 28 days from the completion of the sale, the mortgagee shall send by post to the mortgagor, at the mortgagor's last known address, a notice containing the following particulars of the sale –

(a) the date of the mortgage deed under which the power of sale was exercised;

(b) the address of the property sold;

(c) the name and address of the vendor;

(d) the name and address of the purchaser and of any sub-purchaser;

(e) the amount for which the property was sold;

(f) whether the sale was by private treaty or by public auction; and

(g) the date of the completion of the sale.

(4) An agreement is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee from a duty imposed by this section.

(5) The title of the purchaser is not affected by a breach of any duty imposed by this section; but where a person to whom such a duty is owed suffers loss as a result of its breach that person has a remedy in damages against the mortgagee exercising the power of sale.

(6) A mortgagee who fails without reasonable excuse to comply with subsection (3) is guilty of an offence; and, where the mortgagee who has so failed is a friendly society, an industrial or provident society or a credit union, the following persons are also guilty of an offence, namely, every officer of the society or union who is bound by the rules of the society or union to fulfil the duty imposed by subsection (3) or, if there is no such officer, every person having direction of the affairs of the society or union, unless it appears that such person was ignorant of, or attempted to prevent, the default.

(7) A person or society guilty of an offence under subsection (6) is liable on summary conviction to a fine not exceeding level 2 on the standard scale, and to such additional fine as may be imposed for each week during which the offence continues.

(8) Nothing in this section affects the operation of any rule of law relating to the duty of a mortgagee to account to the mortgagor.

(9) In subsection (3) "mortgagor" includes a person last known to the mortgagee to be the mortgagor, but does not include a person to whom, without the knowledge of the mortgagee, any of the rights or liabilities of the mortgagor have passed.

Conveyance on sale

71. (1) A mortgagee exercising the power of sale conferred by section 68 has power to convey the mortgaged property in accordance with subsection (2)

—

(a) freed from all interests and rights in respect of which the mortgage has priority; and

(b) subject to all interests and rights which have priority to the mortgage.

(2) Subject to subsections (3)(b) and (4), the conveyance —

(a) vests the land or other interest which has been mortgaged in the purchaser;

(b) extinguishes the mortgage, but without prejudice to any personal liability of the mortgagor not discharged out of the proceeds of sale; and

(c) vests any fixtures or personal property included in the mortgage and the sale in the purchaser.

(3) This section —

(a) applies to a sale by a sub-mortgagee so as to enable the sub-mortgagee to convey the head-mortgagor's property in the same manner as the mortgagee; and

(b) does not apply to a mortgage of part only of a tenancy unless any rent which is reserved and any tenant's covenants have been apportioned as regards the property mortgaged.

(4) Where the mortgaged property comprises registered land, the conveyance is subject to section 34 of the Land Registration Act (Northern Ireland) 1970 (c. 18).

Protection of purchaser

72. (1) Where a conveyance is made in professed exercise of the power of sale conferred by section 68, the title of the purchaser is not impeachable on the ground that –

- (a) no case had arisen to authorise the sale,
- (b) due notice had not been given, or
- (c) the power was otherwise improperly exercised,

and a purchaser is not, either before or on conveyance, required to see or inquire whether the power is properly exercised.

(2) Any person who suffers loss as a consequence of an unauthorised or improper exercise of the power of sale has a remedy in damages against the person exercising the power.

Mortgagee's receipts

73. (1) Subject to subsection (2), the receipt in writing of a mortgagee is a sufficient discharge for any money arising under the power of sale conferred by section 68, or for any money or securities comprised in the mortgage, or arising under it, and a person paying or transferring the same to the mortgagee is not required to inquire whether any money remains due under the mortgage.

(2) Subsection (1) does not apply where the purchaser has actual knowledge of an impropriety or irregularity in the exercise of the power of sale or knowingly participates in such an exercise.

(3) Subject to section 74(5), money received by a mortgagee under the mortgage or from the proceeds of securities comprised in it shall be applied as section 74 requires as regards money arising from a sale under the power of sale conferred by section 68.

Application of proceeds of sale

74. (1) Money received by the mortgagee which arises from the sale of mortgaged property shall be applied in the following order –

- (a) in discharge of prior incumbrances, if any, to which the sale was not made subject or payment into court of a sum to meet any such prior incumbrances;
- (b) in payment of all charges, costs and expenses properly incurred by the mortgagee as incident to the sale or any attempted sale or otherwise; and
- (c) in discharge of the mortgage debt, interest and costs, and other money, if any, due under the mortgage.

(2) Any residue of the money so received shall be held on trust by the mortgagee to be paid to the person who would, but for the sale, be the mortgagee secured on the property sold next in priority after the mortgagee selling, or is otherwise authorised to give receipts for the money so received, or, if there is no such person, the mortgagor, or the Crown.

(3) Where, in accordance with subsection (2), the mortgagee gives effect to the trust of the residue by paying it to a subsequent mortgagee, the latter shall apply it in accordance with subsections (1)(c) and (2) and similar obligations attach to each subsequent mortgagee who receives any of the residue.

(4) Any mortgagee who so gives effect to the trust is discharged from any further obligation with respect to the residue.

(5) For the purposes of the application of subsection (1)(b) to money received under section 73(3), charges, costs and expenses payable include those properly incurred in recovering and receiving the money or securities, and in conversion of securities into money, instead of those incident to the sale.

Realisation of equitable mortgages

75. (1) The mortgagee under an equitable mortgage of land or an interest in land may apply to the court for an order for the sale of the land or interest, and, on such application, the court may make such an order on such terms and conditions as it thinks fit.

(2) Without prejudice to any other power of the court, where such an order for sale is made by the court, the court may –

(a) in favour of a purchaser, make a vesting order conveying the land or interest;

(b) appoint a person to convey; or

(c) confer on the mortgagee the same power to carry out the sale, and execute a conveyance in the name of the owner of the land or holder of the interest to be vested in the purchaser, as the mortgagee would have had under section 68 if the mortgage had been a legal mortgage made by a deed not excluding or restricting the power of sale, and the power of sale had become exercisable.

(3) Subsections (1) and (2) do not prejudice any mortgage or other incumbrance or trust having priority to the equitable mortgage unless the person entitled to priority over the equitable mortgage consents to the sale.

(4) This section applies to equitable mortgages made or arising before, on or after the appointed day.

Appointment of a receiver

76. (1) Where the power of sale has become exercisable under section 68(2) the mortgagee or any other person for the time being entitled to receive, and give a discharge for, the mortgage debt, may appoint, by writing, such person as the mortgagee or that other person thinks fit to be a receiver of –

- (a) the income of the mortgaged property; or
 - (b) if the mortgaged property comprises an interest in income, or a rentcharge or other annual or other periodical sum, that property.
- (2) A receiver appointed under subsection (1) is the agent of the mortgagor, who is solely responsible for the receiver's acts or defaults, unless the mortgage provides otherwise.
- (3) The receiver may –
- (a) demand and recover all the income to which the appointment relates, by action or otherwise, in the name either of the mortgagor or mortgagee, to the full extent of the land or interest which the mortgagor could dispose of;
 - (b) give effectual receipts accordingly for such income; and
 - (c) exercise any powers delegated by the mortgagee or other person to the receiver.
- (4) Any power delegated to the receiver shall be exercised in accordance with this Chapter.
- (5) A person paying money to the receiver is not required to inquire whether the receiver is authorised to act.
- (6) The receiver may be removed, and a new receiver may be appointed, by the mortgagee or the other person in writing.
- (7) The receiver may retain out of any money received, for remuneration and in satisfaction of all costs incurred as receiver, a commission at the rate specified in the appointment or, if no such rate is specified, at the prescribed rate.
- (8) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured and keep insured against loss or damage by fire, flood, storm, tempest or other perils commonly covered by a policy of comprehensive insurance, out of the money received, any property comprised in the mortgage, whether affixed to land or not, which is of an insurable nature.

Application of money received

- 77.** (1) Subject to section 78(5), the receiver shall apply all money received in the following order –
- (a) in discharge of all rates, rents, taxes and other outgoings affecting the mortgaged property;
 - (b) in discharge of all annual sums or other payments, and the interest on all principal sums, which have priority to the mortgage under which the receiver is appointed;
 - (c) in payment of the receiver's commission;

(d) in payment of premiums on insurance, if any, payable under this Chapter or the mortgage;

(e) in defraying the cost of repairs as directed in writing by the mortgagee;

(f) in payment of interest accruing due in respect of any principal sum due under the mortgage; and

(g) in or towards discharge of the principal sum, if so directed in writing by the mortgagee.

(2) The residue (if any) of any money so received after making the payments specified in subsection (1) shall be paid by the receiver to the person who, but for the possession of the receiver, would have been entitled to receive that money or who is otherwise entitled to the mortgaged property.

Insurance

78. (1) A mortgagee may insure and keep insured any building, effects or other property of an insurable nature, whether affixed to the land or not, which forms part of the mortgage property.

(2) The insurance shall be for the full reinstatement cost of repairing any loss or damage arising from fire, flood, storm, tempest or other perils commonly covered by a policy of comprehensive insurance.

(3) The premiums paid for any such insurance are a charge on the mortgaged property, in addition to the mortgage debt, with the same priority, and with interest at the same rate, as the mortgage debt.

(4) The mortgagee may give a good discharge for any money payable under any such insurance, but, subject to subsection (5), so much of such money as exceeds the mortgage debt shall be dealt with by the mortgagee as if it were the proceeds of a sale of the mortgaged property.

(5) The mortgagee may require any money received under such or other insurance of the mortgaged property to be applied –

(a) by the mortgagor in making good loss or damage covered by the insurance; or

(b) in or towards the discharge of the mortgage debt.

Tacking

79. (1) Where a mortgage is expressed to be created on any land for the purpose of securing future advances (whether with or without present advances), the mortgagee is entitled, in priority to any subsequent mortgage, to the payment of any sum due in respect of any such future advances, except any advances which may have been made after the date of, and with express notice in writing of, the subsequent mortgage.

(2) In subsection (1) “future advances” includes sums from time to time due on a current account and all sums which by agreement or in the course of

business between the parties are considered to be advances on the security of the mortgage.

(3) Save in regard to the making of such future advances the right to tack in any form is abolished, but without prejudice to any priority acquired by tacking before the appointed day.

(4) This section –

(a) applies to mortgages made before, on or after the appointed day; and

(b) does not apply to registered land.

CHAPTER 4

LEASES AND SURRENDER OF LEASES

Leasing powers

80. (1) A mortgagor of land while in possession, as against every incumbrancer other than a mortgagee, and as against every mortgagee whose agreement in writing (whether or not contained in the mortgage deed) has been obtained, has power to lease the mortgaged land, or any part of it, for any purpose and for any term permitted by law; but, in the case of a mortgage made before the appointed day, the consent of the mortgagee is not required unless the mortgage deed requires it.

(2) A mortgagee of land while in possession, as against all prior incumbrancers, if any, and as against the mortgagor, has power to lease the mortgaged land, or any part of it, for any purpose and for any term permitted by law.

(3) Every grant of a lease in order to be a valid exercise of the power conferred by subsection (1) or (2) (as the case may be) shall –

(a) be in writing and be made to take effect in possession not later than a year after its date or in reversion after an existing lease having not more than seven years to run at the date of the new lease;

(b) reserve the best rent that can reasonably be obtained, regard being had to any fine taken and generally to the circumstances of the case; and

(c) be otherwise on the best terms that can reasonably be obtained (including, where this is usual commercial practice, a term providing for a periodic review of the amount of the rent by any generally recognised method of review).

(4) For the purpose of this section, if any question arises as to whether a rent is the best rent that can reasonably be obtained, it is sufficient to show that the rent has been fixed by valuation, arbitration or some other generally recognised method.

(5) Where a fine is taken –

(a) in the case of a lease by a mortgagor, the amount of the fine or, if the amount of the fine is greater than that of the mortgage debt, then, the amount thereof required for that purpose, shall be applied in or towards the discharge of the mortgage debt, whether or not the date for redemption has arrived (and a condition that it shall be so applied shall be implied in the mortgage); and

(b) in the case of a lease by a mortgagee, the amount of the fine shall be applied, as if it constituted proceeds of sale, in accordance with section 74.

(6) Where a lease is granted for a consideration that includes development of the land by the lessee, a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(7) Nothing in this section affects the rent payable under a lease renewed or extended under a statutory provision which provides for the fixing of the rent payable on renewal or extension.

(8) A duplicate of every lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor is sufficient evidence.

(9) In the case of a lease by the mortgagor, the mortgagor shall, within one month after making the lease, deliver to the mortgagee or, where there are more than one, to the mortgagee first in priority, a copy of the lease duly executed by the lessee, but the lessee is not concerned to see that this provision is complied with.

(10) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding.

(11) This section takes effect subject to the terms of the mortgage.

(12) The mortgagor and mortgagee may, by agreement in writing, whether or not contained in the mortgage deed, reserve to or confer on the mortgagor, the mortgagee or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred are exercisable, as far as may be, as if they were conferred by this Chapter, and with all the like incidents, effects and consequences: but any powers so reserved or conferred do not affect prejudicially the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement, unless that mortgagee joins in or adopts the agreement.

(13) For the purposes of this section, "mortgagor" does not include an incumbrancer deriving title under the original mortgagor.

(14) The powers of leasing conferred by this section are, after a receiver of the income of the mortgaged property or any part thereof has been appointed by a mortgagee under section 76, and so long as the receiver acts, exercisable by the mortgagee instead of by the mortgagor, as respects any land affected by the receivership, in like manner as if the mortgagee were in possession of the land: and the mortgagee may, by writing, delegate any of such powers to the receiver.

Surrenders

81. (1) For the purpose only of enabling a lease authorised under section 80 or under any agreement made pursuant to that section or by the mortgage deed ("an authorised lease") to be granted, a mortgagor of land while in possession has, as against every incumbrancer, power to accept a surrender of any lease of the mortgaged land or any part thereof comprised in the lease, with or without an exception of or in respect of all or any of the mines and minerals therein, and, on a surrender of the lease so far as it comprises part only of the land or mines and minerals leased, the rent may be apportioned.
- (2) For the same purpose, a mortgagee of land while in possession has, as against all prior or other incumbrancers, if any, and as against the mortgagor, power to accept any such surrender as aforesaid.
- (3) On a surrender of part only of the land or mines and minerals leased, the original lease may be modified, provided that the lease when modified would have been valid as an authorised lease if granted by the person accepting the surrender; and, on a surrender and the making of a new or other lease, whether for the same or for any extended or other term, and whether subject or not to the same or to any other covenants, provisions or conditions, the value of the lessee's interest in the lease surrendered may, subject to the provisions of this section, be taken into account in the determination of the amount of the rent to be reserved, and of the nature of the covenants, provisions and conditions to be inserted in the new or other lease.
- (4) Where any consideration for the surrender, other than an agreement to accept an authorised lease, is given by or on behalf of the lessee or on behalf of the person accepting the surrender, nothing in this section authorises a surrender to a mortgagor without the consent of the incumbrancers, or authorises a surrender to a second or subsequent incumbrancer without the consent of every prior incumbrancer.
- (5) No surrender is rendered valid by this section unless –
- (a) an authorised lease is granted of the whole of the land or mines and minerals comprised in the surrender to take effect in possession immediately or within one month after the date of the surrender;
 - (b) the interest granted by the new lease is not less in duration than the unexpired term or interest which would have been subsisting under the original lease if that lease had not been surrendered; and
 - (c) where the whole of the land, mines and minerals originally leased has been surrendered, the rent reserved by the new lease is not less than the rent which would have been payable under the original lease if it had not been surrendered; or where part only of the land or mines or minerals has been surrendered, the aggregate rents respectively remaining payable or reserved under the original lease and new lease are not less than the rent which would have been payable under the original lease if no partial surrender had been accepted.
- (6) A contract to make or accept a surrender under this section may be enforced by or against every person on whom the surrender, if completed, would be binding.

(7) This section takes effect subject to the terms of the mortgage.

(8) The mortgagor and mortgagee may, by agreement in writing, whether or not contained in the mortgage deed, reserve or confer on the mortgagor, mortgagee or both, any further or other powers relating to the surrender of leases; and any further or other powers conferred or reserved are exercisable, as far as may be, as if they were conferred by this Chapter, and with all the like incidents, effects and consequences; but any powers so reserved or conferred shall not affect prejudicially the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement, unless that mortgagee joins in or adopts the agreement.

(9) For the purposes of this section, “mortgagor” does not include an incumbrancer deriving title under the original mortgagor.

(10) The powers of accepting surrenders conferred by this section are, after a receiver of the income of the mortgaged property or any part thereof has been appointed by the mortgagee under section 76, and so long as the receiver acts, exercisable by the mortgagee instead of by the mortgagor as respects any land affected by the receivership, in like manner as if the mortgagee were in possession of the land; and the mortgagee may, by writing, delegate any of such powers to the receiver.

PART 8

CONTRACTS AND CONVEYANCES

CHAPTER 1

CONTRACTS RELATING TO LAND

Evidence in writing

82. (1) Subject to subsection (2), no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person’s authorised agent.

(2) Subsection (1) does not –

(a) apply to a contract for the grant of a tenancy which can be created without any writing; and

(b) affect the law relating to part performance or other equitable doctrines.

Return of deposit

83. Where the court refuses to grant specific performance of a contract for the sale or other disposition of land, or in any action for the return of a deposit, the court may, where it is just and equitable to do so, order the repayment of the whole or any part of any deposit, with or without interest.

Vendor and purchaser summons

- 84.** (1) Any party to a contract for the sale or other disposition of land may apply to the court in a summary manner for an order determining a question relating to the contract.
- (2) On such an application the court may make such order, including an order as to costs, as it thinks fit.
- (3) A question in respect of which an application may be made under subsection (1) includes a question relating to any requisition, objection, claim for compensation or other question arising out of or connected with the contract, but does not include a question affecting the existence or validity of the contract.

CHAPTER 2

TITLE

Root of title

- 85.** (1) On or after the appointed day, a period of at least 15 years commencing with a good root of title is the period for proof of title which a purchaser of land may require.
- (2) Where the title originated with a fee farm grant or lease, subsection (1) does not prevent the purchaser from requiring production of the grant or lease.
- (3) Subsection (1) takes effect subject to the terms of the contract for the sale or other disposition of the land.
- (4) Nothing in this Chapter requires the Crown, when conveying land vested in it as *bona vacantia*, to show any particular title to that land or to produce any documents relating to the title.

Tenancies

- 86.** (1) Under a contract to grant or assign a tenancy or subtenancy of land, the intended grantee or assignee is not entitled to call for the title of the owner of the land or the title to any tenancy superior to that out of which the subtenancy is, or is to be, derived.
- (2) For the purpose of the deduction of title to an intended assignee, no preliminary contract for or relating to the tenancy forms part of the title, or evidence of the title, to the tenancy.
- (3) Where by reason of subsection (1) an intended grantee or assignee is not entitled to call for the title of the owner or to a superior tenancy, that person, where the contract is made on or after the appointed day, is not affected with notice of any matter or thing of which, if the contract had specified that such title should be furnished, that person might have had notice.
- (4) Subsection (1) takes effect subject to the terms of the contract for the grant or assignment of the tenancy or subtenancy.

Other conditions of title

87. (1) Subject to subsection (2), a purchaser of land is not entitled to require –

(a) the production of an instrument dated or made before the period referred to in section 85, or stipulated in the contract for sale or other disposition of land, for the commencement of the title, even though the instrument creates a power subsequently exercised by an instrument produced to the purchaser; or

(b) any information, or make any requisition, objection or inquiry, with respect to any instrument referred to in paragraph (a) or the title prior to that period, notwithstanding that any instrument, or that prior title, is recited, agreed to be produced or noticed.

and the purchaser shall assume, unless the contrary appears, that –

(i) the recitals contained in the instruments produced, relating to any instrument forming part of that prior title, are correct and give all the material contents of the instrument so recited; and

(ii) every instrument so recited was duly executed by all necessary parties, and perfected, if and as required, by any act required or permitted by law.

(2) Subsection (1) does not deprive a purchaser of the right to require the production of any –

(a) power of attorney under which any instrument which is produced is executed;

(b) instrument creating or disposing of an interest, power or obligation which is not shown to have ceased or expired, and subject to which any part of the land is disposed of by an instrument which is produced, or a copy of which is produced; or

(c) instrument creating any limitation or trust by reference to which any part of the land is disposed of by an instrument which is produced.

(3) On a sale or other disposition of land, the purchaser, where the purchaser requires the vendor to carry out such matters, shall bear the expenses (except where such expenses should be borne by the vendor in compliance with the obligation to deduce title) of –

(a) production and inspection of all instruments, letters of administration, probates, proceedings at courts, records, statutory provisions and other documents not in the possession of the vendor, or the vendor's mortgagee or trustee;

(b) making, procuring, producing, searching for and verifying all certificates, declarations, evidence and information, and all attested, office, stamped or other copies or abstracts of, or extracts from, any statutory provisions or other documents, not in the possession of the vendor or the vendor's mortgagee or trustee; and

(c) making any copy, whether attested or unattested, of any document retained by the vendor, or the vendor's mortgagee or trustee, required to be delivered by the purchaser.

(4) On a sale or other disposition of land in lots, a purchaser of two or more lots held wholly or partly under the same title is entitled to no more than one abstract of the common title, nor to more than one copy of any document forming part of the common title, except at the purchaser's own expense.

(5) The inability of a vendor to furnish the purchaser with an acknowledgment of the right to production and delivery of copies of documents of title is not an objection to title where the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

(6) Such acknowledgments and such undertakings for the safe custody of documents as the purchaser requires shall be furnished at the purchaser's expense, and the vendor shall bear the expense of perusal and execution on behalf of or by the vendor, and on behalf of and by necessary parties other than the purchaser.

(7) A vendor may retain a document of title where –

(a) the vendor retains any part of the land to which the document relates; or

(b) the document comprises an instrument –

(i) creating a trust which still exists; or

(ii) relating to the appointment or discharge of a trustee of an existing trust.

(8) This section takes effect subject to the terms of the contract for the sale or other disposition of the land.

(9) Nothing in this section is to be read as binding a purchaser to complete the purchase in any case where, on a contract made without reference to this section but containing stipulations similar to any of its provisions, specific performance would not be granted by the court against the purchaser.

(10) In this section –

(a) "instrument" includes a copy or abstract; and

(b) "production" includes furnishing a copy or abstract and cognate words shall be read accordingly.

Protection of purchasers

- 88.** (1) Recitals, statements and descriptions of facts, matters and parties contained in instruments, statutory provisions or statutory declarations 15 years old at the date of the contract for the sale or other disposition of land are, unless and except so far as they are proved to be inaccurate, sufficient evidence of the truth of such facts, matters and parties.

(2) Where land sold or otherwise disposed of is held under a tenancy (other than a subtenancy), the purchaser shall assume, unless the contrary appears, that the tenancy was duly granted; and, on production of the receipt for the last payment due for rent under the tenancy before the date of the actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the tenancy have been duly performed and observed up to the date of actual completion of the purchase.

(3) Where land sold is held under a subtenancy, the purchaser shall assume, unless the contrary appears, that the subtenancy and every superior tenancy were duly granted; and, on production of the receipt for the last payment due for rent under the subtenancy before the date of the actual completion of the purchase the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the subtenancy have been duly performed and observed up to the date of actual completion of the purchase, and also that all rent due under, and all covenants and provisions of, every superior tenancy have been paid and duly performed and observed up to that date.

Fraudulent concealment and falsification

89. (1) Any person disposing of land to a purchaser, or the solicitor or other agent of such a person, who with intent to defraud –

(a) conceals from the purchaser any instrument or incumbrance material to the title, or

(b) falsifies any information or matter on which the title may depend in order to induce the purchaser to accept the title offered or produced,

is guilty of an offence punishable by fine, or by imprisonment not exceeding two years, or by both.

(2) Any such person or the person's solicitor or agent is also liable to an action for damages by the purchaser, or persons deriving title under the purchaser, for any loss sustained by reason of –

(a) the concealment of the instrument or incumbrance; or

(b) any claim made by a person whose title to the land was concealed by such falsification.

(3) In estimating damages, where the land is recovered from the purchaser or persons deriving title under the purchaser, regard shall be had to any expenditure by them on improving the land.

(4) No prosecution for any offence under this section shall be commenced without the consent of the Director of Public Prosecutions for Northern Ireland.

(5) Before consent to prosecute is granted, there shall be served on the person intended to be prosecuted such notice of the application for consent to prosecute as the Director may direct.

Notice on common title

- 90.** (1) Where land having a common title with other land is conveyed to a purchaser (other than a tenant or mortgagee) who does not hold or obtain possession of the documents forming the common title, the purchaser, notwithstanding a stipulation to the contrary in the contract or conveyance, may require that a memorandum giving notice of any provisions in the conveyance restricting user of or conferring rights over any other land comprised in the common title is indorsed on or permanently annexed to some document selected by the purchaser but retained in the possession or control of the vendor and being or forming part of the common title.
- (2) The title of any person omitting to require an indorsement or annexation under this section is not affected or prejudiced merely by such omission.
- (3) This section does not apply to registered land.

CHAPTER 3

DEEDS AND THEIR OPERATION

Conveyances by deed only

- 91.** (1) Subject to subsection (6), ownership or any legal interest in land shall only be created or conveyed by a deed.
- (2) A deed executed on or after the appointed day is fully effective for such purposes without the need for any conveyance to uses and passes possession or the right to possession of the land, without actual entry, unless subject to some prior right to possession.
- (3) In the case of a voluntary conveyance on or after the appointed day, a resulting use for the grantor is not implied merely because the land is not expressed to be conveyed for the use or benefit of the grantee.
- (4) A bargain and sale, covenant to stand seised, feoffment with livery of seisin or any combination of these are no longer effective to create or convey ownership or any legal interest in land.
- (5) A deed has the effect of an indenture although not indented or expressed to be an indenture.
- (6) Subsection (1) does not apply to –
- (a) an assent by a personal representative;
 - (b) a disclaimer made under Articles 152 or 288 of the Insolvency (Northern Ireland) Order 1989 (NI 19) (subject to anything prescribed under that Order with respect to the notice of disclaimer);
 - (c) a disclaimer not required to be evidenced in writing;
 - (d) a surrender not required to be effected by deed;
 - (e) a lease or an assignment of a lease;

- (f) a receipt not required by law to be by deed;
- (g) a vesting order of the court or other competent authority;
- (h) a conveyance taking effect by operation of law; or
- (i) a vesting of land in the Crown as *bona vacantia* or in accordance with section 2(3).

Words of limitation

- 92.** (1) A conveyance of unregistered land passes the ownership of the land, or other interest in the land which the grantor has power to create or convey, to the grantee or, in the case of a corporation sole, to the corporation in the corporation's official capacity, unless a contrary intention appears in the conveyance.

(2) Where an interest in land is expressed to be given to –

- (a) the heir or heirs,
- (b) any particular heir,
- (c) any class of heirs, or
- (d) issue,

of any person in words which, under the rule known as the Rule in *Shelley's Case*, would, prior to the appointed day, have operated to give that person a fee simple, those words operate as words of purchase and pass ownership in equity accordingly.

(3) Subsection (1) operates regardless of whether or not the conveyance uses words of limitation appropriate prior to the appointed day to convey a fee simple and so for the purposes of construing the effect of a conveyance executed on or after that day any words of limitation shall be disregarded.

(4) Subsections (1) and (2) apply to conveyances executed before the appointed day, but without prejudice to any act or thing done or any interest disposed of or acquired before that day in consequence of the failure to use words of limitation or the application of the Rule in *Shelley's Case*.

Reservations

- 93.** (1) A reservation of a legal interest in a conveyance of land operates, without execution of the conveyance or of any regrant by the grantee, to –

- (a) vest that interest in the grantor or other person for whose benefit it is made; and
- (b) annex it to the land, if any, for the benefit of which it is made.

(2) A conveyance of land expressed to be subject to a legal interest which is not in existence immediately before the date of the conveyance operates as a reservation within the meaning of subsection (1), unless a contrary intention is expressed in the conveyance.

(3) For the purpose of construing the effect of a conveyance of land, a reservation shall not be treated as taking effect as a regrant.

(4) This section applies only to reservations made on or after the appointed day.

Benefit of deeds

- 94.** Where a deed is expressed to confer an interest in land, or the benefit of a covenant or right relating to land, on a person, that person may enforce the deed whether or not named a party to it.

Features and rights conveyed with land

- 95.** (1) A conveyance of land includes, and conveys with the land, all –
- (a) buildings, commons, ditches, drains, erections, fences, fixtures, hedges, water, watercourses and other features forming part of the land; and
 - (b) advantages, easements, liberties, privileges, profits *à prendre* and rights appertaining or annexed to the land.
- (2) A conveyance of land which has houses or other buildings on it includes, and conveys with the land, houses or other buildings, all –
- (a) areas, cellars, cisterns, courts, courtyards, drainpipes, drains, erections, fixtures, gardens, gutters, lights, outhouses, passages, sewers, watercourses, yards and other features forming part of the land, houses or other buildings; and
 - (b) advantages, easements, liberties, privileges, profits *à prendre* and rights appertaining or annexed to the land, houses or other buildings.
- (3) This section –
- (a) does not on a conveyance of land (whether or not it has houses or other buildings on it) -
 - (i) create any new interest or right or convert any quasi-interest or right existing prior to the conveyance into a full interest or right; or
 - (ii) extend the scope of, or convert into a new interest or right, any licence, privilege or other interest or right existing before the conveyance;
 - (b) does not –
 - (i) give to any person a better title to any land, interest or right referred to in this section than the title which the conveyance gives to the land expressed to be conveyed; or
 - (ii) convey to any person any land, interest, or right further or other than that which could have been conveyed to that person by the grantor; and

- (a) takes effect subject to the terms of the conveyance.

Supplemental instruments

- 96.** (1) Any instrument expressed to be supplemental to a previous instrument, or directed to be read as an annex to such an instrument, is, so far as is appropriate, to be read and has effect as if the instrument so expressed or directed –

- (a) were made by way of indorsement on the previous instrument; or

- (b) contained a full recital of the previous instrument.

(2) This section does not confer on a purchaser any right to an abstract, copy or production of any such previous instrument and a purchaser may accept the same evidence that the previous instrument does not affect the title as if it had merely been mentioned in the supplemental instrument.

Partial releases

- 97.** (1) A release of part of land from –

- (a) a rentcharge does not extinguish the rentcharge, but bars only the right to recover any part of the rentcharge out of the land released; and

- (b) a judgment charged on the land does not affect the validity of the judgment as regards any of the land not specifically released.

(2) Subsection (1) does not –

- (a) prejudice the rights of any person interested in the land unreleased and not concurring in or confirming the release; or

- (b) prevent recovery of the whole of the rentcharge or enforcement of the whole judgment against the land unreleased, unless those interested agree otherwise.

Fraudulent dispositions

- 98.** (1) Subject to subsection (2), any voluntary disposition of land made with the intention of defrauding a subsequent purchaser of the land is voidable by that purchaser.

(2) For the purposes of subsection (1), a voluntary disposition is not to be read as intended to defraud merely because a subsequent disposition of the same land was made for valuable consideration.

Construction of instruments

- 99.** (1) Subject to subsection (2) and unless the context requires otherwise, particular words and phrases used in any instrument relating to land executed or made on or after the appointed day have the same particular meaning, construction or effect as given to such words and phrases by section 117 or, so far as appropriate to be applied to an instrument, by sections 41 to 46 of the Interpretation Act (Northern Ireland) 1954 (c. 33).

(2) Where section 117 and the said 1954 Act give a different meaning, construction or effect to a particular word or phrase that given by section 117 prevails.

CHAPTER 4

CONTENTS OF DEEDS

All interest clause

100. (1) Subject to subsection (2), a conveyance of land passes all the claim, demand, interest, right and title which the grantor has or has power to convey in, to or on the land conveyed or expressed or intended to be conveyed.

(2) This section takes effect subject to the terms of the conveyance.

Receipts in deeds

101. (1) A receipt for consideration in the body of a deed is sufficient discharge for the consideration to the person giving it, without any further receipt being endorsed on the deed.

(2) A receipt for consideration in the body of a deed is, in favour of a subsequent purchaser (not having notice that the consideration so acknowledged to be received was not, in fact, given wholly or in part), conclusive evidence of the giving of the whole consideration.

(3) Where a solicitor produces a deed which –

(a) has in its body a receipt for consideration, and

(b) has been executed by the person entitled to give a receipt for the consideration,

the deed is conclusive authority to the person liable to give the consideration for giving it to the solicitor, without the solicitor producing any separate or other authority or direction in that behalf from the person who executed or signed the deed or receipt.

(4) In subsection (3) “solicitor” includes any employee of a solicitor, and any member or employee of a firm in which the solicitor is a partner, and any such employee or member of another firm acting as agent of the solicitor or firm.

Conditions and covenants not implied

102. (1) An exchange or other conveyance of land does not imply any condition in law.

(2) Subject to any statutory provision, use of the word “give” or grant” in any conveyance does not imply any covenant.

Scope of section 104 and 105

103. In sections 104 and 105 –

(a) “conveyance” –

(i) does not include the granting of a tenancy; and

(ii) means a conveyance made on or after the appointed day;

(b) any reference to a person being expressed to “convey”, or to land or an interest in land being expressed to be “conveyed” does not mean that the words “convey” or “conveyed” must be used in the conveyance for the covenant to be implied.

Covenants for title

104. (1) In a conveyance of any class referred to in subsection (2) there are implied the covenants specified in relation to that class in Part II of Schedule 1, and those covenants are deemed to be made –

(a) by the person or by each person who conveys, to the extent of ownership of the land purported to be conveyed or, where a share only of ownership or an interest or share of an interest only in the land is expressed to be conveyed, to the extent of that share or interest (“the subject matter of the conveyance”), and

(b) with the person to whom the conveyance is made, or with the persons jointly and severally, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common.

and have the effect specified in Parts I and II of Schedule 1.

(2) The classes of conveyance referred to in subsection (1) are –

Class 1: A conveyance (other than a mortgage) for valuable consideration of ownership or an interest in land (other than a tenancy) made by a person who is expressed to convey “as beneficial title holder”;

Class 2: A conveyance (other than a mortgage) for valuable consideration of land comprised in a lease made by a person who is expressed to convey “as beneficial title holder”;

Class 3: A conveyance comprising a mortgage of land (other than land comprised in a lease) made by a person who is expressed to convey “as beneficial title holder”;

Class 4: A conveyance comprising a mortgage of land comprised in a lease made by a person who is expressed to convey “as beneficial title holder”;

Class 5: A conveyance made by a person who is expressed to convey “as trustee”, “as mortgagee”, “as personal representative” or under an order of the court.

(3) Where a conveyance is made by a person who is expressed to convey by direction of another person who is expressed to direct “as beneficial title holder”, then, whether or not that other person is also expressed to convey

“as beneficial title holder”, the conveyance is for the purposes of this section a conveyance made by that other person expressed to convey “as beneficial title holder” to the extent of the subject-matter of the conveyance made by that other person’s direction.

(4) Without prejudice to section 34(5) of the Administration of Estates Act (Northern Ireland) 1955 (c. 24) (statutory covenants implied in assent of personal representative), where in a conveyance a person conveying is not expressed to convey “as beneficial title holder”, “as trustee”, “as mortgagee”, “as personal representative”, under an order of the court or by a direction of a person “as beneficial title holder”, no covenant on the part of the person conveying is implied in the conveyance.

(5) The benefit of a covenant implied under this section –

(a) is annexed to and passes with the ownership or interest of the implied covenantee; and

(b) is enforceable by every person, including a tenant, mortgagee and any other person deriving title from or under the implied covenantee, in whom that ownership or interest, or any part of it, or an interest derived out of it, is vested from time to time.

(6) A covenant implied under this section may, by the terms of the conveyance, be –

(a) excluded but not so that a sole covenant or all (as distinct from some only) of the covenants implied in relation to a person expressed to convey as specified in subsection (2) are excluded; and

(b) modified and, if so modified, operates as if the modification was included in this section and Schedule 1.

(7) Any covenant implied under this section by reason of a person being expressed to convey “as beneficial title holder” may, by express reference to this section, be incorporated, with or without modification, in a conveyance, whether or not for valuable consideration, by a person who is expressed to convey as specified in Class 5 of subsection (2).

Additional covenants for land comprised in a lease

105. (1) In a conveyance of any class referred to in subsection (2) there are implied, in addition to the covenants referred to in section 104(1), the covenants specified in relation to that class in Part III of Schedule 1, and those covenants are deemed to be made –

(a) by the person, or by the persons jointly and severally, if more than one, so specified in relation to any class of conveyance, and

(b) with the person, or with the persons jointly and severally, if more than one, who is the other party, or are the other parties, to the conveyance,

and have the effect specified in Parts I and III of Schedule 1.

(2) The classes of conveyance referred to in subsection (1) are –

Class 6: A conveyance (other than a mortgage) for valuable consideration of –

- (a) the entirety of the land comprised in a lease, or
- (b) part of the land comprised in a lease, subject to a part of the rent reserved by the lease which has been, or is by the conveyance, apportioned with the consent of the lessor,

for the residue of the term or interest created by the lease;

Class 7: A conveyance (other than a mortgage) for valuable consideration of part of the land comprised in a lease, for the residue of the term or interest created by the lease, subject to a part of the rent reserved by the lease which has been, or is by the conveyance, apportioned without the consent of the lessor.

(3) Where in a conveyance (other than a mortgage) part of land comprised in a lease is, without the consent of the lessor, expressed to be conveyed –

(a) subject to the entire rent, then covenant (1) in paragraph 2 of Part III of Schedule 1 has effect as if the entire rent were the apportioned rent; and

(b) exonerated from the entire rent, then covenant (2) in paragraph 2 of Part III of Schedule 1 has effect as if the entire rent were the balance of the rent, and “(other than the covenant to pay the entire rent)” were omitted from the covenant.

(4) The benefit of a covenant implied under this section –

(a) is annexed to and passes with the interest of the implied covenantee; and

(b) is enforceable by every person, including a tenant, mortgagee and any other person deriving title from or under the implied covenantee, in whom that interest, or any part of it, or an interest derived out of it, is vested from time to time.

(5) Any covenant implied under this section may, by the terms of the conveyance, be –

(a) modified by the express provisions of the conveyance and, if so modified, operates as if the modification were included in this section and Schedule 1; and

(b) extended by providing expressly in the conveyance that –

(i) the land conveyed, or

(ii) the part of the land which remains vested in the covenantor,

stands charged with the payment of all money which would otherwise become payable under the implied covenant.

Production and safe custody of documents

106. (1) Where a person retains possession of documents and gives to another person in writing –

(a) an acknowledgment of the right of that other to production of those documents and to delivery of copies of them (“the acknowledgment”), and

(b) an undertaking for the safe custody of those documents (“the undertaking”),

the acknowledgment and the undertaking have the effect specified in this section.

(2) The obligations imposed by an acknowledgment are to –

(a) produce the documents or any of them at all reasonable times for the purpose of inspection and of comparison with abstracts or copies of the documents, by the person entitled to request production or by any person authorised in writing by that person;

(b) produce the documents or any of them in court or any other place where, or on any occasion when, production may properly be required for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relating to that title or claim; and

(c) deliver to the person entitled to request them such copies or abstracts, attested or unattested, of or from the documents or any of them.

(3) The obligation imposed by an undertaking is to keep the documents complete, safe, uncanceled and undefaced.

(4) The obligations shall be performed from time to time –

(a) in the case of the acknowledgment, at the request in writing of, and

(b) in the case of the undertaking, in favour of,

the person to whom it is given, or any person, not being a tenant, who has or who claims any interest or right through or under that person or who otherwise becomes through or under that person interested in or affected by the terms of the document to which the acknowledgment or undertaking relates.

(5) The acknowledgment and undertaking bind the documents to which they relate in the possession or under the control of the person who retains them and every other person having possession or control of them from time to time but they bind each such individual possessor or person as long only as that person has possession or control.

(6) Each person having possession or control of such documents is bound specifically to perform the obligations imposed by this section, unless prevented from doing so by fire or other inevitable accident, but all costs

and expenses of or incidental to specific performance of the acknowledgment shall be paid by the person requesting performance.

(7) The acknowledgment does not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates arising from whatever cause.

(8) Any person claiming to be entitled to the benefit of an undertaking may apply to the court for damages for any loss or destruction of, or injury to, the documents or any of them to which it relates.

(9) Upon such application the court may direct such inquiries and make such order as to costs or other matters as it thinks fit.

(10) An acknowledgment or undertaking under this section satisfies any liability to give a covenant for production and delivery of copies of or extracts from documents or for safe custody of documents.

(11) The rights conferred by an acknowledgment or undertaking under this section are in addition to all such other rights relating to production, inspection or obtaining copies of documents as are not satisfied by the giving of the acknowledgment or undertaking.

(12) This section –

(a) has effect where an acknowledgment or undertaking is given by a person to that same person in different capacities in the same way as where it is given by one person to another; and

(b) takes effect subject to the terms of the acknowledgment or undertaking.

Notices

107. (1) Subject to subsection (2), where an instrument makes provision for giving or serving a notice it may be given or served as if it were a document authorised or required to be served under this Act.

(2) Subsection (1) takes effect subject to the terms of the instrument.

CHAPTER 5

GENERAL PROVISIONS

Restrictions on constructive notice

108. (1) A purchaser is not affected prejudicially by notice of any fact, instrument, matter or thing unless –

(a) it is within the purchaser's own knowledge or would have come to the purchaser's knowledge if such inquiries and inspections had been made as ought reasonably to have been made by the purchaser; or

(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser's counsel, as such, or solicitor or other agent, as such, or would have

come to the knowledge of the solicitor or other agent if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or agent.

(2) Without prejudice to section 86(3), subsection (1) does not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, provision or restriction contained in any instrument under which the purchaser's title is derived, immediately or mediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3) A purchaser is not, by reason of anything in this section, affected by notice in any case where the purchaser would not have been so affected if this section had not been enacted.

Court orders conclusive

109. (1) Without prejudice to any ground of appeal against any order, an order of the court under any statutory or other jurisdiction is not invalid, as against a purchaser, on the ground of want of –

(a) jurisdiction, or

(b) any concurrence, consent, notice or service,

whether the purchaser has notice of any such want or not.

(2) This section applies to any lease, sale or other act, under the authority of the court and purporting to be in pursuance of any statutory provision, notwithstanding any exception in that provision.

PART 9

ADVERSE POSSESSION

Vesting of title

110. (1) In Articles 26, 27(2)(ii), 28(1)(ii) and 35 of the Limitation (Northern Ireland) Order 1989 (NI 11) for the words “is extinguished” there shall be substituted the words “vests, subject to the provisions of Part 9 of the Land Law Reform Act (Northern Ireland) 201[], in the person in whose favour the limitation period has run”.

(2) For the purposes of first registration of the title of land under the Land Registration Act (Northern Ireland) 1970 (c. 18), it shall be presumed that the title vesting under the said Articles is that of the owner of the land.

Tenancies

111. (1) Where the title of land vesting under the Articles in the Limitation (Northern Ireland) Order 1989 (NI 11) amended by section 110(1) is a tenancy, the person in whom that title vests may serve a notice, in the prescribed form, on the immediate landlord or any superior landlord, requiring such landlord to furnish –

(a) where the land is held under –

(i) a lease, a copy of the lease; or

(ii) an oral tenancy, a written statement of its terms;

(b) particulars of any incumbrance affecting the land;

(c) the name and address of the person for the time being entitled to the next superior interest in the land and of the holder of any such incumbrance.

(2) Where the existence, identity or whereabouts of any person on whom a notice may be served under subsection (1) cannot be established by taking reasonable measures, a notice may be served instead on any person in receipt of any rents in respect of the land.

(3) A notice served under subsection (2) may require a recipient of the notice to furnish the name and address of the landlord or other person to whom any such rent received is paid and any other information within the recipient's possession or procurement which is capable of assisting in the identification of the terms of lease or tenancy.

(4) If any person fails or refuses to comply with a notice served under this section, the person who served it may apply to the court for an order compelling compliance.

(5) If the existence, identity or whereabouts of any person on whom a notice may be served under subsections (1) or (2) cannot be established by taking reasonable measures, the person entitled to serve the notice may cause an advertisement in the prescribed form to be published in a daily newspaper circulating in the area in which the land is situated or such other areas, including an area outside Northern Ireland, as appears to that person to be appropriate in all the circumstances.

(6) Where a person has served a notice or caused an advertisement to be placed under this section, that person's title to the land is not subject to forfeiture (whether by action or otherwise), ejectment or any other proceedings arising out of the lease or tenancy before the expiration of three months after the date of furnishing that person with a copy of the lease or other particulars or information requested in the notice or advertisement.

Position of parties

112. (1) The vesting of a tenancy under the Limitation (Northern Ireland) Order 1989 (NI 11) takes effect as an assignment of the tenancy notwithstanding that no notice was given to, or consent obtained from, the landlord, or that such an assignment would otherwise be a breach of the terms of the tenancy, and accordingly the landlord continues to be and the person in whom the tenancy vests becomes bound by the terms of the tenancy.

(2) Subsection (1) does not prejudice any remedy the landlord may have against the divested tenant personally for breach of the terms of the tenancy or which may be enforced against any land not vesting in the person in whose favour the limitation period has run.

(3) Where the vesting relates to part only of the land held under the tenancy, the rights and obligations of the landlord and tenant shall be

apportioned as the landlord, the tenant of the part not vesting and the person in whom the other part vests agree or, in default of agreement, as the Lands Tribunal determines on the application by any of those parties.

(4) Upon such an application the Lands Tribunal shall make such order as to apportionment as it thinks appropriate.

Mortgaged land

113. (1) Where land the title to which is vested under the Articles in the Limitation (Northern Ireland) Order 1989 (NI 11) amended by section 110(1) is subject to a mortgage, the person in whom that title vests may tender any amount of money remaining owing under the mortgage to the person entitled to receive it and that person is obliged to receive it in satisfaction of the amount owing.

(2) Subsection (1) does not affect the –

(a) mortgagee's security under the mortgage for all monies owing under it;

(b) personal liability of the dispossessed mortgagor for the mortgage debt; or

(c) the right of any prior incumbrancer or the dispossessed mortgagor to any surplus proceeds of sale following exercise of the mortgagee's power of sale.

(3) The person in whom the land vests subject to any mortgage may serve a notice in the prescribed form on any person entitled to receive the mortgage money, requesting that person, within four weeks of the date of service, to furnish –

(a) particulars of the terms of the mortgage;

(b) particulars of any amount of mortgage money already paid;

(c) the date of the last payment made under the mortgage; and

(d) particulars of any amount outstanding under the mortgage.

(4) If any person fails or refuses to comply with a notice served under subsection (3), the person who served it may apply to the court for an order compelling compliance.

(5) In hearing such an application the court shall have regard to all the circumstances of the case, including any right to confidentiality or privacy of the divested mortgagor.

Purchaser in possession

114. (1) For the avoidance of doubt, where a purchaser under an enforceable contract for the sale of land (whether entered into before, on or after the appointed day) is permitted by the vendor to take possession of the land before obtaining legal title to it, the vendor's right of action to recover possession of the land accrues, for the purposes of Part III of the Limitation (Northern Ireland) Order 1989 (NI 11), on the date when –

- (a) the vendor withdraws the permission, or
 - (b) the purchaser pays the purchase price in full,
whichever is the earlier.
- (2) In subsection (1) a contract for the sale of land does not include a contract for the grant of a lease.

PART 10

MISCELLANEOUS AND SUPPLEMENTARY

Further amendments to and repeal of provisions in the Land Registration Act (Northern Ireland) 1970 (c. 18)

- 115.** The Land Registration Act (Northern Ireland) 1970 (c. 18) is further amended and subject to repeals as set out in Parts II and IV of Schedule 2.

Orders and regulations

- 116.** (1) Subject to subsection (2), the Department shall by regulation prescribe any matter to be prescribed under this Act.
- (2) Any matter to be prescribed which relates to the Land Registry shall be prescribed by rules made under section 85 of the Land Registration Act (Northern Ireland) 1970 (c. 18).
- (3) Any order or regulation made by the Department under this Act may make such supplemental, incidental, consequential or transitional provision or savings as the Department considers appropriate.
- (4) The power to make an order or regulations is exercisable by statutory instrument.
- (5) A statutory instrument containing an order or regulation under this section may not be made unless a draft of the instrument has been laid before and approved by resolution of the Assembly.

General interpretation

- 117.** In this Act, unless the context otherwise requires –
- “consent” includes agreement, licence and permission;
- “conveyance” includes an appointment, assent, assignment, charge, disclaimer, lease, mortgage, release, surrender, transfer, vesting certificate, vesting declaration, vesting order and every other assurance by way of instrument except a will; and “convey” has a corresponding meaning;
- “the Court”, subject to Article 14(b) of the County Courts (Northern Ireland) Order 1980 No. 397 (NI 3), means the High Court;
- “covenant” includes an agreement, a condition, reservation and stipulation;

“Department” means the Department of Finance and Personnel;

“demesne land” means land belonging to Her Majesty in right of the Crown which, prior to the appointed day, was not held for an estate;

“disposition” includes a conveyance and a devise, bequest or appointment of property by will and “dispose” has a corresponding meaning;

“fee farm grant” means any –

(i) grant of a fee simple, or

(ii) lease for ever or in perpetuity,

reserving or charging a perpetual rent, whether or not the relationship of landlord and tenant is created between the grantor and grantee, and includes a sub-fee farm grant;

“fee farm rent” means the rent payable under a fee farm grant;

“fine” includes a premium or foregift and any payment, consideration or benefit in the nature of a fine, premium or foregift;

“incumbrance” includes an annuity, charge, lien, mortgage, portion and trust for securing an annual or capital sum; and “incumbrancer” has a corresponding meaning and includes every person entitled to the benefit of an incumbrance or to require its payment or discharge;

“instrument” includes a deed, will or other document in writing, and information in electronic or other non-legible form which is capable of being converted into such a document, but not a statutory provision;

“land” includes –

(a) any interest in or over land, whether corporeal or incorporeal;

(b) mines, minerals and other substances in the substratum below the surface, whether or not owned in horizontal, vertical or other layers apart from the surface of the land;

(c) land covered by water;

(d) buildings or structures of any kind on land and any part of them, whether the division is made horizontally, vertically or in any other way;

(e) the airspace above the surface of land or above any building or structure on land which is capable of being or was previously occupied by a building or structure and any part of such airspace, whether the division is made horizontally, vertically or in any other way;

(f) any part of land;

“landlord” means the owner of land or other person, including a sublandlord, entitled to the landlord’s interest in a tenancy;

“lease” as a noun means an instrument creating a tenancy; and as a verb means the granting of a tenancy by an instrument;

“lessee” means the person, including a sublessee, in whom a tenancy created by a lease is vested;

“lessor” means the landlord, including a sublessor, where the tenancy was created by a lease;

“mortgage” includes any charge or lien on any property for securing money or money’s worth;

“mortgagee” includes any person having the benefit of a charge or lien and any person deriving title to the mortgage under the original mortgagee;

“mortgagor” includes any person deriving title to the mortgaged property under the original mortgagor or entitled to redeem the mortgage;

“notice” includes constructive notice;

“personal representative” means the executor or executrix or the administrator or administratrix for the time being of a deceased person;

“possession” includes the receipt of, or the right to receive, rent and profits, if any;

“prescribed” means prescribed by regulations made under section 116;

“property” means any real or personal property or any part or combination of such property;

“purchaser” means an assignee, chargeant, grantee, lessee, mortgagee or other person who acquires land for valuable consideration; and “purchase” has a corresponding meaning;

“rent” includes a rent payable under a tenancy or a rentcharge, or other payment in money or money’s worth or any other consideration, reserved or issuing out of or charged on land, but does not include interest;

“rentcharge” means any annual or periodic sum charged on or issuing out of land, except –

(a) a rent payable under a tenancy; and

(b) interest;

“right of entry” means a right to take possession of land or of its income and to retain that possession or income until some obligation is performed;

“right of re-entry” means a right to forfeit ownership or an interest in the land;

“statutory provision” has the meaning given by section 1(f) of the Interpretation Act (Northern Ireland) 1954 (c. 33);

“strict settlement” has the meaning given to it by section 44(1)(a);

“subtenancy” includes a sub-subtenancy; and a “subtenant” has a corresponding meaning;

“tenancy” means the interest which arises from the relationship of landlord and tenant however it is created but does not include a tenancy at will or at sufferance;

“tenant” means the person, including a subtenant, in whom a tenancy is vested;

“trust corporation” means a trust corporation as defined by Article 9(4) of the Administration of Estates (Northern Ireland) Order 1979 No. 1575 (NI 14);

“trust of land” has the meaning given by section 44(1);

“valuable consideration” includes marriage or civil partnership but does not include nominal consideration in money.

Application to the Crown

- 118.** Subject to the provisions of this Act, this Act binds the Crown to the full extent authorised or permitted by the constitutional laws of Northern Ireland.

Amendments and repeals

- 119.** (1) The statutory provisions specified in Schedule 3 have effect subject to the amendments there specified.

(2) The statutory provisions specified in the first column of Schedule 4 are hereby repealed to the extent specified in the second column of that Schedule, but that repeal does not affect the applicability of those provisions to transactions entered into before the appointed day or the continuation on or after that day of any rights, remedies or obligations which arose from such applicability.

(3) Subject to subsection (2) and without prejudice to section 29 of the Interpretation Act (Northern Ireland) 1954 (c. 33) –

(a) any reference in any instrument or statutory provision executed, enacted or made before the appointed day to –

(i) the Conveyancing Acts 1881 to 1911, or

(ii) a statutory provision (other than a statutory provision repealed by this Act) included in that collective title,

shall be deemed on or after that day to include a reference to this Act; and

(b) any reference in any instrument or statutory provision executed, enacted or made before the appointed day to –

(i) a statutory provision which is included in the collective title “the Conveyancing Acts 1881 to 1911” and which is repealed by this Act, or

(ii) any particular provision of such a statutory provision,

shall be deemed to refer to this Act or to the equivalent or substituted provision of this Act.

Commencement

120. This Act comes into operation on such day or days as the Department may by order appoint.

Short title

121. This Act may be cited as the Land Law Reform Act (Northern Ireland) 201[].

COVENANTS IMPLIED IN CONVEYANCES

PART I

EXTENT OF THE BURDEN OF COVENANTS

1. In this Schedule, unless either the context otherwise requires or the contrary is expressed, the covenantor's liability in respect of any covenant extends to the acts or omissions only of persons within any of the following classes:
 - (1) the covenantor and any person conveying by the covenantor's direction;
 - (2) any person through whom the covenantor derives title;
 - (3) any person (including a mortgagee) who either holds or has held a derivative title from the covenantor for less than the interest vested in the covenantor or who holds or has held such a derivative title from any predecessor in title of the covenantor; and
 - (4) any person who holds or had held in trust for the covenantor.
2. It is not a breach of a covenant contained in this Schedule where the conveyance by the covenantor was made expressly subject to the act, matter or thing which, but for this paragraph, would or might have caused such a breach.
3. The covenantor has no liability for any defect in the title of which it is proved that the covenantee had actual knowledge before the making of the contract to convey or the making of the conveyance (whichever is the earlier).

PART II

IMPLIED COVENANTS

Paragraph 1

Class 1 Conveyances

Covenants implied in a conveyance (other than a mortgage) for valuable consideration of ownership or an interest in land (other than a tenancy) made by a person who is expressed to convey "as beneficial title holder".

- (1) That the covenantor has the right to convey the subject-matter of the conveyance, save that the covenantor's liability is only in respect of any acts or omissions of the covenantor or persons within class (2) of paragraph 1 of Part I.
- (2) That the person to whom the conveyance is made will quietly enjoy the subject-matter of the conveyance without disturbance from any person within any class in paragraph 1 of Part I.
- (3) That the subject-matter of the conveyance is free from all claims, demands, incumbrances and interests.

(4) That the covenantor will, at the covenantor's own cost, take such action as may be necessary for the better assuring of the subject-matter of the conveyance as may from time to time be reasonably required by the person to whom the conveyance is made and the persons deriving title under that person.

Paragraph 2

Class 2 Conveyances

Covenants implied in a conveyance (other than a mortgage) for valuable consideration of land comprised in a lease made by a person who is expressed to convey "as beneficial title holder".

(1) to (4) Covenants (1) to (4) in paragraph 1.

(5) That the lease which created the subject-matter of the conveyance is at the time of the conveyance valid and effectual.

(6) That the rent reserved by the lease has up to the time of the conveyance been paid and the covenants expressly or impliedly contained in the lease have been performed and observed by the lessee.

The covenantor's liability in respect of covenants (5) and (6) is restricted to –

(a) any acts or omissions of the covenantor or persons within class (2) of paragraph 1 in Part I; and

(b) as regards the covenants mentioned in covenant (6), breaches caused by such acts and omissions the consequences of which could not be discovered on reasonable inspection of the land conveyed.

Paragraph 3

Class 3 Conveyances

Covenants implied in a conveyance comprising a mortgage of land (other than land comprised in a lease) made by a person who is expressed to convey "as beneficial title holder".

(1) to (4) Covenants (1) to (4) in paragraph 1.

Those covenants are subject to the following variations, that is to say –

(a) liability in respect of any breach of the covenants extends to the acts or omissions of any person whether or not that person is within the classes of person set out in paragraph 1 of Part I;

(b) covenant (2) (for quiet enjoyment) is not implied against any mortgagor until the mortgagee has lawfully entered into possession of the land conveyed.

Paragraph 4

Class 4 Conveyances

Covenants implied in a conveyance comprising a mortgage of land comprised in a lease made by a person who is expressed to convey "as beneficial title holder".

(1) to (4) Covenants (1) to (4) in paragraph 1, subject to the variations mentioned in paragraph 3.

(5) That the grant or lease which created the interest out of which the subject-matter of the conveyance is created is at the time of the conveyance valid and effectual and that the rent reserved by the grant or lease has up to that time been paid and that the covenants expressed or implied in the grant or lease have been performed and observed.

(6) That the covenantor will from time to time, so long as any money remains owing on the security of the land conveyed, pay the rent reserved by the grant or lease and perform and observe the covenants in it and will indemnify the person to whom the conveyance is made in respect of any consequences of the breach of this covenant.

Paragraph 5

Class 5 Conveyances

Covenant implied in a conveyance made by a person who is expressed to convey "as trustee", "as mortgagee", "as personal representative" or under an order of the court.

That the covenantor has not, by virtue of any act or omission of the covenantor, caused the title to the ownership or interest conveyed to be liable to be impeached through the existence of any incumbrance or rendered the covenantor unable to convey that ownership or interest in the manner in which it is expressed to be conveyed.

PART III

ADDITIONAL IMPLIED COVENANTS FOR LAND COMPRISED IN A LEASE

Paragraph 1

Class 6 Conveyances

Additional covenants implied in a conveyance (other than a mortgage) for valuable consideration of –

(a) the entirety of land comprised in a lease, or

(b) part of the land comprised in a lease, subject to a part of the rent reserved by the lease which has been, or is by the conveyance, apportioned with the consent of the lessor,

for the residue of the term or interest created by the lease,

(1) That the assignee, or the person deriving title under the assignee, will at all times, from the date of the conveyance or other date stated in it, duly pay all rent becoming due under the lease creating the interest in the land which is conveyed,

or, as the case may be, such part of such rent as has been apportioned to the land conveyed, and observe and perform all the covenants, contained in it and on the part of the lessee to be observed and performed, so far as they relate to the land conveyed.

(2) That the assignee will at all times, from that date, indemnify the assignor and the assignor's interest from and against all claims, costs and proceedings on account of any omission to pay the rent, or the part of the rent so apportioned, or any breach of any of the covenants, so far as they relate to the land conveyed.

Paragraph 2

Class 7 Conveyances

Additional covenants implied in a conveyance (other than a mortgage) for valuable consideration of part of the land comprised in a lease, for the residue of the term or interest created by the lease, subject to a part of the rent reserved by the lease which has been, or is by the conveyance, apportioned without the consent of the lessor.

(1) *In every case* That the assignee will at all times, from the date of the conveyance, or other date stated in it, pay the apportioned rent and observe and perform all the covenants (other than the covenant to pay the entire rent) contained in the lease creating the interest in the land which is conveyed, and on the part of the lessee to be observed and performed, so far as the same relate to the land conveyed; and also will at all times from that date indemnify the assignor and the assignor's estate, from and against all claims, costs and proceedings on account of any omission to pay the apportioned rent or any breach of any of such covenants.

(2) *Where the conveying party is expressed to convey "as beneficial title holder"* That the assignor, or the persons deriving title under the assignor, will at all times, from the date of the conveyance, or other date stated in it, pay the balance of the rent (after deducting the said apportioned rent and any other rents similarly apportioned in respect of land not retained) and observe and perform all the covenants (other than the covenant to pay the entire rent) contained in the lease and on the part of the lessee to be observed and performed so far as they relate to the land demised (other than the land comprised in the conveyance) and remaining vested in the assignor; and also will at all times, from that date, indemnify the assignee, and the assignee's estate, from and against all claims, costs and proceedings on account of any omission to pay the balance of the rent or any breach of any of such covenants.

LAND REGISTRATION ACT (NORTHERN IRELAND) 1970 (c. 18)

PART I

MINOR AND CONSEQUENTIAL AMENDMENTS

1. Part III, in the head-note, insert “and Leasehold Land” after “Ownership”.
2. (1) Section 10 (The title register) is amended as follows.
 - (2) In subsection (1)(a), for “freehold estates in land” substitute “Ownership of land (within the meaning of sections 1(3) and 3 of the Act of 201[])”.
 - (3) In subsection (1)(b), for “leasehold estates in land” substitute “A tenancy registrable under this Act (in this Act referred to as “leasehold land”)”.
 - (4) In subsection (2)-
 - (a) for “estates” substitute ““ownership” and “leasehold land””
 - (b) for “leasehold estates” substitute “leasehold land”
 - (c) for “a leasehold estate” substitute “leasehold land”
3. (1) Section 11 (Conclusiveness of registers) is amended as follows.
 - (2) In subsection (2) after “owner” insert “or leaseholder”.
 - (3) In subsection (3) for “as owner of any land,” substitute “under section 10(1) in relation to any land”.
4. Before section 11, in the head-note, for “Owners” substitute “Title Holders”.
5. (1) Section 12 (Classes of owners who may be registered) is amended as follows.
 - (2) In the side-note for “owners” substitute “persons”.
 - (3) Before the words “person may be registered” insert “A”.
 - (4) In subsection (a) for “a freehold estate” substitute “ownership of land” and for “in fee simple (in this Act referred to as the “full owner” of that estate)” substitute “(in this Act referred to as the “registered owner”)”
 - (5) In subsection (c) for “a leasehold estate, as the person” to “of that estate)” substitute “leasehold land as the person in whom that land is vested in possession (in this Act referred to as the “registered leaseholder”)”
6. (1) Section 13 (Classes of title with which owner may be registered) is amended as follows.

- (2) In the side-note for after “owner” insert “or leaseholder”.
 - (3) In subsection (1) for “a freehold estate” substitute “land”.
 - (4) In subsection (2) for “ownership of a leasehold estate” substitute “title to leasehold land”.
7. Before section 14, in the head-note for “Freehold Estates” substitute “Ownership.”
8. (1) Section 14 (Application for first registration of freehold estate) is amended as follows.
- (2) In the side-note for “freehold estate” substitute “ownership of land”.
 - (3) In subsection (1)-
 - (a) for “a freehold estate” substitute “land”.
 - (b) after “whether or not such” for “estate” substitute “ownership”.
 - (4) In subsection (3)(c) for “estate” substitute “ownership”.
9. (1) Section 15 (Effect of first registration of freehold estate with an absolute title) is amended as follows.
- (2) In the side-note for “freehold estate” substitute “ownership of land”.
 - (3) In subsection (1) for “an estate in fee simple in” substitute “ownership of”.
 - (4) In subsection (3)-
 - (a) for “In either of the cases” to “registered owner” substitute “Ownership registered under subsection (1)”.
 - (b) in sub-paragraphs (a),(b) & (c), for “estate” substitute “ownership”.
 - (5) In subsection (4) for “holds the estate as” substitute “is a”.
10. (1) Section 16 (Effect of first registration of freehold estate with a good fee farm grant title) is amended as follows.
- (2) In the side-note for “freehold estate” substitute “ownership of land”.
 - (3) In subsection (1) -
 - (a) for “estates” substitute “interests”.
 - (b) after “have the same” for “estate” substitute “rights”.
 - (4) In subsection (2), after “or affect any” for “estate” substitute “interest”.
11. (1) Section 17 (Effect of first registration of freehold estate with a possessory title) is amended as follows.
- (2) In the side-note for “freehold estate” substitute “ownership of land”.

(3) In section 17(1) after “have the same” for “estate” substitute “title”.

12. (1) Section 18 (Qualified title to freehold estate) is amended as follows.

(2) In the side-note for “freehold estate” substitute “ownership of land”.

(3) In subsection (1), after “of registration any” for “estate” substitute “interest”.

(4) In subsection (2), after “enforcement of any” for “estate” substitute “interest”.

13. Before section 19, in the head-note, for “Estates” substitute “Land”.

14. (1) Section 19 (Application of first registration of leasehold estate) is amended as follows.

(2) In the side-note for “estate” substitute “land.”

(3) In subsection (1) -

(a) for “a leasehold estate” substitute “title to leasehold land”.

(b) in sub-paragraph (a), for “owner” substitute “holder” and for “estate” substitute “land”.

(c) for “estate” substitute “leasehold land”.

(4) In subsection (3) -

(a) in sub-paragraph (a) for “owner of the estate ” substitute “leaseholder” and after “deceased” for “owner” substitute “leaseholder”.

(b) in sub-paragraph (b), for “owner of the estate” substitute “leaseholder”.

(c) in sub-paragraph (c), for “estate” substitute “title to the leasehold land” and after “deceased” for “owner” substitute “leaseholder”.

(5) In subsection (4), for “owner of the estate” substitute “leaseholder”.

(6) In subsection (5) -

(a) in sub-paragraph (a) for “estate” substitute “land”.

(b) in sub-paragraph (b) for “freehold estate” substitute “ownership of the land”.

(c) in sub-paragraph (c), for “estate” substitute “interest”.

(7) In subsection (7) for “owner of the leasehold estate” substitute “leaseholder”.

15. (1) Section 20 (Effect of first registration of leasehold estate with an absolute title) is amended as follows.

(2) In the side-note for “estate” substitute “land”.

(3) In subsection (1)-

(a) for “owner of a leasehold estate” substitute “leaseholder”.

(b) for “estate” substitute “land”.

(4) In subsection (3)-

- (a) for “In either of the cases” to “registered owner” substitute “The leasehold land under subsection (1)”.
- (b) in sub-paragraph (a) for “estate” substitute “land”.
- (c) in sub-paragraph (b) for “estate” substitute “land”.
- (d) in sub-paragraph (c) for “estate” substitute “land”.

(5) In subsection (4) for “owner” substitute “leaseholder” and for “estate” substitute “land”.

16. (1) Section 21 (Effect of first registration of leasehold estate with a good leasehold title) is amended as follows.

(2) In the side-note for “estate” substitute “land.”

(3) In subsection (1)-

- (a) for “owner of a leasehold estate” substitute “leaseholder”.
- (b) after “have the same”, for the word “estate” substitute “rights”.
- (c) for “owner of that leasehold estate” substitute “leaseholder”.

(4) In subsection (2) for “owner of a leasehold estate” substitute “leaseholder”.

17. (1) Section 22 (Effect of first registration of leasehold estate with a possessory title) is amended as follows.

(2) In the side-note for “estate” substitute “land.”

(3) In subsection (1)-

- (a) for “owner of a leasehold estate” substitute “leaseholder”.
- (b) after “have the same”, for the word “estate” substitute “rights”.
- (c) for “owner of that leasehold estate” substitute “leaseholder”.

(4) In subsection (2) for “owner of that leasehold estate” substitute “leaseholder”.

18. (1) Section 23 (Qualified title to leasehold estate) is amended as follows.

(2) In the side-note for “estate” substitute “land.”

(3) In subsection (1) -

- (a) for “owner of a leasehold estate” substitute “leaseholder”.
- (b) after “of the lessee to the leasehold” for the word “estate” substitute “land”.
- (c) after “from the effect of registration any”, for the word “estate” substitute “interest”.

(4) in subsection (2) -

- (a) for “owner of a leasehold estate” substitute “leaseholder”.
- (b) after “the enforcement of any” for the word “estate” substitute “interest”.

19. (1) Section 24 (Compulsory first registration) is amended as follows.

(2) In subsection (1) after “ownership of any land” insert “or of the title to any leasehold land”.

(3) In subsection (6), for “a leasehold estate” substitute “leasehold land”.

20. Before section 27, in the head-note, for “Estates” substitute “Title”.

21. (1) Section 27 (Extinguishment of leasehold estates) is amended as follows.

(2) In the side-note for “estates” substitute “title”.

(3) In subsection (1)-

(a) for “a registered leasehold estate” substitute “registered leasehold land”.

(b) in sub-paragraph (a) for “an estate in fee simple” substitute “ownership”.

(c) in sub-paragraph (b) for “the freehold or in a superior leasehold estate” substitute “ownership”.

(d) in sub-paragraph (i) for “estate” substitute “leasehold title”.

(4) In subsection (2) for “owner” substitute “holder” and for “estate” substitute “title” (where both occur).

22. In section 29 (Affidavit required before registration), subsection (1) after “as owner” insert “or leaseholder”.

23. In section 31 (Deeds, etc., to be marked with notice of registration) after “any land” insert “or as leaseholder”.

24. (1) Section 32 (Dealings with registered land) is amended as follows.

(2) In subsection (1) after “any land” insert “or registered leaseholder”.

(3) In subsection (2)

(a) for “estate” substitute “interest”.

(b) in sub-paragraph (a) for “estates” substitute “interests”.

25. (1) Section 33 (Powers of person entitled to be registered) is amended as follows.

(2) In subsection (1) after “registered land” insert “or as a leaseholder”. After “registered owner” insert “or registered leaseholder” (where both occur).

(3) In subsection (2) after “registered owner” insert “or registered leaseholder” and after “as owner” insert “or leaseholder”

26. (1) Section 34 (Transfers of registered land) is amended as follows.

(2) In subsection (1) after “any land” insert “or registered leaseholder”.

(3) In subsection (3) after “the land” insert “or leaseholder”.

(4) In subsection (4) after “the land” insert “or leaseholder” and for “Conveyancing Acts”, substitute “Act of 201[]”.

27. (1) Section 35 (Words of transfer) is amended as follows.

(2) In subsection (1)-

(a) in sub-paragraph (a)-

- (i) for “a registered freehold estate” substitute “land”.
- (ii) for “fee simple, or other the whole estate” substitute “ownership or other interest”.

(b) in sub-paragraph (b)-

- (i) for “a registered freehold estate” substitute “land”.
- (ii) for “fee simple, or other the whole estate” substitute “ownership or other interest”.

(c) in sub-paragraph (d)-

- (i) for “a freehold estate” substitute “land”.
- (ii) for “estates” substitute “ownership or interests” (where both occur).
- (iii) for “a freehold estate” substitute “ownership”.

28. (1) Section 36 (Defeasance of the registered owner’s estate) is amended as follows.

(2) In the side-note for “estate” substitute “or registered leaseholder’s land”.

(3) In subsection (1)-

- (a) after “defeasance of the” for “estate” substitute “ownership or interest”
- (b) after “the registered owner” insert “or interest of a registered leaseholder”
- (c) after “the ownership” for “of the estate” substitute “or the interest”.
- (d) after “transfer from the registered owner” insert “registered leaseholder”.
- (e) after “owner of the” for “estate” substitute “land or as leaseholder”.

(4) In subsection (2) -

- (a) after “registered owner” insert “or registered leaseholder”
- (b) for “estate” substitute “land or as leaseholder”.
- (c) after “registered owner” insert “or registered leaseholder”.

(5) In subsection (3) after “owner” insert “or leaseholder”.

29. In section 37 (Transmission of registered land) after “owner” insert “or registered leaseholder”.

30. (1) Section 41 (Creation and effect of charges on registered land) is amended as follows.

(2) In subsection (1) after “registered owner” insert “or registered leaseholder”.

- (3) In subsection (2) for “ownership of” substitute “interest in”.
- (4) In subsection (3) for “ownership of” substitute “interest in”.
- (5) In subsection (5) after “of land” insert “, registered leaseholders”.

31. In section 42 (Exercise of power of charging land) subsection (1) after “registered owner” insert “or registered leaseholder”.

32. In section 43 (Priority of registered charge for future advances) subsection (1) for “owner” substitute “holder”.

33. In section 44 (Powers with respect to charges under certain statutory provisions) subsection (1) after “registered owner” insert “or registered leaseholder”.

34. (1) Section 47 (Right of residence on registered land) is amended as follows.

- (2) After “confer any” for “right of ownership” substitute “title”.
- (3) After “registered owner” insert “or registered leaseholder”.

35. In section 48 (Modification and discharge of burdens other than charges) subsection (1)(b)(ii) after “the owner” insert “or leaseholder”.

36. (1) Section 49 (Discharge etc. of registered charges) is amended as follows.

- (2) In subsection (1)(a) for “owner” substitute “holder”.
- (3) In subsection (2) for “owner” substitute “holder” (wherever this occurs).

37. In section 50 (Creation of security by deposit of land certificate or certificate of charge) after “registered owner” insert “or registered leaseholder”.

38. In section 51 (Entry of rights appurtenant to land) after “registered owner” insert “registered leaseholder”.

39. (1) Section 53 (Acquisition of title by possession) is amended as follows.

(2) In subsection (1) after “the Limitation (Northern Ireland) Order 1989” insert “as amended by section 110(1) of the Act of 201[]”

(3) In subsection (2) -

- (a) for “an estate in” substitute “ownership of”.
- (b) after “registered land” insert “or of leasehold land”.
- (c) in sub-paragraph (a) for “an estate in” substitute “as registered leaseholder of”.
- (d) after “registration of the title to” for “that estate” substitute “the ownership or the leasehold land”.

(4) In subsection (4)-

- (a) after the words “prejudice any” for “estate” substitute “ownership or interest”.
- (b) for “an estate” substitute “a title”.
- (c) for “extinguished” substitute “divested”.

40. (1) Section 54 (Notice of trusts) is amended as follows.

(2) In subsection (2)(c) after “registered owner” insert “or registered leaseholder.”

(3) In subsection (2)(d) for “estate” substitute “interest”.

41. (1) Section 55 (Undivided shares and co-owners) is amended as follows.

(2) In the side note for “co-owners” substitute “concurrent title holders”

(3) In subsection (1) after “owner” insert “or leaseholder”.

(4) In subsection (2) after “owners” insert “or leaseholders”.

(5) In subsection (3) after “owners” insert “or leaseholders” (where both occur).

(6) In subsection (4) after “owners” insert “or leaseholders” (wherever these occur).

(7) After subsection (4) insert-

“(5) On service of a notice of severance of a joint tenancy under section 49 of the Act of 201[], a note of the service of the said notice shall be entered in the register as may be prescribed”.

42. In section 58 (Provisions as to incumbrances created or issued by a body corporate which are not registered or protected) after “owner” insert “or leaseholder”.

43. (1) Section 59 (Transmissions on bankruptcy of registered owner) is amended as follows.

(2) In the side-note after “owner” insert “or leaseholder”.

(3) In subsection (1) after “owner” insert “or leaseholder” (where both occur).

(4) In subsection (2)-

- (a) for “a registered leasehold estate” substitute “registered leasehold land”
- (b) for “estate” substitute “land” (where both occur).

44. In section 60 (Minors) for subsection (2) substitute –

“Where a minor who is solely and absolutely entitled to registered land under a trust of land ceases to be a minor he may apply, in such manner as may be prescribed, to be registered as owner or, as appropriate, leaseholder of that land”.

45. In section 64 (Effect of description of registered land) subsection (2), after “owners” insert “or leaseholders” and after “owner” insert “or leaseholder”(where both occur).

46. In section 65 (Cautions against first registration) subsection (1) after “owner of the land” insert “or leaseholder”.

47. (1) Section 66 (Cautions against registered dispositions, etc.) is amended as follows.

(2) In subsection (1) –

- (a) for “estate” substitute “ownership or interest”.
- (b) after “owner” insert “or leaseholder”.

(3) In subsection (2) –

- (a) after “owner” insert “or leaseholder”.
- (b) for “estate” substitute “land”.

48. (1) Section 67A (Protection of creditors prior to registration of trustee in bankruptcy) is amended as follows.

(2) After “owner” insert “or leaseholder” (where all occur).

(3) In subsection (6) for “an estate” substitute “the land”.

(4) In subsection (9) for “estate” substitute “land” (where both occur).

49. In section 69 (Rectification of errors) subsection (3) after “owner” insert “or leaseholder” (where all occur).

50. (1) Section 72 (Exemption from registration in the registry of deeds) is amended as follows.

(2) In subsection (1) -

- (a) for “under this Act” to “estate in land” substitute “of ownership or leasehold land under Part III of this Act”
- (b) for “estate” substitute “ownership or leasehold land” (where both occur).

(3) In subsection (2) -

- (a) for “under this Act” to “estate in land” substitute “of ownership or leasehold land”.
- (b) after “title to any other” for “estate” substitute “interest”
- (c) after “deed creating such” for “estate” substitute “ownership or leasehold land”.
- (d) after “title to such other” for “estate” substitute “interest”.

(4) In subsection (3)-

- (a) for “freehold or leasehold estate” substitute “ownership or leasehold land”
- (b) after “first registered under” insert “Part III of”.

51. (1) Section 74 (Execution of documents containing reservations) is amended as follows.

(2) In subsection (1) for “estate” substitute “interest” (where all occur).

(3) In subsection (2)-

(a) after the words “a conveyance of” for the words “an estate” substitute “land”.

(b) after the words “subject to another” for “estate” substitute “interest”.

52. (1) Section 75 (Avoidance of stipulations in documents precluding registration of title) is amended as follows.

(2) After “any document relating to” for “any estate in land” substitute “ownership or leasehold land”.

(3) For “estate” substitute “ownership or leasehold land”.

53. (1) Section 77 (Facilities for registration of Crown land) is amended as follows.

(2) In subsection (1) –

(a) after “owner” insert “or leaseholder”

(b) after “ownership” insert “or leasehold title”.

(3) In subsection (2) after “owner” insert “or leaseholder”.

54. In section 78 (Foreshore and seabed) after “ownership” insert “or as leaseholder”.

55. In section 79 (Land certificates and certificates of charge) subsection (1) after “registered land” insert “or leasehold land”.

56. In section 85 (Rules), subsection (3) after “ownership” insert “or leasehold title” (where all occur).

57. In section 87 (Matters registrable in the Statutory Charges Register) subsection (2) after “owners” insert “or leaseholders”.

58. (1) Section 88 (Provisions as to registration and priority) is amended as follows.

(2) In subsection (1) after the words “the land” insert “or any interest in the land”-

(a) in sub-paragraph (a) -

(i) after “owner” insert “or leaseholder”

(ii) for “estate” substitute “land or interest”

(b) In sub-paragraph (b) for “estate” substitute “land or interest”

(c) in sub-paragraph (c) –

(i) after “owner” insert “or leaseholder”

- (ii) for “estate” substitute “land or interest” (where both occur)
 - (d) in sub-paragraph (d) –
 - (i) after “owner” insert “or leaseholder”
 - (ii) for “estate” substitute “land or interest” (where both occur).
 - (3) In subsection (2) -
 - (a) for “estate in the land” substitute “land or interest”.
 - (b) for “estate” substitute “land or interest”.
 - (4) In subsection (5) for “estate” substitute “interest” (where it first occurs) and where the word “estate” next occurs, substitute “land or interest”.
59. (1) Section 94 (Interpretation) is amended as follows.
- (2) After the definition of the “Local Registration of Title (Ireland) Act 1891,” insert ““the Act of 201[]” means the Land Law Reform Act (Northern Ireland) 201[];”
 - (3) In the definition of ““land”” for “45(1) of the Interpretation Act (Northern Ireland) 1954” substitute “117 of the Act of 201[]”.
 - (4) In the definition of ““lease”” after ““lease” for “means any” to “lease” substitute “has the meaning given by section 117 of the Act of 201[]”.
 - (5) In the definition of ““leasehold estate”” for ““leasehold estate”” substitute ““leasehold land””, after the words “and includes” for “an estate” substitute “land” and after “held that the” for estate” substitute “land”.
 - (6) For the definition of ““mortgage””, for “the Conveyancing Acts” substitute “the Act of 201[];”.
 - (7) Between the definitions of ““the Order”” and ““pending owner”” insert ““owner” has the meaning assigned to it by section 12(a);”.
 - (8) Between the definition of ““statutory provision”” and ““the title register”” insert ““tenancy” has the meaning given by section 117 of the Act of 201[];”.
 - (9) Between the definition of ““the title register”” and ““words of limitation”” insert ““trust of land” has the meaning given by section 44(1) of the Act of 201[];”.
60. (1) Schedule 2 (Compulsory registration) is amended as follows.
- (2) In Part I (Compulsory registration and effect of non-registration), column 1 (Land subject to compulsory registration)-
 - (a) in entry 2-
 - (i) for “freehold or leasehold estate” substitute “ownership or leasehold land”.
 - (ii) after “where the” for “estate” substitute “ownership or leasehold”.
 - (iii) in sub-paragraph (a) for “a freehold estate” substitute “ownership”.
 - (iv) in sub-paragraph (b) for “a leasehold estate” substitute “leasehold land”.
 - (v) in sub-paragraph (b)(i) and (b)(ii) for “an estate” substitute “leasehold land”.
 - (b) in entry 3 after “ownership” insert “or leasehold”.

(c) in entry 6 for “of freehold tenure, or of leasehold tenure” substitute “granted forever or for a leasehold interest”.

(d) in entry 7 for “estate” substitute “ownership or leasehold interest”.

(3) In Part I (Compulsory registration and effect of non-registration), column 2 (effect of non-registration) -

(a) in entry 2-

(i) for “freehold estate” substitute “ownership of the land”.

(ii) for “estate” substitute “land”.

(iii) after “owner” insert “or leaseholder”.

(b) in entry 3-

(i) for “an estate” substitute “ownership or a leasehold”.

(ii) for “land” substitute “ownership or a leasehold”.

(c) in entry 4(b) after “owner” insert “or leaseholder”.

(d) in entry 5(b) after “owners” insert “or leaseholders”.

(e) in entry 6 after “owner” insert “or leaseholder”.

(4) In Part II (Power to extend time for first compulsory registration), after “of the owner,” insert “leaseholder”.

(5) In Part III (Interpretation of Part I), in the definition of “assignment of sale” for “owner of a leasehold estate” substitute “leaseholder” and for “owner” substitute “holder”.

(6) In Part IV (Provisions relating to certain leases) for “estate” substitute “interest” (where all occur) and in paragraph 4(c) for “owner” substitute “holder” (where both occur).

61. (1) Schedule 3 (Reclassification of title) is amended as follows.

(2) In paragraph 1 (Reclassification of titles formerly subject to notes as to equities and deemed to be possessory titles) after “registered owner” insert “or leaseholder”.

(3) In paragraph 2 (Reclassification of titles on efflux of time)-

(a) after the words “a transfer of that” for “estate” substitute “title”

(b) in sub-paragraph (a) after “registered owner” insert “or leaseholder”.

(c) in sub-paragraph (b) for “estate” substitute “land” (where both occur) and after “registered owner” insert “or leaseholder”.

(d) in sub-paragraph (i) for “a freehold estate” substitute “an owner”

(e) in sub-paragraph (ii) for “a leasehold estate” substitute “leasehold land”.

(4) In paragraph 3 (Reclassification of titles in other cases) sub-paragraph 3(a) for “of the estate” substitute “or leaseholder” and after “register the registered owner” insert “or leaseholder”.

(5) In paragraph 4 (Adverse claims) after “owner” insert “or leaseholder”.

62. (1) Schedule 4 (Transmission of registered land) is amended as follows.

(2) In the head-note dealing with paragraphs 1 - 6A for “a full” substitute “a registered” and after “owner” insert “or leaseholder”.

(3) In paragraph 1-

- (a) in sub-paragraph (1) after “rights of the owner” insert “or leaseholder”.
- (b) in sub-paragraph (1) after “registered full owner” insert “or leaseholder”.
- (c) in sub-paragraph (1) after “deceased owner” insert “or leaseholder” (where both occur).
- (d) in sub-paragraph (1) for “estate” substitute “ownership or leasehold”.
- (e) in sub-paragraph (1) after “registered owners” insert “or leaseholders”.
- (f) in sub-paragraph (2) after “deceased owner” insert “or leaseholder”.

(4) In paragraph 2 after “owner” insert “or leaseholder”.

(5) In paragraph 3 after “owner” insert “or leaseholder”.

(6) In paragraph 4 after “owner” insert “or leaseholder” and for “ownership of” substitute “entitlement to”.

(7) In paragraph 5(a) after “owner” insert “or leaseholder”.

63 (1) Schedule 5 (Burdens which affect registered land without registration), Part I (List of burdens which affect registered land without registration) is amended as follows.

(2) In paragraph 6 for “a registered leasehold estate” substitute “registered leasehold land” and after “lease under which the” for “estate” substitute “land”.

(3) In paragraph 11 after “owner” insert “or leaseholder”.

(4) In paragraph 13 after “owner” insert “or leaseholder”.

(5) In paragraph 15, in sub-paragraph (a) for “upon inquiry made of such person, the right is disclosed” substitute “the right is an equitable interest coming within section 47(4)(b)(i) of the Act of 201[]”.

64. (1) Schedule 6 (Registration of certain burdens), Part I (List of burdens to which section 39 applies) is amended as follows.

(2) In paragraph 5 add “or lien for unpaid redemption money coming within section 2B(5) of the Ground Rents (Amendment) Act (Northern Ireland) 201[]” at the end of the paragraph.

(3) In paragraph 9 for “estate” substitute “ownership or leasehold” and after “owner” insert “or leaseholder”.

(4) In paragraph 10 for “estate” substitute “ownership or leasehold” and after “owner” insert “or leaseholder”.

(5) Part II (Provisions affecting registration of Schedule 6 burdens)-

- (a) In paragraph 1 for “ownership of” substitute “entitlement to”.
- (b) In paragraph 2 after “owner” insert “or leaseholder” (where both occur).

65. (1) Schedule 7 (Provisions relating to charges on registered land), Part I (general provisions) is amended as follows.

(2) In paragraph 1-

- (a) in sub-paragraph (1) after “owner” insert “or leaseholder”.
- (b) in sub-paragraph (2) for “any freehold or leasehold estate” substitute “ownership or a leasehold interest”.

(3) In paragraph 4 after “owner” insert “or leaseholder”.

(4) In paragraph 5-

- (a) in sub-paragraph (1) for “owner” substitute “holder” (where both occur).
- (b) in sub-paragraph (1) for “estate” substitute “land or interest”.
- (c) in sub-paragraph (2) for “owner” substitute “holder”.

(5) In paragraph 6 where “owner” first occurs, substitute “holder” and after “owner” where it secondly and thirdly occurs insert “or leaseholder”.

(6) In paragraph 7-

- (a) after “registered”, for “owner” substitute “holder”
- (b) after “owner” insert “or leaseholder”
- (c) for “estates” substitute “interests.”

(7) In paragraph 9 for “owner” substitute “holder” (where both occur).

66. (1) Schedule 8 (Special provisions relating to settled land and to charitable trusts etc.), Part II (Charitable and certain other trusts) is amended as follows.

(2) In the head-note to paragraph 1 after “owners” insert “or as leaseholders”.

(3) In paragraph 1 after “owners” insert “or as leaseholders”.

(4) In the head-note to paragraph 2 after “owners” insert “or as leaseholders”.

(5) In paragraph 2 after “owner” insert “or as leaseholders”.

67. In schedule 9 (Compensation payable under the Act), paragraph 2 (Right to compensation) after “owner” insert “or leaseholder”.

68. In Schedule 11 (Matters which require to be registered in the statutory charges register), in paragraph 16 for “section 1 of the Rights of Light Act (Northern Ireland) 1961” substitute “section 14 of the Act of 2011[]”.

PART II

FURTHER AMENDMENTS TO THE LAND REGISTRATION ACT (NORTHERN IRELAND) 1970 (c. 18)

1. In section 1 (Land Registry) subsection (3) after “appointment of” insert “the Registrar of Titles (in this Act referred to as “the Registrar”),”

2. After section 24 insert –

"Directions

24A.– Land Registry rules under the provisions of section 85 may make provision enabling the Registrar to issue directions–

(a) declaring that the first registration of any land shall be compulsory in the cases specified in such directions; and

(b) specifying the effect of non-registration.”.

3. In section 84 (Fees) subsection (1) for “and shall ensure, so far as is practicable, that those fees shall be such as to produce an annual amount sufficient to meet so much of the operating expenses of the Land Registry as is attributable to its registration functions” substitute “and the amount of the fees so prescribed shall not be greater than is reasonably sufficient for defraying the expenses of the Land Registry including any expenses incurred in improving its systems for registering, mapping, recording and providing information in relation to land”.

PART III

REPEALS

Short title	Extent of Repeal
Land Registration Act (Northern Ireland) 1970 (Chapter 18)	<p>In section 12 the words from “Subject to” to “minors, a”</p> <p>Section 12(b)</p> <p>Section 12(d)</p> <p>In section 14(1)(a) the words “an estate in fee simple in”</p> <p>Section 14(1)(b)</p> <p>In section 14(3)(a) the words “of the estate”</p> <p>In section 14(3)(b) the words “of the estate”</p> <p>In section 14(4) the words “of the estate”</p> <p>In section 14(6) after the words “first registration as an owner” the words “of a freehold estate” and after the words “be registered as owner”, the words “of the estate”</p>

In section 15(1) after the words “of a person as” the word “full” and after the word “owner” the words “of a freehold estate”

Section 15(2)

In section 16(1) after the words “a person as”, the words “full or limited” and after the word “owner,” the words “of a freehold estate” and after the words “he had been registered as” the words “full or, as the case may be, limited” and after “owner” the words “of that estate”

In section 16(2) after the words “registration of a person as”, the words “full or limited” and after the word “owner” the words “of a freehold estate”

In section 17(1) after the words “a person as”, the words “full or limited” and after the word “owner”, the words “of a freehold estate” and after the words “registered as”, the words “full, or as the case may be, limited” and after the word “owner” the words “of that estate”

In section 17(2) after the words “a person as”, the words “full or limited” and after the word “owner,” the words “of a freehold estate” and the words in brackets

In section 18(1), the words “full or limited” and the words “of a freehold estate”

In section 18(2) the words “full or limited” and the words “of a freehold estate”

In section 19(1)(a) the words “or a person” to “a tenant for life”

In section 19(7) the words “of the estate”

In section 20(1) the word “full”

Section 20(2)

In section 21(1) the words “full or limited” and after the words “registered as” the words “full or, as the case may be, limited”

In section 21(2) the words “full or limited”

In section 22(1) the words “full or limited” and after the words “registered as” the words “full or, as the case may be, limited”

In section 22(2) the words “full or limited” and after the words “the title of that person” the words in brackets

	In section 23(1) the words “full or limited”
	In section 23(2) the words “full or limited”
	In section 34(1) the words “and subject, in the case of” to “Settled Land Acts”
	In section 34(4) the word “full”
	Section 34(6)
	In section 35(1)(a) the words “without words of limitation”
	In section 37 the words “full” and “and on the determination of the estate of a registered limited owner”.
	In section 41(5) the words “full” and “and registered limited owners of land”
	Section 41(6)
	Section 56(1)
	In section 57(2) the words in brackets
	Section 60(1) & (3)
	Section 67(3)
	In section 72(1) the words “and, if a person is registered” to “determination of his ownership”
	In section 74(1)(a) the words “of the estate” to “reservation is made”
	In section 88(1) the words “any estate in”
	In section 94 the definition of the following: “estate”, “limited owner”, “Settled Land Acts”, “settlement” to “trustees of the settlement” “an estate in” from the definition of “leasehold estate”, “full”, and “and (c)” from the definition “full owner”
	In Schedule 2, Part I, column 1, entry 2, after the word “not” in brackets, the words “being an estate”
	In Schedule 2, Part III, in the definition of “conveyance on sale”, the words “being an estate”
	In Schedule 3, paragraph 2, after the words “possessory title to any” the words “estate in”

	<p>In Schedule 3, paragraph 3, the words “any estate in”</p> <p>In Schedule 4, paragraph 1, the words “full”</p> <p>In Schedule 4, paragraph 4, the words “full” and “or limited owner”</p> <p>In Schedule 4, paragraph 6</p> <p>In Schedule 4, paragraph 6A, the words “or 6(2)”</p> <p>In Schedule 7, Part I, paragraph 1, the words “a freehold or leasehold estate in” and “of, respectively, that estate or the estate out of which the leasehold estate in purported to be demised,”</p> <p>In Schedule 7, Part II</p> <p>In Schedule 8, Part I</p> <p>In Schedule 8 : head-note, the words “Settled land and to”</p> <p>In Schedule 9, paragraph 8</p> <p>In Schedule 10, paragraph 2, the words “to such uses and” and the word “limited”</p>
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PART IV

FURTHER REPEALS TO THE LAND REGISTRATION ACT (NORTHERN IRELAND) 1970 (c. 18)

Short title	Extent of Repeal
Land Registration Act (Northern Ireland) 1970 (Chapter 18)	<p>In section 1(4) the words from “and, subject to” to “(in this Act referred to as “the Registrar)”</p> <p>Section 84(1A)</p>

MINOR AND CONSEQUENTIAL AMENDMENTS

Acts of the Parliament of Northern Ireland and Orders in Council

Administration of Estates Act (Northern Ireland) 1955 (c. 24)

1. In section 38 (Powers to appoint trustees of infant's property)—
 - (a) In subsection (4) for “sections forty-two and” substitute “section”
 - (b) In subsection (5) for “sections forty-two and” substitute “section”

Trustee Act (Northern Ireland) 1958 (c. 23)

2. In section 13(4) (Power to sell subject to depreciatory conditions and under) for “section two of the Vendor and Purchaser Act, 1874” substitute “sections 85 to 87 of the Land Law Reform Act (Northern Ireland) 201[]”

Property (Northern Ireland) Order 1978 (NI 4)

3. In Article 3 (application and interpretation of Part II) paragraph (1), after “(e) a profit in gross” insert “(f) a possibility of reverter or a right of entry or re-entry (including such a right attaching to a tenancy) as defined by section 117 of the Land Law Reform Act 201[] and which was granted for specific purposes which can no longer be satisfied.”.

Limitation (Northern Ireland) Order 1989 (NI 11)

4. (1) In Article 27(2)(i) for “extinguished” substitute “divested”.
(2) In Article 28(1)(i) for “extinguished” substitute “divested”.

Insolvency (Northern Ireland) Order 1989 (NI 19)

5. In Article 309(3) (Rights of occupation, etc., of bankrupt's spouse) for “any provision of the Partition Act 1868” substitute “the provisions of section 52 of the Land Law Reform Act (Northern Ireland) 201[].”.

Property (Northern Ireland) Order 1997 (NI 8)

6. In Article 50 (Severance of joint tenancy by charge) for “The” substitute “Subject to the provisions of section 49 of the Land Law Reform Act (Northern Ireland) 201[] the.”

REPEALS

Short Title	Extent of repeal
<i>Acts of the Parliament of Ireland</i>	
Statute of Uses (Ireland) 1634 (10 Chas 1 sess. 2 c. 1)	The whole Statute so far as unrepealed
Conveyancing Act (Ireland) 1634 (10 Chas. 1 sess. 2 c. 3)	Sections 1 to 5 so far as unrepealed
Forfeiture Act (Ireland) 1639 (15 Chas. 1 sess. 2 c. 3)	The whole Act
Tenures Abolition Act (Ireland) 1662 (14 & 15 Chas. 2 sess. 4 c. 19)	The whole Act so far as unrepealed
Statute of Frauds (Ireland) 1695 (7 Will. 3 c. 12)	In section 2, the words “or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them,”
Clandestine Mortgages Act (Ireland) 1697 (9 Will 3 c. 11)	The whole Act so far as unrepealed
Administration of Justice Act (Ireland) 1707 (6 Anne c. 10)	Section 23
<i>Statutes of the Parliaments of England and Great Britain</i>	
Statute of Westminster, the Second 1285 (De Donis Conditionalibus) (13 Edw. 1 c. 1)	The whole Chapter so far as unrepealed
Statutes of Westminster, the Third 1289 – 1290 (Quia Emptores) (18 Edw. 1 cc. 1, 2, 3)	The whole of the Chapters so far as unrepealed
<i>Acts of the United Kingdom Parliament</i>	
Illusory Appointments Act 1830 (1 Will. 4 c. 46)	The whole Act so far as unrepealed
Prescription Act 1832 (2 & 3 Will. 4 c. 71)	The whole Act so far as unrepealed
Fines and Recoveries Act 1833 (3 & 4 Will. 4 c. 74)	The whole Act so far as unrepealed

Fines and Recoveries (Ireland) Act 1834 (4 & 5 Will. 4 c. 92)	The whole Act so far as unrepealed
Land Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18)	In section 69 the words “uses,” (both occurrences)
Real Property Act 1845 (8 & 9 Vict. c. 106)	Sections 2 to 6 and 8
Satisfied Terms Act 1845 (8 & 9 Vict. c. 112)	The whole Act so far as unrepealed
Settled Land (Ireland) Act 1847 (10 & 11 Vict. c. 46)	The whole Act so far as unrepealed
Literary and Scientific Institutions Act 1854 (17 & 18 Vict. 112)	In section 13 the words “hold unto and to the use of”
Leasing Powers Act for Religious Worship in Ireland 1855 (18 & 19 Vict. c. 39)	The whole Act so far as unrepealed
Prescription (Ireland) Act 1858 (21 & 22 Vict. c. 42)	The whole Act so far as unrepealed
Landed Estates Court (Ireland) 1858 (21 & 22 Vict. c. 72)	The whole Act
Law of Property Amendment Act 1859 (22 & 23 Vict. c. 35)	Sections 10 to 12 and 24
Law of Property Amendment Act 1860 (23 & 24 Vict.) (c. 38)	Sections 7 and 8
Landed Estates Court Act 1866 (29 & 30 Vict. c. 99)	The whole Act so far as unrepealed
Sales of Reversions Act 1867 (31 & 32 Vict.) (c. 4):	The whole Act so far as unrepealed
Partition Act 1868 (31 & 32 Vict. c. 40)	The whole Act so far as unrepealed
Powers of Appointment 1874 (37 & 38 Vict. c. 37)	The whole Act so far as unrepealed
Vendor and Purchaser Act 1874 (37 & 38 Vict. c. 78)	The whole Act so far as unrepealed
Leasing Powers Amendment Act for Religious purposes in Ireland 1875 (38 & 39 Vict. c. 11)	The whole Act so far as unrepealed
Partition Act 1876 (39 & 40 Vict.) (c. 17)	The whole Act so far as unrepealed

Settled Estates Act 1877 (40 & 41 Vict. c. 18)	The whole Act so far as unrepealed
Contingent Remainders Act 1877 (40 & 41 Vict. c. 33)	The whole Act
Conveyancing Act 1881 (44 & 45 Vict. c. 41)	Sections 3 to 9, 13, 15 to 24, 26 to 29, 41, 42, 49, 51 to 57, 61 to 64, 66, 67, 70, 73, Third Schedule, Fourth Schedule
Settled Land Act 1882 (45 & 46 Vict. c. 38)	The whole Act
Conveyancing Act 1882 (45 & 46 Vict.) c. 39	Sections 3, 4, 6 and 12
Settled Land Act 1884 (47 & 48 Vict. c. 18)	The whole Act
Settled Land Acts (Amendment) Act 1887 (50 & 51 Vict. c. 30)	The whole Act
Settled Land Act 1889 (52 & 53 Vict. c. 36)	The whole Act
Settled Land Act 1890 (53 & 54 Vict. c. 69)	The whole Act
Accumulations Act 1892 (55 & 56 Vict. c. 58)	The whole Act
Voluntary Conveyances 1893 (56 & 57 Vict) c. 21	The whole Act
Mortgagees Legal Costs Act 1895 (58 & 59 Vict. c. 25)	The whole Act
Finance Act 1898 (61 & 62 Vict. c. 10)	Section 6
Bodies Corporate (Joint Tenants) Act 1899 (62 & 62 Vict. c. 20)	The whole Act
Conveyancing Act 1911 (1 & 2 Geo. 5 c. 37)	Sections 1, 3, 4, 5, 11, 13 and 15
Administration of Justice Act 1970 (c. 31)	In section 36(1) the words “not being an action for foreclosure in which a claim for possession of the mortgaged property is also made,”
Judicature (Northern Ireland) Act 1978 (c. 23)	In Schedule 5, Part II(1), the entry relating to the Landed Estates Court (Ireland) Act 1858 (c. 72) In Schedule 5 Part II(1), the entry relating to the Settled Estates Act 1877 (c. 18)

	In Schedule 5 Part II(1), the entry relating to the Settled Land Act 1882
Building Societies Act 1986 (c. 53)	In section 10(1) the words “or Northern Ireland” in brackets
Pension Schemes Act 1993 (c. 48)	Section 163
Pension Schemes (Northern Ireland) Act 1993 (c. 49)	Section 159
Constitutional Reform Act 2005 (c. 4)	In Schedule 11, Part 3, paragraph 6(3), the entry relating to the Settled Estates Act 1877 (c. 18)
	In Schedule 11, Part 4, paragraph 10, the entry relating to the Landed Estates Court (Ireland) Act 1858 (c. 72)

Acts of the Parliament of Northern Ireland and Orders in Council

Landlord and Tenant (War Damage) Act (Northern Ireland) 1941 (5 & 6 Geo. c. 9)	In section 1(4) the word “foreclosure”
Administration of Estates Act (Northern Ireland) 1955 (c. 24)	Sections 38(3) and 40(5)
Trustee Act (Northern Ireland) 1958 (c. 23)	Sections 12(6)
	In section 16(2) from the words “or to trustees” onwards
Rights of Light Act (Northern Ireland) 1961 (c. 18)	The whole Act
Perpetuities Act (Northern Ireland) 1966 (c. 2)	Section 9
Age of Majority Act (Northern Ireland) 1969 (c. 28)	In Schedule 3, paragraph 7
Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 (c. 7)	In section 5, the words “a minor or”
Property (Discharge of Mortgage by Receipt) (Northern Ireland) Order 1983 (NI 9)	In Article 3(1)(iii)
	In Article 3(2), the words “reconveyance, reassignment”
Credit Unions (Northern Ireland) Order 1985 (NI 12)	In Article 32(3) the words “foreclosure or by”

Mental Health (Northern Ireland) Order 1986 (NI 4)	Article 103(6) the words “or foreclosure” In Schedule 5, Part II the entries relating to the Prescription Act 1832 In Schedule 5, Part II the entry relating to the Fines and Recoveries (Ireland) Act 1834
Wills and Administration Proceedings (Northern Ireland) Order 1994 (NI 13)	Articles 22(5) and 27(4)
Business Tenancies (Northern Ireland) Order 1996 (NI 5)	Article 38
Property (Northern Ireland) Order 1997 (NI 8)	Articles 30(5)(c), 48 & 49
Trustee Act (Northern Ireland) 2001 (c.14)	Section 9(2)

EXPLANATORY NOTES

on the draft

Land Law Reform Bill (Northern Ireland) 201[]

PART 1

OWNERSHIP OF LAND

Part 1 of the Bill implements the Law Commission's recommendations that the concepts of feudal tenure and estates in land should be abolished in favour of a system of ownership of land shorn of its feudal connotations (see Consultation Paper NILC 2 (2009) ch 1). The Commission indicated that it would still be possible for the "owner" of land to create interests out of it in favour of other persons, such as tenancies, mortgages, easements, profits *à prendre* and other rights. Part 1 makes provision for this and contains provisions identifying who is the "owner" in the case of both registered and unregistered land on the Appointed Day and thereafter. It also contains savings for the position of the Crown, especially in relation to land which would otherwise be "ownerless" or should vest in the Crown where there is no one else entitled to claim it.

Part 1 clarifies the distinction between legal ownership, legal interests less than ownership and equitable interests. This distinction is an important element in determining priorities as between competing claims to ownership or to an interest in land and the concept of "overreaching" certain interests when a conveyance of land is made.

Part 1 also implements various recommendations by the Commission to simplify the law and to render it more certain. It prohibits the future creation of a fee tail and converts most existing ones into ownership, converts life interests into equitable interests only and provides for an interest vested in a minor to be held under a trust.

CLAUSE 1 – Ownership of land

This clause indicates that in future ownership of land in Northern Ireland will operate as specified by Part 1, i.e. with the abolition of feudal tenure and dropping the concept of estates (in so far as it meant that the land itself was never owned but only the abstract concept of an "estate"). There are some savings originally based on the notion of tenure (largely relating to Crown rights to "ownerless" property which nowadays are governed by statutory provisions) and the notion, which was part of the concept of estates, that interests in land can be created by the owner to be held by others for varying periods of time is retained.

Subsection (1) contains the fundamental principle that ownership of land operates on a different basis as on or after the appointed Day. It abolishes the concepts of tenure and estates and provides that in future what is owned is the land itself.

Subsection (2) indicates who, in future, will be known as "the owner" of land – this is spelt out in clause 3.

Subsection (3) indicates that in future the owner of land may dispose of it as such, instead of disposing simply of an "estate" in the land. What will be disposed of in such cases is the physical entity. Part 8 of the Bill deals with the operation and contents of conveyances of land, including transitional provisions for conveyances made prior to

the Appointed Day. Subsection (3) also confirms that the rule against inalienability (which applied to former freehold land) survives notwithstanding the repeal of *Quia Emptores* - Statutes of Westminster the third 1289-1290.

Subsection (4) confirms that, notwithstanding abolition of the concept of feudal tenure and the dropping of the notion of estates in land, landowners will still be able to create interests less than full ownership in favour of other persons and that such persons may be able to acquire such interests (e.g. by adverse possession (see Part 9) or by prescription (see Part 2). Interests which may last for ever would include easements and profits *à prendre* created by or acquired against the title holder of dominant or servient land (see clause 5). A tenancy for ever could not be created because of the prohibitions on fee farm grants, long leases and perpetually renewable leases introduced by Articles 28, 36 and 37 of the Property (Northern Ireland) Order 1997 (NI 8). Nor will the owner be able to create a *legal* interest for the period of a life or lives. That either will create a succession of interests attracting the trusts of land provisions in Part 4 or was prohibited so far as leases were concerned by Article 37 of the 1997 Order.

Subsection (5) indicates that, in future, the only interests in land which are capable of subsisting at law (by virtue of being created by or acquired against the owner of the land) are those specified by clause 5. The qualification in parenthesis is important, because obviously the owner of the land has legal ownership of it. Clause 5 is concerned with legal interests created in favour of or acquired by other persons which fall short of ownership of the land, to be distinguished from equitable interests.

Subsection (6) makes it clear that the new provisions do not affect the concept of equitable interests in the land, i.e. the creation or acquisition of equitable interests less than ownership. Such acquisition often occurs where the courts invoke doctrines like those concerning resulting and constructive trusts and proprietary estoppel. Such equitable jurisdiction will continue to be available.

CLAUSE 2 – Position of Crown

This clause preserves the position of the Crown notwithstanding the abolition of concepts like tenure. Most aspects of the concept of feudal tenure of land had been eroded over the centuries, but some remained, as explained by the Commission, and the underlying principle that all land was held ultimately from the Crown survived.

Subsection (1) preserves the right of the Crown to demesne land (which is land which was never granted for an estate to someone else under the feudal tenure system, such as the foreshore – see definition in clause 117) and the powers the Crown holds by virtue of the royal prerogative, such as powers relating to the grant of peerages, dignities and honours. Titles of honour were once regarded as incorporeal hereditaments, largely because they were usually accompanied with a grant of land to the title holder (see Challis *Law of Real Property* (3rd ed by Sweet 1911) pp 42, 45 and 48), but that view has been queried (see the Editor's views in Challis pp 468-472). The Bill is concerned only with removing the concept of tenure so far as it relates to land ownership and it is not intended to deal otherwise with matters concerning the royal prerogative.

Subsection (2) confirms that the position of the Crown to succeed to "ownerless" or unclaimed property, now largely governed by statute but derived from the royal prerogative, and, so far as land is concerned, derived from the Crown's position under the concept of tenure as ultimate owner of all land. Essentially that position is as follows:

- (i) Under section 16 of the Administration of Estates Act (Northern Ireland) 1955 (c. 24) on death of a person who has not made a valid will disposing of his or her property (including land), and who has no intestate successors, the property passes to the Crown as *bona vacantia*.
- (ii) Under sections 1012-1019, 1023 & 1034 of the Companies Act 2006 (c. 46) (which replaces Articles 605-609 of the Companies (Northern Ireland) Order 1986 (NI 6) from the 1st October 2009 (see the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 No. 2860 c. 126 and note the saving for property of a dissolved company)), on dissolution of a company governed by this legislation its property vests in the Crown again as *bona vacantia*. The Crown Solicitor for Northern Ireland (acting as agent of the Treasury Solicitor who is the Crown's nominee for dealing with such assets) may disclaim such property, in which case it "escheats" to the Crown (see *SCMLLA Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793). This Bill provides that in such cases the effect of a disclaimer of land owned by the company is to vest it in the Crown with the same effect: see subsection (3). This replaces the notion of "escheat" which operates under the concept of tenure. It is worth noting that the above provisions of the Companies Act 2006 also apply to Limited Liability Partnerships, Building Societies, Incorporated Friendly Societies and bank insolvency or administration.
- (iii) Under Articles 152-156 and 288-294 of the Insolvency (Northern Ireland) Order 1989 (NI 19) if, on the bankruptcy of an individual, the trustee in bankruptcy, and on the liquidation of a company, the liquidator, exercises the power of disclaimer, any land owned by the individual or company escheats to the Crown.
- (iv) At common law, on the dissolution of a corporation not governed by the 1986 Order or the 2006 Act its land escheats to the Crown and personal property (including leasehold property) passes as *bona vacantia* (see *Re Wells* [1933] Ch 29; *Re Strathblaine Estates Ltd* [1948] Ch 228).
- (v) Under the Crown Estate Act 1961 (c. 55) where the Crown has made an infeudatory grant under the Act (which applied to Northern Ireland) subject to a right of re-entry, if that right is exercised, it causes an escheat. That Act deals generally with administration of the Crown Estate.

Subsection (3) contains a further saving for the position of the Crown as regards land in Northern Ireland. Such a right of disclaimer exists under the legislation mentioned above in the context of subsection (2) and also has been held judicially: see *Re Nottingham General Cemetery Co* [1955] Ch 683; *Attorney-General v Parsons* [1956] AC 421; *SCMLLA Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793 at 804-805. The wording of paragraph (b) reflects that in section 40(4) of the Crown Proceedings Act 1947.

Subsection (4) makes it clear that the Crown only incurs liability in respect of land which vests in it in accordance with subsections (2) and (3) if it has actually taken possession or control of such land or entered into occupation of it.

Subsection (5) contains a saving relating to the power of disposal of the Crown Estate conferred on the Crown Estate Commissioners by the Crown Estate Act 1961.

CLAUSE 3 – Owners of land

Clause 3 explains the consequences of clauses 1 and 2, in particular the effect on ownership of land of abolition of the concept of feudal tenure and the dropping of the concept of owning only an “estate” in the land. (Further clarification of the consequences is provided by clause 4.)

Clause 3 is concerned with identifying the “legal” owner (see clause 1(2)), i.e. the person holding legal title to the land and, therefore, entitled to dispose of it on that basis. Clause 1(6) of the Bill preserves the concept of equitable interests which under Part 4 of the Bill will give rise to a trust of land with legal ownership (title) vested in trustees.

Subsection (1) identifies who will be the owners of land on the Appointed Day. In the case of unregistered land (see *paragraph (a)*) it will be the person in whom the fee simple in possession is vested. That concept is further defined by subsection (2). Since “possession” is defined in clause 117 as including receipt of rent and profits à *prendre*, this means that the landlord of a tenancy will be the owner. The fee tail estate will be abolished by clause 6 and ones existing on the Appointed Day will mostly be converted so that the holder will become the owner of the land (those that are not converted will continue under a trust of land under Part 4 of the Bill and the trustees will be the legal owners). A fee simple held in reversion or remainder on the Appointed Day (because, e.g., the land is currently in possession of a life owner) will also become a trust of land on the Appointed Day (with the ownership again vested in trustees). So far as registered land (see *paragraph (b)*) is concerned the owner will be the person registered as “full owner” of the freehold estate under the Land Registration Act (Northern Ireland) 1970 (c. 18). Under sections 15-18 of the 1970 Act, a person so registered has an estate in fee simple but the status of that varies according to the classification of the title (absolute, good fee farm grant, etc). The effect of paragraph (b) on or after the appointed Day is further explained by subsection (3).

Subsection (2) implements the Commission’s recommendations that, in future, modified fees, such as a determinable fee or fee simple subject to a condition, should be treated like a fee simple absolute for the purposes of holding legal title to land and being able to dispose of it (see NILC 2 (2009) para. 3.25). Thus such fees simple would confer legal ownership of the land under clauses 1 and 3 of the Bill and would not involve a trust of land coming within Part 4. Under clause 5 the interests to which such modified fees are subject, such as a possibility of reverter and right of entry or re-entry, would remain legal “interests” in land held by the persons entitled to them on the Appointed Day and to which the legal owner of the land is subject.

Paragraph (a) covers a determinable fee, i.e., where land was granted in fee simple until some event occurs. Such a fee simple is subject to a “possibility of reverter” which operates automatically on the happening of the event to revert the fee simple to the grantor or grantor’s successors in title.

Paragraph (b) deals with a fee simple subject to a condition subsequent whereby, on the happening of an event or on satisfaction of some specified condition, either the grantor (or the grantor’s successors) has a right to re-enter the land and forfeit the grantor’s entitlement to the fee simple or some other specified person (or that person’s successors) has a right to enter the land and again forfeit the grantee’s entitlement. The wording in brackets makes it clear that both situations are covered. The Commission recommended that this treatment of modified fees should be combined with a provision adding interests like a possibility of reverter and right of entry or re-entry to the list of “impediments” contained in Article 3 of the Property (Northern Ireland) Order 1978 (NI 4) (in respect of which the Lands Tribunal has jurisdiction to

make orders for modification or extinguishment). That amendment has been made to the provisions of that Order by Schedule 3.

Paragraph (c) deals with other situations where the land is subject to a minor interest or incumbrance which does not justify applying the trusts of land provisions of Part 4 to it. Again the owner should be free to deal with the land, but subject to that incumbrance.

Subsection (3) clarifies the operation of subsection (1)(b). Where, on the Appointed Day, the registered owner of the freehold estate is registered with an absolute title that person will clearly be the owner of the land, subject, of course, to burdens, etc to which any registered owner may be subject (see section 15(3) of the 1970 Act). However, sections 16 to 18 of the 1970 Act make provision for registration with a title less than absolute (good fee farm grant, possessory or qualified). In such cases the registered owner of the freehold estate on the Appointed Day will still be the legal owner for the purposes of clause 3, but that ownership will be subject to potential superior or adverse claims (including claims to ownership) protected by classifying the title as less than absolute. The registered owner in such cases will remain the legal owner until any such claim is established and results in someone else becoming the new registered owner (and thereby legal owner for the purposes of subsection (1)). The registered owner's legal ownership may, of course, be confirmed later by reclassification of his or her title as absolute under section 25 of the 1970 Act.

CLAUSE 4 – Consequential provisions

Clause 4 provides further explanation as to how the new regime for ownership of land will operate on or after the Appointed Day.

Subsection (1) deals with title documents and statutory provisions executed, enacted or made before the Appointed Day which will have used the old language based on the concept of estates which is being replaced by Part 1. This relates to the fee simple estate which is replaced by the concept of ownership. Other estates will either be abolished under the Bill's provisions or are converted into "interests" only (legal or equitable) (see the Explanatory Notes to clauses 1 and 3 and clause 5). There are definitions of "instrument", "disposition" and "dispose" in clause 117 (these cover both *inter vivos* conveyances, transfers and wills); "statutory provision" is defined by section 1(f) of the Interpretation Act (Northern Ireland) 1954 (c. 33) but that is "for the purposes of" the 1954 Act; that definition is applied to this Bill by clause 117.

Subsection (2) deals with documents and statutory provisions which refer to an "estate" or to the "freehold" or "leasehold" or equivalent expressions, concepts abolished by clause 1. It provides that such references should be deemed, on or after the Appointed Day, to refer to ownership within the meaning of Part 1 or, if this is more appropriate, to the equivalent legal or equitable interest within the meaning of clause 5. Thus a reference to a leasehold estate would be deemed to refer to a tenancy within clause 5(1)(a). A reference to an estate, whether freehold or leasehold, held under a trust, would be deemed to refer to the equivalent equitable interest: see clause 5(4).

Subsection (3) provides for various consequential amendments to the 1970 Act. These amendments relate not only to the provisions of Part 1, but also other Parts of the Bill. Thus not only is the expression "full" dropped from registration of a person as "owner" (to conform with Part 1), but registration of a person as "limited" owner is also dropped because of the provisions relating to trusts of land in Part 4. Under those a tenant for life and certain tenants in tail will no longer own a legal interest in the land and the legal title (the legal ownership) will, instead, be vested in trustees who will be the registered owners. The same applies where a minor is the person entitled to the land (see clause 7). These amendments which are set out in Part I of Schedule 2 are consequential

upon the provisions of this Bill. It should be noted that clause 115 makes provision for other amendments to the 1970 Act which are set out in Part II of Schedule 2.

CLAUSE 5 – Legal interests in land

This clause supplements clause 1(4) and (5). Under the new concept of ownership of land, the owner (who has legal title to it: see clause 1(2)) will still be able to create legal interests less than ownership in favour of other persons, limited by time. As clause 1(4) makes clear, such interests may, in most cases, be specified to last for ever (i.e. for as long as the ownership of the land itself lasts, but subject to the provisions of clause 2(2)) or can be granted or acquired for a more limited period (such as the term of a tenancy). In the case of granting a tenancy, this is subject to the restrictions on making fee farm grants and granting certain types of lease contained in the Property (Northern Ireland) Order 1997 (NI 8).

Subsection (1) lists the only legal interests which in future will be able to be granted out of the land by the owner or may be acquired by someone else in respect of the land (e.g. acquiring an easement or profit *à prendre* by prescription: see clause 9).

Paragraph (a) covers tenancies. A “tenancy” is defined in clause 117 and essentially covers all the situations in which the relationship of landlord and tenant can be created, but not, as recommended by the Commission (see NILC 2 (2009) para. 3.47), a tenancy at will or at sufferance. Since the enactment of section 3 of Deasy’s Act (Landlord and Tenant Law Amendment Act, Ireland 1860 (c. 154)) that relationship ceased to be based on tenure and, instead, is based on contract. Under Part 1 a tenancy will no longer create an “estate” but simply an “interest” in the land, but other than this change in terminology the Bill makes no change of substance to rights of landlords and tenants.

Paragraph (b) covers easements, such as rights of way and rights to light. Part 2 contains further provisions relating to such rights.

Paragraph (c) covers profits *à prendre*, such as mining, quarrying, turbary and other rights like fishing, shooting, hunting and other sporting rights. Part 2 also contains further provisions relating to such rights.

Paragraph (d) refers to covenants the enforceability of which was greatly improved by Article 34 of the Property (Northern Ireland) Order 1997 (NI 8). Prior to that Order, such covenants operated as equitable interests only under the rule of *Tulk v Moxhay*.

Paragraph (e) covers an incumbrance and includes a mortgage, charge or lien on land (see the definition in clause 117). In this context the provision is confined to legal interests (see subsection (4) which confirms that many of the interests listed in subsection (1) can also be created or acquired as equitable interests).

Paragraph (f) refers to the interest retained by the grantor of a determinable fee. This ties in with clause 3(2)(a) under which such a modified fee simple involves legal ownership and does not attract the trusts of land provisions in Part 4.

Paragraph (g) is tied to clause 3(2)(b) and concerns the other types of modified fee. However, the clause in brackets makes it clear that it also covers such a right attached to a legal interest (apart from the ownership of the land), such as a tenancy. It is standard practice for a lease to contain a provision for re-entry by the landlord for breach of covenant by the tenant.

Paragraph (h) covers rentcharges. Although the creation of most of these was prohibited by Article 29 of the Property (Northern Ireland) Order 1997 (NI 8), that Article contained several exceptions and did not affect existing rentcharges.

Paragraph (i) refers to powers which, when exercised, affect the legal ownership of or a legal interest in land. This includes situations where the owner has given someone else a power of attorney to deal with the land or a will gives the personal representatives or trustees power to appoint people as beneficiaries and the statutory powers of mortgagees to realise their security under the provisions of Part 7 of the Bill.

Paragraph (j) deals with interests created by statute, such as wayleave rights (the right to lay cables, pipes, wires and similar items through land or buildings) conferred on utility companies supplying services like electricity, gas and water.

Subsection (2) generally preserves the existing law on the nature and operation of the listed legal interests but this is “subject to the Act” because the Bill includes various other provisions affecting many of the interests listed.

Subsection (3) contains a saving for certain interests which may exist in land. The saving for fee farm rents is included here because their creation was prohibited by Article 28 of the Property (Northern Ireland) Order 1997 (NI 8) (which was brought into force by the Property (1997 Order) (Commencement) (No. 2) Order (Northern Ireland) 1999 (SR 1999 No. 461). The saving covers only pre-2000 rents which survive on the Appointed Day and so it is not appropriate to list such rents in subsection (1). An advowson is a right of patronage or presentation, i.e., the right to appoint a cleric to a church endowed out of private funds. Such a right was traditionally regarded as an incorporeal hereditament and, like a *profit à prendre*, could either be appended to land (usually the manor or estate owned by the “patron” who had endowed the church) or in gross (as a separate interest severed from ownership of any other land). Section 10 of the Irish Church Act 1869 (c. 42) prohibited future exercise of such patronage or appointments made under such rights, but this was subject to a saving in section 70 of that Act which reads: “Nothing in this Act contained shall affect the patronage or right of presentation to any proprietary or district parochial church or endowed chapel of ease which has been endowed out of private funds or affect the property in any such church or chapel or the property held for the purposes of or appropriated to the use of the same, or affect the continuance of the trust relating thereto as originally constituted”. The Commission was informed that such advowsons have been exercised in modern times and subsection (3) preserves their continued operation. Franchises are exclusive rights granted by the Crown to individuals such as the right to hold markets or fairs or to run a ferry. They too by tradition come within the category of an incorporeal hereditament. It is highly unlikely that any new advowsons or franchises will be created in the future and so it seems more appropriate not to include them within subsection (1), which is concerned with creation of legal interests on or after the appointed Day. Customary rights, such as fishing rights held by the fishermen of a local community or a right of way held by the parishioners of a local church, and public rights (such as a public right of way) are not owned by individuals and are subject to special laws. For this reason it is again not appropriate to list them in subsection (1).

Subsection (4) confirms that any interest not listed in subsection (1) or subsection (3) will normally be an equitable interest only. (See also the specific provisions for minors in clause 7). However, it makes it clear that there may be occasions where an interest on the list will not be a legal one because, e.g., the formalities for creation of a legal interest have not been followed (such as execution of a deed as required by clause 91). In such cases the interest may be an equitable one only, if anything. This provision is “Subject to the Act” because, e.g., the Bill prohibits the creation of certain estates or interests, such as a fee tail (see clause 6).

CLAUSE 6 – Abolition of Fees tail

This clause implements the Commission's recommendations that future fees tail should be prohibited and most existing ones should be converted into a fee simple (or ownership under Part 1) (see NILC 2 (2009) paras. 3.28-3.33).

Subsection (1) renders any attempt to create a fee tail on or after the Appointed Day nugatory. Under *subsection (2)* it will either render the intended recipient the owner of the land or create a trust of land under Part 4. It will usually be a permanent interest, but possibly subject to some defeasance clause.

Subsection (3) converts most existing fees tail into ownership on the Appointed Day. But this will not apply if it is subject to protectorship or is not a legal fee tail in possession or is unbarrable because it is a fee tail after possibility of issue extinct. In all these cases a trust of land will arise which may end when the fee tail falls into possession or the protectorship ends. The principle at play here is that subsection (3) brings about an automatic conversion of a fee tail into ownership (the equivalent of a fee simple in possession under the old law) in cases where the holder of the fee tail could on his or her own have achieved the same result under the old law by executing a disentailing assurance under the Fines and Recoveries (Ireland) Act 1834 (c. 74): see also subsection (5).

Subsection (4) clarifies what constitutes an existing "fee tail" converted by subsection (3).

Subsection (5) confirms that the effect of the clause is to convert existing fees tail and purported new ones into the sort of interest which resulted from a disentailing assurance made under the 1834 Act, i.e., barring interests supposed to take effect after the fee tail ended but not interests vesting by way of "defeasance", i.e. cutting short the fee tail.

CLAUSE 7 – Minors

This clause implements the Commission's recommendation that in future land vested in a minor should be treated as an equitable interest only and attracting the provisions relating to trusts of land in Part 4 (see NILC 2 (2009) paras. 3.26-3.27).

Subsection (1) confirms this new position. The consequence is that the legal title to a minor's land will be vested in trustees, as provided by clause 44 (1)(c).

Subsection (2) is included to facilitate conveyancing. If there was no such provision purchasers' solicitors would have to make enquiries as to whether parties to deeds executed after the Appointed Day which form title to unregistered land were minors or not at the date of execution. Instead they will be able to proceed with investigation of title on the assumption that deeds were executed by fully competent parties. In the case of registered land, the Land Registry will have registered the trustees as owners of the land.

PART 2

EASEMENTS AND OTHER RIGHTS OVER LAND

Part 2 implements the Commission's recommendations in Chapter 4 of the Consultation Paper – NILC 2 (2009).

Chapter 1 of this Part deals with reform of the law of prescription and acquisition of rights like easements by implication (replacing the rule in *Wheeldon v Burrows* (1879) 12 ChD 31)). The Commission's recommendations on these matters were based on those contained in the 1990 Final Report of the Land Law Working Group ("1990 Final Report"). The two substantial variations from the 1990 Final Report recommended by the Commission were (1) retention of prescription for both positive and negative easements and (2) a prescriptive period of 20 years rather than 12 years: see NILC 2 (2009) paras. 4.31 and 4.33.

Chapter 2 deals with rights of residence and aligns the law relating to unregistered land with that relating to registered land.

Chapter 3 contains provisions relating to neighbour disputes involving both party structures and access to neighbouring land. In the Consultation Paper the Commission indicated that it had an open mind as to the need for such provisions but subsequent consultations and responses suggested that they would fulfil a useful purpose. Chapter 3, as anticipated by the Commission, is to some extent based on the provisions in the Republic of Ireland's Land and Conveyancing Law Reform Act 2009 (No. 27) ("the 2009 Act"), but various modifications are made to reflect the views of experts familiar with operation of the English equivalent legislation – the Access to Neighbouring Land Act 1992 (c. 23) and the Party Wall, etc Act 1996 (c. 40).

CHAPTER 1

ACQUISITION OF EASEMENTS AND PROFITS À PRENDRE

CLAUSE 8 – Restriction on prescription

This clause implements the Commission's various recommendations for reform of the law of prescription – NILC 2 (2009) paras. 4.29- 4.38.

Subsection (1) abolishes the old methods of prescription at common law and under the doctrine of lost modern grant – NILC 2 (2009) para. 4.32. The Bill also provides that the Prescription Act 1832 (c. 71) (applied to Ireland by the Prescription (Ireland) Act 1858 (c. 42)) will be repealed (see Schedule 4). Instead, acquisition by prescription will, in future, be based exclusively on the provisions of Chapter 1, but subject to the transitional provision in subsection (4).

Subsection (2) implements the Commission's view that in future prescription should be confined to acquisition of easements and no longer apply to profits à prendre – NILC 2 (2009) para. 4.29.

Subsection (3) confirms that in future prescription claims must be based upon the provisions of Chapter 1. It also rules out the development of any future fiction, based upon the notion of a presumed grant – this led to the development of the doctrine of lost modern grant. Again, this is subject to the transitional provision in subsection (4).

Subsection (4) contains a saving for acquisition of easements and profits à prendre based upon a prescriptive period which began to run before the Appointed Day. A claim based on the old law can be made when the relevant period is completed. This is particularly significant for profits à prendre because of the provision in subsection (2). So far as easements are concerned, it enables claimants who have already commenced a prescriptive period (which generally under the old law was 20 years) prior to the Appointed Day to establish a claim on completion of that period less than 20 years after that day. Clause 8 would only be of advantage to such claimants where

they would otherwise have to rely on the longer of the two periods under the Prescription Act, 40 years. If the period had commenced shortly before the Appointed Day, it may be more advantageous to claim under clause 8 (which requires only 20 years in all cases).

CLAUSE 9 – Acquisition of easements by prescription

This clause provides the new statutory method of acquiring easements by prescription and is modelled on Article 154 of the Draft Property (Northern Ireland) Order in Volume 2 of the 1990 Final Report.

Subsection (1) defines the scope of the clause. It applies to any kind of easement recognised by the general law. The Commission concluded that it was inappropriate to interfere with that general law: see NILC 2 (2009) paras. 4.42-4.43.

Subsection (2) contains the new statutory regime for acquisition of an easement by prescription. It provides for an automatic vesting in the dominant title holder on completion of a continuous period of 20 years' enjoyment. *Subsection (8)* provides definitions of the key expressions used in subsection (2). Thus the prescriptive period can be any period of 20 years and not necessarily the immediate past 20 years where a claim comes to court (as the Prescription Act 1832 required). There is no requirement to register the easement in order to acquire legal title to it – an easement acquired by prescription will continue to be a burden affecting registered land without registration (under Schedule 5, Part I para. 9 of the Land Registration Act (Northern Ireland) 1970 (c. 18)). In accordance with Part 1 of the Bill an easement so acquired will belong to the "title holder" of the dominant land and his or her successors and bind the "title holder" of the servient land and his or her successors. The qualification at the beginning of subsection (2) refers to later clauses which e.g., deal with situations where the enjoyment has not been by the dominant title holder (because, e.g., the dominant land has been occupied by a tenant who has exercised the right over the servient land) or the servient land has been by or against persons subject to special characteristics).

Subsection (3) clarifies what is meant by enjoyment of a right during the prescriptive period. This reflects the case law on this subject.

Subsection (4) lists various circumstances where the enjoyment will not qualify. *Paragraphs (a) to (c)* encapsulate the long-standing principle of "user as of right" – *nec vi* (without force), *nec clam* (without secrecy) and *nec precario* (without permission). Again they incorporate principles settled by case law and provide some clarification. In particular, *paragraph (c)* makes it clear that consent may be oral or written and further provision is contained in subsection (5). *Paragraph (d)* carries forward the provision in the Prescription Act 1832 that, to be effective to interrupt continuous enjoyment, an interruption must be for a minimum period of 12 months. *Paragraph (e)* refers to the new method of interruption (not involving physical activity on the part of the servient title holder or the bringing of proceedings) suggested by the 1990 Final Report – notional interruption by registration of a notice in the Statutory Charges Register (see clause 14 of the Bill).

Subsection (5) clarifies what is meant by "consent" for the purposes of subsection (4)(c). By analogy with the provisions relating to "interruption", it must be consent to enjoyment for a minimum period of 12 months. Where consent is given to enjoyment for such a period, once it ends prescriptive enjoyment will begin anew, unless the consent is also renewed.

Subsection (6) explains the character and extent of the easement acquired under subsection (2) and reflects the case law on this subject. *Paragraph (b)* makes it clear

that generally intensification of use which has a substantial effect on the servient title holder's enjoyment of the servient land is not permitted, unless such intensification continues for a period equivalent to the prescriptive period (20 years). Thus, if for the first 10 years a roadway through the servient land is used for the passage of private cars, but during the next 10 years it is used by the dominant title holder for the passage of large trucks and heavy machinery relating to a business, initially the easement acquired will be for the passage of private cars and similar vehicles only. If, however, the use for large trucks and heavy machinery continues uninterrupted for a further 10 years, an easement for passage of such vehicles will also be acquired.

Subsection (7) enables any question as to the operation of subsection (6) to be determined by the Lands Tribunal.

Subsection (8) provides definitions of key expressions used elsewhere in clause 9 and the following clauses in Part 2 dealing with prescription (clauses 10 to 16).

CLAUSE 10 – Trusts of land

This clause deals with the situation where the dominant land or servient land (or both) is subject to a trust of land. This is the new concept introduced by Part 4 of the Bill.

Subsection (1) deals with the situation where the dominant land is occupied by a beneficiary and that person is the person who actually enjoys the right over the servient land for the prescriptive period. The easement acquired under clause 9 will belong to the trust and not to the beneficiary personally. Of course, so long as the beneficiary continues to occupy the dominant land, he or she, as a beneficiary of the trust, will be entitled to enjoy the easement which attaches to that land and which is vested, as part of the ownership of the land, in the trustees.

Subsection (2) makes it clear that, even though the servient land is occupied by a beneficiary, the easement acquired by the dominant title holder is a legal one which binds the legal title holders of the servient land (the trustees so long as the trust subsists; once it ends, it binds whoever succeeds to the servient land).

CLAUSE 11 – Tenancies

This clause deals with the situations where either the dominant or servient land (or both) are occupied by tenants during the prescriptive period.

Subsection (1) confirms the view taken by the Irish courts, but not by the English courts, that prescription can operate as between a landlord and his or her own tenant and as between tenants of the same landlord, e.g., where one tenant occupies the dominant land and another occupies the servient land.

Subsection (2) provides that where the person who completes the prescriptive enjoyment is a tenant, the easement vests in the landlord). However this is subject to the tenant's right to enjoy the easement so long as the tenancy subsists. If the occupying tenant is a sub-tenant, the head-tenant will become entitled to enjoy it if and when he or she becomes entitled to occupy the dominant land (on termination of the sub-tenancy).

Subsection (3) provides that where the prescriptive enjoyment was completed while the servient land was occupied by a tenant, the easement does not bind the landlord or, where the tenant is a sub-tenant, the head-tenant. It only binds the tenant prescribed against, because that is the person who should have known about the enjoyment by

the dominant title holder and was in a position to interrupt it. The subsection makes it clear that the easement will continue to bind the prescribed against tenant so long as he or she or their successors occupy the servient land. This includes where the tenant obtains an extension or renewal of the tenancy or acquires any superior tenancy or even buys out the ownership of the head-landlord. It also applies where the tenant overholds as a tenant at sufferance or other basis (e.g. licensee).

Subsection (4) makes it clear that a new prescriptive claim may be made against the landlord of the servient land if he or she resumes possession of it and allows continued enjoyment for the prescriptive period after that resumption.

CLAUSE 12 – Ultra vires

This clause clarifies the position where the dominant or servient title holder is a corporation or other body with limited powers to own or deal with land.

Subsection (1) makes it clear that the mere fact that the servient title holder could not make an express grant of the easement (because it had no power to do so) would not, in future, prevent an easement arising by prescription in respect of the servient land. The point is that the limited or restricted powers to make an express grant do not prevent such a servient title holder otherwise protecting entitlement to the servient land. Furthermore, as clause 8(3) makes clear, the new law of prescription contained in Chapter 1 is no longer based on any presumption of a grant.

Subsection (2), on the other hand, makes it clear that if the dominant title holder has no power to own or deal with land, clearly it cannot acquire an easement by prescription.

Subsection (3), however, makes it clear that a successor to such a title holder, who is not subject to any such incapacity, may add any period of enjoyment by that title holder to his or her own period of enjoyment, so as to make up the requisite 20-year prescriptive period.

CLAUSE 13 – Mental disorder

This clause deals with the situation where the servient title holder is subject to a mental disorder which renders him or her incapable of managing and administering his or her affairs and property and, therefore, unable to take action (e.g. by interruption) to defeat a prescriptive claim.

Subsection (1) lays down the general proposition that mental disorder either prevents a prescriptive period commencing or suspends one already commenced during the mental incapacity.

Subsection (2) qualifies the general proposition in subsection (1). Under *paragraph (a)* a prescriptive period is not prevented from commencing or suspended if there was some other person who, it is reasonable to expect, could have taken action to prevent a claim arising against the incapacitated servient title holder. This might be a controller appointed under the Mental Health (Northern Ireland) Order 1986 (NI 4) or a guardian. *Paragraph (b)* imposes a “long stop” rule whereby, if a prescriptive period of 40 years can be established, mental disorder is ignored.

Subsection (3) defines “mental disorder” as having the same meaning given by the Mental Health (Northern Ireland) Order 1986 (NI 4).

CLAUSE 14 – Interruption by notice

This clause introduces an alternative means of bringing about an interruption of the running of the prescriptive period, which does not involve the servient title holder having to interrupt physically the dominant title holder's enjoyment or bring proceedings. It is based on Article 159 in the 1990 Final Report's draft Property (Northern Ireland) Order, which, in turn, adapted the provision for light obstruction notices in the Rights of Light Act (Northern Ireland) 1961 (c. 18). In effect it re-enacts and extends to all easements the substance of the 1961 provision.

Subsection (1) makes provision for registration of an "interruption" notice in the Statutory Charges Register maintained by the Land Registry under Part X of the Land Registration Act (Northern Ireland) 1970 (c. 18). It makes provision for a prescribed form, the particulars of which would be set out in Land Registry Rules: see clause 116(2). Such registration can only be made in respect of a specific easement or potential easement being enjoyed by the dominant title holder. It is envisaged that the prescribed form will require the servient title holder to give particulars, so that any person searching the Register will be able to identify the precise potential easement which has been prevented from arising by prescription.

Subsection (2) makes provision for applications for registration, which will also be covered by Land Registry Rules.

Subsection (3) requires the dominant title holder to be given a warning of the impending application for registration of the notice. This enables him or her to make representations to the Land Registry. Even if he or she ignores the warning, the Registry may require the dominant title holder to furnish information – see subsection (5)(b).

Subsection (4) requires the servient title holder to confirm when making the application for registration that the warning has been given to the dominant title holder, otherwise the application will not be processed.

Subsection (5) empowers the Land Registry to require other actions or steps to be taken before registering the notice.

Subsection (6) specifies the effect of registration – as under the 1961 Act, a "deemed" interruption takes place. Unless the registration is cancelled earlier this is deemed to operate for 12 months, which, under clause 9(4)(d) and (e), renders what would otherwise be an effective prescriptive period ineffective.

Subsection (7) enables an aggrieved person to challenge registration of a notice, e.g., a dominant title holder who had already completed the prescriptive period before the notice was registered.

Subsection (8) specifies the options open to the court in an action by an aggrieved person.

CLAUSE 15 – Interference by third parties

This clause is modelled on Article 158 of the 1990 Final Report's draft Property (Northern Ireland) Order. It clarifies the position of a person who is in the course of prescribing for an easement or who has completed the prescriptive period but has not yet had the title to it tested in court.

Subsection (1) deals with the situation where the dominant title holder is in the course of prescribing for an easement and aligns the position with that of a squatter in the course of acquiring title by adverse possession. A squatter can by action defend his or her position as against all persons other than the dispossessed paper owner, but that is based on the squatter being in possession of the land and our law's long recognition of possessory rights. A dominant title holder prescribing for an easement does not have possession of the servient land.

Subsection (2) relates to the situation where the dominant title holder has completed the prescription period, so that the easement has vested under clause 9(2). However, if a third party interferes with it, the dominant title holder has no proof of that vesting. It is unreasonable that proof should be required in the case of a third party who has no title to the servient land and, in effect, no *locus standi*. If, of course, the servient title holder challenges the easement the dominant title holder will have to adduce evidence of the acquisition under clause 9(2), e.g., by statutory declarations as to the enjoyment for the prescriptive period.

CLAUSE 16 – Abandonment of easements and profits *à prendre*

This clause is designed to bring more certainty to the law relating to abandonment (or implied release) of easements and profits *à prendre*. Unlike clauses 9-15, this clause applies to both easements and profits *à prendre*. It is modelled on Article 160 of the 1990 Final Report's draft Property (Northern Ireland) Order.

Subsection (1) raises a presumption of abandonment from 20 years' non-enjoyment as a corollary to acquisition by prescription on the basis of 20 years' enjoyment. At common law it has long been settled that a mere non-enjoyment does not extinguish an easement or profit *à prendre*. Evidence must be produced to show a clear intention to abandon on the part of the dominant title holder and that is often very difficult to do. Subsection (1) raises a presumption and the burden would be on the dominant title holder to rebut that presumption.

Subsection (2) qualifies subsection (1). *Paragraph (a)* contains a saving for other areas of the law relating to abandonment or implied release, e.g., where the dominant title holder agrees to work on the servient land which renders it impossible to assert the easement (such as building work which covers a path over which a right of way existed or infringes a right of light). Alternatively, the dominant title holder may agree to substitution of a new easement or profit *à prendre* without formally releasing the existing one. *Paragraph (b)* makes it clear that no presumption operates under subsection (1) where there is simply partial or reduced use of the easement or profit *à prendre*.

CLAUSE 17 – Implied easements

This clause replaces the rule in *Wheeldon v Burrows* (1879) 12 ChD 31, a rule which is hedged with considerable uncertainty and doubts. It is modelled on Article 152 of the 1990 Final Report's draft Property (Northern Ireland) Order. Unlike that Article clause 17 applies to dispositions and not just conveyances – the rule applied also to dispositions by will: see *Phillip v Lowe* [1892] 1 Ch 47; *Milner's Safe Co Ltd v Great Northern & City Railway* [1907] 1 Ch 208.

Subsection (1) sets out the new statutory rule to cover situations previously covered by the rule in *Wheeldon v Burrows*. *Paragraph (a)* deals with the situation where the title holder of a large area of land subdivides it and disposes of a parcel or parcels to others, perhaps retaining a parcel. *Paragraph (b)* deals with the situation where a title

holder holds several different parcels of land and again disposes of one or more of them separately, perhaps retaining one. Subsection (1) also deals with an agreement to dispose, such as a contract for the sale of land. It was settled that the rule in *Wheeldon v Burrows* applied also to agreements: see *Bolton v Bolton* [1879] 11 ChD 968; *Re Walmsley and Shaw's Contract* [1917] 1 Ch 93; *Borman v Griffith* [1930] 1 Ch 493. *Sub-paragraph (i)* deals with facilities actually enjoyed by the disposing title holder and which it is reasonable to imply in favour of the donee. *Sub-paragraph (ii)* deals with facilities which are new but which are necessary for reasonable enjoyment of any parcel disposed of and which it is reasonable to contemplate as having been intended to be available to the donee.

Subsection (2) sets out the various facilities which may be covered by easements implied under the clause. They must all be capable of forming the subject matter of an easement and be conducive to the reasonable enjoyment of the parcel of land disposed of: see *paragraph (d)*.

Subsection (3) clarifies subsection (2)(b) and entitles a person doing repairs to any installation to recover a contribution towards costs and expenses from others enjoying the benefit of that installation.

Subsection (4) confirms, as under the rule in *Wheeldon v Burrows*, that the clause is concerned with easements arising by implication.

Subsection (5) imports any ancillary rights necessary to render an easement so arising fully effective.

Subsection (6) specifies the scope of the clause. Since it is concerned with easements arising by implication, *paragraph (a)* makes it clear that it gives way to any express provision in the disposition in question. Since the clause involves replacing the previous law contained in the rule in *Wheeldon v Burrows* *paragraph (b)* provides that it applies only to agreements or dispositions made on or after the Appointed Day.

Subsection (7) also clarifies the scope of the clause. *Paragraph (a)* reflects the fact that the rule in *Wheeldon v Burrows* applied not only to dispositions by the legal owner of land, but also to dispositions by or to the holder of a legal (e.g. a mortgagee in possession) or equitable interest (e.g. a purchaser under a contract for sale allowed into occupation prior to completion). *Paragraph (b)* makes it clear that the benefit of an implied easement can only be claimed by a "lawful" occupier, such as a tenant or licensee holding under the owner of a parcel. It cannot be claimed by a trespasser unless and until that person acquires title under the doctrine of adverse possession.

Subsection (8) also clarifies the scope of the clause. It confirms that its object is to replace the rule in *Wheeldon v Burrows*, but not otherwise affect the law relating to easements arising by implication. *Paragraph (a)* saves the other two principles whereby under the general law easements may arise by implication, i.e., under the doctrine of "necessity" (e.g. where, as a result of a conveyance, land has become landlocked and a right of way should be implied to provide access: see *Donnelly v Adams* [1905] 1 IR 154; *Browne v Maguire* [1922] 1 IR 23; *Nickerson v Barraclough* [1981] Ch 426) or based on the common intention of the parties to the disposition (e.g. mutual rights of support arising when one of attached properties is sold: see *Gogarty v Hoskins* [1922] 1 IR 173; *Wong v Beaumont Property Trust Ltd* [1965] 1 QB 173. *Paragraph (b)* contains a saving for the wider doctrine of non-derogation from grant (upon which the rule in *Wheeldon v Burrows* was said to be based).

CHAPTER 2

RIGHTS OF RESIDENCE

Chapter 2 implements the Commission's recommendation that the position of rights of residence created in respect of land should be clarified, to reflect, in particular, distinctions made by recent case law: see NILC 2 (2009) paras. 4.16-4.17.

CLAUSE 18 – Rights in unregistered land

Clause 18 adapts to unregistered land the provisions for registered land in section 47 of the Land Registration Act (Northern Ireland) 1970 (c. 18). The Commission took the view that this alignment should be made: see NILC 2 (2009) para. 4.17.

Subsection (1) provides that a right of residence coming within paragraphs (a) and (b) creates a personal right only in the holder of the right of residence. Such a personal right cannot be transferred to someone else and there is no question of the holder being able to deal with it or the land to which it relates. Instead, the title holder of the land is free to deal with it without having to use the trusts of land provisions in Part 4 of the Bill: see clause 3(2)(c)(iii) of the Bill. However, such a dealing would be subject to the right of residence, as subsection (2) confirms.

Subsection (2) provides that, notwithstanding the personal nature of such a right of residence, it is enforceable against successors in title to the title holder of the land. In that sense the right is not like other strictly personal rights and creates an interest of some kind. Under section 47 of the Land Registration Act (Northern Ireland) 1970 (NI 18), once the right is registered as a Schedule 6 burden, it binds the registered owner and registered leaseholder of the land and successors in title.

Subsections (3) and (4) provide an equivalent rule as to enforcement for unregistered land. In order to bind a successor in title, the right of residence will have to be registered in the Registry of Deeds before the person in question succeeds to entitlement to the land.

CHAPTER 3

PARTY STRUCTURES

Chapter 3 contains provisions dealing with difficulties and disputes which may arise as between neighbouring landowners over works to party structures or works to land or buildings which could only be carried out by having access to neighbouring land. It deals, therefore, with problems dealt with by two Acts in England and Wales, the Access to Neighbouring Land Act 1992 (c. 23) and Party Walls, etc Act 1996 (c. 40). The Commission, as did the 1990 Final Report, initially took the view that there was insufficient evidence of problems arising in Northern Ireland to suggest a need for such legislation: see NILC 2 (2009) paras. 4.44-4.47. However, the responses to that Consultation Paper did produce such evidence and so the Commission decided ultimately to include this Chapter in the draft Bill.

The Commission had drawn attention also to the provisions relating to party structures in the Republic's Land and Conveyancing Law Reform Act 2009 (No. 27) (Part 8 Chapter 3) and suggested that, if it was decided to introduce provisions for Northern Ireland, they should be modelled on the 2009 Act's composite provisions. Chapter 3

does follow several of their features, but, in the light of responses to the Consultation Paper and further consultations with interested parties, various adjustments are made to what is contained in the 2009 Act.

CLAUSE 19 – Rights of building title holder

This clause confers a statutory entitlement on a landowner to carry out works to a “party structure”, subject to various conditions laid down in the clause and procedures set out in the following clauses, both of which are designed to protect the rights of any adjoining title holder. The various expressions used in this and the following clauses, such as “party structure”, “building title holder”, “adjoining title holder” and “works” are defined in clause 24.

Subsection (1) confers the general right of a landowner to carry out works to a party structure – that person is known as the “building title holder”. Paragraphs (a)-(d) limit the purposes for which such works may be carried out. *Paragraph (a)* relates to compliance with statutory provisions, notices or orders, such as those requiring a nuisance or environmental hazard to be dealt with. *Paragraph (b)* relates to development which is authorised under planning legislation, including compliance with conditions attached to planning permission. *Paragraph (c)* relates to preservation (by, e.g., repair works) of a party structure or buildings or land of which it forms a part. *Paragraph (d)* covers works of a minor nature which will not cause any substantial damage or inconvenience to the adjoining title holder or, if they would do so, it is nevertheless reasonable to carry them out.

Subsection (2) lays down conditions to the exercise of the right to do works to a party structure. Under *paragraph (a)* the building title holder must meet all the costs of the building works, subject to contributions from any adjoining title holder which may be payable under subsection (3). Such costs include those arising from compliance with the Chapter, such as obtaining, in most cases, nomination of an independent surveyor to certify the party structure notice which the building title holder is required to serve on any adjoining title holder affected by the proposed works. As clause 20(1)(e) confirms, any adjoining title holder served with a party structure notice is entitled to consult the nominated surveyor about the works specified in the notice. This will often help the adjoining title holder to decide how to respond, as required by clause 21. It is also important to note that any adjoining title holder must be given a “warning notice” prior to certification of the party structure notice: see clause 20(4). This provides the adjoining title holder with the opportunity to make representations to the nominated surveyor before certification of the party structure notice. The building title holder has to meet the cost of such consultation. If, however, the adjoining title holder decided to seek his or her own independent professional advice, the adjoining title holder must meet the cost of this: clause 20(7). Under *paragraph (b)* the building title holder must make good all damage caused to any adjoining title holder or else reimburse such a title holder the reasonable costs of the making good. Under *paragraph (c)* the building title holder must also compensate an adjoining title holder for inconvenience caused by the works (e.g. disruption to a business carried on in the adjoining property). Where it is not practical or economic to carry out such works the compensation must relate to a diminution in the value of any adjoining land which has taken place as a result of the works.

Subsection (3) recognises that the works to a party structure may also benefit an adjoining title holder, because that title holder also uses or enjoys the party structure. The subsection also recognises that the works may relate to a defect or want of repair of the party structure for which an adjoining title holder has a responsibility and so that adjoining title holder should make an appropriate contribution to the costs of remedial work incurred by the building title holder. *Paragraph (a)* entitles the building title holder

to claim a contribution to the costs of carrying out the works. *Paragraph (b)* entitles the building title holder to claim a contribution to, or to deduct an appropriate amount from any reimbursement of, costs and costs of making good damage caused by the works. *Paragraph (c)* provides, as an alternative, the right to deduct an appropriate amount from compensation for inconvenience caused by the works. If there is a dispute as to the amount of such a contribution, this may be determined by the Lands Tribunal in accordance with clause 23. However, that will only determine the amount payable. If it is not paid, an action to recover it will have to be pursued in court in the usual way as subsection (4) provides.

Subsection (4) provides the remedies for a failure to comply with subsections (2) and (3). *Paragraph (a)* entitles an adjoining title holder to pursue a defaulting building title holder. *Paragraph (b)* entitles a building title holder to pursue an adjoining title holder who refuses to pay a contribution to costs and costs.

Subsection (5) makes it clear that clause 19 confers additional rights on a landowner who wishes to carry out works on the land. It does not affect any other rights he or she may have, whether as a result of an agreement or under the general law.

CLAUSE 20 – Party structure notices

This clause is based on section 3 of the England and Wales Party Walls, etc Act 1996 (c. 40). It involves a departure from the provisions in the Republic's 2009 Act. It was considered desirable to adapt the 1996 Act's scheme of notices and counter notices, followed by determination of any dispute by an independent tribunal.

A major departure from the 1996 Act's scheme relates to the role of surveyors. Under section 10 of the 1996 Act often the parties will each appoint his or her own surveyor and those two surveyors will, then, appoint a third surveyor. The provisions of the Chapter are designed to avoid this cumbersome process and to emphasise the independent role of an expert surveyor at the beginning of the process, rather than when a dispute arises. Once a building title holder decides to carry out works covered by the Chapter, in most cases, he or she must first obtain nomination of a surveyor to certify the party structure notice required to be served on any adjoining title holder before any works can be commenced. That nomination will have to be made by the Chairman of the Royal Institute of Chartered Surveyors (RICS) (Northern Ireland) from a panel with appropriate expertise and experience. Regulations will set out appropriate qualifications and provide for establishment and maintenance of this panel. This "independent" nominated surveyor will have to certify that the contents of the party structure notice are accurate and appropriate and any adjoining title holder will be able to consult the nominated surveyor at the expense of the building title holder, before deciding whether to agree to the works or serve a counter-notice refusing consent or raising conditions to be met. However, it will be open to an adjoining title holder to employ his or her own professional adviser, but the adjoining title holder will have to meet the expense of this. If, in the end, the adjoining title holder does not consent to the works, a dispute is deemed to arise which either party may refer to the Lands Tribunal for determination.

Subsection (1) requires a building title holder, wishing to exercise the right to carry out works to a party structure, to begin the process by serving a "party structure notice" on any adjoining title holder, giving details of what is proposed. This enables any adjoining title holder to decide whether to serve a counter notice under clause 21. Furthermore, before the nominated surveyor certifies a party structure notice for due service on any adjoining title holder he is required to give any adjoining title holder prior warning of the likelihood of certification of such a notice: see subsection (4). This ensures that subsequent service of a party notice does not come as a surprise.

Provisions relating to service of notices are contained in section 24 of the Interpretation Act (Northern Ireland) 1954.

Paragraphs (a) to (e) set out the essential contents of the party structure notice, to be amplified by regulations. *Paragraph (a)* requires specification of the name and address of the building title holder and any other method of communication (e.g., e-mail address). *Paragraph (b)* requires specification of the proposed works and this is further explained by subsection (2). *Paragraph (c)* requires specification of the date on which it is proposed to begin the works. *Paragraph (d)* requires, where applicable (which, as subsection (3) makes clear, will be most cases, especially those involving building works) specification of the name and address (and any other method of communication) of the nominated surveyor who must certify the party structure notice under subsection (3). Any adjoining title holder served with a party structure notice is entitled to consult the nominated surveyor, at the building title holder's costs (section 19(2)(a)). *Paragraph (e)* requires the party structure notice to draw the adjoining title holder's attention to this right of consultation. The expectation is that, in many, if not most, cases, the independent status and level of expertise of the nominated surveyor will result in adjoining title holders having confidence in the certification of the contents of the party structure notice as being both accurate and appropriate. Any queries will be resolved following consultation and there will be no need to refer a dispute to the Lands Tribunal.

Subsection (2) contains further provisions as to the contents of the party structure notice, particularly in relation to the proposed works. These will be amplified by regulations and it is envisaged that the details and specifications set out in those regulations will vary according to the nature of the proposed works. Thus the regulations are likely to recognise the different categories of works referred to in the Party Walls, etc. Act 1996 (such as new building on the line of a junction (section 1), repairs to an existing party structure (section 2), and adjacent excavation and construction (section 6)) and need for access to neighbouring land recognised by the Access to Neighbouring Land Act 1992. *Paragraph (a)* refers to a detailed description of the proposed works (including maps and plans) and such other information as may be "prescribed" (i.e. by regulations made under clause 116). *Paragraph (b)* requires specification of the timescale for carrying out and completion of the works (including any making good of damage to adjoining land). *Paragraph (c)* requires specification of the anticipated impact of the proposed works (e.g., obstruction to the adjoining land or disruption to the activities of the adjoining title holder). *Paragraph (d)* requires specification of provision for making good damage or reimbursing costs and costs or paying compensation, in accordance with clause 19(2)(b) and (c). *Paragraph (e)* requires specification of any contribution being claimed from the adjoining title holder under clause 19(3). *Paragraph (f)* facilitates the setting of other requirements by regulations.

Subsection (3) requires certification of the contents of the party structure notice by a nominated surveyor (as explained above) in most cases. The exception relates to minor "works" specified in clause 24, i.e. to hedges, trees or shrubs. It was considered inappropriate to require the expense of certification of an independent, highly qualified surveyor in such cases. If the parties cannot come to an agreement themselves, the dispute can be referred to the Lands Tribunal under clause 21(3).

Subsection (4) provides further safeguards for adjoining title holders. It requires the nominated surveyor to serve a "warning notice" on any adjoining title holder informing him or her of the proposed works and likelihood of certification (*paragraph (a)*). This also provides any adjoining title holder with the opportunity to make representations to the nominated surveyor, which he or she can take into account in deciding whether to certify the party structure notice and what it should contain (*paragraph (b)*). Under clause 19(2)(a) the building title holder has to meet the costs of such consultation with

the nominated surveyor. However, it will be open to the adjoining title holder to consult his or her own surveyor or other professional person, but, in that case, the adjoining title holder must meet the cost of such consultation: subsection (7).

Subsection (5) sets various time limits. *Paragraph (a)* requires the notice to be served at least 2 months before the works are proposed to begin. *Paragraph (b)* provides that the notice will cease to have effect if the works are not begun within 12 months (or later date agreed or determined by the Lands Tribunal in the case of a dispute) and then not carried out with due diligence. The consequence of the notice ceasing to have effect is that the right to carry out the works is lost on this occasion. However, subsection 6(b) makes it clear that the building title holder may institute the procedures again at a later date, by serving a new party structure notice.

Subsection (6) contains some savings. *Paragraph (a)* confirms that there is no need to serve a party structure notice if adjoining title holders agree to exercise of the right conferred by clause 19. *Paragraph (b)* makes it clear that even though a party structure notice may have ceased to have effect under subsection (6)(b), the building title holder may reinstitute the procedure by serving a new one at a later date. *Paragraph (c)* makes it clear that there is no need for such a notice where a statutory notice has been served on the building title holder requiring works to the party structure. *Paragraph (d)* makes it clear that it is open to an adjoining title holder to consult his or her own surveyor or to seek other professional advice, rather than relying upon the nominated surveyor, but he or she will have to meet the cost of this; as *subsection (7)* makes clear.

CLAUSE 21 – Counter notices

Clause 21 enables adjoining title holders to respond to the party structure notice within one month or such longer period as may be agreed with the building title holder. A failure to respond within that period means that consent to the works is deemed to have been given.

Subsection (1) specifies the alternative responses which an adjoining title holder may give. *Paragraph (a)* covers unconditional consent. *Paragraph (b)* covers conditional consent and requires the conditions to be specified in the counter notice. *Paragraph (c)* covers a blanket refusal of consent.

Subsection (2) confirms that a failure to serve a counter notice within the time limit means that the adjoining title holder is deemed to consent to the works.

Subsection (3) provides that a dispute is deemed to arise either where the building title holder is unable or unwilling to meet conditions an adjoining title holder has attached to consent or where an adjoining title holder has refused consent. Such a dispute may be determined by the Lands Tribunal. Clause 23 makes provision for determination of such disputes.

Subsection (4) indicates that amongst the conditions which an adjoining title holder might attach to consent to the works is that the building title holder gives an indemnity or security for damages and costs.

CLAUSE 22 – Nominated surveyor

This clause provides for nomination of an independent, expert surveyor at the beginning of the process to certify, in most cases, the contents of the party structure notice which a building title holder is required, under clause 20, to serve on adjoining

title holders. It eschews the complicated system in the Party Walls, etc. Act 1996 (c. 40), which can result in three surveyors acting, one each appointed by the parties and those two appointing a third one (see section 10 of that Act). Instead it provides for appointment of one independent surveyor.

Subsection (1) provides for the nomination of “the nominated surveyor”, on the application of the building title holder. It provides for nomination by the Chairman of the RICS (Northern Ireland). In the event of that office being vacant, the nomination can be made by whoever is authorised to perform the functions of that office.

Subsection (2) makes it clear that the nominee must be selected from a panel of surveyors to be established by the RICS (Northern Ireland) in consultation with the Department of the Environment and such other bodies as may be prescribed by regulations. Furthermore, it provides that regulations must also prescribe the expertise and qualifications for panel members.

Subsection (3) provides for appointment of a replacement in a variety of circumstances where the nominated surveyor is incapable, unable or unwilling to act. The Chairman can specify whether the replacement should continue with performance of the surveyor’s functions already commenced or start afresh. This will depend on the circumstances leading to the replacement. Not only is it the function of the nominated surveyor to certify the party structure notice, he or she must also deal with queries raised by way of consultation by any adjoining title holder served with such a notice.

CLAUSE 23 – Lands Tribunal

This clause deals with determination of disputes by the Lands Tribunal.

Subsection (1) provides for an application to determine a dispute to be made by either the building title holder or any adjoining title holder or both.

Subsection (2) confers a wide discretion on the Tribunal as to the matters which may be covered by its determination. In particular it refers to whether and how the works should be carried out and payment of costs of the award. It also covers a dispute over the contribution to costs which an adjoining title holder should make under clause 19(3).

Subsection (3) allows the Tribunal to postpone making a determination in order to facilitate mediation or other alternative dispute resolution between the parties.

Subsection (4) is linked with clauses 20 and 21. The building title holder cannot commence works (exercise the right to carry them out) without following the initial notice procedure. The Tribunal must take this into account in specifying the timing for the works in the award.

Subsection (5) contains a saving for rights like easements similar to that in section 9 of the 1996 Act. It adds, however, the qualification “permanent” in *paragraph (a)*, because the works while they are being carried out may necessarily involve a “temporary” interference with rights of light or other rights, such as access.

CLAUSE 24 – Interpretation of Chapter 3

This clause contains important definitions of key concepts used throughout Chapter 3.

The definition of “adjoining title holder” is particularly relevant to clauses 20 and 21. These are the persons who must be served with a party structure notice before any works are carried out and who are entitled to insist upon conditions attached to a counter notice being met or to refuse to give consent. The definition makes it clear that an adjoining title holder must be the owner of adjoining land or hold a substantial leasehold interest in it, i.e., a term with at least one year remaining.

The definition of “building title holder” is particularly relevant to clause 19, since this is the person on whom the statutory right to carry out works to a party structure is conferred. This may be a tenant who, under the terms of the lease, is entitled to carry out maintenance, repairs or other works to the demised premises. It includes other persons similarly entitled, such as a mortgagee who has taken possession of the property which includes the party structure.

The definition of “party structure” is a very wide one and includes all kinds of “structures” which do not come within the traditional concept of a “party wall”. It includes works to ditches, fences, hedges, shrubs and trees, which were covered by the Boundaries Act (Ireland) 1721 (c. 5). That Act was repealed as obsolete by the Property (Northern Ireland) Order 1978 (NI 4) (Article 16(2) and Schedule 2), but the view has been taken that the new scheme in Chapter 3 should have this wider scope. The definition also makes it clear that it covers a structure, such as a wall, which is so close to the boundary with adjoining land or buildings that the only reasonably practical way to carrying out works to it is to have access from the adjoining land or buildings.

The definition of “works” is also a very wide one and, like the definition of “party structure”, is particularly linked with clauses 19 (which authorises works to such structures) and 20 (which require service of a notice specifying the proposed works).

PART 3

FUTURE INTERESTS

Part 3 implements to some extent the Commission’s recommendation in Chapter 5 of the Consultation Paper NILC 2 (2009). First, it abolishes the common law contingent remainder rules which were a throwback to the feudal system of land holding. Such abolition is a natural consequence of other provisions in the Bill, in particular the repeal of the Statute of Uses (Ireland) 1634 (c. 1) and the conversion of most future interests in land into equitable interests. The latter is achieved by a combination of the new concept of legal ownership introduced by Part 1 and the new provisions governing settlements and trusts of land in Part 4: see NILC 2 (2009) paras. 5.2-5.3.

The Consultation Paper also mooted abolition of the rule against perpetuities, but subsequent consultations, particularly with HMRC, revealed that this departure from the law of England and Wales was not appropriate. The Commission anticipated that this might be the ultimate conclusion on this subject and recommended that, if the rule was to be retained, it should be amended as proposed for England and Wales by the Perpetuities and Accumulations Bill then before Westminster. That has since become the Perpetuities and Accumulations Act 2009 (c. 18). Part 3 adapts for Northern Ireland its provisions relating to the rule against perpetuities. Adaptation is necessary because, although the Perpetuities Act (Northern Ireland) 1966 (c. 2) was based on the England and Wales Perpetuities and Accumulations Act 1964 (c. 55), there are differences between those two Acts. For example, the 1966 Act contained various restrictions on the application of the rule which did not appear in the 1964 Act (see section 9 of the 1966 Act). The 1966 Act did not deal with accumulations as is mentioned below.

A separate rule governing accumulations never developed properly in Ireland, because the original Thelluson Act (Accumulations Act 1800 (c. 98)) did not apply, although curiously the amending Accumulations Act 1892 (c. 58) did. The Commission recommended that there should be no special rule on accumulations and that the 1892 Act should simply be repealed. The Bill follows this. In fact the England and Wales 2009 Act largely achieves the same result there (see clause 13), but retains restrictions on accumulation for charities (section 14). The Commission was not convinced of the need for a special rule for charities operating in Northern Ireland and so Part 3 does not contain an equivalent of sections 13 and 14 of the 2009 Act. The longstanding different law on accumulations in Northern Ireland has been judicially noted: see Lord Wilberforce in *Vestey v IRC (Nos. 1 and 2)* [1979] 3 WLR 915 at 920.

CHAPTER 1

OPERATION OF FUTURE INTERESTS

CLAUSE 25 – Equitable interests only

This clause confirms that, as a consequence of the Bill's other provisions, most future interests will operate in equity only. This is because, so far as former freehold land is concerned, the legal title will in future be owned by a person who, under the previous law, would have a fee simple in possession: see clause 3. Where a more limited interest is created (such as a life interest) this will exist only in equity under a trust of land coming within Part 4. Since "possession" includes receipt of rent (see the definition in clause 117) the landlord of land subject to a tenancy will be the legal owner and the reversion will necessarily be a legal interest. *Subsection (1)* is, however, qualified by subsection (2).

Subsection (2) qualifies the general principle in subsection (1) because, again, the provisions of Part 1 dealing with legal ownership of land recognise that certain other future interests will remain legal interests. These are specified in clause 5(1) and include a possibility of reverter and right of entry or re-entry.

CLAUSE 26 – Abolition of rules

This clause confirms, first, the consequence of the Bill's other provisions, including clause 25. Because future interests will largely operate in equity only there is no further need for the common law contingent remainder rules. The Bill repeals statutory provisions linked to these rules, such as section 8 of the Real Property Act 1845 (c. 106) and the Contingent Remainders Act 1877 (c. 33) (see Schedule 4). Secondly, the clause abolishes any remnants of the rule against accumulations – in essence, this involves the repeal of the Accumulations Act 1892 (c. 58) (see again Schedule 4).

CHAPTER 2

RULE AGAINST PERPETUITIES

This Chapter adapts to Northern Ireland the Perpetuities and Accumulations Act 2009 enacted for England and Wales. That Act gave effect to the Law Commission's 1998 report *The Rules Against Perpetuities and Excessive Accumulations* (Law Com 251). The Chapter aims to simplify and modernise the rule against perpetuities. It applies the

rule against perpetuities only to the interests or powers mentioned in the Chapter. The interests and powers which it deems to be within the application of the rule include –

- successive interests;
- an interest subject to a condition precedent;
- successive interests under the doctrine of executory bequests;
- powers of appointment.

A fundamental characteristic of all but one of these categories of interests and powers is that they exist under a trust. The exceptional category comprises successive interests under the doctrine of executory bequests (see clause 27(4)). The rule will no longer apply to future rights outside these categories, such as future easements, options to purchase and rights of pre-emption.

The Chapter preserves the effect of the existing exceptions from the rule only where they are relevant to the rule as applied by its provisions. For example, the exception for gifts over from one charity to another, where a settlor specifies that a gift to one charity is to pass to another charity if a specified event occurs, is preserved (see clause 28(2) and (3)). Similarly, interests arising under relevant pension schemes will remain exempt.

For most cases, the Chapter replaces the existing common law and statutory perpetuity periods with a single statutory perpetuity period of 125 years. The period will start from the date when the instrument creating the interest is created. In the exercise of a special power of appointment, the perpetuity period will be the same period (in terms of duration and commencement date) as that applicable to the instrument which created the power. The exceptions are: interests or rights arising under an instrument (a) nominating benefits under a relevant pension scheme, or (b) made in the exercise of a power of advancement under such a scheme. The Chapter preserves, in relation to the rule as it will apply under its provisions, the effect of the reforms introduced by the Perpetuities Act (Northern Ireland) 1966 (c. 2).

The Chapter's provisions will generally apply to instruments taking effect on or after the Appointed Day, but there are two classes of instrument to which they (other than clause 37) will not apply even though they take effect on or after that day. They are –

- wills executed before, but taking effect on or after, the Appointed Day; and
- instruments taking effect on or after the Appointed Day which are made in the exercise of a special power of appointment, where the special power was created by an instrument which took effect before that day.

Clause 27 differs from the other provisions of the Chapter in that it will apply to wills executed before the Chapter comes into force, whether or not the will in question takes effect from commencement, and to instruments (other than wills) taking effect before commencement. This clause will give trustees of pre-commencement trusts, where the perpetuity period is defined by reference to a life or lives and it is difficult or not reasonably practicable to ascertain whether the lives have ended (and therefore whether the perpetuity period has ended), a right to opt for a fixed period of 100 years.

It is possible to create trusts orally rather than in writing. The provisions of the Chapter will apply equally to such trusts.

CLAUSE 27 – Application of the rule

Subsection (1) defines the circumstances in which the rule against perpetuities will apply. Only the interests and powers mentioned in the clause will be subject to the rule against perpetuities. As a result, the scope of the rule will be narrowed. It will not apply, for example, to most future easements, options and rights of pre-emption, which will fall outside these categories. Most of the existing exceptions to the rule do not need to be replicated, as they will not fall within the section.

It is modelled on section 1 of the 2009 Act, but does not refer to “estates” which would be abolished by Part 1 of this Bill. Nor does it refer to an interest subject to a condition subsequent (with a right of re-entry) or determinable fees because the Irish courts ruled that the rule did not apply to such interests. Rights of re-entry and possibilities of reverter were dealt with by section 13 of the Perpetuities Act (Northern Ireland) 1966 (c. 2), including those relating to property other than land: see section 13(5) of the 1966 Act.

Subsection (2) applies the rule against perpetuities to each of the successive interests created by an instrument which limits property in trust. This means that where property is given to be held on trust for A, then for B, and thereafter goes to C absolutely, the rule has to be applied to the interests of A, B and C separately. Any of the successive interests may be subject to a contingency. For example, a trust is created where the terms are that A will be entitled to the income for life from A’s 18th birthday: then, subject to A’s interest, the capital will pass to whichever of B and C survive A; or, if both survive, to B and C in equal shares; or, if neither survive, then to charity X. Here the interests of A, B, C and X are all subject to the rule.

Subsection (3) applies the rule against perpetuities to an interest in property held on trust which is subject to a condition precedent but which is not one of successive interests, that is, where it is the sole interest created by the trust instrument. The condition precedent might be a condition to be fulfilled by a particular person, for example, a gift “to X provided he becomes a train driver”. Or it might determine who should receive the property: for example, a gift “to the first person to land on Mars” or “to my first great-great-grandchild”.

Under the doctrine of executory bequests it is possible to create successive legal interests in personal property by will without using a trust. For example, a will might leave a valuable painting to A to be enjoyed during his or her lifetime only, then to B for his or her lifetime only, then to C absolutely. *Subsection (4)* applies the rule against perpetuities to each of the successive interests.

Subsection (5) applies the rule to powers of appointment, with the result that a power of appointment must become exercisable within the perpetuity period or it will be void (and, if it is a special power, may be exercised only within the perpetuity period – see clause 33(3) to (6)). For example, C creates a trust with a special power of appointment exercisable by trustees once one or more of C’s grandchildren has attained the age of 40. The power of appointment will be void if none of the grandchildren reaches the age of 40 within the perpetuity period.

Subsection (6) provides that clause 27 has effect subject to the exceptions made by clauses 28 and 29.

CLAUSE 28 – Exceptions to rule’s application

Clause 28 provides for certain general exceptions to the application of the rule against perpetuities (subsection (1)).

Subsections (2) and (3) replicate existing exceptions to the application of the rule against perpetuities. The subsections apply in certain circumstances where provision has been made for property to pass from one charity to another. *Subsection (2)* applies where a charity is granted an interest in property with a gift over to another charity on the occurrence of a specified determining event. A “charity” is defined by section 1(1) of the Charities Act (Northern Ireland) 2008 (c. 12) as “an institution which (a) is established for charitable purposes only, and (b) falls to be subject to the control of the Court in the exercise of its jurisdiction with respect to charities”. In the 2008 Act, “institution” means “any institution whether incorporated or not and includes a trust or undertaking” (section 180(1)). For example, land is given to be held on trust for charity A but, if charity A ceases to require the land for its charitable purposes, the land is to pass to charity B. The rule against perpetuities will not apply to charity B’s interest. The same result will follow if the gift over is for charitable purposes rather than to a named charity.

Subsection (3) applies where property is given to one charity subject to a condition subsequent, with a provision that, if the condition is broken, the property shall pass to another charity. For example, if a painting is granted on trust to charity A on condition that it is displayed to the public, but to charity B if charity A breaks the condition, charity B’s right to claim possession of the painting is not subject to the rule.

Subsections (4) and (5) together define the exception from the rule against perpetuities for interests and rights arising under relevant pension schemes as defined in sections 1 and 181 of the Pension Schemes Act 1993 (c. 48) and sections 1 and 176 of the Pension Schemes (Northern Ireland) Act 1993 (c. 49) (section 43(4) and (5)). The basic exception is described in subsection (4) as covering interests and rights arising under such pension schemes.

Subsection (5) removes from the ambit of subsection (4) interests and rights arising under two types of private trust created in respect of property subject to a pension scheme. These are defined as interests and rights arising under an instrument (a) nominating benefits under the pension scheme or (b) made in the exercise of a power of advancement arising under the scheme. By way of example of the first, a member may make a nomination binding on the pension scheme trustees for a trust to be created with certain pension benefits in favour of a nominated person (typically death in service benefits). The interests under the trust will be subject to the rule. An example of the second is that pension scheme trustees may exercise a power of advancement to make capital payments to trustees in favour of relatives of a member before any entitlement to a pension arises. This capital sum may be settled in such a way that it creates successive interests. These interests will be subject to the rule against perpetuities.

CLAUSE 29 – Power to specify exceptions

Clause 29 gives the Department power to make an Order specifying further exceptions to the rule against perpetuities. The power would be exercisable by statutory instrument, subject to affirmative resolution by the Assembly (see clause 116(4) and (5)).

The power will avoid the need for further primary legislation to deal with as yet unforeseen arrangements that might arise in the future. For example, a new form of financial instrument might be devised which has considerable advantages over existing trust instrument vehicles, but which would be unworkable if the rule against perpetuities were to apply.

CLAUSE 30 – Abolition of certain exceptions

Clause 30 provides that certain existing statutory exceptions to the rule against perpetuities will cease to have effect. These exceptions will be unnecessary in light of clauses 27 and 28. They will, however, continue to be relevant to instruments which took effect before the Appointed Day and to wills that were executed before that day.

CLAUSE 31 – Perpetuity period

Clause 31 defines the length of the perpetuity period governing instruments to which the Bill applies (see *clauses 27, 28, 29 and 38*). The perpetuity period for such instruments will be 125 years.

Subsection (2) provides that subsection (1) applies whether or not the instrument specifies a perpetuity period, and that specifying a perpetuity period will be ineffective.

CLAUSE 32 – Start of perpetuity period

Clause 32 specifies when the 125-year perpetuity period will start. *Subsection (1)* sets out the general rule that the perpetuity period commences when the instrument creating the interest or power referred to in clause 27 takes effect. For this purpose a will takes effect on the death of the testator (section 43(6)).

Subsection (2) provides that the perpetuity period for an instrument created in the exercise of a special power of appointment (clauses 36 and 43 define a special power of appointment) will begin on the date on which the instrument creating the power took effect. The Bill will apply to such instruments only where the instrument that created the special power takes effect on or after the Appointed Day (section 38(1)(b)). The rule for instruments created in the exercise of a general power of appointment remains that the perpetuity period will be 125 years beginning on the date on which the power is exercised, not the date on which the general power was created.

Subsections (3) and (4) specify when the perpetuity period starts to run in the circumstances set out in clause 28(5), that is, where the interests or rights arise under an instrument nominating benefits under a relevant pension scheme, or under an instrument made in the exercise of a power of advancement arising under such a scheme. In these cases the perpetuity period of 125 years (section 31(1)) will run from when the member joined the scheme.

CLAUSE 33 – Wait and see rule

The operation of the rule against perpetuities was modified by the 1966 Act, which introduced the “wait and see” principle. The “wait and see” principle means that the rule against perpetuities does not affect an interest in property unless and until it becomes certain that the interest will not vest within the perpetuity period. Clause 33 of the Bill applies this principle of “wait and see” to the rule against perpetuities in respect of instruments to which the Bill applies.

The clause asks in effect whether, within the terms of the instrument, the interest, right or power in question might –

- vest (in the case of an interest); or
- be exercised (in the case of a special power of appointment); or

- become exercisable (in the case of a general power of appointment);

outside the perpetuity period applicable to it.

If the answer is “yes”, then the principle of “wait and see” (set out in *subsections (2), (4) and (6)*) applies, and the interest or power is valid if in fact it vests, is exercised or becomes exercisable within the perpetuity period. Only when it is clear that this will not happen, is the interest or power void for perpetuity. In such a case, *subsections (2)(b) and (4)(b)* preserve the effectiveness of things already done in relation to the interest, or by way of exercise of the power, during the “wait and see” period.

CLAUSE 34 – Exclusion of class members to avoid remoteness

At common law, where a gift was made in favour of a group of people (a class) the whole gift was void if all of the possible members of the class of beneficiaries were not ascertainable during the perpetuity period. This was because at common law a gift would fail even if only a part of it might vest outside the perpetuity period. Class closing prevents this result by artificially closing the class to prevent potential members (for example, those yet unborn) from being taken into consideration.

The 1966 Act applies the “wait and see” principle to the class closing rule, meaning that all of the members who qualify for the gift during the perpetuity period will benefit. If all of the potential beneficiaries do not qualify during the “wait and see” period, section 4(4) of the 1966 Act allows for the exclusion of any members who did not qualify during the perpetuity period.

Clause 34 replicates the effect of section 4(4) of the 1966 Act. Clause 34 applies if it becomes apparent – whether at the time the instrument takes effect or at some later stage – that the interest would be void for perpetuity if certain members (whether alive or unborn) are included in the class. Under *subsection (2)*, once it is clear that an interest will be void for perpetuity if certain potential members are included in the class, they are excluded, provided their exclusion does not exhaust the class. *Subsection (3)* provides that, if the “wait and see” rule (section 33(1) and (2)) also applies, clause 34 does not invalidate anything done during the “wait and see” period (section 33(2)) in relation to the interest. *Subsection (4)* specifies who is to be treated as a member or potential member of a class.

CLAUSE 35 – Saving and acceleration of expectant interests

Clause 35 replicates the effect of section 6 of the 1966 Act. *Subsection (1)* provides that, where an interest is void for remoteness, an interest ulterior (or subsequent) to, and dependent on, the void interest is not void for remoteness simply for that reason. This deals with the technical problem that, at common law, if a disposition was void for perpetuity, a subsequent disposition that depended on it was also void.

Subsection (2) provides that, where a prior disposition is void for remoteness, the subsequent interest may take effect earlier than it otherwise would (though it can do so only if any other conditions attached to it have been fulfilled).

CLAUSE 36 – Powers of appointment

Chapter 2 refers at various points to powers of appointment, special powers of appointment and general powers of appointment. Clause 36 defines when a power of appointment is a “special power of appointment” for the purposes of the Chapter. The

definition has substantially the same effect as section 7 of the 1966 Act, which does not apply by virtue of clause 39. Powers of appointment not falling within the clause 36 definition are classed as general powers; these are tantamount to outright ownership.

A power of appointment may be given so as to be exercisable in a variety of ways. Chapter 2 divides these into three categories.

Subsections (1) and (2) define when a power is a special power of appointment for the purposes of a power exercisable otherwise than by will. All such powers will be special powers unless they are exercisable by one person only and that person (being of full age and capacity) could transfer all the property subject to the power to himself or herself without having to obtain consent from anyone else and without complying with any other condition.

Subsections (3) and (4) make analogous provision in relation to special powers exercisable by will.

Subsections (5) and (6) apply to powers exercisable by will or otherwise. In such cases, the power is a special power of appointment if it satisfies either subsection (2) or subsection (4).

CLAUSE 37 – Pre-commencement instruments: period difficult to ascertain

Clause 37 applies to instruments which have taken effect (or, in the case of wills, been executed) before the Chapter comes into force, and which have a “lives in being” perpetuity period. Where it is difficult or not reasonably practicable to ascertain whether the lives have ended, and therefore whether the perpetuity period has ended, under clause 37 the trustees have a power to “opt in” to a 100-year perpetuity period. To exercise the opt-in the trustees must execute a deed stating that the trustees believe it is difficult or not reasonably practicable to know if the perpetuity period has ended, and that subsection (2) is to apply (*subsection (1)*). This deed cannot be revoked (*subsection (3)*). The effect of the opt-in is that the trust is deemed to have always had a perpetuity period of 100 years and is subject to clauses 32 to 36. Sections 1 to 14 of the 1966 Act are treated as if they did not apply (and never applied) in relation to the trust (*subsection (2)*).

The power is necessarily a fiduciary power, and so must be exercised in the best interests of the beneficiaries.

CLAUSE 38 – Application of the Act

Clause 38 prescribes the instruments to which *Chapter 2* will apply.

The general rule is that the clauses listed in *subsection (1)* will apply to instruments which take effect on or after the Appointed Day on which the Chapter comes into force. But they will not apply where the instrument is a will executed before that day or is made in the exercise of a special power of appointment created by an instrument which took effect before that day. For such wills or such instruments made in the exercise of a special power the present law will, subject to subsection (2), continue to apply. Wills are deemed to take effect on the death of the testator (section 43(6)).

Subsection (2) provides that clause 37 (pre-commencement instruments: period difficult to ascertain) applies to instruments which take effect before the Appointed Day and to wills executed before that day even if they take effect after that day. By *subsection (3)*, clause 37 cannot apply if before the Appointed Day the terms of the

trust were exhausted or the trust property became held on charitable trusts by way of a final disposition of the property.

CLAUSE 39 – Limitation of 1966 Act to existing instruments

This clause excludes the application of the 1966 Act in relation to instruments to which Chapter 2 applies.

CLAUSE 40 – The Crown

Clause 40 applies the provisions of the Chapter to Crown interests subject to the rule, but does not extend the application of the rule.

CLAUSE 41 – Rule as to duration not affected

As a general rule, a trust may not be created for a non-charitable purpose. However, a small category of non-charitable purpose trusts may be regarded as valid, such as trusts for the maintenance of gravestones. These trusts are valid only if their duration is limited. The permitted period is a period of equivalent to (but distinct from) the perpetuity period.

The Bill is concerned with the law relating to the avoidance of future interests for remoteness rather than the duration of trusts. Clause 41 ensures that the period permitted for the duration of non-charitable purpose trusts is not affected by the Bill. The period will continue to be a life or lives in being plus 21 years, or 21 years if there is no relevant life in being.

CLAUSE 42 – Provision made otherwise than by instrument

Clause 42 corresponds to section 16(6) of the 1966 Act. The scope of the application of the rule against perpetuities under Chapter 2 is defined by reference to instruments. Typically these instruments will be a trust deed or a will. However, it is possible to create a trust orally, without the use of writing. For the purposes of Chapter 2, such a trust is treated as if it were made by written instrument.

CLAUSE 43 – Interpretation of clause 43

Clause 43 provides definitions for a number of terms used in Chapter 2.

PART 4

TRUSTS OF LAND

Part 4 implements the Commission's recommendations relating to settlements and trusts of land contained in Chapter 6 of the Consultation Paper NILC 2 (2009). These were that there should be introduced a unitary trusts of land scheme, as originally proposed by the 1971 Survey and similar to those already introduced in England and Wales and the Republic of Ireland: see NILC 2 (2009) para. 6.9. Such a scheme covers all categories of trusts of land, including implied and constructive trusts, bare trusts and trusts for sale. The essential feature is that the legal title is always held by a

person who is regarded as a trustee (frequently more than one) and that person has the power to deal with the land as an absolute owner. However, as a trustee, any dealing must be executed in the interests of the beneficiaries, i.e., although having the power of an absolute owner the trustee or trustees must not ignore the obligations the law imposes on a trustee.

As under the schemes introduced to England and Wales (by the Trusts of Land and Appointment of Trustees Act 1996 (c. 47)) and the Republic of Ireland (by Part 4 of the Land and Conveyancing Law Reform Act 2009 (No. 27)), the provisions of Part 4 replace the Settled Lands Acts 1882-90. The provisions are modelled on those in the Republic's 2009 Act. They apply to both existing settlements and trusts and new purported settlements and trusts.

CLAUSE 44 – Trusts of land

This clause sets out the scope of Part 4 and, in particular, indicates how settlements and trusts of land will operate on or after the appointed Day.

Subsection (1) explains that Part 4 will, in future, cover not only all situations where land is held under a trust (subject to the exception in subsection (5)), but also traditional settlements of land which may not involve a trust, at least not at the outset. *Paragraph (a)* refers to such a traditional settlement (which hitherto would have been governed by the Settled Land Acts 1882-90) (see further subsection (2)(a)). In such cases land would be conveyed or devised directly to persons in succession (e.g. "to A for life, then to B in fee tail, then to C in fee simple"), without the interposition of a trust. A trust would arise only later when the powers to deal with the land conferred by the 1882-90 Acts resulted in capital money being raised (e.g., the proceeds of a sale) which should be paid to the "trustees of the settlement" (in order that the purchaser obtained a good title to the land and the interests of those previously entitled to the land would thereafter attach to that capital money, i.e., those interests were "overreached"). *Paragraph (b)* makes it clear that Part 4 applies to any situation where land is subject to a trust of any kind – apart from charity land excepted by subsection (5). Thus it applies not only where there is an express trust created but also in the various situations where a trust may arise by implication or operation of law, such as resulting and constructive trusts and bare trusts. This is further emphasised by subsection (2)(b). It also applies to existing trusts. *Paragraph (c)* deals with a situation which was also caught by the 1882-90 Acts. Under existing law a minor could hold legal title to land (that is changed by clause 7 of the Bill), but any dealing prior to attaining majority could be set aside at majority. The 1882-90 Acts provided a mechanism for carrying out a dealing which a third party could rely upon not being so set aside – in essence the minor's land was treated as settled land and trustees could act on behalf of the minor. That will continue to be the position under Part 4, even in respect of land held by a minor on the Appointed Day (except that under clause 7 the minor will no longer hold legal title and it will be vested in trustees: see also clause 45).

Subsection (2) clarifies the provisions of subsection (1). *Paragraph (a)* confirms that a strict settlement refers to the situations coming within the 1882-90 Acts: see subsection (1)(a). In essence, there must be a succession of interests, including cases where a life interest only is granted, so that a reversion exists in the grantor. This ties in with the provisions of Part 1, in particular clauses 1 and 3. *Paragraph (b)* confirms that Part 4 applies to any kind of trust involving land: see also subsection (1)(b).

Subsection (3) confirms that, subject to other provisions of Part 4, a trust of land is subject to the general law of trusts, such as the duties of a trustee, including the duty to act in the interests of the beneficiaries.

Subsection (4) makes it clear that the fact that a life interest will in future be an equitable interest only (as a consequence of clauses 1, 3 and 5) does not relieve the holder of such an equitable interest who is occupying from the land, of the duty, under the law of waste, not to damage it (thereby protecting those succeeding to the land on the death of the holder of the life interest).

Subsection (5) exempts charities from the provisions of Part 4 in respect of land to which they are currently entitled. Charities are governed by special legislation, in particular the Charities Act (Northern Ireland) 2008 (c. 12).

Subsection (6) deems references in documents and statutory provisions executed, enacted or made before the Appointed Day to the Settled Land Acts 1882-90 or one of those Acts or any provision in such an Act to be references to the Act or the equivalent or substituted provision in this Act (essentially in Part 4).

Subsection (7) has a similar provision dealing with references to a settlement of land, settled land or any equivalent expression. Such references are deemed on or after the appointed Day to refer to a trust of land and references to trustees of the settlement or for the purposes of the Settled Land Acts 1882-90 are to be construed accordingly, i.e., as references to trustees of land (as to which see clause 45).

Subsection (8) deems references in documents and statutory provisions executed, enacted or made before the Appointed Day to a limited estate or limited owner, capital money in relation to settled land or any equivalent expression to be references to the interest of a beneficiary under a trust of land or money held by trustees of land.

CLAUSE 45 – Trustees of land

Clause 45 identifies who are on, or will be after the Appointed Day, the trustees of land coming within clause 44. These provisions apply to both settlements and trusts existing on the Appointed Day and future trusts (and purported settlements).

Subsection (1) covers various situations. *Paragraph (a)(i)* deals with strict settlements existing on the Appointed Day. Under the Settled Land Acts 1882-90 the tenant for life under such a settlement had the power of dealing with the land. Under clause 44(1)(a) such a settlement becomes converted into a trust of land, and under clause 46 the trustees will have the absolute power of dealing with the land (in the interests of the beneficiaries, including the tenant for life). *Paragraph (a)(i)* provides that in the case of an existing settlement, the tenant for life will, at least, continue to have a major say in dealings with the land, because he or she will become one of the trustees. The others will be the trustees of the settlement. As under the 1882-90 Acts, if there are no such trustees an appointment can be made in the last resort by the court under subsection (3). *Paragraph (a)(ii)* deals with attempts to create a strict settlement (without interposition of trustees: see clause 44(1)(a) and (2)(a)) on or after the Appointed Day. This should be created as a trust of land (clause 44(1)) and the sub-paragraph treats such an attempt as if it were a creation of a trust of land, by applying to the instrument the provisions of paragraph (b).

Paragraph (b) deals with trusts of land created expressly and designates a descending order of persons who should be treated as the trustees (this adapts provisions in section 2(8) of the Settled Land Act 1882). *Paragraph (c)* adapts the provisions of paragraph (b) to the case of land vested in a minor on the Appointed Day or purported to be so vested after that day. *Paragraph (d)* deals with all other cases where a trust of land may arise, including by implication or operation of law. Resulting and constructive trusts are imposed on the legal owner of land, or holder of the legal interest subject to such a trust, in effect making that person a trustee.

Subsection (2) clarifies the operation of subsection (1). *Paragraph (a)* recognises that in the case of a strict settlement, the trustees nominated by the instrument creating the settlement will usually refer to them as “trustees of the settlement”. Such persons still come within paragraph (b). *Paragraph (b)* makes it clear that a power to appoint trustees is not confined to appointing replacements for existing trustees, but applies also to appointment of trustees where none has existed prior to the appointment.

Subsection (3) preserves the jurisdiction of the courts to appoint trustees where a trust might otherwise fail for want of trustees (see *Pollock v Ennis* [1921] 1 IR 181). There is also a statutory power conferred on the court by section 40 of the Trustee Act (Northern Ireland) 1958 (c. 23).

CLAUSE 46 – Powers of trustees of land

Clause 46 confirms that a trustee of land has full powers to deal with the land, as an owner or other title holder could. This extends the additional powers conferred by the Trustee Act (Northern Ireland) 2001 (c. 14), such as the power to acquire land as an investment or for occupation by a beneficiary conferred by section 8 of that Act. This plenary power is not unqualified. *Paragraph (a)* confirms that a trustee must exercise powers bearing in mind the duties of a trustee. This includes the statutory duty of care introduced by the 2001 Act. *Paragraph (b)* makes it clear that the plenary power is subject to various restrictions, such as those imposed by legislation like the 2001 Act (e.g., the need to have regard to standard investment criteria and to obtain and consider proper advice when making investments: see sections 4 and 5 of that Act) or the general law (e.g., the duty to act impartially as between different beneficiaries). It is also made clear that the trust instrument may restrict the plenary power, as may a court order.

CLAUSE 47 – Overreaching of equitable interests

Clause 47 modifies one of the options for overreaching mooted by the Commission: see NILC 2 (2009) para. 3.45, option (1). Apart from traditional overreaching where a conveyance is made by at least two trustees or a trust corporation, it extends overreaching to a conveyance by a sole owner (trustee), but not where the holder of the equitable interest is in actual occupation and that occupation is reasonably discoverable.

Subsection (1) contains the general principle that a conveyance of legal title (to the land or an interest in the land) overreaches any equitable interests. This is subject to various exceptions set out in subsection (3). Subsection (5) explains what is meant by overreaching.

Subsection (2) specifies when overreaching will occur. *Paragraph (a)* adapts the scheme which operated under the 1882-90 Acts. For overreaching to occur in the case of settlements or trusts involving a succession of interests, the conveyance must be made by at least two trustees or a trust corporation. This principle applies also to land vested in or held on trust for a minor. *Paragraph (b)* deals with other cases of land held on trust, particularly where a resulting or constructive trust is imposed on a legal owner or such an owner holds land on a trust such as a bare trust (e.g. a vendor of land who has been paid the purchase price but has not yet conveyed legal title to the purchaser). Subsection (3)(b)(iii) contains important qualifications to such cases.

Subsection (3) specifies various situations where overreaching will not occur. *Paragraph (a)* deals with cases of fraud concerning the conveyance – “fraud unravels

all". The purchaser will not take free of any equitable interests where he or she has actual knowledge of the fraud at the date of the conveyance or is a party to the fraud. *Paragraph (b)* specifies a number of other situations where overreaching will not occur. *Sub-paragraph (i)* covers the situation where the conveyance is made expressly subject to the equitable interest. *Sub-paragraph (ii)* covers the traditional equitable mortgage created by deposit of title documents – such deposit with the mortgagee has long been held to warn a prospective purchaser of the possible existence of a mortgage. *Sub-paragraph (iii)* deals with conveyances by a single trustee or owner coming within subsection (2)(b). Overreaching will not occur in two situations. One is where the equitable interest has been protected by registration (subsection (4)(a) explains what is meant by this). The other is where the holder of the equitable interest is also in actual occupation of the land, so that, in the case of registered land, it would be a burden affecting the land without registration (under Schedule 5, Part I, para. 15 of the Land Registration Act (Northern Ireland) 1970 (c. 18)). The sub-paragraph applies the same principle to unregistered land. This principle is, however, amplified by subsection (4)(b).

Subsection (4) further explains the operation of subsection (3)(b)(iii). *Paragraph (a)* confirms that protection of an equitable interest by registration (so as to prevent overreaching) means, in the case of unregistered land, registering in the Registry of Deeds a document referring to the equitable interest or, in the case of registered land, lodging a caution under section 66 of the 1970 Act. *Paragraph (b)* adapts, as recommended by the Commission (see NILC 2 (2009) para. 3.45 option (1), a provision introduced in England and Wales with respect to registered land by the Land Registration Act 2002 (Schedule 3 para. 2(c)). *Sub-paragraph (i)* shifts the test as to whether a person in actual occupation is protected from the doctrine of constructive notice of the equitable interest to the question whether it is reasonably discoverable (i.e., was the holder's occupation obvious on a reasonably careful inspection of the land). This involves an amendment to Schedule 5 Part I para. 15 of the 1970 Act: see Schedule 2, Part I of the Bill. *Sub-paragraph (ii)* makes it clear that no overreaching of the interest of a person in actual occupation will take place if the purchaser had actual knowledge of the interest at the time of the conveyance.

Subsection (5) explains what is meant by overreaching – the equitable interest ceases to attach to the land conveyed and, instead, attaches to the proceeds of the conveyance. It makes it clear that proceeds may take many forms – not just purchase money from a sale.

Subsection (6) contains a saving for other situations where overreaching may occur. Thus a conveyance by a mortgagee exercising the statutory power of sale confers a clear title on the purchaser, freed of all interests to which the mortgage has priority: see clause 66 of the Bill. Similarly a conveyance by personal representatives exercising their power of sale passes title freed of all claims: see Administration of Estates Act (Northern Ireland) 1955 section 33.

CLAUSE 48 – Resolution of disputes

Clause 48 provides for the resolution of disputes concerning trusts of land, by way of summary application.

Subsection (1) makes it clear that the clause covers a wide range of possible disputes between different persons interested in the trust. *Subsection (4)* gives further guidance as to who such persons might be – it is not just the trustees and beneficiaries. *Paragraphs (i)-(iii)* of sub-section (1) indicate that the dispute might relate to any of a wide range of matters, including how the trustees are performing their functions and the nature and extent of any beneficial or other interest in the land.

Subsection (2) gives the court a wide discretion in how to resolve a dispute, subject to the considerations set out in subsection (3).

Subsection (3) sets out matters which the court is obliged to take into account in exercising its discretion under subsection (2). What weight is put on any of the matters listed is left to the court. The overriding consideration is the interests of the beneficiaries as a whole.

Subsection (4) provides that a person interested in the trust (and who, therefore, may bring an application under clause 48) includes mortgagees and other secured creditors and a person holding an order charging land (under Article 46 of the Judgments Enforcement (Northern Ireland) 1981 (NI 6)). It also includes a trustee who may not have any interest other than being the holder of that office.

PART 5

CONCURRENT TITLES

This Part contains provisions implementing the Commission's recommendations in Chapter 7 of the Consultation Paper NILC 2 (2009). It deals with certain aspects of the law of concurrent titles.

CLAUSE 49 – Severance of a joint tenancy

Clause 49 implements the changes to the law of severance (whereby a joint tenancy is converted into a tenancy in common) as recommended by the Commission: see NILC 2 (2009) paras. 7.15-7.18.

Subsection (1) introduces a mechanism for severance whereby a joint tenant can serve a notice in a prescribed form on the other joint tenant or tenants: see NILC 2 (2009) para. 7.15. What constitutes proper service is governed by section 24 of the Interpretation Act (Northern Ireland) 1954 (c. 33). This can be done whatever the property held in a joint tenancy, but subsection (2) adds a further requirement in the case of land. Subsection (1) is also subject to subsection (4) which preserves the longstanding jurisdiction of the court to find that a severance in equity has occurred by mutual agreement between the joint tenants or as a result of their conduct (in particular in relation to the property): see *Williams v Henshaw* (1861) 1 J & H 546 at 547-548 (per Lord Thurlow LC).

Subsection (2) introduces a restriction of the effectiveness of service of a subsection (1) notice in the case of land. This was recommended by the Commission to warn purchasers or other persons dealing with the joint tenants: NILC 2 (2009) para. 7.18. No severance will occur either at law or in equity in the case of land until a copy of the notice is registered in the Registry of Deeds or an entry is made in the register in the case of registered land.

Subsection (3) reinforces the new mechanism for severance by notice by providing that other traditional ways in which severance has occurred (by acquisition of another interest in the property or alienation of a joint tenant's interest) will no longer operate, unless either all the other joint tenants give prior consent in writing or a notice is also served under subsection (1).

Subsection (4) preserves the longstanding principle of severance in equity only by mutual agreement or on the basis of the joint tenant's conduct (see above).

Subsection (5) makes it clear that the new provisions apply only to severances on or after the Appointed Day, but this includes in respect of joint tenancies existing on that day.

CLAUSE 50 – Commorientes

Clause 50 implements the recommendation of the Commission for introduction of a provision dealing with commorientes (simultaneous deaths of joint tenants). In such circumstances it is often impossible to operate the right of survivorship because it cannot be proved which joint tenant survived the other or others: see NILC 2 (2009) paras. 7.22-7.23. The provision is modelled on one contained in the Republic's Civil Law (Miscellaneous Provisions) Act 2006 (No. 20).

Subsection (1) provides that, in such cases, the joint tenants are, instead, deemed to be tenants in common immediately prior to their deaths. The result is that they are deemed each to own their own distinctive shares – equal shares since each joint tenant has an equal right to the property.

Subsection (2) confirms that, since each dying joint tenant is deemed to own his or her own share on death, that share belongs to each dying joint tenant's estate and passes to successors under the will or on intestacy (rather than the right of survivorship operating).

Subsection (3) provides that the new provision operates only in respect of deaths of joint tenants occurring on or after the Appointed Day.

CLAUSE 51 – Bodies corporate

This clause re-enacts the provisions of the Bodies Corporate (Joint Tenants) Act 1899 (c. 20). That Act was passed to enable corporations (particularly those providing trust and executorship services) to act as a joint tenant with others. The common law had difficulty with this concept because the principle that “a corporation never dies” was regarded as incompatible with the right of survivorship inherent in a joint tenancy. *Subsection (1) and (2)* treat bodies corporate just like individuals. *Subsection (3)*, in effect, provides for survivorship where a joint tenant corporation is dissolved.

CLAUSE 52 – Court orders

This clause implements the Commission's recommendation that the provisions of the Partition Act 1868 (c. 40) and Partition Act 1876 (c. 17) should be replaced by clearer and wider discretionary powers. The clause is modelled, as recommended, on section 31 of the Republic's Land and Conveyancing Law Reform Act 2009, with some modifications.

Subsection (1) provides the new court jurisdiction to deal with disputes between concurrent title holders. Like the 1868 and 1876 Acts it applies to all property held concurrently, not just land. *Subsection (6)* makes it clear that this also replaces the parallel equitable jurisdiction to order partition. *Subsection (5)(a)* clarifies the persons who have a sufficient interest to be able to make an application to the court for an order under this clause. Several of the provisions of this clause mirror those in clause 48 relating to disputes involving trusts of land.

Subsection (2) specifies the different types of orders which a court may make. *Paragraphs (a) and (c)* replace the powers conferred by the Partition Acts with wider

discretionary powers. *Paragraph (b)* relates particularly to applications by a mortgagee or other secured creditor. *Paragraph (d)* re-enacts the substance of provisions in the Administration of Justice Act (Ireland) 1707 (c. 10) (section 23). Further guidance is provided by subsection (5)(b). *Paragraph (e)* confirms the wider discretion being conferred on the court.

Subsection (3) further confirms the wider discretionary powers, which include the discretion not to make any order at all and to make a combination of orders.

Subsection (4) has been added, as recommended by the Commission, to give the court guidance as to how to exercise its discretion: see NILC 2 (2009) para. 7.21. These provisions mirror those in clause 48(3) of the Bill.

Subsection (5) further explains concepts used elsewhere in the clause. *Paragraph (a)* relates to subsection (1) and mirrors a provision in clause 48(4) of the Bill. *Paragraph (b)* relates to subsection (2)(d) and reflects the substantial case law on section 23 of the 1707 Act and its English equivalent.

Subsection (6) confirms that the new provisions in the clause replace not only the Partition Acts 1868 and 1876 (which are repealed: see Schedule 4) but also the equitable jurisdiction to order partition of property held concurrently.

PART 6

POWERS

This Part draws together various statutory provisions relating to powers, especially powers of appointment, i.e., where a trust or will confers on one person (the “donee” of the power) power to “appoint” (i.e. select) from amongst a group of specified persons (the “objects” of the power) who (the “appointees”) should obtain property and/or what shares they should obtain. The other main type of power recognised by our law, a power of attorney, was dealt with by the Powers of Attorney Act (Northern Ireland) 1971 (c. 33).

CLAUSE 53 – Application of Part 6

This clause makes it clear that the provisions of Part 6 apply both to existing powers and to new powers. The reason for this is that most of the provisions are a re-enactment of old statutory provisions. The one exception, to which the qualifying words at the beginning of clause 53 relate, is clause 54 which amends existing law.

CLAUSE 54 – Execution of non-testamentary powers of appointment

This clause is concerned with execution of a “non-testamentary” power of appointment, i.e., making an appointment by deed as opposed to by will. It replaces section 12 of the Law of Property Amendment Act 1859 (c. 59), but updates it to accord with the change made for appointments made by will by Article 6 of the Wills and Administration Proceedings (Northern Ireland) Order 1994 (NI 13). Under Article 6 an appointment is valid provided the will making it complies with the general requirements for wills. Section 12 of the 1859 Act, on the other hand, laid down requirements for a deed exercising a power of appointment which were not necessary for execution of deeds generally (e.g., execution by two more witnesses). Clause 54, addresses this anomaly by making the same change for appointments by deed as was made for appointments

by will, i.e., in future an appointment by deed will be valid provided the deed meets the general requirements for proper execution of a deed. These are to be found now in Article 3 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 (NI 7).

Subsection (1) makes it clear that the change made for exercise of a power of appointment by deed operates only for deeds executed on or after the Appointed Day. This non-retrospective feature is contrary to the rest of Part 6's provisions: see clause 53.

Subsection (2) re-enacts provisions in section 12 of the 1859 Act. *Paragraph (a)* makes it clear that the instrument creating the power can provide for it to be exercised in some other way, e.g., by writing only and an exercise in this way will remain valid. *Paragraph (b)* makes it clear that the instrument creating the power may specify additional requirements, which must also be complied with, such as obtaining consent from another person or giving notice to another person.

CLAUSE 55 – Release of powers

This clause re-enacts the provisions in section 52 of the Conveyancing Act 1881 (c. 41). Prior to that Act the rule at common law was that the donee of a power could not release it: *Re Dunne's Trust* (1879) 5 LRIr 76; *Re Radcliffe* [1892] 1 Ch 227. Section 52 reversed that common law rule.

Subsection (1) continues the right to release a power by executing a deed to this effect. Note that this provision applies to powers generally and is not confined to powers of appointment (unlike clause 54). A release should be distinguished from a disclaimer (as to which see clause 56). A release involves giving up a power which the donee has previously accepted; a disclaimer involves refusing to accept from the very beginning a power which someone has purported to confer on the intended donee.

Subsection (2) recognises what has long been accepted by the courts to be the position – a power cannot be released if that would involve the donee in a breach of trust or other fiduciary obligation: see *Re Eyre* (1883) 49 LT 259; *Re Will's Trust Deeds* [1964] Ch 219; *Turner v Turner* [1984] Ch 100.

CLAUSE 56 – Disclaimer of powers

This clause re-enacts the provisions in section 6 of the Conveyancing Act 1882 (c. 39). That section conferred a general right on donees of any kind of power to disclaim it, i.e., refuse to accept a power someone has purported to confer on them.

Subsection (1) confirms the general right of disclaimer.

Subsection (2) confirms that a disclaimer does not necessarily destroy the power; it simply prevents the disclaiming donee from exercising it. Other donees can continue to exercise it.

CLAUSE 57 – Validation of appointments

This clause draws together the provisions of the Illusory Appointments Act 1830 (c. 46) and Powers of Appointment Act 1874 (c. 37) (as was done in England and Wales by section 158 of the Law of Property Act 1925 (c. 20)). Prior to those Acts the courts doubted to what extent donees of powers of appointment could appoint very little or

small shares in property or make no appointment at all in favour of potential objects of the power. The 1830 Act made it clear, to use the language of the leading author on the subject (*Farwell on Powers* (3rd ed, 1916), p427), that a donee could “cut off any object of a power with a shilling” and the 1874 Act enabled the donee “to cut off the shilling also”.

Subsection (1) re-enacts the substance of the 1830 and 1874 Acts’ provisions. *Paragraph (a)* re-enacts the provisions in the 1830 Act and *paragraph (b)* re-enacts the provisions in the 1874 Act.

Subsection (2) makes it clear, as did the 1830 and 1874 Acts, that a donee cannot cut off an object if the instrument creating the power makes it clear that the donee must be appointed something.

PART 7

MORTGAGES

Part 7 deals with the law of mortgages and implements the recommendations in chapter 8 of Commission’s Consultation Paper NILC 2 (2009). It deals with the methods of creating mortgages, especially legal mortgages, and contains various statutory provisions relating to mortgagee remedies for enforcing the security provided by a mortgage. It also deals with other mortgagee rights, such as consolidation and tacking. Part 7 replaces the statutory provisions contained in the Conveyancing Acts 1881-1911.

CHAPTER 1

CREATION OF MORTGAGES

This Chapter simplifies the methods of creating legal mortgages of land and, in particular, makes the law reflect the true nature of a mortgage transaction. It is a method of providing security for a loan and should not be regarded as a means whereby the lender (the “mortgagee”) becomes the owner of the land. Thus it abolishes the traditional methods of creating mortgages, whereby the borrower (the “mortgagor”) conveyed ownership to the lender (by conveying the freehold or assigning the leasehold title held by the mortgagor or granting the mortgagee a lease), which would not be conveyed back to the mortgagor until the loan was paid off. Instead, Chapter 1 adapts to unregistered land the method which has always applied to registered land, i.e. the mortgagor giving the mortgagee a charge only over the land. The statutory scheme makes it clear that such a charge gives the mortgagee all the security rights and remedies when a default occurs which the traditional form of mortgage gave.

CLAUSE 58 – Legal mortgages of land

This clause deals with the future creation of legal mortgages relating to unregistered land and adapts the charge system which operates under section 41-46 of the Land Registration Act (Northern Ireland) 1970 (c. 18).

Subsection (1) provides that the only way of creating a legal mortgage (equitable mortgages are unaffected: see subsection (5)) is by way of a charge by deed. Thus it will no longer be possible to create a mortgage by way of conveyance or assignment of the mortgagor’s title or by way of granting a lease or sub-lease (i.e. by “demise”). It is also provided that such a charge should be expressed (e.g., in the instrument creating

it) as a charge “by way of legal mortgage”. This would distinguish such a charge (which would attract the various provisions of Part 7) from other charges (which would not necessarily attract them, e.g., the statutory power, when a default by the mortgagor occurs, to sell the land without a court order).

Subsection (2) provides that on or after the Appointed Day any purported attempt to use the old methods of creating a mortgage or other transaction which would, but for clause 58, operate to create a mortgage in such a way will, instead, operate only to create a charge by way of legal mortgage. It will have no other effect. This accords with the amendment to the Land Registration Act (Northern Ireland) 1970 made by Article 21 of the Registration (Land and Deeds) (Northern Ireland) Order 1992 (NI 7) (amending Schedule 7, Part I of the 1970 Act).

Subsection (3) converts any power to mortgage land by way of legal security, including existing powers, into a power to create such a mortgage by a charge by way of legal mortgage on or after the Appointed Day.

Subsection (4) makes it clear that the new system applies to both unregistered and registered land, so that the one deed could charge a property comprising both types of land. This is subject to section 41 of the Land Registration Act (Northern Ireland) 1970, which requires the charge to be registered in order to confer legal title to it.

Subsection (5) makes it clear that clause 58 does not affect creation of equitable mortgages. Thus it will remain possible to create a mortgage by deposit of title documents, although such transactions are much rarer now than they used to be. However, equitable mortgages may arise in other ways, e.g., where the mortgagor has only an equitable interest in the land capable of being mortgaged. It is also well settled that a failure to complete formalities for creation of a legal mortgage may create an equitable mortgage pending their completion, e.g., where a charge executed in respect of registered land has not yet been registered as a burden in the Land Registry.

Subsection (6) facilitates the continued use in Part 7 of the expressions “mortgage”, “mortgagor” and “mortgagee” even though in many instances they will be referring to the parties to a charge only. The point is, however, that a charge of land under Part 7 is a charge by way of mortgage, to be distinguished from charges which are not mortgages.

CLAUSE 59 – Position of mortgagor and mortgagee

This clause provides that, in general, the new restricted method of creating a legal mortgage (by way of a charge rather than conveying ownership to the mortgagee) does not affect the position of the parties, i.e., the mortgagor and mortgagee have the same rights, obligations and remedies as they would have had if one of the traditional, but abolished, methods had been used.

Subsection (1) contains the general proposition referred to above. Note that this is expressly subject to other provisions in Part 7, because it does alter the previous law in several respects. Thus subsection (3) of clause 59 modifies the former law. *Paragraph (a)* preserves, e.g., the protection a mortgagor has under equitable doctrines such as those relating to clogs on the equity of redemption, collateral advantages and undue influence. The position is further explained by the provisions of Chapter 2. *Paragraph (b)* preserves the position of the mortgagee and this is further explained by the provisions of Chapter 3.

Subsection (2) confirms the long standing right of a first mortgagee to hold the title documents relating to the land until the mortgage is paid off. This is of practical

significance in relation to unregistered land, as it enables the mortgagee to control further dealings with the land by the mortgagor which would require the mortgagor to show evidence of title. The mortgagee can refuse to release the title documents until suitable safeguards are put in place to protect its security (usually in the form of solicitors' undertakings).

Subsection (3) clarifies a point upon which some doubts have been expressed, namely, what obligation does a mortgagee, which has retained title documents, have to look after them (see e.g., *Gilligan v National Bank Ltd* [1901] 2 IR 513). It makes it clear that the mortgagee is to be taken to have given an undertaking for their safe custody under clause 106 (which deals with cases where a vendor conveys part only of land and retains the title documents which relate to the whole land, including the part retained by the vendor).

CHAPTER 2

POWERS AND RIGHTS OF MORTGAGOR

Chapter 2 contains various provisions relating to the position of a mortgagor. It replaces provisions in the Conveyancing Acts 1881-1911.

CLAUSE 60 – Title documents

This clause re-enacts the substance of provisions in section 16 of the Conveyancing Act 1881 (c. 41).

Subsection (1) entitles the mortgagor, so long as the right to redeem exists (in effect, so long as the mortgage exists) to inspect and make copies of title documents in the possession of the mortgagee.

Subsection (2) makes it clear, as did section 16 of the 1881 Act, that this right is exercisable at the request of the mortgagor, but subject to payment of the mortgagee's reasonable costs and expenses.

Subsection (3) makes it clear, as again did section 16 of the 1881 Act, that this right cannot be excluded by the terms of the mortgage.

CLAUSE 61 – Right of consolidation

As paragraph 8.27 of this Report indicates the Commission's recommendation that the right of consolidation should be abolished (see NILC 2 (2009), para. 8.26) did not meet with universal support. Some regarded this as an unnecessary interference with freedom of contract. The Commission ultimately concluded that the existing law, as contained in section 17 of the Conveyancing Act 1881 (c. 41) should remain as re-enacted by this clause. Under section 17 a mortgagor is free to redeem one of several mortgages without having to redeem the others, unless the mortgagee's right to consolidate has been expressly reserved in the mortgage deeds. *Subsection (1)* confirms the general right to redeem one mortgage free of consolidation of other mortgages. *Subsection (2)*, however, preserves the power to reserve a right of consolidation in the mortgage deeds or any one of them.

CLAUSE 62 – Transfer in lieu of discharge

This clause re-enacts the substance of section 15 of the Conveyancing Act 1881 (c. 41), as amended by section 12 of the Conveyancing Act 1882 (c. 39). It enables a mortgagor entitled to redeem the mortgage to require the mortgagee to transfer the mortgage to a third person instead of discharging the mortgage.

Subsection (1) requires the mortgagee to comply with the mortgagor's directions as to such a transfer.

Subsection (2) deals with priorities where there are several mortgages or other incumbrances. Section 12 of the 1882 Act extended the right to call for a transfer in lieu of a discharge to other incumbrancers.

Subsection (3) re-enacts two qualifications contained in section 15 of the 1881 Act. *Paragraph (a)* excludes the right to require a transfer where the mortgagee is or has been in possession, because such a mortgagee is under strict liability and would remain so even after a transfer (see *Re Prytherch* (1889) 42 ChD 590 at 599). *Paragraph (b)* makes it clear that the right to require a transfer cannot be excluded by the terms of the mortgage.

CLAUSE 63 – Advances on a joint account

This clause re-enacts the substance of section 61 of the Conveyancing Act 1881 (c. 41) and deals with the situation where the mortgage loan was advanced by two or more joint mortgagees. If one or more die, the mortgagor can treat the survivor or survivors as authorised to discharge the mortgage.

Subsection (1) makes it clear that the provision operates whether or not the mortgage refers to a joint account or contains a "joint account" clause.

Subsection (2) provides that the surviving joint mortgagee or mortgagees can give a discharge, whether or not the mortgagor has notice that any joint account has since been severed. After the death of the last surviving mortgagee, his or her personal representatives can act.

Subsection (3) makes it clear that the clause's provisions can be excluded by the terms of the mortgage.

Subsection (4) contains definitions of "mortgage" and "mortgagor" which accord with the provision in section 61 of the 1881 Act.

CHAPTER 3

OBLIGATIONS, POWERS AND RIGHTS OF MORTGAGEE

Chapter 3 deals with the position of the mortgagee, in particular, the various statutory remedies for enforcing the security provided by the mortgage. The heading also refers to "obligations" because the Chapter imposes various conditions and restrictions on the exercise of the remedies. Chapter 3 replaces provisions in the Conveyancing Acts 1881-1911.

CLAUSE 64 – Application of Chapter 3

This clause contains various general provisions relating to the operation of Chapter 3 and modifies to some extent the provisions in the 1881-1911 Acts, as recommended by the Commission: see NILC 2 (2009) paras. 8.9-8.12.

Subsection (1) contains three general propositions. These propositions are, however, subject to any later provisions which provide otherwise. For example, some provisions relate to existing, as well as new mortgages, created after the Appointed Day (see e.g., clause 66 and 67). Under *paragraph (a)* the provisions of Chapter 3 apply only to legal mortgages created on or after the Appointed Day. Under *paragraph (b)* the provisions apply, in relation to mortgaged property, to any part of that property. This saves having to repeat wording such as “or any part thereof” through the Chapter. The use of the word “property” rather than “land” in this context follows the replaced provisions in the 1881-1911 Acts. Those Acts recognised that it is not uncommon for the statutory provisions to be adapted and, as adapted, to be incorporated in commercial documents (such as debentures) which cover a wide range of property being mortgaged or charged, i.e. both land and personal property assets. For that reason, the provisions in Chapter 3 usually refer to “mortgaged property,” “land” is referred to only where the provision in question is to be confined to land or other property which is in the nature of land (such as a “dwelling-house”: see clause 66). *Paragraph (c)* preserves the general position under the 1881-1911 Acts, i.e. that the statutory provisions can be modified by the terms of the mortgage. This is particularly important if they are to continue to be adapted to a wide range of commercial transactions. The Commission recommended that they should continue to operate as “default” provisions: see NILC 2 (2009) para. 8.12.

Subsection (2) contains additional general provisions which operate notwithstanding any stipulation to the contrary. As recommended by the Commission (see NILC 2 (2009) para. 8.21), *paragraph (a)* provides that the various statutory powers and rights should vest in the mortgagee as soon as the mortgage is created. This gets rid of the complications under the previous law concerning the distinction between powers “arising” and “becoming exercisable” and, in particular, the absurd practice of inserting a very short “legal” date for redemption (usually 3 or 6 months after the mortgage has been created). The qualification referring to the Land Registration Act (Northern Ireland) 1970 (c. 18) reflects the fact that under that Act no legal mortgage is created until it is registered in the Land Registry (as a Schedule 7 burden). *Paragraph (b)* contains a new general qualification as again recommended by the Commission: see NILC 2 (2009) para. 8.10. Although under *paragraph (a)* the mortgagee’s powers and rights (in particular, the various statutory remedies) will vest as soon as the mortgage is created, they will not be exercisable unless it is necessary in order to protect the mortgaged property (e.g. because the mortgagor has abandoned the property and it is at risk from trespassers or vandals) or to realise the mortgagee’s security (because of a default by the mortgagor).

CLAUSE 65 – Abolition of foreclosure

This clause implements the Commission’s recommendation that the court’s jurisdiction to make a foreclosure order, which has long fallen into abeyance, should be abolished: see NILC 2 (2009) para. 8.18. *Subsection (1)* provides for such abolition. *Subsection (2)* makes it clear that this does not affect the court’s jurisdiction to order a sale of mortgaged property. Such a sale was invariably ordered in a foreclosure action brought in modern times, but it has long been possible for a mortgagee to apply separately for a court order for sale. A sale under a court order should be distinguished from a sale by a mortgagee in exercise of the statutory power conferred by the 1881-1911 Acts and now provided for by clause 68. This does not require an

application to court, although an application may be necessary for a court order for possession as a preliminary to exercise of the power of sale out of court.

CLAUSE 66 – Taking possession of dwelling-houses

This clause implements the Commission's recommendation that a mortgagee should no longer be able to take possession of the mortgaged property "before the ink is dry on the mortgage", where the property involves a dwelling-house: see NILC 2 (2009) paras. 8.13-8.16.

Subsection (1) adapts the provisions of the Administration of Justice Acts 1970 (c. 31) and 1973 (c. 15), which give the court wide powers in dealing with applications for possession by mortgagees. Those Acts did not, however, require a mortgagee to apply for a court order and so the court's powers did not apply where possession was obtained out of court (see *Ropaigealach v Barclays Bank Plc* [1999] 2 WLR 17). *Subsection (1)* now requires a mortgagee to seek a court order where the mortgage comprises or includes a dwelling-house. Part IV of the 1970 Act above (in particular section 39) contains various provisions as to its interpretation and scope, which *subsection (1)* incorporates. *Subsection (1)* also makes it clear that the new requirement to seek a court order in such cases cannot be excluded by the terms of the mortgage. It also makes it clear that the wide powers of dealing with applications for possession contained in the 1970 and 1973 Acts apply – these include power to adjourn proceedings, to stay or suspend execution of an order for possession or to postpone the date for delivery of possession.

Subsection (2) further defines the scope of the new requirement to obtain a court order when possession is sought of mortgaged property involving a dwelling-house. *Paragraph (a)* applies the new requirement to existing mortgages as well as ones created on or after the Appointed Day. *Paragraph (b)* contains a saving for the provisions of clause 67, which entitles a mortgagee to take possession of mortgaged property without a court order in cases of abandonment. *Paragraph (c)* contains a saving for the regulatory scheme contained in the Consumer Credit Acts 1974 (c. 39) and 2006 (c. 14). *Paragraph (d)* makes it clear that there is no need for a mortgagee to obtain a court order under *subsection (2)* where the mortgagor voluntarily surrenders possession.

CLAUSE 67 – Abandoned property

This clause provides an exception to clause 66, but applies to mortgaged property generally. It entitles the mortgagee to take possession without a court order where there are reasonable grounds for believing that the mortgagor has abandoned it and is in default on payments due under the mortgage.

Under *subsection (1)* the mortgagee may take action to prevent deterioration of, or damage to, the property or entry by trespassers, i.e. make the premises wind and water tight and secure windows and doors. This action must be reasonable and such as he or she considers necessary. The mortgagee may use force to obtain entry (e.g. break a window or lock), but the force must be only what is necessary for the purpose. The actions must not be such as to prevent the mortgagor from enjoying the property, should he or she return, e.g. the mortgagee should not brick-up windows or doors. If any action properly taken hinders the mortgagor from resuming possession (e.g. the mortgagee may have broken a lock and installed a new one), the mortgagor's entry must be facilitated (e.g. give him or her a key to the new lock).

Subsection (2) gives the mortgagee a qualified power to take possession of the property. Where –

paragraph (a) subsection (1)(a) and (b) apply (reasonable belief of abandonment; interest or a sum partly in respect of interest and capital is outstanding for four weeks); and

paragraph (b) the mortgagee wishes to obtain possession of the property in order to sell it,

the mortgagee may serve on the mortgagor and on any third party he or she knows or believes to have an interest in the property (e.g. a second mortgagee) a notice stating –

paragraph (i) the belief of abandonment,

paragraph (ii) that the mortgagee intends to take possession under this clause,

paragraph (iii) that after eight weeks the mortgagee will take possession unless an objection has been received.

Subsection (3) permits the mortgagee to take possession after eight weeks, if there has been no objection.

Subsection (4) applies where there is an objection, duly served. The mortgagee's notice ceases to have effect, but he or she is still free to apply to the court for an order for possession under clause 66 or otherwise.

Subsection (5) allows the mortgagee's notice to be served by simply leaving it at the mortgagor's usual or last known place of abode (which will normally be the mortgaged premises) or business. Normally under section 24(2)(c) of the Interpretation Act 1954 (c. 33), a notice can be served by leaving it at premises only if it is left with some person apparently over the age of 16. This condition is not appropriate to abandoned premises, because, in effect, "abandoned" equates with "vacant". Alternatively, service could be effected by post and it is possible that a notice would catch up with the mortgagor at his or her new address if he or she has made an arrangement with the Post Office to have mail re-directed; but in practice it would be unlikely for a mortgagor who has abandoned his or her obligations to make such an arrangement.

Subsection (6) is a saving for the Family Homes and Domestic Violence (Northern Ireland) Order 1998 (NI 6). Article 4(3) of that Order makes any payment or tender made by a spouse or civil partner in or towards satisfaction of mortgage payments due from the other spouse or civil partner in respect of a dwelling-house as good as if made by that other; Article 4(5) enables the mortgagee to treat such payments as if made by the other.

CLAUSE 68 – Power of sale

This clause re-enacts the substance of the provisions in the Conveyancing Act 1881 (c. 24) (see especially sections 19 and 21) conferring a statutory power on the mortgagee to sell the mortgaged property when the mortgagor defaults in making payments or otherwise breaches the terms of the mortgage. What is meant by a mortgagee is governed by clause 58(6), but note also subsection (3).

Subsection (1) confers the general power of sale. This is subject to the restrictions contained in subsection (2). It is also subject to the various supplementary provisions contained in clauses 69 to 74.

Subsection (2) re-enacts the restrictions on the statutory power of sale contained in section 20 of the 1881 Act. In essence, what they mean is that, although the power of sale vests in the mortgagee as soon as the mortgage is created (see clause 64(2)), it does not become exercisable unless and until the mortgagor defaults in making payments under the mortgage or otherwise breaches its terms. The power is also subject to the overriding general restriction contained in clause 59(2)(b) – its exercise must also be for the purpose of protecting the mortgaged property or (which is more relevant in the context of a default or breach) realising the security.

Subsection (3) re-enacts a provision in section 21(4) of the 1881 Act. It enables other authorised persons to exercise the power of sale, e.g., the holder of a power of attorney from the mortgagee.

Subsection (4) re-enacts a provision contained in section 21(6) of the 1881 Act (as amended by section 5(2) of the Conveyancing Act 1911 (c. 37)). The mortgagee is not a trustee of the power and it has long been settled that the mortgagee in exercising the power is required only to act reasonably. This is, however, subject to the obligation to obtain the best price reasonably obtainable (see clause 70).

Subsection (5) re-enacts a provision in section 21(7) of the 1881 Act. It entitles the mortgagee exercising the power of sale to demand and recover any title documents which a purchaser under the power would be entitled to.

CLAUSE 69 – Incidental powers

This clause re-enacts provisions conferring incidental powers relating to exercise of the power of sale contained in the 1881-1911 Acts.

Paragraphs (a) and (b) re-enact provisions in section 19(1)(i) of the 1881 Act and detail the various ways in which the mortgaged property may be sold and upon what basis.

Paragraphs (c) and (d) re-enact provisions added by section 4 of the 1911 Act.

CLAUSE 70 – Obligations on selling

Clause 70 implements the Commission's recommendation that the obligation to obtain the best price for the mortgaged property long imposed on building societies should be extended to all mortgagees exercising a power of sale, whether the statutory power conferred by clause 68 or an express power: see NILC 2 (2009) para. 8.20.

Subsection (1) imposes on a mortgagee exercising either a statutory or an express power of sale the duty to take reasonable care to ensure that the sale produces the best price reasonably obtainable.

Subsection (2) imposes on a mortgagee to whom the court awards possession of the mortgaged property on condition that it be offered for sale a duty to sell the property and complete the sale as soon as reasonably practicable after obtaining possession (the onus of justifying delay being on the mortgagee).

Subsection (3) requires the mortgagee, within 28 days after a sale, to send certain particulars to the mortgagor by post. Section 24(1) of the Interpretation Act (Northern

Ireland) 1954 (c. 33) defines “by post” as meaning by registered post or the recorded delivery service. The particulars are the date of the mortgage, the address of the property, the names and addresses of the vendor, the purchaser and any sub-purchaser, the sale price, whether the sale was a private one or by auction and the completion date.

Subsection (4) prevents a duty imposed by the clause from being varied or removed by agreement.

Subsection (5) provides that any default by the mortgagee in complying with the clause does not affect the purchaser, but the mortgagee may be answerable to the mortgagor in damages (cf. clause 72).

Subsection (6) makes it an offence not to comply with subsection (3). Where the mortgagee is a friendly society, an industrial and provident society or a credit union, responsible officers are also guilty of an offence.

Subsection (7) fixes the maximum fine for an offence at level 2 on the standard scale with a weekly maximum fine for continuing offences. “Standard scale” is defined in section 42(4) of the Interpretation Act (Northern Ireland) 1954. The amount of a fine at level 2 is now £500 (Fines and Penalties (Northern Ireland) Order 1984 (NI 3)). Officers of a body corporate may be punishable for offences committed by that body (Interpretation Act (Northern Ireland) 1954, s. 20(2)).

Subsection (8) is a general saving for a mortgagee’s duty to account to his or her mortgagor.

Subsection (9) defines “mortgagor”, for the purposes of a notice under subsection (3), as including the person last known to the mortgagee to be the mortgagor, and as not including any person to whom, without the knowledge of the mortgagee, any rights or liabilities of the mortgagor have passed.

CLAUSE 71 – Conveyance on sale

This clause re-enacts the substance of a provision in section 21(1) of the 1881 Act.

Subsection (1) provides that the mortgagee, although holding a charge only over the land in the case of a mortgage of land, can nevertheless, when exercising the statutory power of sale, sell that land and convey title to it to the purchaser. This confirms that the new method of creating mortgages by way of a charge (see clause 58) gives the mortgagee the same security and remedies as the old traditional methods (by way of conveyance or assignment). *Paragraph (a)* confirms that the conveyance to the purchaser is free of all interests and rights in respect of which the mortgage had priority. Conversely *paragraph (b)* provides that interests and rights which had priority over the mortgage are unaffected and so the purchaser takes subject to them.

Subsection (2) explains further the effect of the conveyance by the mortgagee exercising the power of sale. *Paragraph (a)* provides that the land or whatever interest was mortgaged (e.g. a tenancy which was all the mortgagor held and was capable of mortgaging) vests in the purchaser. It follows that if an equitable interest only has been mortgaged or the mortgagee otherwise holds an equitable mortgage only, legal title cannot be conveyed to the purchaser, unless, e.g., the mortgagee also has a power of attorney over the legal title or the legal owner of the land is holding it on trust for the mortgagee (who is then entitled to call upon the legal owner to convey it as requested). Further provision for equitable mortgagees is contained in clause 75. *Paragraph (b)* provides that the conveyance extinguishes the mortgage, so that the purchaser obtains

a clean title, but this does not relieve the mortgagor from personal liability for the debt (e.g., where the sale proceeds do not discharge the outstanding debt in its entirety). *Paragraph (c)* provides that any fixtures or personal property included in the mortgage also passes to the purchaser.

Subsection (3) explains further the scope of this clause. *Paragraph (a)* extends its provisions to sub-mortgagees (i.e., a mortgagee of a mortgage), but *paragraph (b)* prevents it from operating in the case of a mortgage of part of property held under a tenancy, unless appropriate provision has been made for apportionment of rent and covenants between the property sold and property retained subject to the same tenancy.

Subsection (4) makes the conveyance by the mortgagee subject, where the mortgage relates to registered land, to the usual requirements of the Land Registration Act (Northern Ireland) 1970 (c. 33), i.e., the legal title will not vest in the purchaser until the conveyance is registered.

CLAUSE 72 – Protection of purchaser

This clause re-enacts the substance of provisions in section 21(2) of the 1881 Act, as amended by section 5(1) of the 1911 Act.

Subsection (1) provides that a purchaser from a mortgagee exercising the statutory power of sale is not concerned with whether the mortgagee has complied with formalities or is exercising the power properly. This is a matter between the mortgagor and mortgagee.

Subsection (2) provides that, although the purchaser obtains an unimpeachable title, any other person, such as the mortgagor, may be able to sue the mortgagee in damages for an unauthorised or improper exercise of the power of sale.

CLAUSE 73 – Mortgagee's receipts

This clause re-enacts the substance of section 22 of the 1881 Act.

Subsection (1) provides the mortgagee's receipt for the proceeds of a sale in exercise of the statutory power of sale is a sufficient discharge and relieves the purchaser from making inquiries as to what is due under the mortgage.

Subsection (2) makes it clear that a purchaser who has actual knowledge of an impropriety or irregularity is not protected by subsection (1).

Subsection (3) applies clause 74 (which deals with application by the mortgagee of the proceeds of a sale) to money received by the mortgagee under the mortgage or from the proceeds of securities comprised in the mortgage. Clause 74(5) adapts that clause to this situation.

CLAUSE 74 – Application of proceeds of sale

This clause re-enacts the substance of provisions in sections 21(3) and 22(2) of the 1881 Act. A mortgagee is not a trustee of the power of sale (see clause 68(4)), but is a trustee of the proceeds of a sale in exercise of the power.

Subsection (1) sets the initial order in which the mortgagee must apply the proceeds of sale.

Subsection (2) provides that any residue should go to the next mortgagee in priority and ultimately to the mortgagor, or the Crown.

Subsection (3) provides that subsequent mortgagees who receive a residue of the proceeds must apply it in the same way.

Subsection (4) discharges a mortgagee once the proceeds have been applied in accordance with the clause.

Subsection (5) adapts the provisions of clause 74 to the provision in clause 73(3) relating to money received under the mortgage or the proceeds of securities.

CLAUSE 75 – Realisation of equitable mortgages

This clause empowers the court to allow a sale of land subject to an equitable mortgage. Where the mortgage is made or accompanied by a deed, the mortgagee has a power of sale under clause 68, although, unless the mortgage contains a power of attorney or declaration of trust, an equitable mortgagee cannot vest the legal title in a purchaser unless the mortgagor concurs or a court order is obtained. An equitable mortgage may be created by, e.g., an agreement to execute a legal mortgage not yet executed or the deposit of title deeds with the intention of creating a mortgage.

Subsection (1) empowers an equitable mortgagee to apply to the court for an order for sale and empowers the court to make such an order. The order may be made subject to terms – e.g. it may entrust the conduct of the sale to the mortgagor, subject to safeguards. It is expected that the procedure in relation to obtaining an order will be prescribed by rules of court.

Subsection (2) gives certain express powers to the court when it orders a sale or where an equitable mortgagee has a power of sale (see clause 68(1)). These do not prejudice any other power the court may have (e.g. by virtue of its power to impose terms). The court may under *paragraph (a)* make a vesting order in favour of a purchaser; under *paragraph (b)* appoint a person to convey the land; under *paragraph (c)* give the mortgagee the same power of sale as he or she would have had under clause 68 in the case of a legal mortgage.

Subsection (3) is a saving for prior interests.

Subsection (4) applies the clause to equitable mortgages whenever made.

CLAUSE 76 – Appointment of a receiver

This clause (together with clause 77) re-enacts the substance of provisions in sections 19(1)(iii) and 24 of the Conveyancing Act 1881.

Subsection (1) confers a statutory power to appoint a receiver, which is exercisable on the same conditions as apply to the statutory power of sale – essentially on a default in making payments due under the mortgage or in the event of some other breach of the terms of the mortgage by the mortgagor: see clause 68(2). Like all the remedies conferred by Chapter 3, the power can also be exercised only for the purpose of protecting the mortgaged property or realising the mortgagee's security: see clause 64(2)(b).

Subsection (2) confirms the long-established principle that, although the receiver is appointed by the mortgagee, he or she is regarded as the agent of the mortgagor, who, therefore, cannot hold the mortgagee responsible for the receiver's acts.

Subsection (3) confers wide powers on the receiver. Subject to the terms of the mortgage or appointment, delegated powers (e.g. leasing powers under clauses 80 and 81) should be exercised in accordance with the statutory provisions: see *subsection (4)*. If the power of sale is delegated clause 70 must be complied with by the receiver.

Subsection (5) protects a person dealing with a receiver – he or she may assume the receiver is acting with full authorisation.

Subsection (6) provides for removal of a receiver who has been appointed and for appointment of a replacement.

Subsection (7) entitles the receiver to remuneration and reimbursement of costs – in the absence of a rate of remuneration specified in the appointment, a prescribed rate will apply. The Department has power to make orders and regulations to cover such matters to be prescribed: see clause 116.

Subsection (8) enables the mortgagee to direct the receiver to insure the mortgaged property as the mortgagee can under clause 78.

CLAUSE 77 – Application of money received

This clause re-enacts provisions in section 24(8) of the 1881 Act.

Subsection (1) specifies the order of payments to be made by a receiver out of money received by him or her out of the mortgaged property.

Subsection (2) provides that any money left over after making such payments should go to the person who would have been entitled to it but for the receiver being in possession of the mortgaged property, usually the mortgagor.

CLAUSE 78 – Insurance

This clause for the most part re-enacts provisions in sections 19(i)(ii) and 23 of the 1881 Act and confers on the mortgagee a statutory power to insure the mortgaged property.

Subsection (1) confers the power to insure, which is confined to whatever is comprised in the mortgaged property.

Subsection (2) modifies the 1881 Act's provisions as recommended by the Commission: see NILC 2 (2009) para. 8.27. It increases the statutory amount of insurance cover to the full reinstatement cost, which, in practice, is what most mortgagees would require.

Subsection (3) provides that premiums are added to the mortgage debt, with the same priority.

Subsection (4) authorises the mortgagee to give a good discharge for the proceeds of an insurance policy, but the balance of any proceeds (after being spent in accordance

with subsection (5)) must be treated as if the proceeds of a sale under clause 68, i.e., in accordance with clause 74.

Subsection (5) authorises the mortgagee to use the insurance money to make good the loss or damage covered by the insurance or to discharge the mortgage debt.

CLAUSE 79 – Tacking

This implements the Commission's recommendations that the mortgagee's right to "tack" should be abolished, save in respect of future advances. So far as the latter is concerned the recommendation was that the law relating to unregistered land should be brought into line with that relating to registered land (as set out in section 43 of the Land Registration Act (Northern Ireland) 1970 (c. 18)).

Subsection (1) adopts for unregistered land (see subsection (4)(b)) the provisions in section 43 of the 1970 Act relating to tacking of future advances.

Subsection (2) adopts the definition of "future advances" in section 43(2) of the 1970 Act.

Subsection (3) abolishes all other forms of tacking as recommended by the Commission. This is without prejudice to priority obtained by tacking already acquired before the Appointed Day.

Subsection (4) defines the scope of the clause. *Paragraph (a)* applies the clause to all mortgages whenever made. *Paragraph (b)* makes it clear that it does not apply to registered land – that is because such land is already covered by section 43 of the 1970 Act.

CHAPTER 4

LEASES AND SURRENDERS OF LEASES

Chapter 4 re-enacts the substance of the provisions in the Conveyancing Acts 1881-1911 dealing with leasing powers of the mortgagor and mortgagee.

CLAUSE 80 – Leasing powers

This clause re-enacts the substance of section 18 of the 1881 Act, as amended by section 3(10) of the 1911 Act.

Subsection (1) gives a mortgagor in possession of the mortgaged land power to lease it. Like other statutory powers, the power to grant leases may be exercised from time to time, as occasion requires (Interpretation Act (Northern Ireland) 1954 (c. 33), section 17(1)). A lease is effective against a mortgagee only if the mortgagee's written consent to it has been obtained; it is effective against other incumbrancers (defined in clause 117) without their consent. A lease may extend to the whole of the land or only part of it. It may be granted for any purpose and any term permitted by law – this is a reference to section 30 of the Property (Northern Ireland) Order 1997 (NI 8) which, broadly, makes the maximum term of a lease 50 years in the case of dwelling-houses.

Subsection (2) gives a mortgagee in possession a similar power of leasing, except that the mortgagee does not need any consents.

Subsection (3) requires a lease to –

paragraph (a) be in writing and made to take effect in possession after not more than a year or, in the case of a reversionary lease, seven years;

paragraph (b) reserve the best rent obtainable;

paragraph (c) be on the best terms obtainable (there should be a rent review provision, where this is the usual commercial practice).

Subsection (4) provides that no question about the sufficiency of the rent can be raised if the rent was fixed by valuation, arbitration or some generally recognised method.

Subsection (5) says how any fine taken on the grant of a lease is to be dealt with:

paragraph (a) Where the mortgagor grants the lease he or she is to use the fine in discharge of the mortgage debt (or so much of that debt as the fine will cover),

paragraph (b) Where the mortgagee grants the lease he or she is to treat the fine as if it were proceeds of sale (section 74).

Subsection (6) allows a nominal or reduced rent to be charged for an initial period not exceeding five years, where part of the consideration for the lease is the carrying out of development work by the lessee.

Subsection (7) is a saving for statutory provisions (e.g. the Business Tenancies (Northern Ireland) Order 1996 (NI 5) and the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 (c. 7) which contain special rules for the fixing of rents).

Subsection (8) requires a duplicate of the lease to be executed by the lessee and delivered to the lessor; the fact that the lessor has executed the lease is to be taken as evidence that such a duplicate was supplied.

Subsection (9) applies where the mortgagor is the lessor; he or she must, within a month, give the mortgagee a copy of the lease, signed by the lessee. The lessee is not concerned to see that this is done.

Subsection (10) makes a contract for a lease under this clause enforceable by or against every person on whom the lease would be binding.

Subsection (11) allows the clause to be excluded or modified by agreement. In practice, most mortgages expressly exclude the power.

Subsection (12) allows the powers conferred by the clause to be extended by agreement. As any extension has effect “as if...conferred by this Chapter”, the variation becomes part of the statutory power, except as regards a non-consenting prior mortgagee.

Subsection (13) prevents the powers under the clause of a mortgagor from being exercised by an incumbrancer deriving title under the original mortgagor. “Incumbrancer” is defined in clause 117 and includes a person entitled to the benefit of a trust.

Subsection (14) prevents the mortgagor from granting a lease under the clause while a receiver appointed by the mortgagee under the statutory power (section 76) is acting. The mortgagee may delegate the power of leasing to the receiver.

CLAUSE 81 – Surrenders

This clause re-enacts the substance of section 3 of the 1911 Act.

Subsection (1) empowers a mortgagor in possession to accept the surrender of an existing lease. The conditions in subsection (5) must be complied with.

Subsection (2) confers a similar power on a mortgagee in possession.

Subsection (3) applies where the existing lease is surrendered as to part only of the land demised by it. In this case, subsection (1) allows an apportionment of rent; this subsection allows the value of the lessee's interest under the surrendered lease to be taken into account in fixing the terms of the new lease.

Subsection (4) Where there is consideration for the surrender (other than the agreement to accept a new lease), if the surrender is to the mortgagor the consent of all incumbrancers is required, and if the surrender is to a second or subsequent mortgagee the consent of every prior incumbrancer is required.

Subsection (5) sets out three conditions which must be satisfied if a surrender is to be valid.

paragraph (a) A lease authorised by clause 80 or the mortgage deed must be granted for the whole of the land surrendered to take effect in possession within a month.

paragraph (b) The term of the new lease must be not less than the term of the old.

paragraph (c) The rent reserved by the new lease must be not less than the rent reserved by the old.

Subsection (6) permits a contract to surrender to be enforced against every person on whom the surrender, if effected, would be binding.

Subsection (7) makes the clause variable by agreement between the mortgagor and the mortgagee.

Subsection (8) allows the powers conferred by the clause to be extended by agreement. Any extension becomes part of the statutory power, except as regards a non-consenting prior mortgagee.

Subsection (9) prevents the powers of a mortgagor from being exercised by an incumbrancer deriving title under the original mortgagor. "Incumbrancer" is defined in clause 117.

Subsection (10) empowers a receiver appointed by the mortgagee under the statutory power to accept surrenders.

PART 8

CONTRACTS AND CONVEYANCES

This Part implements the recommendations in Chapters 9 and 10 of the Commission's Consultation Paper NILC 2 (2009). It deals with the law which underpins the conveyancing process relating to land transactions. Thus it covers the formalities

relating to contracts, title deduction and investigation, deeds and other conveyancing documentation and the parties' remedies when something goes wrong. In so doing it replaces various old statutes like the Statute of Frauds (Ireland) 1695 (c. 13) (so far as it relates to land transactions), the provisions on such matters in the Conveyancing Acts 1881-1911 and in other 19th century statutes, such as the Vendor and Purchaser Act 1874 (c. 78).

CHAPTER 1

CONTRACTS RELATING TO LAND

This Chapter contains various provisions relating to contracts which are usually entered into as the first formal step in a land transaction – only at this stage do the parties enter into binding obligations relating to the sale and purchase of, or other transactions concerning, the land. It implements the Commission's recommendations in Chapter 9 of NILC 2 (2009).

CLAUSE 82 – Evidence in writing

This clause re-enacts the substance of section 2 of the Statute of Frauds (Ireland) 1695 (c. 13), with modifications recommended by the Commission: see NILC 2 (2009) paras. 9.6-9.12.

Subsection (1) retains the 1695 provision that contracts relating to land need only be *evidenced* in writing. There is much case law which provides guidance on this. As regards the wording of the subsection, the expressions "disposition" and "land" are defined in clause 117. The expressions "writing" and "signed" are defined by section 46(1) of the Interpretation Act (Northern Ireland) 1954 (c. 33).

Subsection (2) clarifies the operation of subsection (1). *Paragraph (a)* implements a recommendation made by the Law Reform Advisory Committee (see Discussion Paper No. 8: *Formalities for Contracts relating to the Sale of Land or Interests in Land and the Rule in Bain v Fothergill*) and adopted by the Commission: see NILC 2 (2009) para. 9.11. This was so that the position of contracts for short leases (which leases may be created orally under section 4 of Deasy's Act 1860 (c. 154)) should be aligned. It would be very rare for the grant of a short lease (particularly a periodic tenancy like a weekly or monthly tenancy) to be preceded by a contract for such a grant. *Paragraph (b)* preserves the equitable doctrine of part performance which the courts have long recognised as an exception or alternative to the written evidence requirement first introduced by the 1695 Statute. It also, as recommended by the Advisory Committee and the Commission, makes it clear that other equitable doctrines may be invoked in appropriate cases to get round the written evidence requirement, such as the doctrines of constructive trusts and proprietary estoppel.

CLAUSE 83 – Return of deposit

This clause implements the Commission's recommendation that the uncertainty as to the courts' jurisdiction to order return of a deposit (in cases where it has been held that specific performance of the contract should not be granted) should be resolved as has been done in England and Wales and the Republic of Ireland: see NILC 2 (2009) para. 9.20.

CLAUSE 84 – Vendor and purchaser summons

This clause implements the Commission's recommendation that the summary jurisdiction to determine certain disputes concerning contracts relating to land established by section 9 of the Vendor and Purchaser Act 1874 (c. 78) should be re-enacted: see NILC 2 (2009) para. 9.22.

Subsection (1) reaffirms the summary jurisdiction. *Subsection (2)* reaffirms the wide discretion conferred on the court. *Subsection (3)* clarifies the scope of the jurisdiction, in particular the type of issue or question which can be put to the court by invoking the summary jurisdiction. This reflects the substantial case law on the subject.

CHAPTER 2

TITLE

This Chapter implements recommendations made by the Commission on the subject of title matters, i.e., deduction of title by the vendor and investigation of title by the purchaser. It replaces various provisions in the Vendor and Purchaser Act 1874 (c. 78) and Conveyancing Acts 1881-1911.

CLAUSE 85 – Root of title

This clause implements the Commission's recommendation that the period of title to be deduced in an "open" contract for the sale or other disposition of land should be reduced to 15 years: see NILC 2 (2009) para. 10.7. Under section 1 of the 1874 Act the period was 40 years.

Subsection (1) introduces the new period. This only applies where the contract leaves the issue of the title to be deduced by vendor "open": see subsection (3).

Subsection (2) confirms the long-standing rule that a purchaser taking an assignment of an interest held under a fee farm grant or lease can call for production of the original grant or lease, however long ago it was granted.

Subsection (3) confirms the rule under the 1874 and 1881-1911 Acts that the statutory rules operate only where the contract is "open" as to the title to be deduced by the vendor. The rules give way to express provisions in the contract, i.e., where the contract is "closed" as to the title to be deduced. It is usual for contracts to have express provisions as to title, so that these statutory provisions are "default" ones which very rarely operate.

Subsection (4) contains a saving for the Crown when it conveys land which has vested in it as *bona vacantia* (such vesting is saved by clause 2(2) and (3) of the Bill). The point here is that the Crown may have no documentary evidence of the title to such land and often has to convey it with whatever unknown title it has, without any warranty or other covenant as to the title. A purchaser from the Crown must take it on this basis and subsection (4) confirms that conveyances by the Crown can continue to be made in this way.

CLAUSE 86 – Tenancies

This clause replaces, with various modifications recommended by the Commission, provisions relating to deduction of title in the case of the grant or assignment of

tenancies. It replaces provisions in section 2 of the 1874 Act, sections 3 and 13 of the 1881 Act and section 4 of the 1882 Act.

Subsection (1) re-enacts the general rule in the 1874 and 1881 Acts that, again in the case of an “open” contract only (see subsection (4)), an intended tenant, sub-tenant or assignee of a tenancy or sub-tenancy cannot call for the superior title.

Subsection (2) re-enacts the provision in section 4 of the 1882 Act, under which once a tenancy has been granted, any prior contract for that grant ceases to be part of the title documentation.

Subsection (3) implements the Commission’s recommendation that the rule in *Patman v Harland* should be abolished: see NILC 2 (2009) para. 10.12. Purchasers’ solicitors will no longer be under pressure to specify for deduction of more title than clauses 85 and 86 require. This accords with the general principle also recommended by the Commission, that purchasers of a leasehold interest should be left free to contract for whatever title is considered appropriate by them and their solicitors.

Subsection (4) confirms the general principle just mentioned – purchasers remain free to contract out of subsection (1), by calling for the owner’s or other superior title.

CLAUSE 87 – Other conditions of title

This clause re-enacts the substance of other provisions relating to deduction and investigation of title in section 2 of the 1874 Act and section 3 of the 1881 Act. The Commission recommended such re-enactment: see NILC 2 (2009) para. 10.13.

Subsection (1) replaces section 3(3) of the 1881 Act and prohibits a purchaser from investigating the “pre-root” title i.e. title earlier than that referred to in clause 80 or the contract for sale, and requires him or her to assume that recitals in documents of title produced relating to such prior title are correct and recited instruments were properly executed.

Subsection (2) specifies a number of exceptions to the general rule in subsection (1), which came to be recognised by the courts. These are cases where the validity or effectiveness of an instrument in the deduced title depends on some pre-root instrument e.g. a power of attorney.

Subsection (3) re-enacts the substance of section 3(6) of the 1881 Act and requires the purchaser to bear the cost of production of certain title documentation by the vendor.

Subsection (4) re-enacts the substance of section 3(7) of the 1881 Act and deals with the sale or other disposition of land in lots whereby a purchaser of two or more lots must meet the expense of production of more than one copy of any document relating to the common title of the whole land.

Subsection (5) re-enacts the substance of the Third Rule in section 2 of the 1874 Act, as amended by section 9(8) of the 1881 Act. Section 9 of the 1881 Act is replaced by clause 106 of this Bill. This subsection provides that a purchaser cannot refuse to complete where a vendor cannot furnish an acknowledgment of the right to production and delivery of documents of title, if a right to such production arises on completion of the contract.

Subsection (6) re-enacts the substance of the Fourth Rule in section 2 of the 1874 Act i.e. the requirement that the purchaser must meet the expense of acknowledgements

and undertakings for safe custody of documents which the vendor retains (because part only of the vendor's land is being sold).

Subsection (7) re-enacts the substance of the Fifth Rule in section 2 of the 1874 Act entitling the vendor to retain documents of title in certain situations, such as a sale of part only of his or her land.

Subsection (8) re-enacts the rule that the statutory conditions in clause 82 take effect subject to the terms of the contract, thereby reflecting section 2 of the 1874 Act and section 3(9) of the 1881 Act.

Subsection (9) re-enacts the substance of section 3(11) of the 1881 Act whereby a purchaser is not bound by stipulations in the contract similar to the statutory ones if the court would not enforce the contract against the purchaser.

Subsection (10) contains definitions designed to simplify the wording of clause 82, thereby avoiding repetition of wording in the 1874 and 1881 Acts.

CLAUSE 88 – Protection of purchasers

This clause re-enacts provisions in the 1874 and 1881 Acts designed to protect purchasers in conveyancing transactions.

Subsection (1) re-enacts the substance of the Second Rule in section 2 of the 1874 Act and provides for the presumption that recitals, statements and descriptions in instruments, statutory provisions or statutory declarations at least 15 years old are accurate.

Subsection (2) re-enacts the substance of section 3(4) of the 1881 Act. i.e. the presumption that, where the land sold is held under a tenancy, the tenancy was duly granted and, where the receipt for the last payment of rent is produced, that the covenants and provisions of the tenancy have been performed and observed up to completion of the purchase.

Subsection (3) re-enacts the substance of section 3(5) of the 1881 Act and contains equivalent presumptions where the land sold is held under a sub-tenancy.

CLAUSE 89 – Fraudulent concealment and falsification

This clause re-enacts the substance of section 24 of the Law of Property (Amendment) Act 1859 and section 8 of the Law of Property (Amendment) Act 1860. It provides both criminal and civil sanctions for concealment of documents and falsification of information relating to the title of land being disposed of.

Subsection (1) creates an indictable offence, prosecution of which requires the consent of the DPP: see subsection (4).

Subsection (2) establishes a right to damages for loss and *subsection (3)* deals with assessment of damages.

Subsections (4) and (5) deal with obtaining the consent of the DPP for prosecution of a criminal offence, in compliance with Article 7 of the Prosecution of Offences (Northern Ireland) Order 1972 (NI 1).

CLAUSE 90 – Notice on common title

This clause re-enacts the substance of section 11 of the Conveyancing Act 1911. It entitles a purchaser of part only of land held under a common title to require indorsement or annexation of a notice on or to one of the title documents retained by the vendor, relating to covenants or rights like easements which the purchaser can enforce against other land held under the common title.

Subsection (1) entitles the purchaser in such cases to require indorsement or annexation of a notice, which right cannot be contracted out of.

Subsection (2) makes it clear that there is no obligation on a purchaser to invoke the clause and a failure to do so does not otherwise prejudice the purchaser's title.

Subsection (3) confines the provision to unregistered land. In the case of registered land such matters would be covered by entries in the register, e.g., one made under section 51 of the Land Registration Act (Northern Ireland) 1970.

CHAPTER 3

DEEDS AND THEIR OPERATION

This Chapter implements the recommendations of the Commission relating to deeds (for conveyancing transactions) and their operation: see NILC 2 (2009) paras. 10.14-10.23.

CLAUSE 91 – Conveyances by deed only

This clause implements the Commission's recommendation that arcane methods of conveying land should be abolished altogether and the modern deed should become the sole method: see NILC 2 (2009) para. 10.14.

Subsection (1) establishes the deed as the sole method of conveyance in most land transactions. This is, however, subject to the exceptions listed in subsection (6). What constitutes a deed is governed now by Article 3 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 (NI 7).

Subsection (2) abolishes the need for a conveyance "to uses". The Statute of Uses (Ireland) 1634 is repealed (see Schedule 4) and this area of the law rooted in feudal times is consigned to history as recommended by the Commission: see NILC 2 (2009) para. 10.15.

Subsection (3) deals with another arcane area of the law linked with the Statute of Uses, whereby a "resulting use" was implied in favour of the grantor of a voluntary conveyance and would render the conveyance a nullity (by virtue of it being "executed" by the Statute) unless the conveyance used the formula "unto and to the use of" the grantee. The subsection renders this unnecessary.

Subsection (4) abolishes the old methods of conveying land developed in feudal times, as recommended by the Commission: see NILC 2 (2009) para. 10.14. Although the Real Property Act 1845 introduced the modern method of a deed, it did not abolish the old methods.

Subsection (5) re-enacts a provision in section 5 of the Real Property Act 1845.

Subsection (6) lists various, well-established, exceptions to the rule that a deed must be used for conveyances of land. These are –

- (a) Assents by personal representatives. These are required by section 35(1) of the Administration of Estates Act (Northern Ireland) 1955 to be in writing only signed by the personal representatives.
- (b) Disclaimers by a liquidator or trustee in bankruptcy, which are required by Articles 152 and 288 respectively of the Insolvency (Northern Ireland) Order 1989 to be in the form prescribed by Insolvency Rules made by the Lord Chancellor.
- (c) A disclaimer by a legatee or devisee of a testamentary gift may be made in writing or orally, or may be implied from conduct.
- (d) Surrenders not required to be by deed. These include surrenders of leases by estoppel or by operation of law – e.g. *Foster v Robinson* [1951] 1KB149 (surrender of lease by operation of law in return for a licence to occupy free of rent).
- (e) Leases or assignments of leases. Under Deasy's Act 1860 some tenancies may be created orally and others may be created or assigned in writing only.
- (f) Receipts not required to be under seal: a receipt endorsed on a mortgage which operates by virtue of the Property (Discharge of Mortgage by Receipt) (Northern Ireland) Order 1983 to discharge the mortgaged property from the mortgage may be executed by the mortgagee.
- (g) Vesting orders – e.g., orders under sections 43-50 of the Trustee Act (Northern Ireland) 1958.
- (h) Conveyances taking effect by operation of law – e.g. the vesting of a deceased's property in his personal representatives (Administration of Estates Act (Northern Ireland) 1955 s. 1(1)); the vesting of a bankrupt's estate in his trustee in bankruptcy (Insolvency (Northern Ireland) Order 1989 Article 279), or the reverter of land to its donor under section 4 of the Literary and Scientific Institutions Act 1854.
- (i) A vesting of land in the Crown as *bona vacantia* or in the Crown Estate (e.g. on a disclaimer of *bona vacantia*) – such vesting is saved by clause 2(2) and (3) of the Bill (see the Explanatory Notes to that clause).

CLAUSE 92 – Words of limitation

This clause implements the Commission's recommendation that the need for words of limitation in conveyances of unregistered land should be abolished, as was done for transfers of registered land by section 35 of the Land Registration Act (Northern Ireland) 1970: see NILC 2 (2009) para. 10.18. However, it adapts the provisions of section 35 to the new provisions concerning ownership in Part 1 of the Bill. Words of limitation were part of the law of estates (concerning, in particular, creation and conveyances of a fee simple or fee tail) which is also abolished by Part 1. Similar adaptation of section 35 of the 1970 Act is made by Schedule 2 of the Bill.

Subsection (1) contains the general rule for the future that a conveyance of unregistered land will pass ownership (as defined by Part 1) or what other interest in land the grantor had power to convey. In the case of a corporation sole (like a bishop or other office holder) the ownership or other interest will vest in him or her in his or her official, as opposed to private, capacity. This is all subject to a provision to the contrary in the conveyance.

Subsection (2) abolishes the Rule in *Shelley's Case* which put a particular construction on conveyances using a formula like "To A for life, remainder to A's heirs". Under the rule the remainder provisions would not be construed as giving A's heirs any interest, but rather as part of the limitation of A's interest. The result was that, instead of A receiving a life interest only, with an interest going to A's heirs on his death, A was regarded as having both a life interest and fee simple which merged (thereby treating the conveyance as if it has said simply "To A and his heirs"). *Subsection (2)* makes it clear that if such a formula is used in future, A will receive simply the life interest and his or her heirs their own interest in remainder, with the consequence that a trust of land will arise coming within Part 4 of the Bill. As to who constitutes a person's "heir" or "heirs", this is governed by section 5 of the Administration of Estates Act (Northern Ireland) 1955 – under subsection (3) of that section it will usually mean a person's intestate successors (as designated by Part II of the 1955 Act).

Subsection (3) makes it clear that use of words of limitation on or after the Appointed Day is pointless, especially since estates like the fee simple are abolished by Part 1. However, if such words are used they are to be disregarded and the conveyance will have effect in accordance with subsection (1).

Subsection (4) gives limited retrospective effect to subsections (1) and (2), so as to correct what will often have been an oversight in earlier conveyances. However, this does not prejudice parties who have acted on the basis of the previous law or who have disposed of or acquired interests in consequence of application of the previous law. This protects "vested" rights.

CLAUSE 93 – Reservations

This clause simplifies the law relating to reservations made in a conveyance in favour of the grantor. It removes the complications involving use of the Statute of Uses (Ireland) 1634 (which is repealed, see Schedule 4) and replaces section 62 of the Conveyancing Act 1881 (which required use of the 1634 Statute).

Subsection (1) provides that in future reservations of rights like easements and profits à *prendre* operate fully without the need for the grantee to execute the conveyance; it is sufficient that the grantor executes it. The grantee will only have to execute it where he or she is doing something e.g., entering into covenants. The previous necessity for the grantee to execute the conveyance arose from the principle that a reservation was regarded as a re-grant of the right in question by the grantee to the grantor. This principle is negated by subsection (3).

Subsection (2) confirms the long-established distinction between an "exception" and a "reservation" in a conveyance. The former relates to something which already existed before the conveyance, e.g., minerals on the land. The latter relates to some new right arising for the first time at the time of and in consequence of the conveyance, e.g., reservation of a right to mine minerals on the land conveyed to the grantee.

Subsection (3) is consequential on subsection (1) and displaces a rule of construction which previously applied to reservations. Because under previous law a reservation was regarded as a regrant by the grantee any ambiguity in the wording of the reservation was construed against the grantee. This was contrary to the general rule of construction of deeds and other documents, that they are construed against the person who usually has them drawn up, the grantor. As a result of subsection (3), in future reservations will be subject to this general rule.

Subsection (4) makes it clear that the new provisions apply only to reservations made on or after the Appointed Day.

CLAUSE 94 – Benefit of Deeds

This clause re-enacts the substance of part of section 5 of the Real Property Act 1845 (the other part, relating to “indentures” is re-enacted by clause 86(5) of the Bill) and clarifies its scope. Section 5 was probably designed to get round the so-called “*inter partes*” rule, i.e., that the benefit of a deed *inter partes* (one made between two or more parties, to be distinguished from a deed “poll”) could be claimed only by those parties. However, it is also not uncommon for a deed to purport to confer a benefit on persons other than the named parties, e.g., a deed made between A and B may contain a covenant by B for the benefit of A “and the owners for the time being of” adjacent lands: see *Smith v River Douglas Catchment Board* [1949] 2KB 500. The clause confirms that such adjacent owners can also enforce the covenant against B.

CLAUSE 95 – Features and rights conveyed with land

This clause implements the Commission’s recommendation that the “word-saving” provisions of section 6 of the Conveyancing Act 1881 should be re-enacted but clarified to make it clear that they do not “upgrade” rights and pass only rights existing at the date of the conveyance: see NILC 2 (2009) para. 10.20. The Commission also recommended that it should be made clear that the provisions do not apply in the *Wheeldon v Burrows* situation (as to which see clause 17 of the Bill), i.e., they do not convert a *quasi*-easement into a full easement.

Subsection (1) re-enacts the substance of section 6(1) of the 1881 Act. *Subsection (2)* re-enacts the substance of section 6(2) (section 6(3) is not re-enacted as it relates to the feudal concept of “manors”, a concept which ceased to be relevant to Ireland by the end of the 19th century).

Subsection (3) provides the clarification recommended by the Commission. *Subparagraph (a)(i)* makes it clear that the clause does not create any new right (not already existing at the date of the conveyance) or convert a *quasi*-right, such as occurred under the rule of *Wheeldon v Burrows*. *Subparagraph (a)(ii)* makes it clear that it does not “upgrade” existing rights, such as converting a revocable licence which existed prior to the conveyance into a permanent legal easement. *Paragraph (b)* re-enacts the substance of section 6(5) of the 1881 Act and *paragraph (c)* re-enacts the substance of section 6(4).

CLAUSE 96 – Supplemental instruments

This clause re-enacts the substance of section 53 of the Conveyancing Act 1881, but extends and clarifies its scope. It facilitates the use of a supplemental instrument to add to or explain an earlier instrument, by treating it as if it were part of that earlier instrument, without the need to indorse it on the earlier one.

Subsection (1) re-enacts the substance of section 53 of the 1881 Act, but extends its scope to instruments generally (section 53 was confined to “deeds”).

Subsection (2) confirms what has long been taken to be the position with respect to section 53, i.e., the statutory provision does not affect a purchaser’s position as regards title to be deduced by the vendor (as to which see Part 8 Chapter 2 of the Bill).

CLAUSE 97 – Partial releases

This clause re-enacts the substance of provisions in sections 10 and 11 of the Law of Property (Amendment) Act 1859. Those sections reversed the common law rule that a partial release of a rentcharge or judgment on land released the entire land from the rentcharge or judgment.

Subsection (1) confirms that a partial release does no more than release the part of the land to which the release relates.

Subsection (2)(a) protects the interests of persons not concurring in or confirming the release. *Paragraph (b)* makes it clear that, unless the parties to the release agree otherwise, the whole rentcharge or judgment can be enforced against the part of the land not released.

CLAUSE 98 – Fraudulent dispositions

This clause implements the Commission's recommendation that sections 1-5 of the Conveyancing Act (Ireland) 1634 (as amended by the Voluntary Conveyances Act 1893) should be recast and clarified: see NILC 2 (2009) para. 10.22. Section 10, 11 and 14 of the 1634 Act were replaced by the Insolvency (Northern Ireland) Order 1989: see para. 10.23. The Sale of Reversions Act 1867 is repealed, see Schedule 4 to the Bill, but not re-enacted, as recommended by the Commission: see again para. 10.23.

Subsection (1) recasts in simpler form the provisions of section 1-5 of the 1634 Act. It makes it clear both that there must be an intention to defraud on the part of the vendor and that the conveyance is voidable only (i.e., it remains valid until the purchaser takes step to "avoid" it, usually by applying to the court for an order for rescission).

Subsection (2) recasts the substance of the 1893 Act.

CLAUSE 99 – Construction of instruments

This clause implements the Commission's recommendation that there should be introduced statutory definitions of words commonly used in deeds similar to those provided for statutes by the Interpretation Act (Northern Ireland) 1954.

Subsection (1) applies to private instruments the meaning, construction or effect given to words and phrases by clause 117 of the Bill or the 1954 Act. Generally clause 117 does not provide a definition which is already provided by the 1954 Act. However there is one important exception, namely the definition of "land" (cf the definition in section 45(1)(a) of the 1954 Act). *Subsection (2)* deals with such differences. *Subsection (1)* makes it clear that it applies subject to the context, so that it will not operate where the particular instrument provides its own definitions.

Subsection (2) provides that where there is a difference between the definitions in clause 117 and those in the 1954 Act, those in clause 117 prevail so far as private instruments are concerned. Clause 117 makes it clear that an "instrument" does not include a statutory provision.

CHAPTER 4

CONTENTS OF DEEDS

This chapter implements the recommendations of the Commission for re-enactment, with some modifications, of other provisions of the Conveyancing Acts 1881-1911 relating to the contents of deeds: see NILC 2 (2009) paras. 10.24-10.26.

CLAUSE 100 – All interest clause

This clause re-enacts the substance of section 63 of the Conveyancing Act 1881. It augments the provisions of section 92.

Subsection (1) implies in conveyances a provision to the effect that everything that a vendor has in respect of land passes to the purchaser. This is, however, subject to a provision to the contrary in the conveyance: see *subsection (2)*.

CLAUSE 101 – Receipts in deeds

This clause re-enacts the substance of provisions in sections 54-56 of the Conveyancing Act 1881, but with some modifications.

Subsection (1) re-enacts section 54 of the 1881 Act and renders a receipt in the body of a deed as good as one endorsed on it.

Subsection (2) re-enacts section 55 of the 1881 Act but renders a receipt conclusive (rather than simply sufficient) in favour of a subsequent purchaser, unless he or she has notice that the consideration acknowledged as received was not, in fact, received.

Subsection (3) re-enacts section 56 of the 1881 Act, but again renders the receipt conclusive authority for a solicitor acting for the vendor to receive the purchase money.

Subsection (4) clarifies the scope of subsection (3) to make it accord with standard conveyancing practice, where completion of a sale may be carried out by an employee of the vendor's solicitor's firm or of another firm acting as agent for the vendor's solicitor.

CLAUSE 102 – Conditions and covenants not implied

This clause re-enacts the substance of section 4 of the Real Property Act 1845. It is intended to ensure that conveyances do not have unintended effect.

Subsection (1) prevents a condition being implied and, in effect, requires any condition to be inserted expressly. A condition, as opposed to a covenant, is a very serious provision to have in a deed because, unlike a covenant, it gives rise automatically to a right of forfeiture or of re-entry for breach.

Subsection (2) prevents covenants being implied simply because the words “give” or “grant” are used. Note that additional words have to be used to imply the covenants for title under clauses 104 and 105.

CLAUSE 103 – Scope of clauses 104 and 105

This clause clarifies the scope of clauses 104 and 105 which deal with covenants for title implied in conveyances.

Paragraph (a)(i) makes it clear that they do not apply to the *grant* of a new tenancy, as opposed to the subsequent assignment of an existing (previously granted) tenancy. This reflects the existing law. Clauses 104 and 105 replace section 7 of the Conveyancing Act 1881 which did not apply to grants of tenancies. Such grants are governed by section 41 of Deasy's Act (Landlord and Tenant Law Amendment Act, Ireland 1860). *Paragraph (a)(ii)* confines the new provisions in clauses 104 and 105 to conveyances made on or after the Appointed Day. This is because they make various changes to the provisions in section 7 of the 1881 Act. *Paragraph (b)* makes it clear that the implied covenants will still operate even though the conveyance does not actually use the words "convey" or "conveyed". Under Article 3(2)(a) of the Law Reform (Miscellaneous Provisions)(Northern Ireland) Order 2005, a deed conveying land may be expressed to be some other appropriate document "according to the nature of the transaction intended to be effected", e.g., an assurance or mortgage.

CLAUSE 104 – Covenants for title

This clause, together with clause 105 and Schedule 1, implements the recasting of the provisions of section 7 of the 1881 Act recommended by the Commission: see NILC 2 (2009) paras. 10.26-10.27. It is modelled on provisions contained in the draft Property Order set out in the 1990 Final Report (see Articles 106 and 107 and Schedule 1) and adopted in the Republic's Land and Conveyancing Law Reform Act 2009 (see sections 80 and 81 and Schedule 3). This clause, together with Schedule 1 Parts I and II, sets out the covenants which are implied in conveyances of various kinds when the conveying party is expressed to convey in a stated capacity. The object of the clause is to shorten conveyances.

Subsection (1) implies, in conveyances of each class mentioned in paragraph (2), the corresponding covenants specified in Part II of Schedule 1. Where two or more persons together constitute parties of one or the other parties to a conveyance, the implied covenants are enforceable by or against (as the case requires) both or all of them and each of them. *Paragraph (a)* adapts the provisions to the new concept of ownership of land set out in Part 1 of the Bill. The implied covenants will attach either to ownership purported to be conveyed or any share or lesser interest in the land which is expressed to be conveyed.

Subsection (2) sets out the relevant classes of conveyance.

Class 1 is an outright conveyance (and not a mortgage) for valuable consideration made "as beneficial title holder" of land other than leasehold land: the covenants are for (1) the right to convey, (2) quiet enjoyment, (3) freedom from incumbrances and (4) further assurance. Part I of Schedule 1 limits the persons whose actions give rise to a breach of covenant.

Class 2 is an outright conveyance of leasehold land for valuable consideration made "as beneficial title holder": the covenants are the four implied for *Class 1* together with (5) the lease is valid and in effect and (6) the rent has been paid and covenants and conditions have been honoured. Liability under (5) is restricted to acts or omissions of the covenantor or persons through whom he or she has derived title, and under (6) so as not to include breaches of covenants or conditions which could have

been discovered on reasonable inspection of the property. The purchaser can assume that the lease was duly granted and that covenants have been performed, until the contrary is shown (clause 88(2) and (3)).

Class 3 is a mortgage made “as beneficial title holder” of land not subject to a rent: the covenants are the four implied for *Class 1*, but subject to two variations, namely, that (a) liability under the covenants extends to the actions of any person and (b) the covenant for quiet enjoyment does not take effect until the mortgagee goes into possession.

Class 4 is a mortgage made “as beneficial title holder” of land subject to a rent: the covenants are those implied for *Class 3* (with the variations applicable to that class) together with (5) the grant or lease is valid and effectual, the rent has been paid and the covenants and conditions have been honoured and (6) the mortgagor will continue to pay the rent and honour the covenants and conditions and will indemnify the mortgagee against any failure to do so.

Class 5 is a conveyance made “as trustee”, “as mortgagee”, “as personal representative” or under a court order (e.g., a court order under Article 101(2) of the Mental Health (Northern Ireland) Order 1986 directing or authorising a controller appointed for a patient to sell property): the only covenant implied is a qualified one for title – that the conveying party has not made the title liable to be impeached or rendered himself or herself unable to give the title he or she purports to give.

Subsection (3) applies where a person conveys under the direction of another who is expressed to direct “as beneficial title holder”, e.g., where a beneficiary of full capacity is solely entitled to all the beneficial interest in trust property and directs the trustee to convey the property to a specified person. The same covenants are implied as if the person giving the direction had himself or herself conveyed “as beneficial title holder”.

Subsection (4) makes it clear that if the catch-phrases which attract the implied covenants are omitted from a conveyance, no covenants are implied. But there is an exception for the case covered by section 34(5) of the Administration of Estates Act (Northern Ireland) 1955 – where personal representatives execute an assent in favour of a beneficiary (but not when they make any other conveyance such as on a sale for money) the covenant appropriate to a *Class 5* conveyance is implied, even though the assent is not expressed to be made “as personal representatives”.

Subsection (5) causes an implied covenant to devolve together with the ownership or interest of the covenantee and to attach, not only to that ownership or interest in the hands of successive title holders, but also to derivative interests such as the interest of mortgagees or lessees.

Subsection (6) gives the sanction of the clause to any modifications of the implied covenants that are agreed by the parties. The covenants may be modified or partly excluded, but they cannot be wholly excluded (because total exclusion would be inconsistent with use of the statutory catch-phrase).

Subsection (7) allows the covenants applicable on a sale in consequence of the use of the words “as beneficial title holder” to be attracted to a *Class 5* conveyance by express reference to this clause.

CLAUSE 105 – Additional covenants for land comprised in a lease

This clause implies certain covenants, additional to those implied by clause 104, on an assignment of a lease. The covenants imported by clause 104 are assignor's covenants: those imported by this clause are assignee's covenants (save those contained in Schedule 1, Part III, paragraph 2(2), which relate to land retained by the assignor and not to the land conveyed).

Subsection (1) implies, in conveyances of each class mentioned in subsection (2), the corresponding covenants specified in Part III of Schedule 1. Where two or more persons together constitute parties of one or the other party to a conveyance, the implied covenants are enforceable by or against (as the case requires) both or all of them and each of them.

Subsection (2) sets out the relevant classes of conveyance. The numbering of these classes follows on from the numbering of the classes in clause 104.

Class 6 is an outright conveyance (and not a mortgage) for money or money's worth of all the land comprised in a lease or of part of that land subject to part of the rent which has been apportioned with the lessor's consent.

Class 7 is an outright conveyance for money or money's worth of part of the land comprised in a lease subject to part of the rent apportioned without the lessor's consent.

Subsection (3) adapts the covenants (in Schedule 1, Part III, paragraph 2) applicable where rent is apportioned without the lessor's consent to the situation where, without that consent, either all the rent is loaded on the conveyed land or all of it is loaded on the retained land.

Subsection (4) corresponds to clause 104(5). The benefit of the implied covenants passes to the original covenantee's successors and the title holders of derivative interests.

Subsection (5) corresponds to clause 104(6) and allows the implied covenants to be modified by the parties. Where part of the land has been sold, the subsection allows all money payable under the covenants implied by this clause to be charged wholly on the land conveyed or wholly on the land retained.

CLAUSE 106 – Production and safe custody of documents

This clause re-enacts, with minor modifications, the substance of section 9 of the Conveyancing Act 1881. It provides for the effect and enforcement of acknowledgements of the right of a person to production of documents and undertakings for the safe custody of documents.

Subsection (1) applies the clause where one person retains possession of documents of title to land and gives another an acknowledgment of his or her right to have the documents produced or copies of them provided and an undertaking for their safe custody.

Subsection (2) lists the obligations of the persons bound by the acknowledgement. They are –

- (a) to produce the documents for inspection;
- (b) to produce them for the purposes of legal proceedings;

(c) to deliver copies or extracts.

Subsection (3) states the obligations of the persons bound by the undertaking for safe custody.

Subsection (4) indicates who is entitled to enforce the obligations.

Subsection (5) indicates the documents to which the obligations relate.

Subsection (6) indicates the extent of the liability of a person bound by the obligations.

Subsection (7) provides that the acknowledgment on its own does not confer any right to damages for loss, destruction or injury; a right to damages arises only if an undertaking for safe custody is also given: see subsection (8).

Subsection (8) gives a right to damages for breach of the undertaking for safe custody.

Subsection (9) gives the court a discretion as to inquiries, costs, etc in an action for damages for breach of the undertaking for safe custody.

Subsection (10) provides that the statutory acknowledgement and undertaking satisfy any obligation to give a covenant for production and delivery of copies or extracts from documents or for safe custody of documents.

Subsection (11) is a saving for any other rights relating to the same matters: see, e.g., clause 87(5) of the Bill.

Subsection (12)(a) applies the clause to an acknowledgement or undertaking given by a person to himself or herself in different capacities, e.g., where a personal representative executes an assent in his or her own favour. *Paragraph (b)* makes the clause subject to express terms in the conveyance containing the acknowledgement or undertaking.

CLAUSE 107 – Notices

This clause contains a “default” provision for private instruments which provide for giving or serving notices but fail to say how the actual giving or serving can be carried out.

Subsection (1) provides that in such cases the instrument should be read as if such a notice were a document authorised or required to be served under the Bill. This attracts the provisions of section 24 of the Interpretation Act (Northern Ireland) 1954.

Subsection (2) makes it clear that subsection (1) is a default provision only, which gives way to an express provision in the instrument in question.

CHAPTER 5

GENERAL PROVISIONS

This Chapter contains some general provision relating to conveyances and conveyancing transactions.

CLAUSE 108 – Restrictions on constructive notice

This clause re-enacts the substance of section 3 of the Conveyancing Act 1882. That section clarified what was meant by the concept of constructive notice.

Subsection (1) restricts constructive notice to matters which would come to light if good conveyancing practice is followed.

Subsection (2) confirms that a purchaser is bound by the provisions of instruments which form part of the title required to be deduced by the vendor. The saving relates to the reversal of the rule in *Patman v Harland* by clause 86(3).

Subsection (3) prevents the clause being used in a particular case to expand the scope of constructive notice.

CLAUSE 109 – Court orders conclusive

This clause re-enacts the substance of section 70 of the Conveyancing Act 1881. It makes orders of the court conclusive in favour of a purchaser (so far as not reversed on appeal) despite any lack of jurisdiction or prior procedural defects.

Subsection (1) protects a purchaser who acts in reliance on a court order, even though there is a lack of jurisdiction or some prior procedural defect and the purchaser knows of it. A grant of letters of administration or probate is such an order.

Subsection (2) applies subsection (1) to a lease, sale or other act done by the court under a statutory power. The subsection is intended to cure irregularities of procedure, rather than substance, and so will not apply where the court sells the wrong person's property by mistake (*Re Hambrough's Estate* [1909] 2 Ch 620). Nor will it protect a transaction tainted by fraud - the purchaser's own fraud or fraud which is or becomes known to him or her before the transaction is completed.

PART 9

ADVERSE POSSESSION

This Part of the Bill implements the Commission's recommendations with respect to adverse possession contained in the Supplementary Consultation Paper, NILC 3 (2010), Chapter 2. For the most part the Commission recommended no change to the various features of the doctrine of adverse possession, except in one fundamental respect. This was the introduction of the principle of a "parliamentary conveyance" for unregistered land, so as to make the law accord with the principle which the Land Registry has operated in practice for decades: see NILC 3 (2010), paras. 2.66-2.70. This involves the successful claimant under the Limitation (Northern Ireland) Order 1989 ("the 1989 Order (NI 11)") not just "extinguishing" the dispossessed owner's title but obtaining a conveyance or transfer of that title. Introduction of this principle necessitates amendments to the 1989 Order. The provisions of this Part also explain how the new principle will operate in respect of particular types of title, such as where the land is held under a tenancy or is subject to a mortgage. There is also a provision clarifying the position of a purchaser allowed into possession before the vendor conveys or transfers legal title. Such clarification was recommended by the Commission: see NILC 3 (2010) paras. 2.88-2.89.

CLAUSE 110 – Vesting of title

This clause implements the recommendation that the 1989 Order should not just state that, upon expiration of the limitation period, the title to the land of the dispossessed title holder is “extinguished” but rather that it passes to the person in whose favour the period has run (the squatter or adverse possessor). In view of the fact that the 1989 Order contains the detailed provisions governing adverse possession in respect of land (in particular, in Part III and Schedule 1), the most effective way of implementing the change is to amend that Order. The remaining clauses in Part 9 contain largely consequential provisions.

Subsection (1) amends the relevant Articles in the 1989 Order, so that, instead of saying that the dispossessed owner’s title is “extinguished”, they will say, in future (on or after the appointed Day), that the title vests in the person in whose favour the limitation period has run. The reference to this latter person is also taken from the 1989 Order: see, e.g., in relation to the concept of “adverse possession” itself paragraph 8 of Schedule 1 to the Order. It should be noted that the amendment is not made to other Articles in the 1989 Order which also refer to title being “extinguished”. This is because it is not appropriate to refer in such cases to the dispossessed owner’s title vesting in someone else on expiration of the limitation period. Rather these are cases where some incumbrance on a title ceases to be enforceable. The consequence of expiration of the limitation period is that the incumbrance disappears (i.e., it is correct, in this instance, to say that title to the *incumbrance* is “extinguished”), but that simply leaves the land (and its owner) free of the incumbrance. There is no question of title to the land passing to someone else. Examples are Articles 33 (title of mortgagee extinguished), 38 (mortgagee’s right to principal sum and interest secured by mortgage or charge extinguished), 39 (mortgagee’s right to debt secured on personal property extinguished) and 41 (right of support or right of residence extinguished).

Subsection (2) has been included to facilitate conveyancing and the operation of the Land Registration Act (Northern Ireland) 1970. Under section 53 of that Act the doctrine of adverse possession applies to registered land as it applies to unregistered land. No legal title is, however, acquired to registered land by a squatter until an application for registration is made under that Act. For that reason the 1989 Order specifically states that it operates subject to section 53: see, e.g., Article 26. The Commission pointed out that, in practice, the Land Registry has for decades operated section 53 as if there is a transfer of title from the dispossessed owner to the successful squatter. Where the land is already registered land, it is easy to identify what the title is – the dispossessed owner’s title is shown on the register. However, in the case where the dispossessed owner’s title is unregistered, the successful squatter may not be sure what title vests in him or her, nor what title should any application for registration request. (It is always open to a make an application for voluntary first registration and this is often done in order to settle a dispute or to facilitate a sale of the land.) *Subsection (2)* facilitates this by creating a statutory presumption that the title vesting is ownership (as defined by Part 1 of this Bill). The Land Registry can then act on the basis of this presumption and register the squatter initially with a possessory title under section 17 of the 1970 Act (as amended by Schedule 2 of this Bill). If, of course, it later transpires that the presumption can be rebutted by appropriate evidence, the Land Registry can rectify the register accordingly under section 69 of the 1970 Act. Even where the squatter does not apply for voluntary registration, if he or she later decides to sell the land, this will be a triggering event requiring registration of the title by the purchaser.

CLAUSE 111 – Tenancies

This clause, together with clause 112, deals with situation where the dispossessed title holder was a tenant only in the land adversely possessed. In such cases it is clear that

the landlord's title is not affected: see *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510. The only title which can vest in the successful squatter is the tenancy, as clause 112 confirms. However, since no express assignment has taken place, the squatter may not know the terms of the tenancy. Clause 111 facilitates the obtaining of the essential details and preserves his or her position until they are furnished. Once they are furnished the squatter must comply with those terms and the landlord also remains bound by them: see clause 112. Of course, the squatter may be unaware of any tenancy, in which case he or she may choose to rely upon the presumption that ownership has vested in accordance with clause 110(2). This is, however, a presumption only and carries the risk that a landlord whose title has not vested comes forward to assert it. How a squatter chooses to act is likely to be governed by the state of his or her knowledge concerning ownership of the land adversely possessed.

Subsection (1) enables a squatter who knows or suspects that the dispossessed title holder was a tenant only, so that only a tenancy has vested in the squatter, to obtain information about the terms of the tenancy, including a copy of the lease, where it was created by such a document. It also requires the landlord (immediate or superior) served with the notice to disclose incumbrances and the names and addresses of any superior title holders. The point here is that such persons may be entitled to take enforcement action against the land which could have an impact on the squatter who has acquired the inferior tenancy.

Subsection (2) enables the notice to be served on any person receiving rents, where the existence, identity or whereabouts of landlords is unknown or cannot be established.

Subsection (3) enables a notice served on a recipient of the rent to give particulars as to the landlord or other person to whom the rent is passed on and other information which may assist in identifying the terms of the lease or tenancy.

Subsection (4) enables the squatter to apply for a court order requiring compliance with notices served under subsections (1) and (2). The other sanction is that the landlord cannot enforce the lease or tenancy terms until compliance has occurred: see subsection (5).

Subsection (5) makes provision for advertisements to be published where the squatter is unaware of any person on whom a notice could be served under subsections (1) or (2).

Subsection (6) prevents a landlord taking enforcement action (e.g. for non-payment of rent or other breach of the terms of the tenancy) against the squatter in whom the tenancy has vested until 3 months after the landlord or other person served under subsection (1) or (2) has furnished the particulars or other information requested or responded to an advertisement published under subsection (5).

CLAUSE 112 – Position of parties

This clause clarifies the effect of vesting a tenancy in a squatter who successfully completes the adverse possession period and, in the case of registered land, completes registration under section 53 of the Land Registration Act (Northern Ireland) 1970.

Subsection (1) makes it clear that its effect is as an assignment of the tenancy, so that the landlord and squatter (as new tenant) are bound by the terms of the tenancy. It is also made clear that this is so despite the fact that the landlord was not given notice or asked for consent, as would usually be required by a well-drafted lease. Such a lease

will usually have an “alienation” covenant prohibiting the tenant from assigning, subletting or otherwise parting with possession without consent. This does not mean, however, that the landlord is without a remedy, as subsection (2) makes clear.

Subsection (2) makes it clear that, although the landlord has to accept the squatter as the new tenant, he or she may still be able to claim that the divested tenant has broken the terms of the tenancy. Thus there may be a personal claim against that tenant for damages (provided loss can be established) and, where the divested tenant retains some of the land (subsections (3) and (4) deal with this) there may be the possibility of forfeiture of the tenancy in respect of that part.

Subsection (3) provides for apportionment of the rights and liabilities of the parties where the adverse possession related to part only of the land held under the tenancy. In such a case only that part will vest in the successful squatter and the tenant who was dispossessed of that part will remain tenant of the remaining part. If the parties (who include the landlord) cannot agree on the appropriate apportionment the matter can be referred to the Lands Tribunal for determination.

Subsection (4) confers a wide discretion on the Lands Tribunal in dealing with such applications.

CLAUSE 113 – Mortgaged land

This clause deals with the situation where the land vesting in the squatter is subject to a mortgage. The dispossessed mortgagor remains liable for this, but the risk is that he or she will default having lost title to the land. That may trigger action by the mortgagee to enforce its security, which might result in the squatter losing the land (e.g., through exercise of the mortgagee’s power of sale). The squatter may wish to head this off by paying off some or all of the outstanding mortgage debt. Clause 113 facilitates this, while otherwise preserving the position of the mortgagor and mortgagee. That position remains even in cases where part only of the land subject to the mortgage vests in the squatter. The mortgagee remains free to enforce the security against the whole land subject to the mortgage (including the part vested in the squatter) and there is no question of the security being split between different parts of that land.

Subsection (1) confers the right on the part of the squatter in whom the land is vested to tender mortgage money and the obligation on the part of the mortgagee or other person entitled to it to receive it in satisfaction of the mortgage. *Subsection (3)* deals with obtaining the requisite information about the mortgage debt in order to do so and subsections (4) and (5) deal with lack of co-operation by the mortgagee, which may be for a good reason.

Subsection (2) makes it clear that the position of the mortgagee and dispossessed mortgagor is not affected otherwise. This is important because subsection (1) simply gives the squatter a right which he or she may choose not to exercise. In that event the mortgagee will wish to enforce the mortgage regardless of the adverse possession, of which it may be totally unaware. *Paragraph (a)* preserves the mortgagee’s powers to enforce the security provided by the mortgage. *Paragraph (b)* makes it clear that the dispossessed mortgagor remains liable on the personal obligation to repay the debt. *Paragraph (c)* preserves the rights of prior incumbrancers and ultimately the dispossessed mortgagor to surplus proceeds, if the squatter chooses not to pay off the mortgage and the mortgagee decides to enforce the security by selling the land (see clause 74 of the Bill).

Subsection (3) facilitates the squatter obtaining information about the mortgage and

Subsection (4) enables him or her to apply to the court to compel compliance by the mortgagee. However, *subsection (5)* makes it clear that a court might refuse to order compliance because of issues of confidentiality or privacy.

CLAUSE 114 – Purchaser in possession

This clause implements the Commission's recommendation that the position of a purchaser let into possession by a vendor before the legal title is conveyed or transferred should be clarified: see NILC 3 (2010) para. 2.88.

Subsection (1) specifies that time runs against the vendor as soon as permission is withdrawn or the purchaser pays the full purchase price, whichever is the earlier. The result is that, if the purchaser continues in possession for another 12 years without obtaining legal title, title will vest as specified by the amendment made to the 1989 Order by clause 110 and there will be no need for the purchaser to take further action against the vendor or the vendor's successors.

Subsection (2) makes it clear that this provision applies only to contracts for a sale of land and not to a contract for the grant of a lease. The Commission took the view that it was inappropriate that time should run against the intended landlord of the lease, i.e., that landlord should retain the right to the benefit of covenants to be included in the lease.

PART 10

MISCELLANEOUS AND SUPPLEMENTARY

This Part contains the usual general provisions relating to legislation.

CLAUSE 115 – Further amendments to and repeal of provisions in the Land Registration Act (Northern Ireland) 1970 (c. 18)

This clause provides for further amendments to and repeal of provisions in the Land Registration Act (Northern Ireland) 1970 (c. 18), as explained in paragraph 11.17 of the Report. These are in addition to the consequential amendments provided for by clause 4(3) and are specified in Schedule 2 Parts II and IV.

CLAUSE 116 – Orders and regulations

This clause deals with orders and regulations to be made by the Department of Finance and Personnel (see definition in clause 117). *Subsection (1)* confers power to make regulations to deal with prescribed matters other than those relating to the Land Registry, such as party structure and warning notice forms (section 20), a severance notice form (section 49), abandoned property notice forms (section 67), and adverse possession notices (clauses 111 and 113). *Subsection (2)* deals with matters relating to the Land Registry, such as an interruption notice form (section 14). Other provisions of the Bill confer power on the Department to make orders, such as clause 29 (rule against perpetuities) and clause 120 (commencement). *Subsection (3)* confers power to include supplementary and other provisions in orders or regulations. *Subsections (4) and (5)* provide for the making of orders and regulations by statutory instruments approved by the Assembly.

CLAUSE 117 – General interpretation

This clause provides definitions of words used throughout the Bill and supplements definitions provided elsewhere for specific parts: see, e.g., clauses 24 (Part 2, Chapter 3) and 43 (Part 3, Chapter 2).

CLAUSE 118 – Application to the Crown

This clause confirms that the provisions of the Bill will bind the Crown. The qualification at the beginning recognises that other provisions of the Bill refer to the Crown, see, e.g., clauses 2 and 40.

CLAUSE 119 – Amendments and repeals

Clause 119 provides for the amendments and repeals specified in Schedules 3 and 4. Clause 4(3) and clause 115 provide for the amendments to the Land Registration Act (Northern Ireland) 1970 set out in Schedule 2.

Subsection (2) contains a saving for rights, remedies and obligations which arose in respect of transactions entered into before the Appointed Day by virtue of application of statutory provisions repealed on that day by Schedule 4, e.g., the provisions in the Conveyancing Acts 1881 – 1911 relating to mortgages.

Subsection (3) deals with references to the Conveyancing Acts 1881-1911. They are largely repealed but some provisions in them would survive: see Schedule 4 to the Bill. *Paragraph (a)* provides that references to the 1881-1911 Acts should be read as “including” a reference to this Bill – this difference in wording is because those Acts would not be repealed entirely by this Bill. *Paragraph (b)* deals with references to provisions in the 1881-1911 Acts which would be repealed by this Bill – they are to be construed as references to the equivalent or substituted provision in this Bill. Note that references to the Settled Land Acts 1882-90, which are repealed entirely, are dealt with in clause 44(6).

CLAUSE 120 – Commencement

This clause enables different parts of the Bill to be brought into force at different times. This may be appropriate where some parts are dependent upon various matters being prescribed by regulations, e.g., Part 2, Chapter 3 (Party Structures).

CLAUSE 121 – Short title

This clause specifies the short title for the Bill.

SCHEDULE 1

COVENANTS IMPLIED IN CONVEYANCES

This Schedule sets out the scope and terms of the covenants which are implied in a conveyance by clauses 104 and 105.

PART I

This Part explains just what acts or omissions are covered by the implied covenants. They are acts or omissions of the covenantor; his or her predecessors in title; his or her mortgagees or tenants; or his or her trustees.

The covenantor has no liability under the covenants for any defect in the title of which he or she can show the covenantee had actual knowledge before he or she agreed to, or accepted, the conveyance.

PART II

This Part sets out the implied covenants.

Ownership or an interest in land (other than a tenancy), paragraph 1, Class 1 Conveyances: Covenants for title, quiet enjoyment, freedom from incumbrances and further assurance.

Leaseholds, paragraph 2, Class 2 Conveyances: As for ownership with the addition of the lease being valid and effectual and rent having been paid and the covenants and conditions of the lease having been performed and observed (unless reasonable inspection of the property would have disclosed a breach). For the purposes of these additional covenants the person conveying is not liable for the acts or omissions of mortgagees, sub-tenants or trustees. See also Clause 88(2) and (3).

Mortgages of land not held for rent, paragraph 3, Class 3 Conveyances: As for ownership, except that liability for the breach of any of the covenants extends to the acts or omissions of any person (and not just those listed in Part I) and the covenant for quiet enjoyment arises only if and when the mortgagee takes possession.

Mortgages of land subject to rent, paragraph 4, Class 4 Conveyances: As for mortgages where there is no rent, with the addition of covenants that the original grant or lease is valid and effectual, that rent has been and will be paid and that covenants and conditions have been and will be performed and observed; and an indemnity for consequences of any future breach of covenant.

Trusts, etc., paragraph 5, Class 5 Conveyances: No derogation from title by covenantor.

PART III

This Part implies additional covenants for leaseholds.

Assignment of all land comprised in a lease, or of part of that land, subject to a legal apportionment of rent, paragraph 1, Class 6 Conveyances: Future payment of rent and

observance of covenants, agreements and conditions. Indemnity against future breaches.

Assignment of part of land comprised in a lease subject to an equitable apportionment of rent, paragraph 2, Class 7 Conveyances: Future payment of apportioned rent and observance of covenants, agreements and conditions so far as applicable to the part of the land in question. Indemnity against future breaches. Where the assignor assigns “as beneficial title holder” he or she indemnifies the assignee against non-payment of rent not apportioned to the part of the land conveyed and breaches not applicable to that part.

SCHEDULE 2

LAND REGISTRATION ACT (NORTHERN IRELAND) 1970

This Schedule contains various minor and consequential amendments to the Act, as provided for by clauses 4(3) and 115.

SCHEDULE 3

MINOR AND CONSEQUENTIAL AMENDMENTS

This Schedule provides for minor and consequential amendments to other legislation. These are minimal because of the general provisions in clauses 4(1) and (2), 44(6) – (8) and 119(3).

SCHEDULE 4

REPEALS

This Schedule contains a substantial list of repeals of old legislation relating to land law, which, where still relevant, has been replaced by the provisions of the Bill.

DRAFT

Ground Rents (Amendment) Bill (Northern Ireland) 201[]

CHAPTER []

CONTENTS

1. Automatic redemption of certain ground rents and other rents
2. Other amendments to the Act of 2001
3. Interpretation
4. Amendments and repeals
5. Commencement
6. Short Title

SCHEDULES:

Schedule 1	Other amendments to the Act of 2001
Schedule 2	Amendments
Schedule 3	Repeals

Ground Rents (Amendment) Bill (Northern Ireland) 201[]

201[] CHAPTER []

An Act to amend the Ground Rents Act (Northern Ireland) 2001 (c. 5) and to make further provision for redemption of ground rents and related matters.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to Her Majesty as follows:

Automatic redemption of certain ground rents and other rents

1. After section 2 of the Act of 2001 insert –

“Automatic redemption of certain ground rents and other rents

2A. (1) Any ground rent -

(a) to which section 2 applies, and

(b) which is a rent at a yearly amount of £10 or less or such other amount as may be prescribed from time to time,

is deemed to have been redeemed automatically –

(i) on the execution after the appointed day of a conveyance coming within section 2 and made before the appointed day or days referred to in paragraph (ii); and

(ii) where no automatic redemption has occurred in accordance with paragraph (i), on the appointed day or days.

(2) Such automatic redemption operates as a full and final discharge of the land from the ground rent under section 7(4) without the need for sealing of any certificate of redemption under section 7 and sections 10 to 17, as amended by the Ground Rents (Amendment) Act (Northern Ireland) 201[] (c. 00), apply with appropriate modifications accordingly.

(3) The Department of Finance and Personnel may by order made subject to negative resolution –

(a) extend the provisions of this section and section 2B to ground rents not coming within section 2; and

(b) fix another amount for the purposes of subsection (1) (b).

(4) For the purposes of this section “ground rent” includes, notwithstanding section 28(1), a “nominal rent” as defined by section 28(2).

Consequences of automatic redemption

2B. (1) Any rent-owner whose ground rent (but not a nominal rent) is automatically redeemed under section 2A is entitled to be paid on the date of execution of the conveyance or the appointed day, as appropriate, the redemption money which would be payable if the ground rent was redeemed on that date or day under section 1, provided that, in the case of redemption under paragraph (ii) of subsection (1), notice of a claim for such money in the prescribed form (in this section referred to as a "claim notice") has been served on the rent-payer at least 28 days before the appointed day.

(2) Where a claim notice is not so served the redemption money is not payable until 28 days have lapsed after the date on which such a notice is served.

(3) Any rent-owner who is paid redemption money in accordance with subsection (1) or subsection (2) shall give to the rent-payer a receipt in the prescribed form.

(4) Redemption money payable under subsection (1) or subsection (2) (and which in the case of the latter has been claimed) but not paid when it becomes payable accrues interest at the prescribed rate from the date when it becomes payable by the rent-owner.

(5) Redemption money which is payable, plus any interest accruing on it, is a sum coming within Article (4)(d) of the Limitation (Northern Ireland) Order 1989 (NI 11).

(6) Redemption money payable under subsection (1) subsection (2) which remains recoverable but is not paid, plus interest accruing under subsections (4) or (5) , constitutes, so long as it remains recoverable but unpaid,-

(a) in the case of a ground rent relating to registered land, a lien on the land coming within paragraph 5 of Part 1 of Schedule 6 to the Land Registration Act; and

(b) in the case of a ground rent relating to unregistered land, a lien on the land for unpaid redemption money.

(7) A person entitled to a lien under subsection (6)(b) may execute a declaration of non-payment of redemption money in the prescribed form and such a declaration is a document registrable under the Registration of Deeds Acts.

(8) For the purposes of registration of a declaration under subsection (7) the rent-payer is the grantor."

Other amendments to the Act of 2001

2. The Act of 2001 has effect subject to the other amendments specified in Schedule 1.

Interpretation

3. In this Act “the Act of 2001” means the Ground Rents Act (Northern Ireland) 2001 (c. 5).

Amendments and repeals

4. (1) The statutory provisions specified in Schedule 2 have effect subject to the amendments there specified.

(2) The statutory provisions specified in the first column of Schedule 3 are hereby repealed to the extent specified in the second column of that Schedule.

Commencement

5. This Act comes into operation on such day or days as the Department of Finance and Personnel may by order appoint.

Short title

6. This Act may be cited as the Ground Rents (Amendment) Act (Northern Ireland) 201[].

SCHEDULE 1

Other amendments to the Act of 2001

1. In section 3, wherever they appear (including the heading), for “sections 1 and 2” substitute “sections 1 to 2A”.
2. In section 9(2) after “sections 1,” insert “2A,”.
3. In section 12 –
 - (a) in subsection (1)(c) after “ground rent” insert “or section 2A applies to the ground rent”;
 - (b) in subsection (2) after “redemption” insert “or the ground rent is automatically redeemed under section 2A”.
4. In section 13 –
 - (a) In subsection (1) after “certificate of redemption” where they appear insert “or automatic redemption under section 2A”;
 - (b) In subsection (2) -
 - (i) after “certificate of redemption” insert “ or automatic redemption under section 2A”;
 - (ii) after “certificate” where it appears for the second time insert “or automatic redemption”;
 - (c) in subsection (4) after “certificate of redemption” insert “ or automatic redemption under section 2A”.
5. In section 15 after “certificate of redemption” insert “or automatic redemption under section 2A”.
6. In section 16 –
 - (a) In subsection (1)(a) after “certificate of redemption” insert “or automatic redemption under section 2A”.
 - (b) In subsection (7) in the definition of “relevant building scheme” for the words “or which is taken to subsist in respect of land by virtue of section 17(6).” substitute the words “and other land held under the same superior lease or other title.”.
7. In section 17 –

substitute for subsection (6) –

“(6) Covenants to which section 16(2)(i) applies remain enforceable by and against the rent-owner and as between the rent-payer and other participants in the relevant building scheme to the same extent, but only to that extent, as they were so enforceable immediately before the event mentioned in paragraph (a) or paragraph (b) of section 16(1).”.

8. In section 23 after subsection (8) insert –

“(9) Any dispute relating to automatic redemption of a ground rent under section 2A or the operation of any of the provisions of this Act in relation to such redemption may be referred by any party to the dispute to the Lands Tribunal for determination.”.

9. After section 30 insert –

“Regulations

30A. (1) The Department of Finance and Personnel may by regulations subject to negative resolution prescribe any form or other matter to be prescribed under this Act.

(2) Any regulations made by the Department under this Act may make such supplemental, incidental, consequential or transitional provision or savings as the Department considers appropriate.”.

SCHEDULE 2

AMENDMENTS

The Land Registration Act (Northern Ireland) 1970 (c. 18)

1. In Schedule 5, in Part 1, entry 16(a) delete “or 35A (7)”.
2. In Schedule 6, In Part 1, entry 5 insert at the end “, or lien for unpaid redemption money coming within section 2B(5) of the Ground Rents Act (Northern Ireland) 2001.”.

The Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 (c. 7)

In section 1(3)(e) after “occupies” insert, “unless prevented from doing so by reason of a disability which constitutes a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.”.

SCHEDULE 3

REPEALS

Short title	Extent of repeal
The Property (Northern Ireland) Order 1997 (N.I.8)	Article 31(4) and 35A.

EXPLANATORY NOTES

On the draft

Ground Rents (Amendment) Bill (Northern Ireland) 201[]

This Bill implements the Commission's ultimate recommendations with respect to the ground rents redemption scheme. The Commission had proposed some radical changes to the scheme now contained in the Ground Rents Act 2001 in its *Supplementary Consultation Paper: Land Law*, NILC 3 (2010). However, the responses to this did not reveal sufficient support for those changes and, as is recorded by Ch 13 of this Report, the Commission concluded that the changes should be confined to supplementing and making minor changes to the 2001 scheme. For this reason this Bill is essentially an amending Bill. It introduces into the 2001 Act a scheme for automatic redemption of "small" ground rents relating to dwelling-houses (initially targeting annual rents less than £10, but giving scope to extend the scheme to higher rents). This scheme would operate alongside the voluntary scheme which already operates under the 2001 Act and the compulsory redemption scheme operating on "conveyances" of dwelling-houses, which has never been brought into operation, would remain an option. Whether it will be brought into operation in the future would remain a policy decision and, no doubt, would depend to some extent on the experience of operating the new automatic redemption scheme to be inserted in the 2001 Act by this Bill.

Apart from introducing an automatic redemption scheme, and dealing with consequential amendments to the 2001 Act, the Bill makes other amendments to that Act, in particular its provisions relating to covenants which, as the Commission pointed out in the *Supplementary Consultation Paper*, have proved to be very controversial: see NILC 3 (2010), Ch 4.

CLAUSE 1 – Automatic redemption of certain ground rents and other rents

Clause 1 would insert two new sections into the 2001 Act (sections 2A and 2B). These would provide for automatic redemption of "small" ground rents relating to dwelling-houses. (However, the power to extend it to commercial ground rents is included in the Bill.) Initially, as from an appointed day, automatic redemption would occur on conveyances of dwelling-houses subject to small rents. This would operate under the normal conveyancing process without, unlike the 2001 Act's scheme, involvement of the Land Registry in the redemption process. It is envisaged that this initial automatic scheme would operate for two to three years to enable experience of the scheme to be built up. Then a further appointed day or days would be specified when all small, still unredeemed, ground rents would be redeemed. On redemption the ground rents will cease to attach to the land and rent-owners will be entitled to compensation calculated in accordance with the 2001 Act – applying a number of years purchase "multiplier" to the annual rent. Under the Ground Rents (Multiplier) Order (Northern Ireland) 2002 (S.R. 2002 No. 228) the multiplier is currently fixed at 9. The onus will be on the rent-owner to claim this compensation and, if it is not paid, interest, at a prescribed rate, will accrue and the land, although no longer subject to the ground rent, will remain subject to a lien for the outstanding compensation and interest. The accumulating interest will be an incentive for former rent-payers to pay the compensation. In any event, the existence of the lien will be an incumbrance which purchasers are likely to expect to be discharged on a subsequent sale of the land. Such a lien would be similar to a vendor's lien for unpaid purchase money. Since the former rent-owner would usually not be in possession of the land, such a lien is an equitable one, but its registration ensures that it binds successors in title of the former rent-payer. The ultimate remedy for enforcement of such a lien is the right to apply to the court for an appropriate order,

such as an order for sale of the land and discharge of the unpaid debt out of the proceeds of sale. Since it is an equitable lien, the court has a discretion whether to make such an order. In this respect the position of a former rent-owner is preserved. Under existing law, a rent-owner who is not paid the ground rent could seek to forfeit the lease for non-payment of rent and seek an order for possession (ejectment) against the rent-payer. However, the rent-payer could invoke the court's equitable jurisdiction to grant relief against such a forfeiture.

As regards the new section 2A, *subsection (1)* provides for the automatic redemption of ground rents of less than £10 initially on any conveyance of the land after the appointed day and then, for all remaining unredeemed small ground rents, on a subsequent appointed day or days. Subsection (1) also facilitates raising the figure for small rents to operate from later appointed days. This applies only to ground rents relating to dwelling-houses, but again power is given to extend the provisions to other ground rents. Since section 2A is inserted in the 2001 Act key definitions in that Act apply, such as sections 2 ("conveyance"), 28 ("ground rent") and 29 ("dwelling-house") and, of course, the general interpretation provisions in section 27. It is important to note, however, that *subsection (4)* qualifies the definition of "ground rent" as is explained below. *Subsection (2)* reiterates that under section 2A (unlike sections 1 and 2 of the 2001 Act) redemption is automatic – there is no need for the procedure involving sealing of a certificate of redemption by the Land Registry. *Subsection (3)* confers power on the Department of Finance and Personnel to extend the scheme to commercial ground rents and to fix a different limit on the size of rents within the automatic redemption scheme. The Commission envisaged that if the "£10 or less" scheme proves to be a success, the Department may consider it appropriate to extend the scheme to higher rents. *Subsection (4)* extends the automatic redemption scheme to ground rents which fall outside sections 1 and 2 of the 2001 Act. The definition in section 28 of that Act excluded "nominal" rents, i.e., those of a yearly amount of less than £1 or peppercorn or other rents of no money value. However, the 2001 Act inserted a new section 35A in the Property (Northern Ireland) Order 1997, enabling the rent-payer in such case which involved a fee farm rent to execute a "deed of declaration" discharging the land from the rent. This extended the power in Article 35 of that Order which applied only to lessees liable for no rent at all. The point about both Article 35 and Article 35A is, however, that no compensation is payable to the rent-owner in such cases. The view has been taken that the new automatic redemption scheme should apply also to Article 35A cases, which saves the rent-payer having to execute a deed of declaration. However, unlike cases where the rent is more than "nominal", but in accordance with Article 35A, no compensation would be payable in such cases: see section 2B(1). As a consequence of section 2A covering such cases, Schedule 3 of the Bill repeals Article 35A.

As regards the new section 2B, this provides for the consequences of the automatic redemption scheme introduced by section 2A. Further modifications to the 2001 Act are made by section 2 of this Bill and Schedules. *Subsection (1)* confirms the entitlement of the rent-owner to compensation (i.e. "redemption money") on execution of the conveyance under the initial automatic scheme and then, after it has run for a specified period, on the appointed day when automatic redemption takes place with respect to any remaining unredeemed ground rents. Under the initial scheme, the redemption money will be paid as part of the purchase price in accordance with usual conveyancing practice. However, the proviso makes it clear that where automatic redemption occurs on a subsequent appointed day for all remaining unredeemed small ground rents, the rent-payer is not required to pay the redemption money unless and until a claim notice is served. If the rent-owner wants to be paid on the appointed day this notice must be served at least 28 days before that day. If the notice is served late, *subsection (2)* provides that the redemption money is not payable until 28 days after the date of service. Late service also postpones the accruing of interest for late payment under subsection (4). The 2001 Act's provisions relating to calculation of the

redemption money (Schedule 1) and other provisions, such as those relating to superior rents (section 11) and several lands in separate occupation subject to a simple rent (section 12), apply with appropriate modifications (see Schedule 1 to this Bill). *Subsection (3)* requires the rent-owner to give the rent-payer a receipt for the compensation money. Such a receipt would be important documentary evidence to establish, e.g. on a subsequent sale or other transaction, that the land is not subject to a lien for unpaid redemption money. *Subsection (4)* provides that unpaid redemption money will accrue interest at a prescribed rate. Paragraph 9 of Schedule 1 to the Bill inserts a new section (30A) in the 2001 Act conferring power on the Department of Finance and Personnel to make regulations to deal with matters to be prescribed. Such interest will accrue from the date the redemption money becomes payable in accordance with subsection (1) or (2), but *subsection (5)* makes it clear that this is subject to the 6-year limitation period which applies to sums recoverable by virtue of any statutory provision under section 4(d) of the Limitation (NI) Order 1989. After 6 years from the appointed day any unclaimed redemption money and accrued interest will be irrecoverable. *Subsection (6)* confirms, as was mentioned earlier, that unpaid redemption money, plus accruing interest, so long as it remains recoverable under the 1989 Order, constitutes a lien on the land. If it is registered land, it can be registered under paragraph 5 of Part I of the Land Registration Act (Northern Ireland) 1970 (Schedule 2, paragraph 2, of the Bill amends that paragraph accordingly). If it is unregistered land, the lien can be registered in the Registry of Deeds by the former rent-owner executing a declaration of non-payment and lodging it in the Registry: *subsections (7) and (8)*. Where a search is made in subsequent transactions which reveals the existence of such a lien, the purchaser or other person entering into the transaction can proceed on the basis that the lien no longer applies either because a receipt for subsequent payment of the redemption money is produced or, if applicable, by reliance upon the 6-year limitation period referred to in subsection (5).

CLAUSE 2 – Other amendments to the Act of 2001

Clause 2 provides for the various other consequential amendments to the 2001 Act, necessary to accommodate insertion of the new sections 2A and 2B by clause 1. These are set out in Schedule 1 to the Bill.

CLAUSE 3 – Interpretation

Clause 3 provides that references in this Bill to the “Act of 2001” are references to the Ground Rents Act (Northern Ireland) 2001.

CLAUSE 4 – Amendments and repeals

Clause 4 provides for the amendments and repeals to other legislation set out in Schedules 2 and 3 of the Bill.

CLAUSE 5 – Commencement

Clause 5 gives the Department of Finance and Personnel power to specify appointed days for commencement of the new provisions.

CLAUSE 6 – Short title

The short title reflects the fact that the Bill contains essentially amendments to the 2001 Act.

SCHEDULE 1 – Other amendments to the Act of 2001

Schedule 1 contains various textual amendments to the 2001 Act designed to accommodate the new automatic redemption scheme inserted in the 2001 Act by section 1 of this Bill (new sections 2A and 2B in that Act). It should also be noted that various other amendments to the 2001 Act are contained in the Land Law Reform Bill (Northern Ireland) 201[] also appended to this Report. Those amendments are consequential upon the various changes which would be introduced by that Bill, such as abolition of the concept of tenure and estates and introduction of the statutory concept of “ownership” of land. *Paragraphs 1-5* insert in various sections in the 2001 Act necessary references to the automatic redemption scheme. *Paragraphs 6 and 7* amend the covenants provisions in section 16 and 17 of the 2001 Act to deal with problems highlighted by the Commission in its *Supplementary Consultation Paper*, NILC 3 (2010) Ch 3, and reiterated earlier in this Report: see Ch 14. They are designed, in particular, to ensure that covenants relating to a building scheme remain enforceable only to the same extent as they were enforceable prior to redemption. *Paragraph 8* extends section 23 of the 2001 Act to permit disputes relating to the automatic redemption scheme to be referred directly to the Lands Tribunal for determination. Under the voluntary and compulsory redemption schemes in sections 1 and 2 of the 2001 Act, which is administered by the Land Registry, disputes are dealt with initially by the Registrar and go to the Tribunal only on reference by the Registrar or by way of appeal. The Land Registry is not concerned with automatic redemption except by way of dealing with its consequences in terms of the registration process. Any disputes relating to that process should be dealt with in accordance with the Land Registration Act (Northern Ireland) 1970 (see, e.g., Parts I, II and VIII of that Act). *Paragraph 9* confers a new power on the Department of Finance and Personnel to make regulations to prescribe matters required by the new sections 2A and 2B inserted in the 2001 Act by clause 1 of this Bill, i.e., changing the figure for ground rents covered by the automatic redemption scheme (section 2A(1)(b) and (3)); publishing the prescribed form for receipts relating to payment of redemption money (section 2B(2)); fixing the rate of interest to accrue on non-payment of redemption money (section 2B(3)); publishing the form for declarations of non-payment to be lodged for registration in the Registry of Deeds (section 2B(6)).

SCHEDULE 2 – Amendments

This Schedule deals with consequential amendments to legislation other than the 2001 Act. *Paragraph 1* deletes the reference to Article 35A(7) of the Property (Northern Ireland) Order 1997 in Schedule 6 to the Land Registration Act (Northern Ireland) 1970. That Article would be repealed by Schedule 3 to this Bill. *Paragraph 2* implements the provision in the new section 2B(5)(a) inserted in the 2001 Act by clause 1 of this Bill. It provides for registration of a lien for unpaid redemption money as a burden affecting registered land in accordance with section 39 of the 1970 Act. *Paragraph 2* deals with an amendment to the 1971 Act designed to avoid discrimination against persons prevented from occupying their sole or principal residence by reason of a disability. Under the definition in section 1 of the 1995 Act this covers both physical and mental disability.

SCHEDULE 3 – Repeals

This Schedule provides for repeals consequential upon the amendments to the 2001 Act made by this Bill. The repeal of Article 31(4) of the 1997 Order was recommended in the *Supplementary Consultation Paper* (see paragraph 3.80) and supported by responses to the consultation. The repeal of Article 35A of the 1997 Order is, as explained in the Notes to Schedule 1, consequential upon extending the automatic redemption scheme to “nominal” rents covered by that Article.

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