Law Commission

Reforming the law

Rights to Light

Analysis of Responses

Consultation Paper No 210 (Analysis of Responses)

December 2014

RIGHTS TO LIGHT

CONSULTATION ANALYSIS

This document analyses the responses of consultees to the Law Commission's Consultation Paper, *Rights to Light* (Law Com Consultation Paper No 210) – referred to in this document as the "Consultation Paper". This document is published at the same time as our Report[1] which sets out our recommendations to reform the law as it relates to rights to light. The Report contains further analysis and examination of responses.

This analysis does not set out every response, but is intended to give an overall flavour of the responses received. It is intended to be policy-neutral; we express no opinion on the merits of responses, nor on their accuracy.

This document is split into chapters that correspond to those in the Consultation Paper. There is no chapter 2, because the Consultation Paper considered the current law in that chapter and invited no response. In chapter 1 of the Consultation Paper we asked consultees to provide us with material that would assist in the eventual preparation of an impact assessment; material given to us in answer to that question is considered in Chapter 8 of the Report.

The chapters that follow set out the questions and provisional proposals made in the Consultation Paper. Each question is followed by an analysis of relevant consultation responses. A final chapter draws together some of the comments made by consultees that are not directly linked with specific questions and provisional proposals in the Consultation Paper.

A list of consultees (except for those who have asked to remain anonymous or have asked that their responses should be treated as confidential) is included as Appendix A.

[1] Rights to Light (2014) Law Com No 356.

CONTENTS

CHAPTER 3
THE CREATION OF RIGHTS TO LIGHT BY PRESCRIPTION

We provisionally propose that prescription should be abolished for rights to light.

Do consultees agree?

[Consultation Paper, paragraph 3.48]

3.1 In Chapter 3 of the Consultation Paper, we examined whether rights to light should continue to be capable of creation by prescription – that is, by virtue of long-term uninterrupted enjoyment of light.

3.2 We explored the reasons for and against acquisition of property rights by prescription generally, as well as specific arguments for and against prescription of rights to light. We concluded that the arguments in favour of abolishing prescription for rights to light outweighed those in favour of its retention, and, accordingly, proposed its abolition.

The responses

3.3 Nearly 70 consultees responded to this question. Of these, 23 supported the proposal to abolish prescription of rights to light, 36 were against it, and a few took no clear stance either way.

Consultees who supported abolition of prescription for rights to light

3.4 Several consultees simply stated their support for the proposal without elaboration. These included the Council of HM Circuit Judges, Matthews & Goodman LLP, 4 Housing Architects, Julian Barwick (Director, Development Securities plc), and Transport for London.

3.5 The Bar Council explained its support on the basis that "clarity and simplicity of the law is always desirable", agreeing with the view in the Consultation Paper that it is unlikely the average landowner would know enough of the law to be able to take steps to prevent his or her land becoming burdened by easements of light arising from prescription, which requires no action whatsoever on the neighbour's part. The ability of parties to create rights to light by express agreement was seen as sufficient protection for dominant owners.

3.6 HDG Ltd supported the proposal "fully", considering rights to light arising from prescription to be "a trap for the unwary… who may have no way of knowing that they will be disentitled to alter their property without their neighbour's permission" and "a windfall for the lucky few". It felt that the planning process was better equipped to balance the competing interests of useful development of land and the preservation of amenity in the context of the broader public interest.

3.7 In a confidential response, one consultee stressed the perceived unfairness of permitting a neighbour to dictate the use of adjacent land despite having done nothing to earn such a right of control, and having paid nothing for the power to do so. It considered that "abolishing the creation of rights to light by prescription will support development" at a time when housing is in significant demand.

3.8 Helical Bar plc expressed the view that "rights to light acquired after a period of 20 years are an anachronism in today's world".

3.9 Malcolm Hollis LLP noted that although the light obstruction notice procedure can already be used to prevent rights to light arising by prescription, it is a burdensome and potentially expensive step for landowners to have to take.

3.10 The City of Westminster and Holborn Law Society emphasised the uncertainty that prescription causes, making it difficult for any developer of land to establish exactly whose rights may be infringed by a proposed development. It suggested that post-abolition, all new structures should benefit from a specified statutory minimum right to light.

3.11 Other consultees gave more cautious and qualified support.

3.12 Derwent London plc felt that the proposal was a "nice to have" rather than a "must have", explaining that:

> Our perception is that this will have very little beneficial impact in the short to medium term and the impact of this reform will only be felt – if at all – in decades to come. Therefore, given the adverse press and publicity reaction to this proposal, we would not like to see this proposal pushed through at the expense of the other proposals which are in our view more helpful from a developer perspective.

3.13 Similarly, Berwin Leighton Paisner LLP also felt that the proposal "could be the least helpful proposal to developers and the most controversial proposal from a press/public perspective". Accordingly, it only supported the proposal if it could be implemented without adversely affecting the implementation of other, more immediately helpful proposals. Along with Land Securities, it raised concerns that abolition of prescriptive rights going forward would mean existing rights would be "jealously guarded", becoming more valuable, and increasing the emphasis on legal arguments about whether a right to light has transferred from one building to another.

3.14 The Berkeley Group plc supported the abolition of prescription for rights to light, but only "in built up city areas".

3.15 Herbert Smith Freehills LLP queried whether the concept of acquiring rights to light by prescription was of "continuing real relevance in the 21st century", highlighting the complexity involved in discovery, proof and valuation. It also emphasised that the light obstruction notice ("LON") procedure under the Rights of Light Act 1959[1] could, in theory, be used to block all future prescription anyway, and so did not see the proposal as a radical step beyond the current law. However, it felt that the proposal risked derailing other, more useful reforms, without doing anything to ease the problems linked to already established rights to light.

3.16 Nabarro LLP considered that "if the Consultation is to meet its stated objectives, the abolition of the future acquisition of prescriptive rights of light is necessary and justifiable". However, given the "sensitivities" and negative press comment surrounding the proposal, it recommended limiting reform to commercial premises only, allowing residential premises to continue to acquire rights to light by prescription. It argued that the LON procedure does not provide enough protection and does not make the proposal for reform unnecessary, since:

(1) the utility of the LON procedure for preventing prescription is not universally appreciated;

(2) the LON procedure is cumbersome and expensive, especially where multiple properties are affected by a single development, and must be repeated every 19 years;

(3) even where a landowner is aware of the LON procedure, it is often not possible accurately to predict when a neighbouring property is close to acquiring a prescriptive right of light so that it should be invoked.

3.17 Nabarro LLP justified treating commercial premises separately to residential premises on the basis that the former frequently rely heavily on artificial light rather than natural light, whereas the latter are "more sensitive to a reduction in [natural] light". It did not consider that defining residential use presented an insurmountable obstacle. It argued that any change of use from residential to commercial during the prescription period could be regarded as an interruption that stops the clock and prevents the acquisition of a right to light.

3.18 The Association of Light Practitioners felt that abolition in respect of commercial premises only was an option worth considering.

Consultees who opposed abolition of prescription for rights to light

3.19 A number of key themes arose from the responses of consultees who were against the proposal to abolish prescription for rights to light. The reasons for opposition can be divided into the following categories, with many responses raising more than one of the points below.

[1] See para 3.71 and following below.

CONCERN ABOUT THE PROTECTION OF LIGHT IN PLANNING LAW

3.20 A number of consultees' primary objection to the proposal was that it would leave protection of the amenity of light to the planning system, which they considered inadequate.

3.21 Harry Pritchard emphasised that "following the Town and Country Planning (General Permitted Development) Order 1995, as amended, it has become relatively easy for a householder to build an extension and interfere with the amount of light reaching his neighbours' windows". Accordingly,

> Acquiring the right to light by prescription is the only protection a householder has against a neighbour's plan to block the amount of light reaching the windows of his property.

3.22 Anstey Horne noted that the planning system's approach to protecting amenity is "just as unpredictable and inconsistent" as the protection afforded by rights to light in private law. It explained:

> This is due to a range of factors including varying levels of knowledge of daylight and sunlight principles among planning officers, limited resources available to local planning authorities, limited ability to take independent professional advice and the influence of local politics on decision making. If the planning system alone was to be relied upon it could lead to more neighbours objecting to applications, thereby burdening and slowing the planning system that the Government is trying to improve, or even challenging more consented schemes by judicial review.

3.23 BRE[2] outlined a number of situations where, despite the planning regime, dominant owners would still need recourse to the private law of rights to light. In summary these were that:

(1) Permitted development of an extension may cause an actionable loss of light without the local authority having the chance to stop it

(2) A local authority may make a mistake. Adjoining owners cannot appeal against these decisions.

(3) Local authorities are usually not concerned about loss of light to non domestic properties, but they should still receive compensation for loss of light.

3.24 The National Housing Federation foresaw unintended consequences of increasing reliance on the planning system to protect rights to light. It explained that:

[2] BRE is the trading name of Building Research Establishment Ltd.

> … there is a possibility that the planning system will be pressured far more to act as a vehicle for arguing that light should be protected. We feel that this could act as more of a brake on development than rights to light and would therefore suggest that [the proposal to abolish the acquisition of rights to light by prescription] is removed when the proposals are taken forward.

3.25 Anstey Horne made the same point in its response, which also underlined the influence of local politics on decision-making in the planning regime and therefore the risk of inconsistent protection of light amenity across England and Wales. It also pointed out that the planning system as a whole would be slowed, and that there could be an increase in judicial review actions seeking to challenge consented schemes.

3.26 The City of London Corporation did not take a decisive stance for or against the proposal, however it advised that "great caution should be exercised" in relying on the ability of planning policy to protect the light and amenity of residential owners, as:

> While loss of amenity (including sunlight/daylight) is an acknowledged planning consideration, were owners to lose alternative property law routes to pursue concerns about light, it is likely that those concerns would lead to increased focus on planning amenity and sunlight/daylight issues with implications for evaluation of planning applications and the time involved in determination (and possible appeal).

CONCERN THAT A DISCRETE EXCEPTION FOR RIGHTS TO LIGHT IS UNPRINCIPLED

3.27 John McGhee QC (Maitland Chambers) opposed any measures that would isolate rights to light from other easements, arguing that "there is nothing in the nature of rights to light which justifies treating them differently".

3.28 This objection was also raised in the responses of the Property Litigation Association, Anstey Horne, the City of London Law Society, and Andrew Francis (Serle Court Chambers).

REFORM IS UNNECESSARY

3.29 Some consultees were unconvinced that a satisfactory case had been made for abolition of prescription for rights to light, and/or felt that other issues were far more problematic and in need of attention.

3.30 The Campaign to Protect Rural England, for example, did not see the need for the proposal on the grounds that:

> While the recent High Court decision discussed in the consultation document [*HKRUK II (CHC) Ltd v Heaney [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15*] may have been unexpected we do not believe that there is extensive, wider evidence that justifies substantial changes to the law by which rights to lights are acquired, enforced or extinguished.

3.31 Similarly, the National Housing Federation suggested that the current issues with the law on rights to light are "primarily based on delay and uncertainty, and not acquisition of the rights themselves". The National Trust also felt that the proposals made elsewhere in the Consultation Paper were sufficient, and that there was not a "compelling case for abolition" of prescription for rights to light.

DELAY TO TRANSACTIONS

3.32 The City of London Law Society expressed concern that the reform proposal would cause difficulties in negotiations, as conveyancers argued over whether or not rights to light should be expressly granted in a transfer.

3.33 The National Housing Federation and the City of London Corporation both felt that there would be an inevitable increase in recourse to the planning system to protect rights to light that would also cause delays in conveyancing and development of land.

RISK OF ERRORS IN CONVEYANCING

3.34 The City of London Law Society flagged the possibility of the inadvertent omission of expressly reserved easements from transfer documentation, leaving landowners unprotected.

LEGITIMATE EXPECTATIONS AND PROTECTION OF AMENITY

3.35 Several consultees felt that there was a risk inherent in the proposal of the erosion of established expectations of a certain standard of amenity enjoyed by landowners.

3.36 The National Trust considered that the ability to acquire a right to light by prescription, which has "ancient roots in the common law", is:

> … part of the rich tapestry of interweaving rights playing a highly important role in helping strike a fair balance between the competing interests of neighbouring land owners. We believe that the abolition of the right would upset this balance at the expense of people who use their properties as homes and businesses.

3.37 Deloitte Real Estate recognised that:

> … in this current day and age, the proposal could be seen to be unfairly depriving adjoining owners of a right they have had for many centuries to be able to obtain a right, and then enjoy it.

ABANDONMENT WILL BECOME TOO GREAT AN ISSUE

3.38 Several consultees pointed out that once rights to light can no longer arise by prescription, those already in existence will become more valuable. They thought that this would increase the instances of litigation concerning whether or not an existing right to light has survived some alteration of the property it benefits.

3.39 BRE said that, as a result, "courts would spend ages deciding what buildings were present in 1995 (or whenever the cut off date was) and whether the windows in question corresponded to them".

3.40 Anstey Horne expressed concern that the law relating to the way in which rights can benefit new or modified apertures is "currently very unclear", and as such any increased reliance on it would contribute to greater uncertainty overall, increasing the need to resort to litigation. Berwin Leighton Paisner LLP agreed, noting that the Consultation Paper had not proposed reform of this problematic area, making any change that puts greater emphasis on it undesirable.

REFORM WOULD BE OF TOO LIMITED USE FOR TOO LONG

3.41 A number of consultees expressed their concern that the proposed reform would have little effect overall and would not solve any problems for years to come.

3.42 As Anstey Horne put it:

> Most of the rights of light problems occur in established city centres where the majority of buildings already enjoy rights of light, either through prescription or by express or implied grant or reservation. These rights will continue to be enjoyed even if future prescriptive rights are abolished and, to that extent, we consider that this proposal would have limited effect.

3.43 The British Property Federation said that "from a pragmatic perspective any abolition of prescription is not going to resolve the issues that are severely constraining our industry at present".

CONCERN ABOUT THE GENERATION OF LITIGATION

3.44 Anstey Horne, Berwin Leighton Paisner LLP and Nabarro LLP all expressed concern that the proposal would lead to a sudden rush of litigation as dominant owners issue claims in order to crystallise rights to light under the Prescription Act 1832.

3.45 These claims would all have to be brought within a year, which Anstey Horne feared would result in "widespread litigation and/or burdening the Land Registry, which would be a very heavy, and possibly unintended, consequence of abolition".

OTHER MORE USEFUL REFORM COULD BE DERAILED

3.46 As discussed above, some consultees who supported the proposal in principle did so on the condition that other, preferred reforms would not be jeopardised.

3.47 Among those sharing this concern, but altogether opposed to the provisional proposal were the Westminster Property Association, the British Property Federation and Anstey Horne. The latter stated that:

> Overall, the fact that abolition of prospective prescription will bring little benefit and yet the downsides are significant. It could cause public outcry and threaten to derail the reform altogether.

3.48 Similarly, Berwin Leighton Paisner LLP said that:

> … in our view, the proposal to abolish prescription could be the least helpful proposal to developers and the most controversial proposal from a press/public perspective. Whilst acknowledging the longer term benefit, our client soundings were strongly of the view that this proposal should only be supported if it could be implemented without adversely affecting the implementation of other more immediately helpful proposals.

3.49 One consultee, that wanted its response to remain confidential, summarised its position as follows:

> In our view, the proposed reforms to the Shelfer principles through a new statutory test … and the Notice or Proposed Obstruction procedure … are the most important aspects of the proposed reform and are largely uncontroversial as matters of principle (although we accept there will be devils in the details) We are concerned that by including within the overall proposal the abolition of prescription for rights to light the reform programme as a whole may become bogged down and ultimately not be brought in to effect.

THE CREATION OF A TWO-TIER SYSTEM OF RIGHTS TO LIGHT

3.50 Consultees expressed concern that the provisional proposal could lead to a "two-tier" system (whereby new properties are never able to acquire rights to light by prescription, whilst older properties may continue to benefit from rights that already exist).

3.51 Nabarro LLP pointed out that the result would likely be perceived as unfair by both dominant and servient owners. The former may be unhappy to find that they will lose a right to light and be unable to acquire a new one in time simply because they choose (or are compelled) to develop their land in a way that will not facilitate transference of an existing right to light. The latter may be surprised that an entirely new building constructed on the dominant land after reform might yet have the benefit of a right to light despite the proposal, because it is possible for the existing right to transfer on the modification or movement of an aperture.

3.52 The Association of Light Practitioners echoed these concerns in its response, although, on balance, both Nabarro LLP and the Association of Light Practitioners supported abolishing prescription for rights to light, considering that the concerns were best addressed by prohibiting transference of rights to light.[3]

Counter proposals

3.53 A number of consultees offered their own proposals for reform of the law of prescription.

3.54 Harry Pritchard opposed abolishing prescription for rights to light, suggesting instead that the period of use to prescribe for a right to light should be reduced from twenty years to ten years, and that "the legal process of action should be made easier and quicker".

[3] See ch 7 below.

3.55 Dave Jackson also wanted to see the period of use to prescribe for a right to light "substantially reduced", as did Chelsfield LLP, which argued that:

> If a person has invested significant sums in a commercial development or a new home, why should he wait 20 years before he can enjoy rights of light protection? A typical development cycle for large projects from acquisition/feasibility to sales completion is probably 5-7 years. The general limitation period in many aspects of law is 12 years. These timescales are probably more appropriate and we would suggest consultation is held to reduce the prescription period to, say, 12 years.

3.56 Iain Meek (Meek Associates) asserted that "any new building should have a right to light as soon as it is approved by the relevant planning authority".

3.57 The City of London Law Society felt that a big problem with prescription for rights to light at present was the potential for a multitude of rights being acquired in multi-let building scenarios. Some of its members suggested that this might be countered by providing that rights to light could only be acquired by prescription by those "who own a freehold interest or a leasehold interest granted for more than seven years".

3.58 Malcolm Hollis LLP suggested that if prescription were not abolished, then there should be a requirement on dominant owners to take some positive step to claim the benefit of a right to light, to which a servient landowner could respond with a light obstruction notice if it wanted to avoid the creation of a right to light. It said that this proposal:

> … has the benefit of enabling the retention of prescription but at least warns the servient owner of the position to enable it to react.

3.59 John McGhee QC (Maitland Chambers) considered that the most "conceptually appropriate" way of dealing with the perceived problem of rights to light causing difficulties with development was:

> … to provide, by the application of section 84, that rights to light are enforceable only where they in fact protect substantial amenity value.

3.60 Berwin Leighton Paisner LLP suggested a "simpler and cheaper course of action" than abolition of prescription for rights to light would be "a registration procedure" for existing rights to light.

3.61 The Berkeley Group plc suggested that if prescription for rights to light were not abolished, then existing rights to light should be modified so they are "no greater than the BRE standards applied by planning authorities when assessing the impact of redevelopment on adjoining properties".

3.62 As discussed above, Nabarro LLP favoured abolition of prescription for rights to light only in respect of non-residential premises.

3.63 Exemplar Properties took the view that the proposal "is not bold enough", and advocated not just abolishing prescription of rights to light for the future, but also abolishing all existing rights to light acquired by prescription too.

3.64 Similarly, the City of Westminster and Holborn Law Society wanted to see prescription for rights to light abolished and a further recommendation made that where a structure benefitting from a right to light is "materially altered or demolished", it should not be able to benefit from any of the prescriptive rights of light that benefitted the previous structure, in order that "every new development would start with a clean slate in relation to rights to light". It proposed that in place of prescription, every structure should be entitled to a statutory minimum amount of light, dependent on its use.

Other responses

3.65 Other consultees appeared to be ambivalent, or expressed no clear view in favour or against the proposal.

3.66 Clifford Chance LLP discussed the issues and concluded that it was for the Commission to "consider if the benefit of removing the right in order to facilitate development… sufficiently outweighs the removal of the benefit of the right of light itself".

3.67 The Chancery Bar Association stated that it was "neutral on the question of whether reform should be undertaken".

3.68 Allen & Overy LLP gave views from both a developer and a dominant owner's perspective.[4] For the former, it took the view of several consultees discussed above, namely that the proposal would yield little immediate benefit and risked upsetting other more useful reforms. For the latter, it felt the proposal gave inadequate attention to the importance of natural light and amounted to a disproportionate response to the issues raised by developers.

3.69 A few consultees made comments in respect of prescription generally (rather than for rights to light). We have not set them out in this analysis.

3.70 Victor Mishiku, writing on behalf of a body called "The Covenant Movement", indicated that:

> With planning regulations being relaxed as we write, residents do not wish to be left unprotected at the mercy of planning officers who say that matters such as covenants and easements "are not planning considerations" …
>
> All the cases we know of are to do with existing rights - the housing here in [an area of West London] … is between 110 to 130 years old. There would be little in the way of "new" rights being acquired.

[4] It explained in its response that it had provided both points of view to "set out the points which can fairly be made on behalf of each of the interest groups (developers and adjoining owners)".

On the basis that some consultees had interpreted our proposal to abolish prescription as terminating rights that existed, but were created in that way, we have interpreted this response as being against our provisional proposal.[5]

[5] A number of responses, all in a broadly similar form or with a similar message were received, which appeared to have prompted by the efforts of the Covenant Movement. Whilst we give weight to the comments made by those consultees, we treat their responses in terms of numbers as a single response for the purposes of the analysis of the responses the provisional proposal. For further details see paras 8.13, 8.20 and 8.21 below.

Consultees, in particular those who do not wish to see the abolition of prescription for rights to light, are asked to tell us their views on the procedural requirements for the service and registration of light obstruction notices under the Rights of Light Act 1959, and whether they wish to see any reform or simplification of those requirements.

[Consultation Paper, paragraph 3.54]

3.71 Prescription of a right to light can be interrupted where the passage of light across the servient land to the dominant land is blocked by a physical structure. The Rights of Light Act 1959 provides a mechanism for creating a notional interruption of light that produces the same effect.

3.72 Registering a light obstruction notice (a "LON") by following the procedure set out in the 1959 Act results in the light crossing the servient owner's land being treated as if interrupted by an opaque physical structure. If the light obstruction notice goes unchallenged by the recipient then, for the purposes of the Prescription Act 1832, the prescription clock is reset. It is thought that a light obstruction notice may also prevent the acquisition of an easement of light under the principle of lost modern grant, by stopping the continuous use required under that principle.

The responses

3.73 Thirty consultees offered views on this matter. Of these, roughly one-third felt the current system was satisfactory, whereas the remaining two-thirds felt that some change was needed.

Consultees who felt no change was necessary

3.74 Those consultees who felt that no change to the law was needed generally felt that the current system worked well and did not go into further detail. The Council of HM Circuit Judges, for example, stated simply that it was "not aware of any need for any change". Waterslade Ltd did not "see any problem with the current procedure" and the Berkeley Group plc was "happy with existing light obstruction notice procedures".

3.75 The National Organisation of Residents Associations and Loughton Residents Association both felt that the current procedure was fair and sufficiently simple, arguing that:

> The expense and effort required to register a light obstruction notice is sufficient to make the possible 'servient' party think twice whether or not to pursue it. The need to protect property from positive easements such as rights of passage being acquired by possible 'dominant' parties also requires some effort and expense, so negative easements should be no different.

3.76 Transport for London considered that the 1959 Act procedure should be preserved even if prescription for rights to light were to be abolished, arguing that it affords "a degree of certainty and flexibility which, in our view, will not be adequately replaced by the Notice of Proposed Obstruction".

3.77 The Property Litigation Association noted that "around two-thirds" of its membership who offered views on the LON process found it reasonable.

Consultees who wanted change to the light obstruction notice procedure

3.78 Consultees who advocated reform of the LON procedure argued generally that the 1959 Act procedure was unduly cumbersome, time-consuming or expensive. Many put forward their own suggestions for how it could be improved, most focussing on reform of the service requirements, the role of the Lands Chamber, and/or the overall timing of the procedure.

3.79 Those who wanted simplification and/or clarification of the procedure without offering suggestions as to how this could be achieved included St Stephen in Brannel Parish Council Planning Committee and the City of London Law Society.

3.80 Dr Peter S Defoe (calfordseaden LLP) suggested that there was a need for "a formal application to the [local planning authority] for the registration of a notional obstruction with the usual notice published to the affected adjoining owners … an objection period and ultimately registration of approval on the planning portal".

3.81 Around one-third of those in the Property Litigation Association's membership who offered views on the LON procedure felt that it was "unnecessarily cumbersome". The Association explained that the process is "not straightforward and is time-consuming and increasingly more expensive (for example, Lands Chamber fees have increased significantly in recent years)". But it observed that it is difficult to see how the process should be simplified, explaining:

> The most administratively involved aspect of this process is identifying and then serving LONs on the various layers of adjoining interests. However, this is necessary, as evidence of the notional obstruction must be given to those with a current interest as much as to those that may acquire an interest in the future. Whilst registration of the LON at the Local Land Charges Registry would be the simplest way of achieving a registration, this would ignore those currently in occupation or ownership who may enjoy rights. Therefore, the service process is a necessary part of the LON process.

3.82 However, the Association went on to suggest that:

> It may be possible to carve out the role of the Lands Chamber and instead allow for registration of the LON at the LLCR together with provision of a certificate from the developer's conveyancer that service of the LON has been effected on all those with a registered legal interest in the property.

> … Further, service itself could be limited to those parties whose interest is evident from the Land Registry – i.e. registered freeholders and leaseholders and those whose lease is for less than 7 years and whose interest is noted on the landlord's title. This does away with the need for a physical inspection of the property and the uncertainty that arises where access is not possible or where the identification of the owner is difficult. This would also remove the need to serve on 'the occupier'. This could lead to unregistered leases being unprotected. However, should the proprietor be obliged to register, but choose not to do so, then perhaps that should be their issue for failure to register.

3.83 Both Clifford Chance LLP and the British Property Federation argued that it should only be necessary to serve freeholders and those with leases originally granted for seven years or more, on the grounds that these interests would be discoverable at Land Registry.

3.84 Hunters (solicitors) also favoured curtailing the role of the Lands Chamber to save costs, and for the passing of registration formalities to Land Registry:

> As no entitlement has already arisen at the time, we wonder why service of the light obstruction notice has to be overseen (at a fee of £1,200) by a judicial body and also why registration is at the Local Land Charges Registry of matters concerning public authorities. These days, the functions concerning notices about private rights could be overseen by the Land Registry, as the vast majority of urban properties will soon have registered titles if they do not have them already.

3.85 Similarly, Neighbourly Matters (Chartered Surveyors) suggested that "the current requirement for a certificate from the Lands Chamber serves no practical purpose and could be removed". It concluded that "a simple notice followed by registration is all that is required", with a view to reducing costs. Laurence Target (solicitor, Trowers & Hamlins LLP) agreed that the need for certificates from the Lands Chamber of the Upper Tribunal should be removed in order to simplify the procedure.

3.86 Anstey Horne made the point that under the current LON procedure, the notice is registered against a building as a whole and there is no way to discriminate between windows that already have rights to light and those that may yet acquire them. To counter this problem, it suggested:

> …a modified procedure that includes an option to specify particular window apertures or parts of a building whose light would be obstructed by the notional obstruction. The amended procedure would necessitate inclusion of a drawing showing the relevant windows or relevant part of the building whose light it is proposed to obstruct.

3.87 Berwin Leighton Paisner LLP suggested that:

> The [Rights of Light Act 1959] should be amended to make it clear that a "dwelling house" can include a flat or a number of flats in a building. This would mean that only the flat or flats in a building which are actually impacted on by the reduction in light need receive notices.
>
> The Act should make it clear that the notional obstruction described in the notice may be such that it only impacts on certain windows in the dominant building, without having to actually to draw a plan showing the notional obstruction. It should also make it clear that the notional obstruction need not be one which is capable of being built in reality.

3.88 In order to reduce costs and simplify the LON process, the Bar Council suggested that:

> The application to the Local Authority ought not to need to be accompanied by certificates from the Lands Tribunal as per s.2(3) Rights of Light Act 1959 as the cost and process of obtaining the certificate is disproportionate in our view. A landowner ought not to have to fund the prevention of the acquisition by a third party of a right over his land. A direct application to the Local Authority should be sufficient. Such certificates should also not need to be applied for every 19 years. Once in place the registration should not be removed and the 20 year clock should not resume until the registration is removed at the request of the landowner.

3.89 Allen & Overy LLP, from the perspective of its developer clients, argued that the service provisions in the LON procedure should be simplified. Service of a LON is "incredibly time-consuming and expensive", thanks to:

> (i) the lack of any provisions for deemed service; and
>
> (ii) the fact that notices must be served on all those occupying the servient land or with a proprietary interest in it, without any "de minimis" provision (to exempt leasehold interests of less than a certain duration).
>
> Together, this means that in theory, actual service has to be effected on all relevant persons, some of whose identities it is impossible to discover (as short leases of less than 7 years are unregistrable).

3.90 Allen & Overy LLP therefore recommended the introduction of deemed service provisions, and 'de minimis' leasehold provisions such that notices would only need to be served on those with a freehold interest or leasehold of seven or more years' duration. It also recommended that the time period for challenging a LON be shortened to six months.

3.91 The British Council for Offices also considered the service provisions under the 1959 Act to be too inflexible, arguing that "there needs to be a resolution for situations where it's not possible to contact the dominant owner at their last known address". The British Property Federation also suggested that there should be deemed-service provisions.

3.92 The Royal Institution of Chartered Surveyors criticised the procedure as "cumbersome", recommending that it be "streamlined", and that the period of effective obstruction be reduced to six months.

3.93 Although it was "broadly happy" with the LON procedure, the UNITE Group plc "would suggest the 'nineteen years and a day' rule is clarified to avoid the confusion of section 3(4) of the Rights to Light Act 1959".

3.94 Land Securities contended that the LON procedure would still have a role to play even in the event that prescription for rights to light were abolished, and argued that it should "be extended so as to be capable of extinguishing lost modern grant claims".

3.95 Andrew Francis (Serle Court Chambers) suggested that it is currently not clear whether the 1959 Act can prevent the acquisition of a right to light under the principle of lost modern grant, and that clarification would be welcome.

3.96 The British Property Federation favoured the introduction of a requirement that the developing party give a notice of registration to the dominant owner. At present, the dominant owner has to search the register periodically to check whether registration has been completed, "as the reality is that many servient owners do not promptly do the registration after obtaining the certificate from the Lands Chamber".

3.97 Nabarro LLP complained that Rule 41(1)(f) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 states that a party seeking to serve a light obstruction notice "must" specify "the names and addresses of all persons known by the applicant, after conducting all reasonable enquiries, to be occupying the dominant building or to have a proprietary interest in it". It indicated that this can mean that even if a development will only affect a small number of flats in a dominant building, its application for a LON will nevertheless have to list the names of every flat owner, and even their guests or other licensees currently occupying. It suggested that the Rule be amended such that only those with a proprietary interest in those parts of the building with apertures which may be affected should be entitled to notice.

CHAPTER 4
INTERFERENCES WITH RIGHTS TO LIGHT

We ask consultees whether reform is needed to the principles governing when an obstruction of light is actionable and, if so, we would be grateful for consultees' suggestions for reform.

[Consultation Paper, paragraph 4.43]

4.1 As the law stands, the owner or occupier of property benefitting from a right to light is "entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of [the property]".[6] An obstruction of light will constitute an actionable nuisance where it deprives the dominant land of this standard of light, taking into account both the current use of the land, and potential uses to which it might be put.

4.2 We discussed this test in paragraphs 4.2 and following of the Consultation Paper, and concluded that no change should be made.

The responses

4.3 Around forty consultees responded to this question. Of these, just over half favoured retention of the current test either in its entirety, or with some modest clarification. Of those remaining, opinions were divided between those who wanted to see the introduction of an objective test, those who wanted "soft-law" guidance or reformed practices, those who wanted to see a distinction between commercial and residential properties, and those who wanted the lighting available to the dominant property prior to the light being obstructed to be considered.

Consultees who favoured retaining the current test

4.4 Seventeen consultees favoured retention of the current test without modification. A number of these, including the Council of HM Circuit Judges, the National Organisation of Residents Associations, the Compulsory Purchase Association and Laurence Target (solicitor, Trowers & Hamlins LLP) stated that they did not want or see any need for change.

4.5 Of those that gave reasons, several focussed on the flexibility of the current law. For example, the City of London Law Society said:

> The greater flexibility that this test provides is, generally, helpful and, while perhaps less certain than a more objective test, it should allow for fairer outcomes.

4.6 Mount Anvil Ltd echoed this sentiment, stating that flexibility is necessary to enable the court to "assess each individual case on its own merits", and "to determine that an injury is not actionable even if it exceeds a 'rule of thumb' figure".

[6] *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 208.

4.7 Hunters (solicitors) also supported retaining the current test, but expected that once there is a "technical evaluation" of new methods for evaluating interference with light and greater consensus amongst rights to light experts, consultants and lawyers would be better able to set appropriate criteria to describe what obstruction is actionable and what remedy is suitable.

4.8 However, John McGhee QC (Maitland Chambers) noted that:

> A more precise scientific test could be enshrined in statute but this would not make any sense if, as the courts have rightly said, the test for interference with rights to light is of loss of amenity. It should be recalled that the action is based on the tort of nuisance, a tort which the courts are well able to apply and adapt to different urban and rural environments and changing times. Accordingly I do not propose any change from the current law in this regard.

4.9 Similarly, Deloitte Real Estate stated that:

> The current method of assessment is considered a clear and simple method which is already understood and accepted by the Courts. New or alternative calculations would inevitably be more complex than the existing formulas, and therefore only lead to more disputes.

4.10 The UNITE Group plc and Travis Perkins plc gave their support to our view that no change should be made to the test on the condition that the proposed revision to the test for when an infringement might be remedied by the award of damages instead of an injunction is implemented.

4.11 Five consultees supported maintaining the status quo, but wanted clarity on certain aspects of the current test. These were:

(1) Dr Peter S Defoe (calfordseaden LLP).

(2) Berwin Leighton Paisner LLP, who wanted clarity on four matters:

  (a) Application of the "50/50 rule", particularly for unusually shaped rooms;

  (b) Small losses of light to already poorly lit rooms, and whether such losses should be injunctable;

  (c) The assumptions that ought to be made as to room layouts behind the apertures, and whether there should be an overall limiting depth of say nine metres;

  (d) How the "50/50 rule" should apply to commercial and residential use respectively.

(3) Land Securities requested clarification on the same matters raised by Berwin Leighton Paisner LLP and also proposed that different "bands" should apply in determining actionable nuisance. It suggested by way of example:

> Up to 25% any loss of light is injunctable; between 25% and 50% losses of more than 5% are injunctable …

(4) One consultee, in a confidential response, expressed concern over the application of the current test to the potential uses to which the dominant property could be put, in particular cases where it can be sub-divided.

(5) Herbert Smith Freehills LLP wanted to see consideration of how to deal with possible future uses of the dominant property, particularly where an alteration to the dominant premises makes an obstruction of light actionable, despite the same obstruction not being actionable before the alteration.

Consultees who wished to see change

4.12 Consultees who wanted to see the law changed fell broadly into the following groups, with no clear consensus on how change should be effected.

AN OBJECTIVE TEST

4.13 A number of consultees felt that there should be a fixed minimum standard of light guaranteed by a right to light, with infringement occurring whenever an obstruction causes the light to the dominant property to fall below the prescribed level.

4.14 Lynn Pollard was of the view that:

> Nowhere is the actual calculation set down in clear terms. At present the 50% rule is used but that may be subject to case law in the future which is very unsettling. As I understand it we are above the caution zone of 50 – 55% but who is to stop a judge deciding that the figure should be 65 or 70% between the approval of our plans and the start of building? … The actual limit to which the dominant neighbour's easement can be infringed should be stated in irrefutable terms by way of a percentage.

4.15 Similarly David Feather said:

> Your proposals also seem shy of actual light measurement. It is an engineering discipline and it is possible to measure light values. It is possible to measure light values inside a building and then assess what effect the new development would have. Minimum levels for light within a window should be established.

4.16 BRE argued that "whatever the method chosen, an objective means of assessment is important both for developers and claimants, as they need to know whether an injunction will succeed". It highlighted perceived flaws in the "50-50 rule" and proposed that the vertical sky component on the outside of the window be used as a measure instead. It added:

> The idea would be for guideline values to be set which were lower than the good practice guidance in the BRE Report 'Site layout planning for daylight and sunlight: a guide to good practice'.

However, BRE acknowledged that it might be inappropriate or difficult to enshrine these values in legislation, in which case it suggested they might form part of an 'Approved Document' or similar for the industry.

4.17 Nigel Hamilton and the British Council for Offices expressed similar views on the desirability of an objective test.

4.18 Several other consultees (amongst them Anstey Horne, Mount Anvil Ltd and Deloitte Real Estate) were explicitly opposed to an objective test. Anstey Horne argued that:

> … we do not believe it should be a case of "one size fits all" and we believe that is, quite sensibly, the approach of the courts. This was the conclusion confirmed by Professor Paul Chynoweth of the School of the Built Environment, University of Salford, in his paper on "Progressing the Rights to Light Debate Part 3: Judicial Attitudes to Current Practice". His summary concluded that only three of the sixteen legal cases he considered had determined adequacy according to the 50/50 rule approach.
>
> In our opinion the courts should not, indeed must not, be bound by any rigid number or percentage, because every case must be considered on its individual merits and there should be room to conclude that an injury is not actionable in law even though it may technically breach certain rules of thumb or guidelines.

NEW GUIDANCE/CODE OF PRACTICE

4.19 Other consultees fell short of suggesting a new objective legal test for when an interference is actionable, but instead wanted the Law Commission to recommend new standards and guidelines by which light should be assessed.

4.20 Southern Housing Group asked that standards for assessment of the impact on natural light be revised to be sensitive to location and aligned with tests used in determining planning applications. It recommended:

> Reform of standards could most readily be achieved by using techniques provided in the current BRE guidelines in conjunction with more appropriate target values for particular urban areas.
>
> … Consideration should be given to harmonising the techniques for the analysis of daylight impacts, both the assessment of legal Rights to Light and for assessment under the planning system. These common techniques should be accepted as the preferred format for legal evidence in Rights to Light cases and the means by which local authorities assess planning applications.

4.21 Neighbourly Matters (Chartered Surveyors) requested that the guidance relating to the rights to light issued by the Royal Institution of Chartered Surveyors be given authority by the Courts as a "statement of best practice, to allow a benchmark standard to be adopted in all disputes".

4.22 HDG Ltd and Herbert Smith Freehills LLP and a consultee, in a confidential response, also voiced support for the issuing of further guidance.

A COMMERCIAL/RESIDENTIAL DISTINCTION?

4.23 Only a few consultees regarded as significant the use of the dominant property – whether residential or commercial. Three (the Property Litigation Association, Clifford Chance LLP and a further consultee who wished to remain anonymous) urged separate tests for when an infringement is actionable, one for commercial properties and one for residential properties.

4.24 The rationale behind the perceived need for a distinction to be drawn between residential and commercial premises was neatly articulated by the anonymous consultee, which said:

> … there is a case for differentiating between commercial and residential premises when assessing the adequacy of light, particularly where commercial offices utilise artificial light throughout the day. The impact of an obstruction of light on a commercial property is, in most cases, likely to be less detrimental than to that of a residential property. As a result, commercial properties should be considered separately where a greater amount of light can be obstructed or artificial light can be considered when assessing whether an obstruction of light has caused a nuisance. This would reduce the ability for commercial entities to utilise their position to demand sums of money from developers; when the obstruction has a minimal impact on their ability to continue operations as they primarily utilise artificial light versus a residential property where it may impact the comfortable use and enjoyment of their house.

4.25 Any such distinction was, however, rejected by the British Council for Offices which felt that "distinguishing between commercial and residential premises will introduce a new level of complexity into the situation".

CONSIDERATION OF ARTIFICIAL LIGHT

4.26 The Property Litigation Association, Clifford Chance LLP, the Bar Council and HDG Ltd all gave explicit support to taking into account the use of artificial light at the dominant property when assessing whether an obstruction of light amounts to an infringement of a right to light.

4.27 Anstey Horne felt artificial light should only be taken into account in the exceptional case where a room benefitting from a right to light was already very poorly lit, and it is clear that it could not sensibly be used without artificial lighting. It argued that, in this case, a further, small reduction of the light available should not be actionable. Otherwise, it regarded artificial light as relevant only at the remedy stage.

4.28 The City of London Law Society and the British Property Federation were of the view that artificial light should only be taken into account at the remedy stage.

LOSS OF LIGHT TO A POORLY-LIT ROOM

4.29 A number of consultees felt that the state of a relevant room in the dominant property and the amount of light it received through the relevant aperture prior to the obstruction should be taken into account in determining whether an obstruction is actionable.

4.30 Under the current law, the courts have regarded the amount of light that a poorly-lit room receives as all the more precious for its scarcity, making a small further loss of light actionable.[7] Julian Barwick (Director, Development Securities plc) criticised this result as "perverse", and together with BRE, Waterslade Ltd recommended reform to avoid such outcomes. Anstey Horne was tentatively prepared to support such reform.

Other responses

4.31 Neville Pentecost stated that an interference "should never be actionable without the consent of the adjoining property owners", and that "no development without signed agreements from neighbouring land owners" should be possible.

4.32 Lynn Pollard felt that a "professional of good standing" should be granted a right of access to a neighbour's property where a right to light is asserted, in order that the claim may be verified and developers can be more accurate in their estimations of the impact a proposed scheme will have on neighbouring properties.

4.33 The City of Westminster and Holborn Law Society suggested that the law should be "redefined by reference to what is actually enforced by the courts". It said that there were effectively two types of right to light under the current law: absolute rights and qualified rights. The latter, it was argued, was comparable to any other easement, in that it may not be lawfully infringed and is capable of protection by an injunction; in contrast, the former may be lawfully infringed upon payment of compensation. Buildings which benefited from "qualified" rights to light could be "the factory, the warehouse and perhaps the office building, for which daylight may be valuable but not essential".

4.34 It suggested that the qualified right to light "exists only in theory, in the sense that English law applies it in practice whilst expressly denying its existence". It continued:

> Should a reformed law give the commercial property owner such a qualified right? An example would be an office building whose light is severely diminished by a development. Under present law [the dominant owner] would, if refused an injunction, at least be entitled to damages. If reform were to create a qualified right to light that position would be preserved, but otherwise he would have no right at all. The argument in favour of the qualified right is simply that where the law facilitates development it should not be at the expense of neighbouring owners.

[7] See the Consultation Paper, para 4.29.

CHAPTER 5
REMEDIES: INJUNCTIONS AND DAMAGES

We provisionally propose that a court may award damages in substitution for an injunction in rights to light cases if the grant of the injunction would be disproportionate, bearing in mind:

(1) the size of the injury in terms of loss of amenity (which can include consideration of whether artificial light is usually used by the claimant);

(2) whether a monetary payment will be adequate compensation;

(3) the conduct of the claimant;

(4) whether the claimant delayed unreasonably in bringing proceedings; and

(5) the conduct of the defendant.

Do consultees agree?

[Consultation Paper, paragraph 5.50]

5.1 In the event of infringement of a right to light, the court has discretion under section 50 of the Senior Courts Act 1981 to award damages in substitution for an injunction – the traditional remedy granted to protect property rights. The case most often cited that sets out guidance that courts use to guide the use of the discretion is *Shelfer v City of London Electric Light Company* [1895] 1 Ch 287.

5.2 We discuss the application and development of this guidance at length in paragraphs 5.2 and following of the Consultation Paper, and note in particular the concern over its interpretation in the *Heaney*[8] decision.

5.3 We discussed the difficulties arising from the way the courts approach the *Shelfer* criteria and the uncertainty this has caused, and provisionally proposed that the above criteria should be applied instead.

The responses

5.4 Nearly 60 consultees responded to this question. Of these, 20 approved the proposed new test as is; 16 accepted it but suggested modifications or additional relevant factors; 13 advocated a different approach for reform; the remainder were content with the current law or offered responses that were ambiguous.

Consultees who favoured the provisional proposal without amendment

5.5 Many consultees who favoured the provisional proposal simply voiced their agreement without adding comment. Amongst those that provided more detail was the Property Litigation Association, which remarked that:

[8] *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

> … *Shelfer* per se is not flawed, but its interpretation can be inconsistent. A new statutory test would retain much of the objective nature of *Shelfer*, but would ensure that the primary focus in ascertaining if damages should be awarded in lieu is whether the award of an injunction would be disproportionate.

5.6 Similarly, Travis Perkins plc added:

> It seems to us that the Court's application of the Shelfer test in the RTL context has been too inflexible. Presently, the application of the third limb of that test (that is, whether the compensation payment would be 'small') means the more profitable a development, the less likely it is that a Court will be prepared to award damages in lieu of an injunction. That cannot be right.

5.7 Commenting on several aspects of the new test, Land Securities said that:

> We welcome the fact that the word "small" is omitted from the new statutory test. This has resulted in judicial decisions that have often been inconsistent and uncommercial, with the figure of £5,000 not regarded as "small" in a number of cases. The substitution of the word "adequate" is an improvement as this recognises that a payment may be "adequate" without being "small".
>
> The direction that artificial light may be taken into account is also welcome as this now reflects the reality in the modern world, especially in relation to commercial space, where the use of artificial light is practically compulsory and where in fact the prevalence of natural light may interfere with the use of modern technology such as computer screens.
>
> We also support the rejection of a test based on whether it would be oppressive to grant an injunction. Such a test set too high a threshold before an injunction could be refused. The new test of disproportionality sets the scene more accurately.

5.8 In his response, Andrew Francis (Serle Court Chambers) was satisfied with our proposal on condition that it be made clear that it is not necessary in any given case for all the relevant factors to be made out in a "tick box" fashion.

5.9 Four consultees, although supportive of the proposed reform without more, expressed concern that the new test may not make it any easier for parties to predict with accuracy whether an injunction might be awarded, or at least not until it is seen how the courts approach the new test in practice. These were Land Securities, Nabarro LLP, the Association of Light Practitioners, and Berwin Leighton Paisner LLP.

Consultees who favoured the provisional proposal but with modification

5.10 Some consultees broadly agreed with the provisional proposal, but offered a variety of further factors they believed the court should consider when deciding whether to grant an injunction or damages in lieu.

5.11 Several among them, namely the City of London Law Society, the City Property Association, Herbert Smith Freehills LLP, felt that the nature of the claimant's interest in the dominant property should be relevant – in particular, the duration of the term where that interest is leasehold.

5.12 The Law Society argued that there must be "clarity about who will be able to seek an injunction or damages in order to provide greater certainty for developers". It also suggested that the factors could be used at an earlier stage to help structure negotiations between the parties.

5.13 Waterslade Ltd felt that, where the dominant property loses light to a room that is less than 50% well-lit beforehand, there would have to be "significant" further loss of light before the court could grant an injunction. It also said that:

> … where the dominant tenement has particularly onerous design features which exacerbate the loss of light (for example overhanging balconies, small windows or very deep rooms) the awarding of an injunction should be regarded as disproportionate.

5.14 In an anonymous response, one consultee argued that the court should consider public interest in the development as a relevant factor albeit with less significant weight than the other factors we supposed. It continued:

> In particular, developments which deliver affordable housing or essential infrastructure for key services should have greater consideration as these can ultimately drive the economic growth of the area to the benefit of all including the dominant owner.

5.15 HDG Ltd also supported taking account of any public benefit generated by the development causing the obstruction.

5.16 The Royal Institution of Chartered Surveyors expressed concern that the "wording excludes elements of [the test in *Shelfer*]. Whilst [we are] not necessarily opposed to [a revised test, it] must be no less equitable than [*Shelfer*]".

5.17 Transport for London favoured the inclusion of a further factor of "materiality", which it explained meant that the court should look to the loss in value of the dominant owner's interest as a proportion of its total value; only if the percentage is above a certain threshold could an injunction be granted. Otherwise, only damages would be available.

5.18 The UNITE Group plc wished for the Law Commission to codify the view that if a dominant owner confirms, in open correspondence, a willingness to accept damages in lieu of an injunction, this will be treated as an irrevocable election that the court will enforce.

5.19 Conversely, Herbert Smith Freehills LLP wanted to see the opposite result. Noting the trend in civil litigation of encouraging settlement it said that:

> … we recommend that a better approach would be for the parties to be expected to have negotiated and considered ways in which the dispute could be resolved by means of payment, and that practice guidance or any codified Shelfer principle to make it clear that any open reference to such discussion or a level of willingness should not be evidence used as a basis of opposition to the grant of an injunction.

5.20 The British Property Federation had suggestions for improvements. It requested further direction and clarification as to what counts as unreasonable for the purposes of the "conduct" factor, and consideration of a longstop date after which point an injunction would cease to be available. This latter suggestion was also made by Capital & Counties Properties plc.

5.21 Deloitte Real Estate welcomed the proposal, but suggested that the first factor be reformulated as follows:

> (1) The significance of the injury in terms of loss of amenity, taking into account the reliance on natural light during the prescriptive period".

It explained that:

> We suggest that it is fairer for both parties that the significance of any light loss takes into account how much the light was depended upon during the prescriptive period (i.e. the last 20 years). For example if the building has been an office with electric lighting used continually for the last 20 years, any argument to say that the building could be residential in the future, and therefore have a higher dependency on natural light, should be given less weight.

5.22 Helical Bar plc also suggested changing the first factor:

> (1) Above should be the size of the injury in terms of loss of value (not amenity – how can amenity be valued – rather difficult). An injunction should only be capable of being granted where the injury is severe in terms of considerable diminution in value.

5.23 The Bar Council considered the proposal "a suitable test" but also felt that there should be "a definitive stage at which injunctions will not be granted because of the hardship it would cause to the Defendant.

5.24 Lastly, HDG Ltd suggested that the wording of the test be changed from "the court *may* award damages" to "the court *should* award damages" (emphasis added).

Consultees who proposed alternative reform

5.25 A number of consultees proposed a variety of alternative options for reform. However, there was a degree of consensus that damages should be the default remedy, with an injunction being awarded only in exceptional circumstances.

5.26 Such an approach was favoured by the Berkeley Group plc, the Westminster Property Association, Exemplar Properties, a consultee who wished for its response to remain confidential, and BRE (where the dominant property is used for commercial purposes).

5.27 The Berkeley Group plc went on to say that an "injunction should not be available where the BRE standards will not be breached save in very special circumstances". However this would be accompanied by:

> … a mechanism that ensures that an adjoining owner will recover any damages awarded to prevent abuse by servient owners. This could be dealt with by cross-undertakings or lodging money with the court unless the financial covenant of the defendant is such that the court is satisfied that any award for damages and costs can be met by the defendant.

5.28 In the confidential response mentioned above, the consultee added that:

> Injunctive Relief should only be available as a temporary halt to development whilst the monetary compensation is established where the developer has failed to engage with the owner in a timely manner in seeking to agree the compensation. The costs associated with Injunctive Relief and the financial risks inherent in halting a development are disproportionate to the damages claimed, and this threatened tool should not therefore be available to leverage higher compensation for those who have the financial ability to mount such proceedings.

5.29 BRE felt that adjoining owners hold out for an injunction to maximise the damages available, and argued that injunctions should only be awarded "for those spaces where there is a demonstrable need for natural light including habitable rooms in dwellings, schools, hospital wards and care homes".

5.30 Exemplar Properties and the Westminster Property Association were similarly in favour of the grant of an injunction in only "the most exceptional of circumstances".

5.31 Other suggestions offered included those of Lady Kingston, who preferred "basic rules" on where an infringement could be remedied by the grant of an injunction above a test that gave the court discretion. Lady Kingston suggested that different rules would be needed for large developments affecting many people to those needed for small disputes between one or two neighbours.

5.32 Similarly, Chelsfield LLP argued that the Law Commission should:

> investigate further whether quantitative guidelines can be set down to assist a court, and therefore all parties concerned, to determine whether the injury warrants an injunction. It may be possible to identify criteria that relates to:
>
> > a. minimum absolute light levels for different uses and one or two generic room types for residential (eg. principle rooms – living, kitchen, other rooms);

b. loss of light % - again for different uses and different room types in residential.

An element of subjectivity may still be incorporated but within much tighter parameters.

5.33 Hunters (solicitors) did not go so far as to propose a presumption against injunctive relief, but felt that

> … what is urgently needed is to reverse the Regan and Heaney approach, at least for rights to light cases, so that there will be no presumption that an injunction must be granted save in the very exceptional circumstances where all four factors in Shelfer are satisfied in a tick-box manner.

It added that "where rights to light are enjoyed by residential occupiers, there should be recognised criteria so that premises will have a normal minimum standard of daylight".

5.34 Julian Barwick (Director, Development Securities plc) questioned "whether the proposed guidance goes far enough and would significantly improve matters", but did not offer an alternative proposal for reform.

Consultees who favoured retaining the current law

5.35 Four consultees were opposed to any reform.

5.36 John McGhee QC (Maitland Chambers) argued that:

> The test to be applied to whether an injunction ought to be awarded is precisely the same in rights to light as in other cases concerning property rights. There is no reason of principle to single out rights to light for the application of a different test. If it is, as with prescription, a numbers argument, then the answer is the same: the provision of an effective power of modification so as to limit the enforcement of rights to those with real amenity value is sufficient.

5.37 He continued:

> In my opinion [the proposed test] will not make it any easier to predict whether or not an injunction will be granted. Indeed the Chancery judges are unused to considering whether or not something is "disproportionate" and this test is likely to create greater uncertainty than there is at present. At present we have the advantage that we can have regard not only to rights to light cases but cases involving remedies for infringement of other property rights in order to guide us as to when the court are likely to grant or refuse injunctive relief. Those cases will cease to be relevant if a new test applicable only to rights to light is introduced.

5.38 The Chancery Bar Association similarly felt that it would be "arbitrary and … unprincipled" to treat rights to light differently from other easements, and that such a development would complicate the law without providing greater certainty. It felt the introduction of a "proportionality" standard would generate litigation, without simplifying or improving the law. It concluded that a better way to address perceived problems with rights to light law was by:

> … [focussing] directly on the cause of the problem, namely the right to light itself, rather than on its symptoms. We think that the obvious and most suitable solutions to any problem of sufficient substance to justify intervention are (i) the Law Commission's proposals for amendment to section 84, including ensuring that any amendments to apply to existing as well as future easements including rights to light; and (ii) amendment to the planning regime ...

5.39 The Campaign to Protect Rural England said that it did not see real justification for change, and that an injunction should continue to be the most appropriate remedy in normal circumstances. It added:

> While the [Heaney] decision discussed in the consultation document may have been unexpected we do not believe that there is extensive, wider evidence that justifies substantial changes to the law by which rights to lights are acquired, enforced or extinguished.

5.40 Laurence Target (solicitor, Trowers & Hamlins LLP) dismissed the proposed change, believing "the substitution of 'disproportionate' for 'oppression' to be unhelpful".

Other responses

5.41 Allen & Overy LLP commented on several aspects of the provisional proposal. It questioned whether the proposal requiring an examination of whether the grant of an injunction was "disproportionate" signalled a move "towards more of a balance of convenience test". From the dominant owner's perspective, it argued that such a move would represent an objectionable disregard for property rights and amount to authorising, effectively, compulsory purchase. From a developer's perspective, it considered it would be an appropriate reflection that there is a public interest in development. It also commented that a developer would wish for "a hard time limit to be imposed beyond which an injunction cannot be claimed".

5.42 As regards the proposed factors for consideration set out in the Law Commission's provisional proposal, Allen & Overy LLP again presented views from the perspective of both a dominant owner and a developer. It echoed many of the arguments discussed above for and against change. From the dominant owner's perspective, it expressed concern that the concept of "unreasonable delay" would generate uncertainty as to when delay is to be measured from and how it might be avoided, and that the reference to "conduct" might be interpreted as overriding traditional equitable bars to relief. On this latter point it recommended that it would be "clearer and more appropriate" to refer expressly to traditional equitable bars as having survived the decision in *HKRUK II (CHC) Ltd v Heaney*,[9] "as commentators generally agree that they do".

5.43 In a confidential response, one consultee expressed the view that "monetary compensation would not have been acceptable to my relative [involved in a rights to light dispute]". It added that for the lay person, seeking professional help is difficult and time-consuming, and that allowance must be made for this.

5.44 The National Trust could see the benefit in the provisional proposal, but felt that it was not able to give its support without seeing "examples of how the proposed criteria would operate". It also wanted to make sure that where a court takes into account the use of artificial light, it bears in mind that artificial light will inevitably be used during the autumn and winter months.

5.45 Matthews & Goodman LLP stated that it would be "inappropriate to factor in the use of artificial light to supplement natural light as this is something which invariably reflects the use to which a space is put and this may change with time". However, it did not clarify whether it otherwise agreed or disagreed with the provisional proposal, and did not offer any alternative for reform.

[9] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

We would be grateful for consultees' views on limiting to rights to light cases reform of the test for when damages may be awarded in substitution for an injunction.

[Consultation Paper, paragraph 5.56]

5.46 We asked consultees for their thoughts on whether the proposed test to assist a court in deciding when to award damages instead of an injunction might apply to the court's discretion to grant an injunction to protect other property rights, or whether it should be limited to cases involving rights to light.

The responses

5.47 Thirty consultees responded to this question. Of these, seventeen felt it should be confined to rights to light cases, five were satisfied that it should apply more generally, three were unable to give a definite view either way, and two either stated that they were neutral, or gave an ambiguous response. The remaining three were opposed to any reform of the *Shelfer* test at all but also gave views on the broader applicability of the Law Commission's proposal.

Consultees who favoured limiting the new test to cases involving only rights to light

5.48 Over half of consultees who responded felt that the proposed test should be limited to rights to light cases. Where reasons were given, most focussed on the need to explore the specific impact of any reform in contexts outside of rights to light, and the risk of unintended consequences associated with premature extension.

5.49 For example, Clifford Chance LLP said:

> … we are not aware of Shelfer being an issue beyond rights to light, so consideration as to whether a statutory test would be suitable beyond the sphere of rights to light should be given before any reform is extended beyond rights to light. Our view is that any test should not extend beyond rights to light.

5.50 The Bar Council stated that "any further application of this test would need additional and more widespread consultation to avoid unintended consequences", and Malcolm Hollis LLP also felt reform should be limited "unless and until the full implications upon other cases [are] considered …".

5.51 The City of London Law Society commented that:

> Rights to light cases appear to be the key mischief where there is a critical need for greater certainty. We would not want enactment of the proposed test to be held up by consideration of whether it has other applications.

5.52 The British Council for Offices argued that the clarity we seek to bring about through the new test is only necessary for rights to light, because "other rights such as rights of way will be visible on title and will not have the same complexity as rights to light".

5.53 A number of consultees made clear that, whilst they were unable to support the extension of the provisional proposal to cases involving property rights other than rights to light at present, they would not be averse to it in the future once it is apparent how the new test works in practice.

Consultees who favoured extension of the new test generally

5.54 Some consultees felt that if the proposed reform would be useful for rights to light cases, it should similarly work for other easements.

5.55 The National Organisation of Residents Associations said that its members saw "no adequate reason to impose a different set of rules for cases involving rights to light". Similarly, the Royal Institution of Chartered Surveyors felt that that "all easements should be treated equally to preserve the proper protection of property interests".

5.56 Hunters (solicitors) stated its preference to have "rules across the board, but flexibly applied so as to take account of different factors in different circumstances".

5.57 Andrew Francis (Serle Court Chambers) argued that any new rule or test must apply to cases of interference with other property rights and interests as well as rights to light. He explained:

> Any set of rules should be clear and where possible of universal application in their context. The context here is property rights and interests broadly defined. The same policy reasons apply in disputes over rights of way, covenants, trespass to land and private nuisance. The origin of those rights is … irrelevant in most cases.
>
> … It would also be wrong to place rights of light into a special category in terms of the application of s. 50. There are two reasons for this. First, because such rights do not require special treatment. Secondly, because there are cases where interference with light may be just one of a number of breaches in issue. Many rights of light cases also raise issues over breach of covenant, if not other rights; eg rights of support and rights of way. How could the "old" Shelfer principles and any "new" rules be applied in such cases where s. 50 has to be considered?
>
> Finally, whilst para. 5.55 says that there is no awareness "of any criticism of how Shelfer is being applied in other contexts" there are, for example, covenant cases, such as Mortimer v Bailey [2004] EWCA Civ 1514, and Site Developments (Ferndown) Ltd. v Barratt Homes [2008] EWHC 415, and noise nuisance cases (eg. Watson v Croft Promo Sport [2009] EWCA iv 15) where Shelfer produces tension in the process of determining the remedy under s. 50. These cases support my view that any reform should apply to other property rights and interests.

Consultees opposed to the Commission's provisional proposal who commented on its extension to cases involving other property rights

5.58 John McGhee QC (Maitland Chambers) disagreed with the Commission's provisional proposal and also argued against a regime discrete to cases involving rights to light as follows:

> At present we have the advantage that we can have regard not only to rights to light cases but cases involving remedies for infringement of other property rights in order to guide us as to when the court are likely to grant or refuse injunctive relief. Those cases will cease to be relevant if a new test applicable only to rights to light is introduced.

5.59 In its response, the Chancery Bar Association said of a proposed extension of the Law Commission's new test:

> This is a very interesting possibility and, obviously, it raises a topic of potentially profound importance. However, it goes far beyond the narrow and specialist field of rights to light. We greatly doubt whether the present consultation exercise will attract a wide enough audience to provide the Law Commission with the full range of potentially valuable responses to such an interesting and important question … .
>
> We sincerely hope that the Law Commission will not decide to recommend reform outside rights to light without first widening its consultation.

We would be grateful for consultees' views on the options for reform of the method of assessment of equitable damages explored in [Chapter 5]. We would also be grateful for consultees' views on the introduction of a cap on the amount of equitable damages that may be awarded and how this could be achieved in practice.

[Consultation Paper, paragraph 5.94]

5.60 In paragraphs 5.67 and following of the Consultation Paper we explained that damages awarded in substitution for an injunction (or "equitable damages") for infringement of a right to light are assessed on the basis of the price for which the dominant owner would have agreed to release his or her right. The court attempts to find a figure reflecting a "fair" result of this hypothetical negotiation between the parties.

5.61 One method of doing so means the court will look to the anticipated profit the servient owner is expected to make as a result of being able to build in such a way as to infringe the dominant owner's right to light, and the bargaining position of the dominant owner. We explained in paragraph 5.81 of the Consultation Paper that some stakeholders were particularly unhappy with this profit-sharing principle, and suggested the following three ways of reforming equitable damages at paragraph 5.82 and following of the Consultation Paper:

(1) a greater role for comparable transactions;

(2) changing the measure of equitable damages so that it reflects the diminution in value of the dominant owner's property as a result of the loss of light (plus damages for loss of amenity and for any financial losses suffered due to the infringement); and

(3) as above, but with the addition of a statutory uplift applied to the diminution in value figure.

5.62 We invited comment on the three options to reform equitable damages and on the introduction of a cap on the amount of equitable damages a court could award.

The responses

5.63 Around 50 consultees responded to this question. Ten were opposed to any change. Nineteen consultees favoured the second of our possible options for reform set out at paragraph 5.61 above – changing the basis of the award to reflect the diminution in value of the dominant property – whilst three consultees preferred the third method (diminution in value basis plus a statutory uplift).

5.64 As regards a cap on the amount of damages, seven consultees were in favour of a cap as the sole reform necessary, while many of those who also advocated a change in the basis of assessment of damages also favoured some form of cap.

5.65 Of the remaining twelve consultees, seven favoured alternative reform to the possibilities we considered, and a few gave ambiguous responses.

Consultees opposed to any change

5.66 A variety of reasons were put forward for retention of the status quo. Dr Peter S Defoe (calfordseaden LLP) commented that "the status quo is best for negotiation. Free market will determine the best deal". The National Organisation of Residents Associations focussed on fairness to dominant owners, saying that:

> … the solutions and methods of assessment that have evolved are unlikely to be improved without hazarding the fairness of the awarding of damages. The key problematic issue described in the consultation paper is that of ransom payments, and it would be quite wrong to change the system in favour of commercial servient parties when residents as dominant parties just do not want to lose their rights to light.

5.67 John McGhee QC (Maitland Chambers) was opposed to change, provided that the proposed reform to section 84 of the Law of Property Act 1925[10] is enacted, reasoning that:

> In circumstances in which a developer overrides important amenity rights of an adjoining owner (which accordingly are not modified under section 84) it is right that he should be put into the position he would have been in had the developer first sought his agreement to give up his rights. The assessment of such damages has been the subject of much recent authority and "is becoming". Developers may object that they are having to pay amounts by way of damages which put the viability of the development in jeopardy but, if so, they are not properly applying the test which requires them to pay only what a reasonable person in their position would pay.

5.68 Hunters (solicitors) were concerned that a change in the basis of damages would lead to lower awards, with the likely practical consequence that dominant owners may be deterred from negotiating to relax their rights to light at all.

5.69 The Chancery Bar Association felt it best to leave questions of damages to the common law.

5.70 The Bar Council felt that no reform was necessary as the current legal test is "relatively straightforward", and it is equitable that profits should be taken into account in assessing a fair result of a hypothetical negotiation between the parties as "the value of the extinguishing of a right to light to the developer [is] directly related to the profit he anticipates from the project". It continued:

> A cap would also be entirely inappropriate as it would prevent the scale of any project and the extent of any obstruction from being taken into account to determine the appropriate level of damages.

5.71 The City of Westminster and Holborn Law Society was of the view that it would be inappropriate to have a separate regime for determining equitable damages in rights to light cases only, recommending that:

[10] See para 7.34 below.

> If the general view is that there is a problem with the way equitable damages are assessed, this is best resolved by a separate consultation on equitable damages.

Consultees who favoured the assessment of equitable damages based on the diminution in value of the dominant property

5.72 Many consultees who favoured reform to make the measure of damages in lieu of an injunction reflect the diminution in value of the dominant property focussed on profit-sharing, suggesting that this aspect of equitable damages is leading to high awards that are deterring development on servient properties. They argued that awards based on profit-sharing are out of proportion with the loss suffered by the dominant owner. Uncertainty in the present law as to what percentage of the profit from a development is likely to be awarded in damages was also highlighted as a problem.

5.73 BRE, for example, stated its support for equitable damages to be based on diminution in value on the grounds that:

> The recent awards of large punitive damages based on a proportion of the profits of the development are inappropriate because they are often not related to the injury … with the recent recession and drop in building values a profit factor is also inappropriate because there may not be any profit from the development.

5.74 Similarly, Berwin Leighton Paisner LLP was of the view that it is "wrong that a neighbour that suffers a modest injury may nevertheless seek a large profit share". Additionally, it expressed concern that presently developers must negotiate settlements on the basis that a court would award a profit-share, yet negotiations often take place at a point where the profit is unrealised and uncertain. It indicated that the effect of doing so is to place a great burden on servient landowners and compounds their exposure to risk.

5.75 This latter point was emphasised by Land Securities:

> We consider that the emphasis on the perceived "benefit" to the developer does not take into account sufficiently the risks borne by the developer, including the fact that the developer has to pay its neighbour before any profit has actually been achieved.

5.76 Clifford Chance LLP also stated that its preference was for damages to be based on the diminution in value of the dominant land. In addition to making the above points, it argued that:

> An adjoining owner's right to prevent an infringement of their rights may be more valuable than the actual loss that would be suffered if the adjoining owner's right is infringed. However, if this is the case, we would expect such adjoining owners to be adequately protected by an award of an injunction – such award being proportionate on the basis of the proposed statutory test.
>
> Development profit damages could still be reserved for extreme cases where the developer's behaviour merits such an award.

5.77 The Berkeley Group plc argued that profit-based damages create the "bizarre" result that the level of compensation for an infringement exceeds the value of the dominant building, which in turn:

> … could create "rights to light" shopping ie buyers acquiring buildings adjoining development sites with planning consent to create a compensation "income". We have seen some possible examples of this post-Heaney.

5.78 It also highlighted the fact that a development on the servient property may well lead to an increase in value of the dominant property despite the infringement, yet at present no account is taken of this where equitable damages are awarded.

5.79 HDG Ltd considered that assessing equitable damages on a diminution in value basis would be "the preferable and least artificial approach" to damages in rights to light cases. It pointed out that for the court to reach the stage of assessing equitable damages, it must necessarily have decided not to grant an injunction. This means that:

> The adjoining owner … would have no equivalent to a ransom strip because an injunction would [have] been found or considered to be disproportionate; the measure of damages under the proposed regime should therefore be related to loss not to profit share.

5.80 It added that, as things stand:

> The risk of paying an indeterminate amount of a premature calculation of developer's profit acts as a strong disincentive for schemes that might otherwise have looked viable as economic conditions begin to improve.
>
> … Given the random and haphazard way in which the consultation paper acknowledges that rights of light may be acquired or known about, a share of profit is likely to prove a windfall benefit to the adjoining owner….

5.81 The City Property Association focussed on the perceived greater certainty that a change in the basis of assessment of equitable damages would bring, as:

> The process of property valuation is well established, is carried out by property professionals and is subject to rules laid down by the Royal [Institution] of Chartered Surveyors.

5.82 Several consultees felt that the availability of profit-sharing damages is encouraging dominant owners to hold developers of servient properties to ransom. The British Property Federation, for example, said that:

> … the fact there is significant profit-sharing damages to be had does act as a significant incentive to establish a ransom situation and thereby secure a bigger payment.

5.83 The City of London Corporation identified further problems with damages based on a share of a developer's profits:

> Such an approach is awkward, for example, where there are overlapping right to light interests. In addition, where, for instance, a building is developed without a direct profit motive it would be inappropriate for a measure of damages to be based on share of profit. Such situations may arise, for instance, where a local authority develops a site for housing social enterprises.

5.84 It also added that damages assessed on a diminution in value basis would have the virtue of being "in keeping with familiar compulsory purchase valuation principles".

5.85 One consultee, in a confidential response, added that the present system "favours those with the personal financial strength or where-with-all to threaten injunctive relief and thereby drive a higher compensatory payment".

Consultees who favoured the assessment of equitable damages based on the diminution in value of the dominant property plus an uplift

5.86 Two consultees stated a preference for equitable damages to be based on the diminution in value of the dominant land plus an uplift.

5.87 Chelsfield LLP reasoned as follows:

> There needs to be greater certainty in the measure of damages, however it should also recognise that the dominant land owner has not invited a rights of light injury but the initiative has come from the developer. Damages should therefore reflect the disturbance and the loss of right to the land owner. Accordingly it is suggested that the basis of assessment should be diminution of value with quite a generous uplift factor to compensate for disruption and the loss of light (say 50—200% depending on circumstances).

5.88 Julian Barwick (Director, Development Securities plc) favoured a measure of damages set at two times the diminution in value of the dominant owner's property.

5.89 Other consultees also explored this possibility. Clifford Chance LLP stated it would be its second preference. The British Property Federation also felt that "diminution of value, plus or times x" had some attraction as an approach, but that further research and dialogue with stakeholders would first be required. In an anonymous response, one consultee felt that such an approach should be reserved for "exceptional circumstances (where the developer has acted unscrupulously and made no attempt to follow the process to agree compensation)".

5.90 The Property Litigation Association stated that equitable damages based on the diminution in value of a dominant owner's property plus an uplift was its membership's preferred option, with diminution in value without any uplift being its second. It also felt it reasonable to focus on the damage suffered by the dominant owner rather than on the benefits accruing to the servient owner. It explained:

> … a sizeable number of members consider that the adjoining owner's right to prevent an infringement of their rights is more valuable than the actual loss that would be suffered if the adjoining owner's rights are infringed. However, if this is the case, arguably we would expect such adjoining owners to be adequately protected by an award of an injunction – such award being proportionate on the basis of the proposed statutory test.

5.91 Herbert Smith Freehills LLP was explicitly opposed to any uplift however, on the grounds that it "may be arbitrary and lacking in a proper valuation or legal basis".

5.92 Anstey Horne was also critical of this approach, on the basis that:

> … in our opinion the approach adopted by most rights of light consultants is to calculate a baseline figure related to diminution in value and then to apply some form of uplift or enhancement (sometimes referred to as a multiplier) to arrive at a figure that the adjoining owner might reasonably be expected to accept.
>
> Therefore, in a sense any statutory uplift would be an element of double counting if, as per point (2) one had already taken account of loss of amenity in addition to diminution in value. We therefore believe there could be some confusion arising as between points (2) and (3) in practice, which would need to be resolved in the first instance. However, we do accept that it is sensible to have a baseline figure related to diminution in value and some uplift from that point. We do not believe it would be appropriate to apply a statutory uplift, because once again and as with most things related to rights of light, it really must be a question of judgement related to the specific circumstances of the case at hand.

Consultees favouring a cap on the amount of equitable damages

5.93 Consultees favouring a cap on the amount of equitable damages fell into two categories: those who preferred to cap damages based on the value of the dominant property, and those who preferred to cap damages based on a percentage of the profit the obstruction on the servient land would generate. A number of consultees in both categories favoured their chosen cap in addition to reforming the measure of equitable damages.

CAPPING DAMAGES AT THE VALUE OF THE DOMINANT PROPERTY

5.94 The majority of consultees desirous of a cap on damages favoured this approach. Many felt it disproportionate that dominant owners could receive an award that exceeded the value of their interests in the properties affected by an obstruction.

5.95 The Council of HM Circuit Judges said that it could "see some attraction" to this idea, explaining:

> Whilst this could be construed as an arbitrary limit, it would have the advantage of avoiding the dominant owner effectively being able to hold a developer to ransom.

5.96 Waterslade Ltd considered the idea "sensible", and Berwin Leighton Paisner LLP stated that its developer base would welcome such a cap adding that:

> This would be particularly beneficial in the case of residential flats or houses or commercial dominant leasehold owners, who are currently able to command a large release payment based in some cases on very short remaining lease terms, but where due to their ability to renew their lease, there is a disproportionate injunction risk.

5.97 The British Property Federation argued in favour of a cap based on a dominant property's value on the basis that "it seems unfair that a neighbour should gain more from their neighbour's property than their own investment in their own property".

5.98 Deloitte Real Estate suggested that "the price of releasing rights of light cannot be disproportional to a property's value".

5.99 Anstey Horne and the Association of Light Practitioners both felt that a cap based on the value of a dominant property "could do no harm and would help in certain instances". However, they noted that such a cap would be of no assistance in cases involving expensive dominant properties, whose values could run into millions of pounds.

5.100 As regards the extent of the cap, the UNITE Group plc and Travis Perkins plc suggested a cap of 30% of the market value of the dominant property where it is used for residential purposes, and 10% where it is used for commercial purposes. In each case, the valuation date would be the date planning permission for the proposed scheme was obtained, or otherwise the date the dominant owner objects to the proposed development. Nabarro LLP suggested a cap of "half the value of the dominant building".

CAPPING DAMAGES AT A PERCENTAGE OF THE SERVIENT OWNER'S PROFIT

5.101 Only a few consultees favoured this option. One consultee, in a confidential response, suggested that:

> the total sum paid out to all claimants affected by the same obstruction does not exceed 30% of the profit which is actually achieved from the relevant part of the new building.

5.102 Additionally, Berwin Leighton Paisner LLP and Land Securities both asked that the Law Commission consider whether the maximum share of profit should "be expressly capped at a figure significantly less than one third".

Consultees opposing a cap on the amount of equitable damages

5.103 Several consultees expressly stated their opposition to any cap.

5.104 The Chancery Bar Association drew an analogy with a cap on the measure of damages available for breach by a tenant of its repairing obligation under section 18 of the Landlord and Tenant Act 1927. It pointed out that this cap has had a number of undesirable unforeseen consequences, has "introduced … a layer of unintended complexity and brought about the potential for hard cases", and concluded that it would have been better to leave it to the developing common law to deal with the problem.

5.105 In the Bar Council's view, "a cap would … be entirely inappropriate as it would prevent the scale of any project and the extent of any obstruction from being taken into account to determine the appropriate level of damages".

5.106 Herbert Smith Freehills LLP explained its opposition as follows:

> The notion that damages should not exceed the value of the dominant owner's interest is a beguiling one but does not stand analysis. For a start (and this is not our main point), following [*Stokes v. Cambridge Corporation* (1961) 13P & CR 77], the value of a right in ("dominant") land that if released would allow a neighbour to build profitably on his own land is part of the value of the dominant land. Therefore the point is circular.

In relation to a cap based on the value of the dominant property, it added:

> … the fact is that there are many very high value premises that would not be affected by such a cap at all, not because the level of damage is low, but just because the land that is suffering the damage is (say) a large unit. Whether a cap would be applied in one case or another would therefore, ultimately, be somewhat arbitrary.

It continued:

> There are also practical difficulties. To impose a cap a Court would first need to assess what, on each occasion, the value of the dominant land is, which would set the level for the cap. This would lead to a raft of expert valuation evidence being submitted and scrutinised. There might be argument as to what is meant by the dominant land. How far does it extend, say, in the case of one wing of a building on a large single registered title consisting of many perhaps inter-connecting buildings? The answer may occasionally be simple. But in practice we think that, most times, there may be no easy way of assessing fairly what the extent of the dominant property to be valued is, and what, therefore, the level of the cap is.

It concluded:

> … such a cap would be arbitrary, would create complexity/expense in litigation, and would serve no real purpose. It could, on the contrary, bar a dominant owner of a small plot from compensation to which it is fairly entitled and which would always have been available as a negotiated settlement to represent what that party would expect to be paid in return for its easement being extinguished.

5.107 Allen & Overy LLP specifically opposed a cap based on the value of the dominant property, giving the following as a hypothetical example:

> If two properties are next to one another, one worth £100,000 and one worth £1 million, and each suffer an equivalent injury (which on ordinary principles would be valued at say £500,000 each), the property with the lower value will have its damages capped at £100,000 whilst the property with the greater value will receive the full amount. Further, in a situation where a cut-back is shared equally between two properties, this will enable the property with the higher value to receive an even bigger share of the profits (in the above example, if the cutback were equally attributable to both properties' rights, the property with the higher value would be entitled to £900,000 in damages and the property with the lower value only £100,000). We do not consider that this is fair.

5.108 In an anonymous response, a consultee opposed a cap on profit sharing on the grounds that:

> … for large scale commercial developments the cap could impact dominant owners disproportionately giving the developer too strong a position and not accounting for the fact that the development could not proceed without the dominant owner's consent.

It concluded:

> … whilst a cap would be advantageous for providing certainty [as to the] maximum damages … there is not a clear solution at present as to how this can be achieved. There are too many variables to ensure the cap would be adequate in different circumstances e.g. location, type of site etc which could in turn lead to the cap being set too high and therefore effectively becoming redundant.

The use of comparables

5.109 It was suggested in the Consultation Paper that reform that provided for the greater use of comparable transactions when assessing equitable damages may not be a viable option, and indeed it was not popular with consultees; the Property Litigation Association mentioned that a "small proportion" of its members favoured this approach, but otherwise the response was negative.

5.110 Anstey Horne felt it would be:

> … extremely difficult to apply in practice because most rights of light transactions are confidential and even if the relevant figures were available it would [be] necessary to carry out a detailed analysis of the rationale and background to the settlement. Rights of light settlements can take many forms and there can be complex reasoning behind them.

> … Of course, a court might well seek to review comparable evidence from preceding court cases, although the circumstances may again be different and fortunately there are very few court cases one can refer to, certainly in modern times and where the question of damages might have been reviewed in detail.

Both Waterslade Ltd and the Association of Light Practitioners made similar points.

5.111 HDG Ltd made the point that:

> Comparable evidence of the likely hypothetical transaction is uniquely problematic in rights of light cases where the level of knowledge about the rights is so variable.

5.112 Herbert Smith Freehills LLP stated that:

> The practice area in which comparable evidence is best defined, qua property, is the field of reviewing commercial rents. Comparison works there for two fundamental reasons. One is the sheer volume of comparable evidence and the commercial property industry's ability to invent geared comparison where actual comparisons may be thin on the ground. The other is the related practice of applying valuation discounts and increments, where a comparison is similar but not the same; and the body of case law which has built up around it. This is a very mature practice. Applying it to the assessment of damage [in rights to light disputes] would, we think, be fraught with difficulty.

Other responses and suggestions from consultees

5.113 The remaining consultees either suggested alternative proposals for reform, or requested that other factors be taken into account in the assessment of damages beyond those to which the court currently has regard.

5.114 Neville Pentecost favoured a novel approach to equitable damages, by which a set rate would be payable per "light hour" lost, applying uniformly across the country. He argued that the number of light hours lost could "easily be calculated if the correct site surveys and studies are carried out over an initial period, and thereafter these are the set hours per location of which light is present".

5.115 Clifford Chance LLP favoured procedural reform, by giving the Lands Chamber jurisdiction to determine the amount of damages payable, and asked that the Law Commission consider this and the possibility that it be empowered to determine liability as well.

5.116 The Berkeley Group plc, Clifford Chance LLP, the City of London Law Society and the Property Litigation Association felt that, in assessing damages, the court should be able to take into account the use of artificial light in the dominant property prior to the obstruction. The City of London Corporation similarly felt that the purpose for which the dominant property was used and the importance of natural light for that purpose should also be taken into account.

5.117 Berwin Leighton Paisner LLP and Land Securities asked that the Law Commission provide guidance on how cutbacks are to be "shared" between different dominant owners where there are multiple claims arising from the same obstruction. It also wanted clarification on the assumptions made as to "yield, void periods, hurdle rates etc" when the court assesses equitable damages.

5.118 Derwent London plc suggested a different approach:

> … [the] starting point ought instead to be based on book values (with a departure from book values only in cases of severe impact to amenity e.g. for residential properties). This would shift the focus from the "perceived benefit" to the developer to the "actual impact" to the neighbour.

5.119 Herbert Smith Freehills LLP felt that a new approach to damages was required, whereby:

> (i) equitable damages should compensate for the diminution in value of the dominant land as a result of the loss of light, allowing for damages for loss of amenity and for financial losses caused by the infringement.
>
> (ii) restitutionary damages should only be awarded where the court is satisfied that damages should reflect a degree of benefit to the defendant, bearing the defendant's conduct in mind.
>
> (iii) Compensatory damages should be set at such figure which would reasonably be expected to be negotiated between notional owners of the servient and dominant lands, on the assumptions that each is willing to agree a fair and reasonable amount (compensating for the matters mentioned in (i), including the dominant owner's reasonable costs of the claim), that regard would be had to the actual use of the premises at the date of the claim and that the servient owner would proceed with the development within a timeframe reflecting that which applies in fact and that the dominant owner could not (even if it could in fact) injunct the development.

5.120 The Association of Light Practitioners did not think it would be equitable to move away from damages based on profit-share altogether. They suggested that the court:

> … should look at the range of figures that result from application of all the different methodologies available, and consider them "in the round" before forming a judgment as to what might be reasonable in all the circumstances and "feel right".

5.121 Anstey Horne made comments to the same effect.

Ambiguous responses

5.122 A few consultees gave responses that were ambiguous or not readily categorised.

5.123 The Compulsory Purchase Association's response stated that:

> The CPA draws the attention of the Law Commission to the basis of compensation (diminution in value of benefitted land) where an obstruction is statutorily authorised as against damages on a negotiation basis at common law. The CPA also draws the attention of the Law Commission to its own Report No. 286 - Towards a Compulsory Code: (1) Compensation at para 11.23, where it recommended that there should be a single claim for depreciation caused by the construction or use of public works in place of the claims in section 10 of the Compulsory Purchase Act 1965 and in Part I of the Land Compensation Act 1973.

It was not clear whether it felt these alternative methodologies were desirable or undesirable in the rights to light context.

5.124 As was the case with much of its response, Allen & Overy LLP presented a balanced response framed from two perspectives – that of a developer, and that of a dominant owner. The former would "welcome any change that saw the amounts in damages reduced", whereas the latter would "agree entirely with the comments made in the consultation paper".

5.125 Nigel Hamilton's response appeared to favour retention of some measure of profit-sharing, on top of damages based on diminution in value with an uplift. He set out a number of "Compensation Principles for loss of Right to Light":

> • A defined level of substantial compensation should be set.
>
> • With the basis of compensating for the loss of amenity and loss of value of the property impacted. And an element for inconvenience if the original occupant feels compelled to sell up and move.
>
> • This figure should be linked to the rate of inflation, with a sliding scale based on the amount of loss of amenity (% percentage light).
>
> • This can be calculated objectively using accurate surveying and calculation software.
>
> • I suggest this becomes a planning requirement, as part of planning applications and the costs should be borne by the developer.
>
> Damages:
>
> • If the developer is making a profit by infringing the rights of the other landowner there should be a formula linked to the future profit.
>
> • In addition damages should be a mixture of loss of value with an uplift, compensation for loss of amenity and any financial loss caused by infringement.

• The uplift should be higher if the impacted property is residential and the development is commercial.

Parasitic damages

5.126 Two consultees, Anstey Horne and the Association of Light Practitioners, raised an issue arising from of a body of case law that suggests that if there occurs an actionable obstruction to windows that enjoy rights to light that also obstructs other windows in a manner that is not actionable (for example because there is no right to light), then the dominant owner can claim for damage based on the injury to the whole building.

5.127 Anstey Horne said that it would "welcome clarity" on these "parasitic damages", but conceded that it is a complex matter, such that "it may be best left for the courts to consider on the individual merits of the case".

5.128 The Association of Light Practitioners suggested the following for taking account of parasitic losses:

i. Demote all parasitic losses to the makeweight zone in the equivalent first zone (EFZ) calculation and thereby value them at one-quarter of their full amount.

ii. Calculate a cutback to the scheme to avoid an actionable injury to the windows with rights and work out the EFZ loss in the usual way. Then add on the additional losses that result from reinstating the cutback portion of the scheme after demoting them to the makeweight zone.

CHAPTER 6
THE NOTICE OF PROPOSED OBSTRUCTION PROCEDURE

We provisionally propose that a court should not be able to grant an injunction to prevent or remedy an infringement of a right to light where the dominant owner has received a Notice of Proposed Obstruction and has not protected his or her right to an injunction in accordance with the procedure described in Chapter 6 and illustrated by the draft clauses at Appendix C of this Consultation Paper.

Do consultees agree?

[Consultation Paper, paragraph 6.47]

6.1 In Chapter 6 of the Consultation Paper we proposed the creation of the "Notice of Proposed Obstruction" ("NPO") Procedure, whereby a landowner that is contemplating building in a way that may obstruct the passage of light to a neighbour's property may serve a notice on that neighbour to that effect. Where the neighbour wishes to protect a right to light affected by the proposed obstruction by injunction, he or she must issue proceedings for one. Failure to do so within a certain time period would prevent the court from later granting an injunction in respect of the proposed obstruction. Nothing in the procedure would have affected the dominant landowner's entitlement to damages.

6.2 We explained that the aim of the procedure was to give greater certainty to landowners that a proposed development will be possible, and reduce delays by requiring landowners to make clear their intentions as regards the enforcement of their rights to light.

The responses

6.3 Broadly speaking, of the 52 consultees that responded to this question, around 80% were in favour of the NPO procedure in principle. There was a substantial divergence of opinion on the details of how such a procedure should work, which many consultees alluded to in their responses. Those comments are considered in the discussion of the next question we posed, at paragraph 6.21 and following below.

Consultees in favour of a statutory notice procedure

6.4 Many consultees agreed with our provisional proposal without more. Those that gave reasons focussed on the value of being able to understand from neighbours how far they are willing to go to protect their light and avoiding expensive delays. They complained that the current law enables the owners of rights to light to hold back on issuing proceedings for an injunction in order to drive up the price ultimately paid for their release by developers as the damage an injunction would potentially cause a developer mounts.

6.5 The Property Litigation Association explained that an "overwhelming majority" of its members supported the proposed NPO procedure, as there was "a strong feeling that ascertaining if a dominant owner is seeking an injunction early on in the development process is important". It concluded that:

> The NPO would resolve a lot of uncertainty as to adjoining owner intention and provide the developer with knowledge that it can build out its scheme without the risk of it being demolished/cut back.

6.6 Mount Anvil Ltd similarly stated that:

> We are in agreement with this proposal as it will provide further clarity regarding the injured parties' intentions and allow the developer to start considering appropriate risk mitigation strategies in the event that an injunction is likely to be sought. Equally it will help deal with the issue of unreasonable delays and ensure that the development process is not unduly stalled.

6.7 The Bar Council noted that the loss of an injunction would weaken the bargaining position of a dominant owner, but considered that:

> … that has to be balanced with the real problem in practice that the dominant owner openly objects and reserves all his rights and then conducts without prejudice negotiations to seek to agree a price, often very high and increasing as the development progresses, which negotiations are deliberately not resolved by the time that the building is nearing completion, so that the injunction threat can then be used at that stage to obtain even larger sums, with the apparently willingness to settle for a money payment being hidden by the privileged negotiations. This has become all too common, with the threat of an injunction being used to extract disproportionately large sums, when the owner is in reality happy for the development to proceed.

It concluded that the proposed procedure:

> … limits the dominant owner's bargaining position to a genuine bargaining position rather than a ransom position, which strikes the right balance between the parties competing interests.

6.8 Echoing this sentiment, HDG Ltd argued that the impossibility of knowing whether a dominant owner wants to prevent an obstruction or would be content with compensation is currently a "disincentive to resolving rights to light issues". The NPO procedure would, it felt, "reduce delay and encourage settlement whilst reducing litigation [as] both sides would know where they stand without needing to apply to court".

6.9 Helical Bar plc summarised the position neatly: "the problem with the current situation is that a dominant owner need do absolutely nothing and every day that goes past, the cost to the developer rises".

6.10 Capital & Counties Properties plc felt that, if the procedure is drafted to be practical and workable, it would "bring the biggest benefit for development" of all the proposals in the Consultation Paper.

6.11 The British Property Federation also expressed support and said:

> The ability of a dominant owner to use the combination of delay and threat of injunction to extract greater compensation is having a serious adverse impact on the development industry and in turn its important contribution towards growth.

It continued:

> A procedure that therefore does not deprive the dominant owner of rights, but through procedural rules, seeks to elicit the dominant owner's intentions in a timely fashion – a so called "put up or shut up rule" - would be very helpful and is something we support.

6.12 One consultee, in a confidential response, commended the procedure for striking a balance between "the competing pressures of encouraging the timely and cost effective development of land (with its wider economic benefits)" and the preservation of owners' rights.

Consultees opposed to a statutory notice procedure

6.13 Six consultees were opposed to the introduction of the NPO procedure.

6.14 Nigel Hamilton opposed the procedure on the grounds that "it will massively erode established rights and give a huge advantage to the developer who is infringing the established right to light". He explained that typically developers have far greater resources than the typical dominant owner. He did not consider it "fair or equitable" that:

> … a hypothetical large PLC, which is well resourced, effectively could demand an elderly person of very modest means to issue potentially very expensive and complex legal proceeding within a few months or simply accept their rights had been infringed.

He continued:

> How do we know that the developer will enter into serious negotiations first, to obtain the rights by negotiation, when they could simply mesmerise and legally intimidate the other party?

6.15 Despite this, Nigel Hamilton suggested that a NPO procedure could work fairly, provided it were modified such that where the dominant owner does not respond to a notice:

> … it will automatically be compensated for the loss of their rights using an agreed formula- and all costs to be born by the developer- perhaps in a form of binding arbitration or expert determination by a right to light surveyor.

6.16 Another consultee, in a confidential response, expressed concern as to "poor access to information [about property owners' rights] … especially as access to Legal Aid is being cut". The consultee emphasised that seeking professional help is difficult for a layperson, and time consuming.

6.17 Neighbourly Matters (Chartered Surveyors) opposed the procedure on the grounds that "once natural light is lost to an area that loss can be felt for hundreds of years". It contended that "a bully developer should never have the legal right to enforce darkness on a neighbour. The legal system should protect the weak against the bully".

6.18 The Chancery Bar Association stated that it was "neutral" as to whether reform was necessary. Even if that were not the case, the consultee expressed concerns about the Law Commission's proposal for reform. It cited several criticisms of the proposed scheme. In summary, these were that:

(1) Time limits in the procedure would necessarily be arbitrary, and generate litigation about when they have been missed, as well as hard cases where they are narrowly missed or missed with good reason (for example where the dominant owner is away or under a disability) and cause great hardship;

(2) Litigation about the correctness of the form and content of notices would inevitably ensue;

(3) Mistakes made in registration of NPOs as Local Land Charges will lead to claims against the public purse and against negligent advisers;

(4) Service of a notice will be regarded as a hostile act by the recipient, and may force litigation that would not otherwise have taken place;

(5) The scheme will add further complexity to an already difficult field, to the further disadvantage of those who do not have ready access to expert advice.

It concluded that:

> … we fear that the proposed notice procedure would prove to be a recipe for yet further complication, expense and litigation. We think there would be a real risk that it would create as many problems as it resolved.
>
> Additionally, we question whether it would be much used. We suspect that some of the considerations which we have mentioned may deter developers from making much use of the new procedure. Therefore, if and to the extent that there is a problem serious enough to be addressed, we question whether the notice procedure would achieve much towards addressing it.

Other responses

6.19 Rachel Benson stated that “I do agree with a statutory notice procedure being created to avoid delays and ransom situations occurring”, however she was against “this proposal for automatic compensation in all circumstances”, and felt that “an order for specific performance should be kept as an option”.

6.20 Hugh Macmillan expressed the view that “it would seem important to establish the principle that developers should incur the full cost of their development including compensating neighbours for any resulting losses”, and that “the legal process needs to help to quantify loss consistently and equitably”.

We would be grateful for consultees' comments on the detail of the Notice of Proposed Obstruction procedure as provisionally proposed, including:

(1) the form and content of the notice;

(2) the rules governing service of the notice;

(3) the third-party effect of the notice;

(4) responding to the notice by a counter-notice and issuing proceedings;

(5) multiple-notices and shelf-life; and

(6) cost recovery.

[Consultation Paper, paragraph 6.43]

The responses

6.21 Consultees offered a wide range of views on this question, many of which were expressed to be in response to the question above. Several had very detailed suggestions on multiple aspects of the proposed procedure, going beyond the six aspects mentioned in the question. For ease of analysis, we consider consultees' responses below under the heads set out in the provisional proposal.

The form and content of a NPO

6.22 Many consultees responded to this with comments on the details a dominant owner would need to make an informed decision whether or not to seek an injunction.

6.23 The Property Litigation Association and Clifford Chance LLP recommended that an NPO should contain such drawings as are "sufficient to enable an adjoining owner to know if its rights are to be infringed (though the adjoining owner may need rights to light surveying assistance in this regard)," agreeing with the position suggested in the Consultation Paper.

6.24 Anstey Horne stressed the need to:

> … avoid a situation where the recipient is in doubt as to impacts and is therefore almost forced to err on the safe side and elect to issue proceedings rather than declaring a willingness to accept compensation.

It therefore proposed that the NPO include as a minimum "a location plan clearly indicating the position of the development site and the dominant owner's property", and "the proposed massing compared to the existing massing on the development site in both the elevations seen by the neighbour and cross-sections". This would, in its view, be sufficient (combined with advice from a specialist rights to light surveyor) for the recipient to form an initial view.

6.25 Anstey Horne also considered that it might be helpful if the developer were to provide "a fully-detailed and accurate rights of light study, including computer modelling and sky factor contour plans showing the areas of loss on a room by room basis" – but, it suggested, only during the period after a party has served a counter-notice. The consultee continued by noting that such rights of light studies are commonly based on estimation and may overstate the extent of obstruction or otherwise mislead the dominant owner. It suggested that a more accurate survey would only be possible if the developer were given access to the dominant owner's property, which can be difficult and/or time consuming to organise.

6.26 Anstey Horne queried whether developers might be inclined to overstate the extent of the proposed scheme in order to cover all eventualities; to counter this, it wondered if "it might be better to limit the developer's ability to issue an NPO to a defined scheme with the benefit of planning permission". Although the consultee recognised that this may prove too restrictive.

6.27 Similarly, Mount Anvil Ltd felt that it would be worthwhile to show "some detail" as part of the notice, suggesting "a massing model outlining the nature of the proposed scheme and proximity to the affected aperture and perhaps comparison with the existing building". It did not feel that provision of further technical information would be of any use at the point the NPO is served, given that most recipients would not be experts in the field of rights to light.

6.28 Other consultees also preferred not to prescribe over-detailed or technical content. The Berkeley Group plc was "relaxed about the form and content of the notice", provided that "it is easily understood and not so complex that the courts can use technical defects in the notice to defeat its purpose". Nabarro LLP stated that it should suffice that the NPO contains "a drawing showing the outline of the intended development and spot heights/widths of each elevation". It argued that this "building envelope" would be sufficient to enable the dominant owner to seek professional advice as to the effect such a development would have on access of light to the dominant building.

6.29 The British Property Federation (with which Julian Barwick (Director, Development Securities plc) agreed) similarly felt that the notice need only show "the size and shape of the obstruction" and the developer should not have to have applied for, or obtained, planning permission, so that the developer retains flexibility as to when to serve the notice. The consultee also proposed that the notice contain a pro forma explanatory note to the dominant owner explaining what a right to light is and how the notice may affect his or her rights.

6.30 Chelsfield LLP appeared to favour a more stringent requirement. It noted that "it is important to consider that the dominant landowner has not invited the rights of light problem but is simply reacting to a situation created by the developer", and argued that the NPO should include the developer's "assessment of the injury" (such that the dominant owner would not be required to take professional advice in order to be able to decide whether or not to seek an injunction) together with an initial offer of compensation.

6.31 One consultee, in a confidential response, stressed the need for certainty as to the necessary details to include in an NPO so that developers know when is best in the development process to serve an NPO, but did not specify what those details should be.

6.32 The National Trust felt that there should be a "prescribed form of notice which explains clearly to the recipient in plain English how their property and rights may be affected and what action they should take if they wish to respond to the notice". It suggested that examples of standard form notices under the Landlord and Tenant Act 1954 might be illuminating.

6.33 Allen & Overy LLP presented views from both developer clients and dominant owners. From the former's perspective, it argued that indication of the extent of the interference in generic form (by a drawing or diagram showing the size of the obstruction) should suffice. However from the latter's perspective it argued that an NPO should also contain an explanation of what a rights to light claim is and how the NPO procedure works, as well as specific information about the effects of the proposed obstruction (including contour diagrams and EFZ tables indicating the light lost by floor area and percentage of each room adequately-lit to the one lumen standard before and after the proposed obstruction).

Service of an NPO

6.34 Consultees were anxious that NPOs should be served in such a manner that dominant owners will be aware of them in good time, given the consequences that follow where an NPO is not reacted to. Responses were generally favourable to the provisional proposal to model rules for service of NPOs on Part 6 of the Civil Procedure Rules and section 6 of the Acquisition of Land Act 1981.

6.35 The National Organisation of Residents Associations was concerned to ensure that a NPO is "properly received by the relevant party". Patrick Vaughan felt that a definition of "dominant owner" would be required so that a developer may know on whom to serve an NPO.

6.36 The Property Litigation Association and Clifford Chance LLP agreed with the Consultation Paper proposal that the NPO should need to be served only on those with a legal interest in the dominant land. They also noted that a developer of the servient land frequently has no interest in the land and so proposed that "…provision should be made for a developer to be able to serve on behalf of an owner of development land, and with the owner's authority".

6.37 Malcolm Hollis LLP also noted that developers did not always own a sufficient interest in the land to serve an NPO, however it suggested that the problem could be overcome by handling the service of NPOs in the developer's contract with the servient owner to acquire an interest in a property.

6.38 Addressing when it should be possible to serve an NPO, the Property Litigation Association and Clifford Chance LLP felt that this should be a matter for the developer to decide on. In contrast, Hunters (solicitors) was opposed to leaving the timing of service up to the developer, arguing that no notice should be served until:

> … there is a realistic prospect of the development taking place, in the sense of either having planning permission or... a planning application has been favourably considered by the relevant committee…

6.39 The Berkeley Group plc were keen that rules relating to service should be "relatively straightforward". It stated that a developer should be required to leave a notice at the dominant property for the benefit of occupiers who may not have registrable interests.

6.40 In contrast another consultee, in a confidential response, urged that the NPO should have to be served personally by someone obliged to explain in detail how the recipient can seek help.

6.41 The City of Westminster and Holborn Law Society expressed concern that a developer might be unsure on whom it should serve a NPO – whether on all properties in close proximity, or just those that might be most seriously affected by the development. It suggested that where it is difficult to ascertain the owner or lessee of any part of the dominant property, the developer should be empowered to apply to the court for an order for "substituted service" of the notice, for example by advertisement or by affixing copies to a door.

Service of multiple NPOs

6.42 The suggestion in the Consultation Paper that a developer should be limited to serving one NPO in any five-year period was criticised by many consultees, who considered it unduly restrictive.

6.43 The Property Litigation Association and Clifford Chance LLP expressed concern that this restriction would simply drive developers to overstate the size of the development to protect against all eventualities, fearful that stepping outside of the envelope will leave it unprotected. They continued:

> What if developer A becomes insolvent and the site is sold to developer B who wishes to build a different and higher scheme? Effectively, developer B could not serve an NPO until 5 years had passed from service of the original NPO. Presumably the price that B pays for the site will reflect the effect of the NPO. However, it does seem to unnecessarily and unwisely restrict what a subsequent developer may want to do with the property.

6.44 As regards the concern highlighted in the Consultation Paper that a dominant owner should not face pressure to make continual applications to the court to seek an injunction and the risk that it may be worn down by repeated service of NPOs, the Property Litigation Association and Clifford Chance LLP pointed out that the service of each NPO would involve the developer in substantial expense, and this would naturally deter repetitious and cynical service of NPOs.

6.45 Similarly, Mount Anvil Ltd were opposed to a limitation on the number of notices that could be served in a five-year period, stressing the importance for developers of being able to take account of changes to the scheme which may occur subsequent to service of a NPO, or total revision of the scheme necessitated by unforeseen circumstances.

6.46 Anstey Horne was also opposed, explaining that it may not be practical; development schemes are often revisited and amended, and a site may be sold to a purchaser who considers it appropriate to alter the massing. However, it suggested that a compromise of two or three years may be a fairer solution.

6.47 The Berkeley Group plc took the view that restricting service of notices to one every five years would "undermine the efficacy of the reforms the Law Commission is proposing". It continued:

> It is highly unlikely developers will bombard dominant owners with multiple notices or serve notices on a whim. The costs of serving notices and negotiating will be high and there is no reason a developer would incur such costs without good cause. There is no evidence that serving notice of a number of planning applications deters planning objectors and we see no reason why service of Notices of Proposed Obstruction should be treated any differently by the recipients.

It concluded:

> If additional notices can only be served if the developer withdraws previous notices and the developer is made responsible for all professional fees thrown away by the dominant owner this would be a fair compromise and prevent the service of notices on a whim.

6.48 Chelsfield LLP argued "that multiple notices should be avoided" but felt that "a 5 year limitation to one notice is rather harsh". It continued:

> There may be factors outside the developer's control that influence the design of a scheme (planning for example). Two notices in a five year period is more reasonable.

6.49 HDG Ltd shared the concern that the single notice restriction would encourage developers to exaggerate the size of the proposed development to give "room for manoeuvre". It agreed with Chelsfield LLP that two notices within a five-year period would be reasonable.

6.50 Transport for London also felt it likely that the restriction would lead to a developer serving a NPO that "future proofs" any potential development. This could result in the NPO identifying a much larger and potentially more invasive development, thus triggering premature and possibly unnecessary litigation that a more realistic and accurate notice might have avoided.

6.51 Another consultee, in an anonymous response, considered that "giving only one change is not reflective of the current challenges developers face with planning". It proposed that there should be the ability for the developer to make a case for issuing another NPO if an enlargement of the obstruction is "reasonable and unforeseeable or unavoidable".

6.52 The UNITE Group plc said that "…most planning permissions are extant for three years. It makes no logical sense to us, therefore, why it is proposed a developer should be bound by a particular NPO served for a five year period". It continued:

> Development plans often change. This could be for multiple reasons – some of which are beyond a developer's control. We would suggest the removal of this fetter altogether.

6.53 Helical Bar plc saw no reason to limit the number of NPOs that may be served in any given period, provided that the servient owner covers the costs to the dominant owner incurred in dealing with each notice.

6.54 Capital & Counties Properties plc urged us "to consider further whether developers can repeat the NPO procedure". It favoured either no limit, a much shorter restriction, or a provision whereby a further NPO can be served whenever a revised planning permission is obtained.

6.55 The British Property Federation (with whose response Julian Barwick (Director, Development Securities plc) agreed) also found the proposed restriction "constraining" and "unnecessary", and again underlined the likelihood that it would simply result in NPOs being served that exaggerate the size of the proposed obstruction. It doubted that servient owners or developers of the servient land would be likely to inundate the dominant owner with NPOs. Provided that the notices "cannot run concurrently and therefore cause confusion", and that the servient owner/developer bore the dominant owner's costs in each instance, it was satisfied that there was no need for the restriction.

Change of development schemes after service of a NPO

6.56 By and large consultees were happy with the position proposed in the Consultation Paper, whereby a developer would be able to modify its construction as it saw fit without having to serve a fresh NPO, provided that it did not create any greater obstruction of the dominant owner's rights than that outlined in the NPO.

6.57 The British Property Federation, for example, said that:

> We support the [proposal] that where a developer's plans change and this leads to a lesser infringement of the dominant owner's right to light, the NPO will remain valid. However, where the plans change and lead to a greater infringement the obstruction will no longer be covered by the NPO.

6.58 However, other consultees felt that there should be more flexibility. The Property Litigation Association and Clifford Chance LLP both suggested there should be tolerance of a 500mm deviation from the NPO outline, and that equally the erection of building features such as railings that have no material impact on the adjoining owners' light but which infringe the strict NPO envelope should be acceptable.

6.59 Malcolm Hollis LLP suggested that there could be tolerance of any greater change that does not "have a material worsening effect".

Registration of an NPO and impact on third-parties

6.60 Most consultees appeared to agree with the proposal to register a NPO as a Local Land Charge without more. Those who explicitly did so included the Property Litigation Association, Clifford Chance LLP, Anstey Horne, Mount Anvil Ltd, and the British Property Federation.

6.61 Land Data gave a detailed response highlighting certain ramifications of the provisional proposal, including a discussion about its potential administrative and cost impacts.

6.62 Acknowledging the proposal that registration of a NPO would be effective against the addressees' successors in title, the Law Society felt that:

> It is unclear from the consultation paper whether existing tenants of a building would be covered by an NPO served on the owner or whether they need to be served separately. If the latter, this could pose administrative and practical difficulties, particularly where a building has multiple tenants. If an NPO does not cover existing tenants, it is unclear how this procedure would help a developer to avoid the risk of injunctions being brought in the future by the current occupiers of a building.

6.63 HDG Ltd questioned whether local land charge registration was appropriate, and whether more formal title registration would not be preferable. It explained:

> Whilst it is right that the local land charges register will be searched the significance of the notice may not be understood, particularly bearing in mind its time limits. If local land charges registration is decided on we would suggest a warning be inserted by way of informative.

6.64 The Council of HM Circuit Judges agreed with the proposal, but pointed out that the draft section 1(5) on registration of a NPO should make clear that registration should only be possible after service on the dominant owner.

6.65 In contrast, Hunters (solicitors) were opposed to the registration of NPOs as local land charges. It said:

> If need be, they can be registered at the Land Registry, but we wonder how the Law Commission proposals can be relevant to future owners with different needs and wishes to those of a former owner who received the initial notice quite some time previously. Notices under the Party Wall etc Act 1996 do not require registration, partly because of the particular function and partly because timings are short.

6.66 The City of Westminster and Holborn Law Society felt that "Land Registry (or Land Charges Registry)… is the proper place for notices and charges as to easements and other private property rights".

The "shelf-life" of an NPO

6.67 The proposal to limit the time during which the NPO protects against the grant of an injunction to a five-year period was supported by a number of consultees. For example, the City of London Law Society felt this period to be "about right" and Helical Bar plc said that it "seems long enough".

6.68 Other consultees felt there should be a saving provision of some sort. One consultee, in a confidential response, suggested "a proviso… to protect a servient owner that has substantially implemented the scheme to which the NPO relates". Herbert Smith Freehills LLP similarly said that:

> For the very largest developments five years may not be long enough and we wonder whether there needs to be some form of saving provision protecting a developer who has legitimately followed the NPO process but hasn't fully completed the 'obstruction' and therefore faces the risk of an injunction being resurrected.

6.69 Others were opposed to any "shelf-life". The Association of Light Practitioners, Berwin Leighton Paisner LLP, Land Securities, the City of Westminster and Holborn Law Society and Derwent London plc all felt that the loss of the potential for an injunction should be permanent. As Derwent London plc explained:

> … we do not see why there should be a "shelf-life" on the injunction immunity of five years. This does not provide sufficient certainty. We do not see why the right to an injunction should revive simply because of the "chance" occurrence that the development does not proceed. The neighbour has demonstrated its lack of concern about its rights of light and that position should remain.

The cost of responding to an NPO

6.70 Most consultees were content that the developer should bear the reasonable costs incurred by the dominant owner in responding to a NPO.

6.71 Anstey Horne agreed that the developer should pay the reasonable legal and surveying fees of the dominant owner, reasoning that:

> If no such undertakings are given there is less likelihood of negotiations progressing promptly and in truth that would place an unreasonable and unfair burden on the dominant owner. Therefore, we think similar provisions need to be applied to the NPO procedure so that proper legal and surveying advice can be taken.

6.72 It continued by explaining that the developer's liability must not be unlimited in this respect. As a cap would be inappropriate, given the variable amount of work required from one instance to another, Anstey Horne concluded that a "reasonable fees" limitation would be appropriate. The costs of any eventual litigation would be dealt with by the courts in the usual way.

6.73 Mount Anvil Ltd also considered "some form of cap" on costs to be "essential", also favouring a limitation based on what sum is "reasonable". Chelsfield LLP, the British Property Federation and Julian Barwick (Director, Development Securities plc) and a consultee that wished its response to remain confidential all agreed with this approach.

6.74 Allen & Overy LLP recommended that the developer should be required to pay a sum of money up front to cover the dominant owner's costs, suggesting "up to £5,000 plus VAT". It considered this fair because "the need to incur such costs arises out of the developer's intention to infringe the adjoining owner's light". It also recommended that the court be able to take into account the notice procedure as a factor when considering the costs of litigation under the civil procedure rules.

6.75 The City of Westminster and Holborn Law Society indicated that funds must be made available to the dominant owner "at the time they are to be incurred", suggesting that "a procedure akin to that used in party wall matters" should be implemented. It went further than the other consultees in suggesting that the developing party should also be liable for all litigation costs later incurred, if necessary, and that costs would follow the event only where the dominant owner "had acted unreasonably in opposing the claim".

6.76 In contrast, Nabarro LLP pointed out that it is already established practice for the developer's solicitors to give an undertaking for the dominant owner's reasonable costs incurred in resolving a dispute. Developers are "aware that if they do not give undertakings, the dominant owner may not be willing to discuss settlement and the conduct of the developer in refusing to give an undertaking can be taken into account by the court if the matter did come before it", Nabarro LLP felt that costs would normally be resolved fairly without the need for compulsion.

Applicable time limits

6.77 There was little consensus as to when a person served with an NPO must respond to it, although a not inconsiderable number of consultees felt the total of eight months proposed in the consultation paper was too long.

6.78 Those that agreed with the time limits as proposed in the Consultation Paper included the City of London Law Society, the British Property Federation, and Julian Barwick (Director, Development Securities plc).

6.79 The Property Litigation Association felt that the time limits proposed were satisfactory, but recommended that provision be made to permit extension by mutual agreement. It explained:

> … it is often the case that developers and adjoining owners spend a reasonable amount of time negotiating the terms of a settlement deal whereby the adjoining owner releases its rights in return for a compensatory payment. These negotiations can become protracted. Therefore, we would propose that provisions be included in the proposed legislation that allow for the developer and the adjoining owner to mutually agree in writing to extend the deadline for the adjoining owner being obliged to apply for its injunction. The mutuality provisions means that both parties would have to see it as being in their interests to extend time and so there remains an incentive to complete a deal without the adjoining owner having to worry about its Court application if there is a reasonable prospect of a deal being completed.

6.80 Anstey Horne agreed that eight months was the right overall time limit, but that the initial response period of four months (before a dominant owner must serve a counter-notice or commence litigation) proposed in the consultation paper should be reduced to two or three months, leaving five or six months for negotiations after service of a counter-notice. This was because it felt that the relatively simplistic information provided in the NPO means that there should not be much for the dominant owner to have to consider and investigate in the first period, and that a longer period after service of a counter-notice for negotiations and detailed surveying (or a speedier commencement of proceedings if the dominant owner was set against negotiation) would be more useful.

6.81 Those who felt the time limits proposed in the Consultation Paper were too long included HDG Ltd, who felt that "the cumulative eight month period for the notices is excessively long and should be halved in duration". Malcolm Hollis LLP also felt that the period "should be shortened, particularly the initial notice period which seems too long" and that "an eight month wait before the development can be commenced is a burden to the proposed developer".

6.82 Similarly, the City of Westminster and Holborn Law Society deemed the timing "not realistic for practical operation".

6.83 Berwin Leighton Paisner LLP and Land Securities both pointed out that the Civil Procedure Rules give a claimant four months from issue of a claim to serve particulars on the defendant. On top of the eight months afforded by the NPO procedure this could leave the developer in an uncertain position for up to 12 months. They felt this was excessive, preferring that the NPO procedure should only give the recipient a maximum of six months to respond.

6.84 Other consultees' responses picked up on a statement made in the Consultation Paper, at paragraph 6.9, where we said that:

> We envisage that [the NPO procedure] will be used as a last resort following extensive negotiations which have failed to result in agreement.

6.85 Capital & Counties Properties plc said that if the NPO procedure was indeed only to be used as a last resort, then the eight-month time frame was too long, since "in practice negotiations will already have been taking place, and so these time periods need to be reduced to prevent further delay to a development". It went on to say that:

> If a developer can serve an NPO early on in the planning and/or negotiations stages then the four month periods seem suitable.

6.86 Nabarro LLP felt that if an NPO is not to be served until the developing party has exhausted all discussions, it would likely be "too late for the NPO to achieve its stated objective". It explained:

> The end of that 8 month period (on top of extensive negotiations) has the potential to be seriously prejudicial to the developer who only finds out that an injunction is a reality when it is likely to be very close to wanting to commence the development. If the developer does not want to fight the injunction (knowing there is a serious risk a court will protect the right of light), it may be too late for it to redesign the development without great expense.
>
> … On top of that, there is the delay from the issue pending a trial.
>
> … Therefore, before a developer knows the final outcome, they may have to:
>
> (a) carry out extensive negotiations,
>
> (b) then wait another 8 months before he or she knows whether there is to be an injunction claim, and
>
> (c) wait for the trial to be heard.
>
> … The stated objective of the procedure is to prevent the injunction threat being held on to until the last moment, but there is a real risk… that this will still be the outcome under the NPO.

6.87 It pointed out that giving the dominant owner four months within which to state that an injunction would be sought would be redundant if extensive negotiations had already taken place, as by that point the dominant owner would necessarily have made it clear that it was not prepared to settle. Similarly, it would be safe to assume that the dominant owner would have had sufficient time in which to seek professional advice by this point.

6.88 For this reason, Nabarro LLP suggested that a total period of six months was appropriate. If on the other hand a developing party were permitted to serve an NPO at an earlier juncture, it was content that eight months would be an appropriate time frame.

Counter-notices

6.89 In the Consultation Paper, we proposed that a dominant owner should have to respond to an NPO by serving a counter-notice (which would extend the time for negotiation), or commence litigation for an injunction within four months of registration of an NPO as a local land charge. Failure to do so would result in a court having no power to grant an injunction in respect of the obstruction (or a lesser obstruction) set out in the NPO. We received little feedback.

6.90 The Property Litigation Association expressed concern that once a counter-notice is served, it becomes clear that the dominant owner is likely to seek an injunction and, at this point, the developer could immediately apply for a declaration, accelerating litigation and avoiding the second four-month period provided for.

6.91 Herbert Smith Freehills LLP queried to what extent a counter-notice, once served, would bind the dominant owner's estate. It highlighted a potential difficulty where interests in the dominant estate merge, following service of contradictory counter-notices – for example, where a tenant of the dominant property served a counter-notice but the landlord had not, prior to the tenant purchasing the freehold. One consultee, in a confidential response, also picked up on this, asking for clarity as to which notice would prevail.

Provision of information by a developer to third parties

6.92 Few consultees expressed views either for or against suggestions in the Consultation Paper as to a developer's duties to provide information about the proposed obstruction to parties other than the dominant owner.

6.93 The British Property Federation felt it would be "fair and unlikely to be unduly burdensome" if a developing party were required to provide a copy of the information contained in the NPO to any person who reasonably requests it and whose rights might be affected by it.

6.94 One consultee, in a confidential response, on the other hand felt that clarity would be needed as to who exactly is able to make a request for such information in order to avoid abuse. It suggested that only those with an interest in the dominant property capable of benefitting from a right to light should be eligible.

Keeping the dominant owner informed of changes to a development scheme

6.95 The proposal that a developer should be obliged to inform the dominant owner of proposed changes to a development scheme deviating from that outlined in the NPO met with disapproval from Nabarro LLP, which said that:

> We disagree however that the NPO procedure should impose a statutory duty on the developer to keep the dominant owner informed of changes to its plans (with an automatic cost consequence), as developers are likely to see this as onerous and any such duty is likely to be regarded as a powerful disincentive to following the NPO procedure. In any event, such a statutory duty is unnecessary in view of the current ability of the court to take conduct into account when awarding costs.

6.96 The City of London Law Society similarly stated that greater precision as to how often and by what method of communication a developing party would be expected to contact the dominant owner would be necessary.

Damages in lieu of an injunction

6.97 A number of consultees took issue with the proposal that once the court is no longer able to grant an injunction by operation of the NPO procedure, it may still award to the dominant owner damages as if an injunction were still a possibility.

6.98 However, the intention was not to give to dominant owners a guarantee that equitable damages would be awarded, only that they would not lose the potential if no injunction was available solely as a result of the NPO procedure.

6.99 For example, Nabarro LLP queried why a dominant owner who decides that it does not want an injunction under the NPO procedure should automatically be entitled to claim equitable damages whereas a dominant owner who is not served with an NPO has no such entitlement.

6.100 The Association of Light Practitioners was "concerned" that preserving the right to damages in substitution for an injunction would make negotiation difficult as:

> A neighbour may choose not to negotiate with a developer if his lawyers tell him that he is better off waiting until an NPO is served. He then knows that his claim for damages in lieu, and maybe therefore a share of profit, is established or at the very least preserved, without having to go to the risk of applying for an injunction. We still see examples in many smaller cases where the parties do agree compensation based on book value or a multiplier of book value.

6.101 Berwin Leighton Paisner LLP had similar concerns, stating that:

> … the provision preserving the right to claim damages in lieu of an injunction after a notice is served (whether or not it is objected to) may have unintended consequences. This is materially worse than the current position where if a neighbour remains silent and fails to act for a period of one year after the obstruction has occurred, any rights under the 1832 Act (whether to an injunction or to damages) are lost. A similar failure to act in response to an NPO on the other hand means that although the right to an injunction is lost, the right to damages remains.

Obliging the dominant owner to provide evidence of any right to light

6.102 A number of consultees felt that there should be an obligation on the dominant owner to provide information to the developer detailing the extent of the right to light claimed and justifying this position.

6.103 Malcolm Hollis LLP stated that any potential claimant must provide evidence to substantiate the existence of a right to light within the period prior to which a counter-notice must be served, or litigation commenced. It went on to suggest that if it is later shown that the claimant did not in fact have the benefit of the easement claimed, it should have to compensate the developer for the loss caused by the delay to the development.

6.104 The Berkeley Group plc proposed that such a requirement should apply to "prevent spurious claims and clear the way for fair and sensible negotiations".

6.105 Herbert Smith Freehills LLP said that:

> We believe it would be consistent with the principle (if principle it is) of applying responsibility to land ownership if any person who might enjoy a right to light were placed under a statutory duty to respond to a servient developer's interrogative about whether, how, when and what right to light the person enjoys over any land. It could not go further than a statutory duty and a warning that failure to respond would be an ingredient of 'claimant's conduct'.
>
> …We cannot think of a material downside to that proposal. Nor do we think it would necessarily pave the way for the ideal of a considered and selective approach to the service of NPOs. The ability for a developer to enquire first on a formal basis would, though, set the scene for a responsible, constructive and proportionate fact finding climate in the development process.

Other concerns and suggestions

6.106 Consultees outlined a range of other concerns and suggestions in their responses outside the categories discussed above.

6.107 In the Consultation Paper we remarked (at paragraph 6.9) that the purpose of the NPO procedure is not "to enable the developer to flush out potential claimants". Several consultees objected to this, on the grounds that such use of the procedure would be very useful to developers in determining which adjoining owners were seriously interested in litigating to protect rights to light they might enjoy. The Berkeley Group plc said that not allowing this would be a "lost opportunity", as:

> One of the problems presently encountered is that it is not always possible to identify owners with a potential claim, particularly where such claim may arise because of unusual circumstances eg unusually deep rooms or rights enjoyed by occupational tenants who may have accrued rights to light by prescription over their years as tenants. These tenants could be residential occupiers of affordable housing or commercial tenants on short leases that are frequently renewed under the Landlord & Tenant Act 1954. Such interests are not apparent on an inspection of the Land Registry titles.

6.108 The City of London Law Society, Land Securities and Berwin Leighton Paisner LLP also alluded to the value of the procedure for "flushing out" claimants in their responses. The City of London Corporation suggested that the Law Commission should not make any recommendation as to the intention that underlies the use of the NPO procedure, leaving open the possibility to use it in this way if a developer so desires.

6.109 HDG Ltd and Chelsfield LLP advocated provision be made for a developer to be given a right to (supervised) access to the dominant property in order to inspect for evidence of any rights to light claimed. The latter explained that:

> This is important to assist the developer in understanding the actual impact on the dominant land owner's property and maybe change the development plan is to avoid sensitive rooms etc.

6.110 The City of London Law Society suspected that the NPO procedure might be cumbersome in the case of dominant properties occupied by a great many tenants, all of whom would potentially have to be served with a NPO individually. It queried whether there might be scope for a streamlined process in such cases.

6.111 The Law Society felt that the NPO procedure did not go far enough to encourage the parties to reach agreement without court intervention. It suggested that there should be a requirement for the parties to try mediation in the first instance, as:

> … it would help to air the parties' issues and may help to remove the obstacle of one party holding the threat of litigation over the other in order to try and prevent a development.

6.112 Similarly, Deloitte Real Estate suggested that the developer could be obliged to fund a process of non-binding mediation or arbitration to better inform the parties of the likely outcome of (more time-consuming and costly) litigation.

6.113 The Property Litigation Association suggested that the Lands Chamber of the Upper Tribunal could be empowered to adjudicate on disputes concerning the validity of notices and observance of time limits, and to extend time limits in appropriate circumstances – for example, where insufficient information is provided by a developer in a NPO.

6.114 Two consultees expressed concerns about the means by which the NPO procedure would be implemented. Whilst supportive of the procedure in principle, both John McGhee QC (Maitland Chambers) and Hunters (solicitors) felt that as many details of the procedure as possible should be set out in primary legislation, rather than being left to subordinate legislation. This was so that, in the words of John McGhee QC (Maitland Chambers), the Law Commission can:

> …be sure that a regime can be created which will appropriately balance the rights and interests of developers and adjoining owners. I do not think that this has yet been demonstrated and whilst it may be possible to do so the appropriate scrutiny ought to take place at the stage of formulation of primary legislation.

6.115 The Property Litigation Association and Clifford Chance LLP both wondered what would happen where a dominant owner has enjoyed a right to light for less than 20 years prior to service of a NPO. They queried whether the NPO might have the same effect as a light obstruction notice under the Rights of Light Act 1959, thereby preventing the dominant owner from acquiring a right to light by continued enjoyment.

6.116 Some consultees expressed concern that the procedure would lead to a marked increase in the volume of rights to light litigation. Anstey Horne anticipated that when served with an NPO most dominant owners would declare that they are prepared to seek injunctive relief to protect their rights to light in order to protect their negotiating position, and that most solicitors would advise them to do so. It suggested that one way of avoiding legal proceedings might be:

> …to ensure that if they were prepared to express a willingness to accept money, it is clear that their compensation claim could be based on any of the existing available methodologies, including developer's gain and effectively what the two parties might reasonably have negotiated if the injured party had the ability to obtain an injunction to stop the infringement taking place. In that way their negotiating position would not be prejudiced and their compensation claim should not be diminished in any way by expressing a willingness to accept money from the outset.

6.117 Berwin Leighton Paisner LLP feared that the procedure would:

> …lead to the proliferation of a new breed of specialist solicitors and rights of light surveyors who will likely advise impacted neighbours on an aggressive basis, quite possibly on CFA or other similar arrangements. This may lead to the entrenching of positions and further complexity, rather than the simplification that we all seek.

We would be grateful for consultees' views on the suitability and practicability of limiting the Notice of Proposed Obstruction procedure to use in relation to rights to light benefiting commercial premises only.

[Consultation Paper, paragraph 6.45]

6.118 In the Consultation Paper we queried whether it might only be reasonable to expect commercial landowners to issue proceedings to protect their rights to light.

6.119 We therefore asked whether the NPO procedure should be limited to rights to light benefitting commercial premises only. However, we noted that defining "commercial premises" may be difficult, and a change of use of a dominant property could create problems.

The responses

6.120 Consultees were overwhelmingly opposed to limiting the NPO procedure to commercial premises. Of the 32 consultees that responded, 31 were opposed.

Consultees in favour of limiting the NPO procedure to commercial premises

6.121 Allen & Overy LLP, in a response that deliberately considered both sides of the argument, was of the view that it would not be fair to apply the proposed procedure to residential premises. The fact that there would be borderline cases and difficulties of definition "does not affect this general principle". It explained that:

> It is wholly unfair that the procedure puts the burden onto adjoining owner of taking action, first by objecting, and secondly by issuing proceedings, if they wish to retain the ability to claim an injunction. Why should adjoining owners have to incur the time and cost of taking steps to protect their rights (which many unsophisticated adjoining owners will find deeply intimidating), especially at an early stage (notices could be served up to 5 years before developments actually commence).
>
> … The main situation where the procedure will be effective will be in relation to unsophisticated owners, who will accordingly be unfairly prejudiced by the procedure. … In addition, small businesses and unsophisticated persons will find the concept of having to commence proceedings very intimidating and may not be able to find the money for legal costs.

6.122 Hunters (solicitors) stated that the NPO procedure "should be limited to commercial premises as not being suitable and practicable for rights to light enjoyed by residential premises in particular, in contrast to the position with notices under the Party Wall etc Act 1996".

Consultees opposed to limiting the NPO procedure to commercial premises

6.123 Other consultees were strongly opposed to limiting the NPO procedure to commercial premises, fearing that it would undermine the utility of the reform.

6.124 Dr Peter S Defoe (calfordseaden LLP) commented that "the vast majority of rights of light cases involve residential properties and these can be very complex with multiple owners in a very small area", and that the procedure would solve many issues if it applied equally to residential properties.

6.125 The Council of HM Circuit Judges felt that such differences as exist between commercial and residential ownership were not sufficient to justify "denying a servient owner wishing to develop his land the opportunity to avail itself of the protection potentially afforded by the proposed NPO procedure". It concluded that the court's wide discretion as to costs should be sufficient to reflect any such differences.

6.126 The Property Litigation Association's response focussed on the need for certainty, which would be greatly hindered if the procedure were not to apply to "residential" premises – which it felt was a difficult category to define. It also highlighted the impracticality of the scheme where an affected property was of mixed-use, containing both residential and commercial properties, and the problems that might arise if the use of a property were to change from commercial to residential after service and registration of a NPO.

6.127 Additionally, whilst it recognised that bringing litigation may be a more daunting process for many residential owners, the Property Litigation Association felt that the uncertainty created by leaving open the possibility of an injunction in all cases involving residential property:

> … is disproportionate to requiring the residential owner to enforce its rights by applying for an injunction within a time frame that is not unreasonable and which accords with the equitable principles governing when injunctive relief should be awarded.

6.128 The City of London Law Society also underlined the difficulty a limited NPO procedure would have when applied to a mixed commercial- and residential-use building commenting that the procedure will fail to provide greater comfort to developers in relation to injunctions if it cannot be used in respect of residential properties. It continued:

> We accept that perhaps some residential tenants may not be best placed to respond promptly to the notice, but the same point could be applied to some commercial tenants, not all of whom are large and wealthy corporations.
>
> We consider that no convincing argument has been presented for limiting the notice procedure to commercial premises.

6.129 The Berkeley Group plc emphasised the rapid increase in development of residential properties in city areas over the last 10 to 15 years; excluding such properties from a reformed rights to light regime would be:

> … missing an opportunity for comprehensive reform and storing up problems for the future that could compromise the ability to bring forward city sites for further regeneration in the future.

6.130 The Bar Council echoed these views and added that "the onus would also be upon the developer to correctly define his neighbours and he may not have access to the relevant information, which would allow him to do this".

6.131 The City of Westminster and Holborn Law Society agreed that restricting the NPO procedure to commercial premises would be undesirable, however it outlined a number of concerns with including residential premises within the scope of the NPO procedure. In summary, the consultee felt there would be:

(1) difficulties in ensuring the notice gets to the right person – for example, a landlord may be concerned to protect the right to light whereas the tenant occupier is not; and

(2) difficulties in ensuring unsophisticated parties understand the significance of the NPO and the extent of the obstruction.

CHAPTER 7
BRINGING RIGHTS TO LIGHT TO AN END

We would be grateful for consultees' views on whether the law of abandonment through alteration of apertures should be reformed and, if so, how the current law could be improved.

[Consultation Paper, paragraph 7.48]

7.1 An easement, such as a right to light, can be extinguished where the dominant owner ceases to use it, and intends to abandon it permanently. We explained this in detail in paragraph 2.47 and following of Chapter 2, and paragraph 7.4 and following of Chapter 7 of the Consultation Paper.

7.2 Questions as to whether a right to light has been abandoned arise where a window benefitting from a right to light has been blocked up, altered or moved, or where the building in which it lies is demolished and a new building constructed in its place. The right to light may survive such alteration or movement if the new aperture receives "substantially the same light" as the previous aperture.

7.3 This test appears simple, but is difficult to apply in practice. We invited comment on whether the law might be improved.

The responses

7.4 Nearly forty consultees offered views on this matter. Twelve were opposed to any change. Nine favoured a new test for whether a right to light survives an alteration to the aperture to which it attaches. Five desired a registration requirement along the lines of that considered at paragraphs 7.40 to 7.43 of the Consultation Paper; a few favoured such a measure in addition to other reforms. Two favoured a prohibition on transference of rights to light altogether. Six felt that non-user for a given period should cause the right to be deemed abandoned; a further consultee favoured this in addition to other reforms. One consultee suggested introduction of a new protocol to deal with the issues. Finally, a few consultees gave ambiguous feedback.

Consultees opposed to change

7.5 These consultees were generally of the view that although the present law is problematic, it is too difficult to formulate changes that would be sure to improve matters; accordingly it is best left to the courts to develop the law.

7.6 The Council of HM Circuit Judges felt that it is "[not] possible to formulate any proposal that would represent a clear improvement upon the present law". Similarly the Royal Institution of Chartered Surveyors was of the view that "it is difficult to imagine how such a technical matter can be better governed in a revised but acceptable form".

7.7 The UNITE Group plc and Travis Perkins plc did not feel there was a problem, stating that "we have no issues with the operation of the present law of abandonment".

7.8 Andrew Francis (Serle Court Chambers) neatly summarised the point:

> In any event the issue is an evidential one (turning [on] the extent to which the old and new lights coincide) so no rule of law, or even percentages could really help here; the "pragmatic attitude" referred to at para. 7.46 [of the Consultation Paper] is really the best way of summing up the present position and the lack of any need for reform.

Consultees in favour of a new test for when a right to light can survive the alteration of an aperture

7.9 Conversely, several consultees felt that it should be possible to formulate a clearer test and provide greater certainty.

7.10 The Property Litigation Association noted that a majority of its respondent members supported a new statutory definition of when rights to light survive the alteration or demolition of an aperture. It suggested:

> As a first principle, redevelopment where there is no coincidence of light should amount to abandonment of the easement that the demolished building enjoyed.
>
> … It would seem odd to preserve such light when a natural intention to abandon the light could be inferred from the erection of a new building on the site.

7.11 Anstey Horne gave greater detail still, proposing that a right to light could only survive an alteration in the event of the following:

> In terms of elevational overlap of the old and new windows, the coincidence must cover at least 70% of the new window opening. We think that is a reasonable approach, but a more moderate approach might be to apply at least 50% simply so that no one could argue that it was an unreasonable and not even-handed approach.
>
> In terms of the location of the window wall on plan, we question whether it should be possible to move the plane by more than 1m and yet still claim that it is effectively the same window opening and thus enjoying transferred rights. However, even if that were extended to say 2m, it would provide a definitive line for consultants and developers to assess.

Anstey Horne continued:

> There would still be uncertainty following on from that in terms of how one then assessed the impact upon the coincident windows, the fact that internal partitioning arrangements may have changed, internal floor levels may have changed etc. That could also be looked at, but our proposed simplistic changes would be a very healthy starting point.

7.12 Waterslade Ltd suggested that:

> Transferred rights should only be allowed if the old and new windows are in substantially the same position (in plan and elevation), and the burden on development provided by the new building (new windows) is no worse than the previous building, and there is a material impact to the new building.

7.13 Berwin Leighton Paisner LLP and Land Securities were of the view that "… clear parameters as to when rights will and will not be transferred, coupled with clear principles and methodology based on the Waldram method of analysis need to be formulated". However neither consultee offered suggestions as to what these parameters could be.

7.14 The Bar Council recommended that:

> A new test for when a right to light survives alteration, if clearly defined in terms of the upper limits of plane movement would remove much of the ambiguity that currently subsists. The role of competing experts would be limited and the approach would be significantly more objective. This may not be as negative as suggested in this consultation as the determination by experts currently is clearly ambiguous and inconsistent. Although it would be potentially arbitrary to set out an upper limit for movement of apertures, people rebuilding their properties would at least know their limitations and less litigation would be conducted over the percentages of overlap between previous and altered apertures.

7.15 Transport for London argued that rights to light should be abandoned "if the apertures are altered by more than a given percentage".

7.16 Deloitte Real Estate proposed that a right to light should be deemed to have been retained despite alteration only if:

> . The majority of a new window should overlap an old aperture on elevation i.e. more than 50% [and] the new aperture should be within one metre of the old aperture on plan.

Consultees in favour of a registration requirement to retain a right to light

7.17 These consultees felt that a dominant owner should be required to register a right to light desired to be retained after alteration of the property.

7.18 The Property Litigation Association noted that its members favoured a registration scheme in addition to a new test for when a right to light survives alteration of the dominant property. However it cautioned that:

> If registration is to work, it would require precise guidelines as to what could be preserved and how. This could involve a role for secondary legislation governing when an application to register should be made (e.g. within 4 months of practical completion of a new development). It could also cover what can be registered (e.g. just those original apertures that coincide with the new apertures) based on current surveying principles.

7.19 Hunters (solicitors) and the City of Westminster and Holborn Law Society both stated that:

> We would favour a requirement that if it is desired in effect to transfer old rights to light to new windows then there should be a requirement to apply to register notice asserting the right to light within say six years after the old windows cease to exist or, if earlier, one year after the new windows are created. Notice asserting existing right to light being so continued ought to be registered at the Land Registry, with any dispute normally going to the Adjudicator to the Land Registry. In the absence of such notice, the old right to light should not apply to windows of the new building. Mere changes to an existing building can remain subject to the current legal position.

7.20 Chelsfield LLP similarly was of the view that:

> It's probably unreasonable to expect a developer to firstly anticipate whether the dominant landowner does intend to rebuild and create a rights of light transfer. Also it may be difficult for the developer to establish window positions, especially if some of these were changed from published plans.

It concluded that:

> It would surely be helpful for all concerned if upon demolition the dominant landowner was required to register an entitlement and maintain a record of window apertures. It will help avoid disputes.

7.21 Allen & Overy LLP was in favour of compulsory registration with the additional requirement that the adjoining owner file plans indicating the position and dimensions of the original windows so that the extent of transferred rights claims can later be examined and ascertained by third parties. This, it suggested, would address the problem that developers of servient land seldom have access to the necessary records to enable them to make a judgement as to the likelihood and extent of transference.

7.22 Herbert Smith Freehills LLP felt that a requirement to register the location, dimension and plane of any rights of light in advance of alteration in order to prevent their becoming enforceable would be "both a proportionate requirement and conducive to providing the evidence required for survivorship of the easement to transferred windows, i.e., clarity".

Consultees in favour of prohibiting transference

7.23 Nabarro LLP felt that it is "neither fair nor equitable" that a right to light should survive alteration or demolition of the aperture it benefits. It noted that it is difficult to predict when a dominant owner has formed the requisite intention to abandon a right to light. This has led it to have to advise clients that a building under 19 years old and which was built on a site previously host to a windowed building may continue to benefit from rights to light that the former building enjoyed.

7.24 Accordingly, Nabarro LLP recommended prohibition of transference altogether. It continued:

> We appreciate that this could lead to unfairness where the plane of the window differs only marginally (for example the vertical elevation of the new window is only, say, a metre from the vertical plane of the window in the demolished building). However, we believe that the unfairness highlighted above from retaining a right of light where the plane of the aperture changes, far outweighs the disadvantage to landowners where the plane only differs marginally.

7.25 Another consultee, in a confidential response, asserted that rights to light should be extinguished where the building they accommodate is demolished.

7.26 In contrast, the Property Litigation Association and Clifford Chance LLP were opposed to an outright prohibition on transference. They noted that, although this would be the simplest way of providing certainty, it would be a "draconian" response that:

> … would deny the owner of the right the ability to continue to enjoy the right following demolition of the dominant property… Further, how would the issue of an injunction or damages be addressed in the event that the dominant owner was forming plans to demolish and rebuild its property?

Deemed abandonment after a period of non-use?

7.27 A number of consultees were of the view that if an aperture is destroyed or blocked up, or the light is otherwise not used for a given period of time, the right to light should be deemed abandoned and be extinguished.

7.28 Mount Anvil Ltd, Neighbourly Matters (Chartered Surveyors) and the Property Litigation Association supported the principle, but did not specify a time period after which a right should be deemed abandoned. The British Property Federation, Julian Barwick (Director, Development Securities plc) and the British Council for Offices were of the view that five years of non-use was a fair and sufficient period after which the right to light would be deemed abandoned.

7.29 The British Property Federation noted that this marked a departure from the Commission's recommendation in its recent work on the general law of easements[11] which recommended that a dominant owner's intention to abandon an easement should arise after 20 years of non-use. However, it reasoned that:

> Rights to light … as a negative easement, require the right holder to do something positive to abandon the right, for example bricking in a window. It was felt in such circumstances that 20 years was too long and for rights to light the period should be shorter, say 5 years.

7.30 Dr Peter S Defoe (calfordseaden LLP) appeared to favour a tighter restriction still, stating by way of example that "if… an opening is blocked with masonry for more than 1 year then the right ought to be abandoned".

[11] Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327.

7.31 Nabarro LLP opposed an approach based on a presumed intention to abandon a right to light on the ground that "a rebuttable presumption of abandonment after a fixed period of time is no better than no presumption at all" since it provides no greater certainty as it would always remain possible for the dominant owner to adduce evidence to rebut the presumption.

Other responses received

7.32 The Association of Light Practitioners felt that the best way forward was "through agreed protocol instead of through a change in the law". It noted its intention to produce a "Best Practice" paper summarising and explaining the current law to aid practitioners and landowners.

7.33 It was not clear what opinion was being expressed by a few respondents.

We provisionally propose that the jurisdiction of the Lands Chamber of the Upper Tribunal should be extended so as to enable it to make orders for the modification or discharge of existing rights to light.

Do consultees agree?

[Consultation Paper, paragraph 7.132]

7.34 Section 84 of the Law of Property Act 1925 empowers the Lands Chamber to order the discharge or modification of a restrictive covenant where it is satisfied that one or more of the following grounds is met:

(1) that following a change in the character of the neighbourhood or other circumstances the restriction ought to be deemed obsolete;

(2) that the continued existence of the restriction impedes some reasonable use of the land and either does not give those entitled to it any practical benefits of substantial value or advantage or is contrary to the public interest, and that money will be an adequate compensation for the loss suffered;

(3) that all those entitled to the benefit of the restriction have agreed by their acts or omissions to its discharge or modification; or

(4) that the proposed discharge or modification will not injure those entitled to the benefit of the restriction.

7.35 In our earlier work on the general law of easements[12] we recommended extension of this jurisdiction to permit the Lands Chamber to modify or discharge easements created after the implementation of the recommendations made in that Report, on the grounds mentioned in the paragraph above. In the Consultation Paper for rights to light we looked at whether the recommendation made in our previous work had been too cautious. We concluded that, for rights to light, we should provisionally propose the extension of section 84 to cover all rights to light regardless of when they are created.

The responses

7.36 Fifty consultees responded. They were divided broadly into three camps: those who were against the extension of section 84 as proposed (five consultees), those in favour of extension without more (27 consultees), and those in favour of extension who also wanted extra grounds for discharge or modification of rights to light (7 consultees). A small number of consultees offered alternative proposals or gave ambiguous responses.

[12] Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327.

Consultees opposed to extending section 84 of the Law of Property Act 1925

7.37 The main concern expressed by consultees was that the provisional proposal to extend the jurisdiction conferred by section 84 would be of limited practical utility. Dr Peter S Defoe (calfordseaden LLP) stated simply that he "[is] not sure that this would get much use".

7.38 The UNITE Group plc considered the proposal as "potentially a Trojan Horse for developers, for little (realistic) upside". It and Travis Perkins plc were conscious of "a danger of an inconsistent approach of the Courts and the Lands Chambers which may create uncertainty".

Consultees in favour of extending section 84 of the Law of Property Act 1925

7.39 Many consultees agreed with the provisional proposal without comment.

7.40 John McGhee QC (Maitland Chambers) welcomed the extension as a way of "… [preventing] rights to light being misused so as to … make money rather than to preserve amenity value". His support was subject to two conditions – first, that the Lands Chamber has adequate resources to deal with the extra workload an extension would entail, and secondly that the Lands Chamber should be able to hear both the application to modify and the question of whether an injunction ought to be granted at the same time, to avoid the increased costs and delays of having to apply for the former in a tribunal and the latter in a court.

7.41 Hunters (solicitors) and the City of Westminster and Holborn Law Society also expressed concern that the Lands Chamber should have sufficient resources to deal with the possibility of an increased workload resulting from the extension.

7.42 Clifford Chance LLP noted that:

> The Lands Chamber is skilled in property issues and provides an appropriate forum for the determination of whether a right to light should be modified or discharged.

7.43 Whilst supportive of the proposal, the Property Litigation Association and Clifford Chance LLP queried whether in practice the Lands Chamber would be called on to "modify" a right to light:

> Modification of an existing easement may simply be too difficult to deal with and perhaps unnecessary if the sorts of cases to go before the tribunal are essentially about obsolescence arising from abandonment.

They also urged the Commission to bear in mind that:

> An easement is a right enjoyed by a party whereas a restrictive covenant is a restriction preventing the use of land in a particular way. Discharging or modifying someone's right over another person's land is quite different to removing a restriction on the use by a person of its land.

7.44 Anstey Horne commented on each ground for modification and discharge, and expressed concern that a developer of the servient property might put pressure on dominant owners by forcing them to incur costs to defend their position.

7.45 The Bar Council stated that:

> The Lands Tribunal is already well versed in modifications to covenants and we consider that a specialist tribunal to deal with such technical matters is preferable for cost and for process. It also accords with the increasing use of specialist tribunals.

7.46 The Royal Institution of Chartered Surveyors gave their support conditional upon "agreement of suitable wording". The British Council for Offices also expressed this view.

7.47 Malcolm Hollis LLP gave more qualified support, stating that:

> Whilst applications to the Lands Tribunal pursuant to s84 can lead to protracted legal arguments and are often viewed by lawyers as unlikely to succeed, arguments about abandonment are better conducted within this forum than against a background of a pending development.

7.48 Laurence Target (solicitor, Trowers & Hamlins LLP) agreed with the proposal provided that the jurisdiction will extend to all easements and not only to rights to light.

7.49 Andrew Francis (Serle Court Chambers) commented that from the point of view of barristers practising in this area, it would seem "daft" not to bring existing rights to light into the extended jurisdiction, as:

> … otherwise, 20 years would have to pass from the commencement of any reform before any application under the reformed s. 84 could be made.

7.50 He also noted that although he was generally opposed to treating rights to light distinctly from other property rights:

> … rights of light are unduly troublesome in many cases and in reality their benefit to the dominant owner may be negligible or non existent. To counter the numerous extortionate ransom demands and to lessen the huge economic cost referred to under para. 8.33 above, the proposal creates an effective remedy.

Consultees in favour of extending section 84 of the Law of Property Act 1925 and adding further grounds

7.51 Consultees in favour of extending the jurisdiction of the Lands Chamber to modify or discharge rights to light and adding new grounds were divided into two groups.

7.52 The first group was in favour of permitting discharge of rights to light where it is in the public interest to do so. Consultees in this group included Berwin Leighton Paisner LLP, Land Securities, Mount Anvil Ltd and Nabarro LLP.

7.53 Berwin Leighton Paisner LLP and Land Securities based their conception of public interest on "the benefits accruing to the local economy and community". Nabarro LLP emphasised considerations such as regeneration and job creation. Mount Anvil Ltd also took this view.

7.54 The second group advocated the jurisdiction to discharge a right to light should apply where the enforcement of the right to light could be seen as illegitimate, in that the dominant property is commercial, the impact on amenity is extremely limited, and the real purpose of the dominant owner's defence of the right is to extract money. This group comprised Derwent London plc, the British Property Federation and Julian Barwick (Director, Development Securities plc).

7.55 Consultees in the second group felt the additional ground was needed as the current grounds were too narrow and hard to satisfy, and would not be "of sufficient benefit to commercial developers" (the British Property Federation).

Other responses

7.56 The Chancery Bar Association qualified its comments by stating that it was "neutral" as to whether reform should be undertaken. It went on to state that an extension would not have significant impact in practice, and that the discharge or modification of interests under section 84 is a "not especially fast" procedure.

7.57 The National Trust declined to take a stance in favour or against the proposal absent "more information on how the grounds… would operate in relation to applications to the discharge or modification of rights to light".

7.58 Neighbourly Matters (Chartered Surveyors) agreed with extension of the section 84 jurisdiction only in relation to "historic rights of light deeds or agreements", seemingly ruling out newly created or future rights to light.

7.59 The City of London Corporation did not take a clear stance for or against the proposal, but noted that there may be a duplication of proceedings in relation to the same dispute, with applications to the Lands Chamber running in parallel with court action. The consultee suggested that, were this to happen, it may increase litigation costs and cause delays. It also pointed out that the Lands Chamber sits only in London, and that legal aid is generally not available.

7.60 Southern Housing Group, suggested a wider remit for the Lands Chamber. It recommended that "an independent body, such as the [Lands Chamber of the Upper Tribunal], could make non-binding recommendations on individual cases, including levels or compensation or whether a truly injunctable injury would be caused".

CHAPTER 8
OTHER COMMENTS

The need for reform and the scope of the project

8.1 The National Housing Federation said that it "broadly supports the trajectory of the proposals in the consultation paper" and that they would go a long way to "remove unnecessary barriers to development and provide certainty and transparency in the development process".

8.2 Berwin Leighton Paisner LLP agreed that rights to light "are a significant, if not the most significant, current brake on development".

8.3 Transport for London welcomed the consultation, arguing that:

> Many other common law jurisdictions do not have rights to light and neither does Scotland. We believe that the concept is outdated and issues of the proper provision of light should be dealt with as part of the planning process by possibly reformulating [and] strengthening the daylight and sunlight survey.

8.4 The City Property Association stated that although many of its members are owners of property interests that potentially stand to benefit from the current position where they are dominant owners, "the current position needs to change in the interests of delivering economic growth and fostering London's competitiveness as a world leading business centre".

8.5 The British Property Federation stated that "rights to light have become a significant brake on the development and extension of commercial property in the UK, and therefore a significant obstacle to growth". It considered that rights to light "represent the greatest uncertainty in readying sites for development and extension".

8.6 Herbert Smith Freehills LLP remarked that there has been much "freeing-up and de-fogging" of land law, with a "corresponding evolution of responsibility and duty associated with land ownership". It concluded that it "seems to be time for this evolution to be applied to easements and, in particular, to rights to light".

8.7 Hugh Macmillan felt that overall the proposals in the Consultation Paper did not achieve the aim of "protecting the amenity value of right of light". He also suggested that the Law Commission should apply to any final proposals a test to ensure that they "contribute more to conflict resolution than they do for creating work for lawyers, surveyors and bureaucrats".

8.8 Loughton Residents Association felt that the Consultation Paper focussed on rights to light disputes "between commercial organisations", adding that the Commission "appears to have no evidence of similar problems in cases involving residents". It therefore felt that the proposals "seem disproportionate in their effect on residents".

8.9 The Chancery Bar Association queried whether the problems caused by the decisions in *HKRUK II (CHC) Ltd v Heaney*[13] and *Regan v Paul Properties DPF No 1 Ltd*[14] should not be left to the common law, which would "react and mould itself in response to any real as opposed to any perceived difficulties". It cautioned that a statutory regime might not match with developments in the common law by the time it is introduced, resulting in "a more onerous or complicated burden than the one it was originally intended to relieve".

8.10 Urban Building Surveyors Ltd felt that the Consultation Paper seemed "to have been written very much from the developer's point of view". Sharing its experiences with clients, it could think of only one occasion where a dominant owner's sole motivation seemed to be to extract the maximum compensation possible regardless of the extent of the injury caused by an obstruction of a right to light. It considered that any reduction in natural light to property would lead to a reduction in the overall standard of human wellbeing, reducing the value of any development.

8.11 Allen & Overy LLP felt that a "fundamental" policy question was not addressed, namely "whether light is worthy of protection" in the first place. It explained:

> …we find it difficult to understand how policy decisions regarding altering the law on rights of light can be made *without* considering the fundamental question of whether (and to what extent) light is worthy of protection. This affects where the balance should lie between the competing interests. If light is worthy of protection, then any change to the law requires careful justification. The progressively less worthy that light is of protection, the more heavily the pendulum swings in favour of altering the law to facilitate development.

8.12 From a dominant owner's perspective, Allen & Overy LLP queried whether change was necessary. It considered that the decision in *HKRUK II (CHC) Ltd v Heaney*[15] did not change the law, but merely showed that developers had been unduly confident in their ability to avoid injunctions before it. It argued that section 237 of the Town and Country Planning Act 1990 provided the necessary protection in the public interest. It noted that, in any case, the amount of light protected by rights to light is a "bare minimum". It added that a developer always has a choice whether to build in a way that infringes rights to light or not, that this will be reflected in the price it is willing to pay for the servient land, and that it is not appropriate to alter the law simply to maximise developers' profits.

General comments on the value of rights to light

8.13 Several consultees responded to the Consultation Paper by stressing the importance of natural light for residential homeowners, and the corresponding value of rights to light. We believe that a number of the comments were prompted by the efforts of the Covenant Movement to encourage residential landowners to respond and/or as a result of the press coverage of the Consultation Paper in the Telegraph.

[13] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

[14] [2006] EWCA Civ 1319, [2007] Ch 135.

[15] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

8.14 Erika Higginson stressed that obstruction of light to a residential home "makes life unbearable", preventing a homeowner from enjoying their land, contributing to the development of algae and causing depression. She did not consider that monetary compensation could be an adequate substitute for a loss of light.

8.15 Friederike Maeda said that a right to light is "a basic human right" and urged that rights to light should be unchanged.

8.16 J R K Armstrong expressed concern that rights to light might be "scrapped", which would greatly impact on his ability to enjoy his garden.

8.17 David Feather stated that it was "morally right" that any infringement of rights adversely affecting someone's property should be compensated. He also appeared to suggest that a right to a view should be recognised, and that the obstruction of such a view should be compensated.

8.18 Peter Odds found it "outrageous that the ancient right to light should even be under consideration". He suggested that developing parties are currently able to get away with infringing rights to light as dominant owners are loath to incur legal costs in pursuing claims, and argued that the Commission should devise a scheme that "would cause developers to hesitate before infringing someone's right to light".

8.19 Tony Furniss highlighted research showing the positive benefits of natural light for health, and argued that "the quality of a person's life should be more important than developers making money by building inappropriate extensions".

8.20 The Covenant Movement wrote to express concern that developers should not be permitted to override landowners' rights, stating that "our residents are not seeking to extort cash payments from the developers (as suggested in your consultation) they merely wish to protect the amenity of their properties". It emphasised the importance of rights to light for residential properties, and was strongly opposed to any curtailment of rights to light.

8.21 The following consultees expressed similar sentiments to those mentioned above: Chester Ball, Gatehill (Northwood) Residents Association, Professor Alan Gillett, Gordon Philip, Alan Wickens, Marilyn Rust, Judith Jaafar, Susan Gennoe, Jenny King, Collette and Philip Dunkley, Charles Carroll, Thomas Carroll and Claudia Carroll, Creffield Area Residents' Association, Ann Alan, Alex Hawran, Rohit Radia, Rosco White, Jane Galbraith, Stephen Carver, Nicholas Black, Ashley Road Residents Association, Lucien Gover, Iain Nisbet, Bill and Sue Blyth, Karie and James Clifford, Matthew Owen-Hughes, Kathleen Walsh, Hazel Deattrey Talbot, Martin Tighe, and Velma Lyrae.

Comments on the Easements Report

8.22 A few consultees commented on the Law Commission's previous work on easements generally (see Making Land Work: Easements, Covenants and Profits à Prendre[16] – we call this the "Easements Report" in the paragraphs that follow). Those that commented either expressed dissatisfaction with the recommendations made in the Easements Report, or concern that the fate of any reform of rights to light might depend on whether and when the recommendations made in the Easements Report are implemented by Government.

8.23 Berwin Leighton Paisner LLP considered that "any recommendations made as a result of this consultation must be independent of the Easements Report". It also expressed concern that the statutory scheme for the prescriptive acquisition of easements recommended in the Easements Report would be "very similar to Lost Modern Grant", and that "the issues we have about identifying claims for Lost Modern Grant will simply transfer to the new statutory prescription scheme". It also suggested that the proposal made in our earlier project to permit only freeholders to acquire rights by prescription should be re-visited.

8.24 The City Property Association agreed that reform of rights to light should not be dependent upon the implementation of the recommendations made in the Easement Report.

8.25 Hunters (solicitors) drew attention to the fact that the Consultation Paper assumes that recommendations in the Easements Report will be implemented in the near future, and expressed the hope that the "urgent" need for change for rights to light will be realised regardless of the fate of the Easements Report.

8.26 In contrast, Herbert Smith Freehills LLP cautioned against piecemeal reform, stating that this would cause difficulties for "education, understanding and practices", and that it would be better if reform of the law on easements covenants and profits were "achieved in one hit".

Incorporating rights to light into planning law

8.27 Several consultees reached the conclusion that it would be best if rights to light were dealt with wholly within the planning law regime.

8.28 Lynn Pollard shared her experience of right to light litigation between herself and her neighbour. Having obtained planning permission for works to her property, during the course of which the impact of the development on light to the neighbouring property was considered, she was concerned to discover that a civil action for infringement of a right to light was still possible. She queried why the right to light could not be absorbed into planning law, to avoid this "asinine situation".

8.29 Nigel Hamilton agreed that changes to "National Planning guidance" would be best, and suggested that objective data on light loss could be used, "i.e. if light reduction hit a certain percentage there should be a presumption of refusal of planning permission if it impacted on a dwelling house".

[16] (2011) Law Com No 327.

8.30 Although it was "neutral" as to whether reform was required, the Chancery Bar Association stated that if the Commission were to conclude that there is a serious problem calling for reform, the solution lay in reforming the planning legislation – which it considered "the natural vehicle for the protection of amenity rights generally, including light". In essence, it suggested that there should be clear statutory recognition that in determining whether to grant planning permission, regard shall be had to the effect of the proposed development on the light reaching any property affected by the proposal.

8.31 The Chancery Bar Association continued by suggesting that only development that benefits from planning permission should "attract… immunity from the assertion of rights to light". The consultee argued that the common law should continue to apply to any development that was not so authorised, with compensation (based on diminution in value of the dominant property) available to those whose rights to light are overridden by a grant of planning permission. Non-payment of this sum by the developer would revive the court's jurisdiction to award an injunction against the developer. The Chancery Bar Association proposed in the alternative that a charge be granted over the developed land to secure the payment of compensation.

8.32 The National Housing Federation felt that there was "more scope for integration between the two regimes". It suggested that:

> This could be through encouraging the serving of notices at obvious 'trigger' points in the planning process and/or by reducing any right to light post planning to a right of compensation.

8.33 Exemplar Properties argued that:

> … if existing rights to light are to be retained, then the planning process is the appropriate forum within which to make the decision as to whether those rights ought to be respected or overridden. This is already an effective forum to determine issues such as daylight and sunlight impacts, and as these issues are linked to some degree to light, it would be sensible and convenient for all those issues to be addressed in the round.

8.34 It explained that having the planning decision and the rights to light issue resolved at the same time and by the same decision-making body would "remove a huge amount of uncertainty". This sentiment was shared by the Westminster Property Association.

8.35 Anthony Gray said that, in his view, rights of light, the planning regime and building regulations are "all part of a total package protecting not only the building owner but adjoining owners and they have evolved as such for good reason". He hoped that the Law Commission would take into account "how the average UK householder lives" when considering any changes to the law on rights to light.

Section 237 of the Town and Country Planning Act 1990

8.36 As we explain in paragraphs 2.49 and following of the Consultation Paper, section 237 of the Town and Country Planning Act 1990 empowers a local authority to override rights, including rights to light, where it acquires land for planning purposes. Any developer to whom the land is sold or leased may develop the land even though doing so would otherwise infringe a neighbour's right to light. The owner of the right is then entitled to compensation.

8.37 Although we did not make any recommendation to reform section 237, or ask any question on it (save as to the costs involved where section 237 is used), a number of consultees offered views on section 237 in their responses.

8.38 Dr Peter S Defoe commented that "many local authorities have proven extremely reluctant to invoke section 237, probably for the very reasons stated within [the Consultation Paper]".

8.39 The Property Litigation Association stated that the majority of its membership who had given an opinion on this issue "had no experience of advising in respect of or implementing [section 237]". It commented that this "could be taken to suggest that the [section 237] route is not one regularly taken by developers", adding:

> There are various explanations for this including the fact that the developer would have to show that the development brought a significant financial or social benefit to the locality, the often inconsistent approach of local authorities and the possibility of judicial review.

It continued:

> A small number had experience of advising in respect of s237 and using the threat of s237 to 'encourage' adjoining owners to reach agreement with a developer to release their rights for compensation (usually for an amount higher than that which would be payable pursuant to the statutory compensation payable in the event of a s237 appropriation). A very small number of respondents had actual experience of engaging s237 to override adjoining owner rights. Local authorities take a variable approach to their willingness to use s237. As it is rarely used, they often have little knowledge or experience of it and they may also find the prospect of use of their powers politically unattractive.

8.40 Anstey Horne commented that if section 237 is available, it is "of enormous benefit to the developing party, both in removing the injunction risk and limiting the financial exposure in terms of compensation payments".

8.41 The Berkeley Group plc said that it had never pursued the use of section 237 to assist development, for the following reasons:

> a) Local authorities are loathe to do this unless they are deriving a direct benefit themselves as they do not see it as part of their remit to assist a private developer to resolve development risk;

b) If a local authority were minded to exercise s237 powers, the developer loses control of the process which is both time consuming and at risk of judicial review proceedings if the authority makes any administrative error;

c) The loss of control by the developer may cause more delays than those caused by negotiations;

d) The process may be more expensive than a negotiated settlement as local authorities always seek a full indemnity as to costs so there is no incentive on the authority to manage costs carefully and the developer has no control over the costs incurred.

8.42 The Law Society stated that "the use of section 237 powers by a local authority is increasingly threatened (to encourage negotiations) but rarely actually invoked". The consultee explained that this was for three reasons:

(i) The land on which the development is to be constructed must have been acquired or appropriated by the local authority for planning purposes;

(ii) The developer must derive title under the local authority; and

(iii) The scheme must be carried out in accordance with planning permission.

It went on to explain the problems that follow:

The first two limbs cause problems in a situation where the developer already owns the development site and can mean that developers and local authorities have to enter into artificial and complex arrangements to satisfy these two requirements. It can also cause problems in respect of the valuation of the land and the local authority's duty to ensure best consideration on any disposal of land.

8.43 The Law Society suggested that guidance should be issued on how local authorities should use their powers under section 237 to resolve rights to light disputes, in order that there might be "a consistent process across the entire country".

8.44 Allen & Overy LLP said that:

Local authorities are rightly careful about use of their powers and therefore require developers to show that appropriate attempts have been made to agree a settlement with adjoining owners first, including offering them certain levels of compensation.

8.45 Chelsfield LLP was cautious about the use of section 237 in the rights to light context, commenting that:

> In our experience it is rare for authorities to use 237 powers and when they do the authorities come under much scrutiny. It cannot be long before an aggrieved party mounts a successful challenge against the use of 237 powers which could then undermine its availability for the future.

8.46 Transport for London stated that, although it had not yet petitioned a local authority for use of section 237, it was considering whether it should do so in the light of the decision in *HKRUK II (CHC) Ltd v Heaney*[17] to ensure that its development plans can proceed. Conversely, a consultee, in a confidential response, stated that it was its "standard practice" to ask the local authority to appropriate the site of any proposed development using section 237. Others, including the UNITE Group plc, had previously tried but not managed to convince a local authority to use section 237.

8.47 Julian Barwick (Director, Development Securities plc) commented that in its discussions with local authorities, the view had been expressed that:

> … it is not the place of the local authority to enforce through the use of its powers to resolve [problems arising from rights to light]. Councils have said that, where the parties are commercial organisations, they expect them to behave in a commercial manner and sort out a deal.

He continued by saying he felt that there was a need for further guidance on the use of section 237, to promote a uniform approach.

8.48 The British Property Federation echoed concerns that the procedure is not ideal from a developer's perspective, as there is no guarantee a local authority will agree to invoke the power. It also highlighted the reluctance of local authorities to use section 237 for fear of judicial review proceedings. It concluded:

> Whilst section 237 can therefore be extremely useful, it is all rather cloak and dagger stuff. Will the local authority support the developer? If so, is it a bluff? If used, will the injured party seek judicial review? This is not creating a climate of certainty that is conducive and likely to promote development and growth.

8.49 The British Property Federation also felt that guidance and clarity on the circumstances in which local authorities would be willing to use section 237 would be useful, but noted that such guidance would not protect local authorities from judicial review, "as any judgement would be based on the interpretation and application of the legislation and trump any guidance".

Solar panels

8.50 A small number of consultees expressed views as to the value of solar panels and the importance of natural light for their use.

[17] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

8.51 Laurence Target (solicitor, Trowers & Hamlins LLP) stated that there should be a new easement protecting the passage of light to solar panels. David M Smith similarly felt that solar panels should "be protected from neighbours allowing trees to grow and shade [them]", and that obstruction of the passage of light to such panels should be compensated. Dave Jackson and David Feather agreed that compensation should be due in these circumstances.

8.52 The Ceredigion Green Party emphasised the role of solar panels in reducing reliance on fossil fuels, and felt that those who have invested in them should be protected in order to further broader aims of energy efficiency.

Miscellaneous comments

8.53 Paul Hargreaves suggested that any new law that results from the project should apply to Crown land in the same way it applies to all other holdings.

8.54 William Cooper queried whether it might be possible to provide for the introduction of a right to a view, since "light forms all visual images".

8.55 Finally, we are grateful to Professor John Mardaljevic (University of Loughborough) and to Professor Troy A Rule (University of Missouri), both of whom submitted academic papers discussing current and new methods of measuring light for the purposes of determining the extent of any obstruction.

APPENDIX A
LIST OF CONSULTEES

A.1 Below, we list those who responded to the Consultation Paper and who did not request that we keep their details confidential.

RESPONSES TO THE CONSULTATION

4 Housing Architects

Ms Ann Allan

Allen & Overy LLP

Anstey Horne

Mr J R K Armstrong

Ashley Road Residents Association

The Association of Light Practitioners

Mr Chester Ball

The Bar Council

Mr Julian Barwick (Director, Development Securities plc)

Mr David Bennion

Ms Rachel Benson

The Berkeley Group plc

Berwin Leighton Paisner LLP

Mr Nicholas Black BSc, formerly (now retired) FRICS

The Bloomsbury Association

Mr Bill and Ms Sue Blyth

BRE (the Building Research Establishment Ltd)

The British Council for Offices

The British Land Company plc

The British Property Federation

Mr Michael Burrows

Campaign to Protect Rural England

Capital & Counties Properties plc

Mr Stephen Carver FAPM FIRM BSc MSc CEng EurIng

The Ceredigion Green Party

The Chancery Bar Association

The Chartered Institute of Architectural Technologists

Chelsfield LLP

The City of London Corporation

The City of London Law Society

The City of Westminster and Holborn Law Society

The City Property Association

Ms Karie and Mr James Clifford

Clifford Chance LLP

The Compulsory Purchase Association

Mr William Cooper

Ms Helen Coughlan

The Council of HM Circuit Judges

The Covenant Movement

Creffield Area Residents' Association

Dr Peter S Defoe PrD(BE) DipArb FRICS FCIArb MCQI CQP (calfordseaden LLP)

Deloitte Real Estate

Derwent London plc

Ms Collette and Mr Philip Dunkley, Mr Charles Carroll, Mr Thomas Carroll and Ms Claudia Carroll

Exemplar Properties

Mr David Feather

Mr Andrew Francis (Serle Court Chambers)

Mr David Freud

Mr Tony Furniss

Mrs Jane Galbraith

Gatehill (Northwood) Residents Association

Ms Susan Gennoe

Professor Alan Gillett OBE DSc MA FRICS FCEM

Mr Lucien Gover

Mr Anthony Gray

Mr Riccardo Grillo BA

Mr Nigel Hamilton

Mr Paul Hargreaves MRICS MCIOB

Mr Alex Hawran

HDG Ltd

Helical Bar plc

Herbert Smith Freehills LLP

Ms Erika Higginson

The Home Builders Federation

Hunters (solicitors)

The Institute of Historic Building Conservation

Ms Judith Jaafar MA, DHyp, MBSCH

Mr Dave Jackson

Dr Anthony Kaye

Ms Jenny King

Lady Kingston

Ms Jean Knight MSc

Land Data

Land Securities

The Law Society

The Local Land Charges Institute

Loughton Residents Association

Ms Velma Lyrae

Mr Hugh Macmillan

Ms Friederike Maeda

Malcolm Hollis LLP

Mr Mark Mallon (Lawrence Graham LLP)

Professor John Mardaljevic PhD FSLL (University of Loughborough)

Matthews & Goodman LLP

Mr John McGhee QC (Maitland Chambers)

Mr Iain Meek DipArch RIBA (Meek Associates)

Mount Anvil Ltd

The National Organisation of Residents Associations

The National Trust

Neighbourly Matters (Chartered Surveyors)

Mr Iain Nisbet

Mr Peter Odds

Ms Diane O'Neill

The Open Spaces Society

Mr Matthew Owen-Hughes

Mr David G Parratt JP, LLB, FRICS, FCIArb, DipICArb, FBEng, PEng, MAE

Mr Neville Pentecost

Mr Gordon Philip

Ms Lynn Pollard

Mr Harry Pritchard

The Property Litigation Association

Nabarro LLP

The National Housing Federation

Mr Rohit Radia BSc (Comp Sci) FRSA

Mr Morris A Richards (Architect, Morris Richards Associates)

The Royal Institution of Chartered Surveyors

Professor Troy A Rule (University of Missouri)

Ms Marilyn Rust

St Stephen in Brannel Parish Council Planning Committee

Mr David M Smith

Southern Housing Group

Mr Donald Stickland

Ms Hazel Dealtrey Talbot

Mr Laurence Target (solicitor, Trowers & Hamlins LLP)

Mr Martin Tighe

Mr Brian Timmins

Transport for London

Travis Perkins plc

The UNITE Group plc

Urban Building Surveyors Ltd

Mr Patrick Vaughan

Ms Kathleen Walsh

Waterslade Ltd

The Westminster Property Association

Mr Rosco White

Mr Alan Wickens

Mr John M Wyles