LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

SUBMITTED ON BEHALF OF THE

PROPERTY LISTING ASSOCIATION

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.
We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
Property Litigation Association c/o Mary Block 21 Goodwyns Vale London N10 2HA The PLA Law Reform Committee is a committee of the Property Litigation Association. The Property Litigation Association has over 1,000 members, all of whom are lawyers who deal at least 50% of the time with property-related disputes. Members deal with disputes in the commercial and residential sectors.
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As explained above, we will take full account of your explanation but cannot give an

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

Yes, we agree, subject to such rights being exercised in relation to the apparatus permitted by the agreement. The rights should not be exercisable in relation to other apparatus not expressly permitted by the agreement. See our response to question 10.15 for further detail.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

No comment

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

No comment

10.6 Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what?

Consultation Paper, Part 3, paragraph 3.19.

No comment

10.7 We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it?

Consultation Paper, Part 3, paragraph 3.27.

No comment

10.8 We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code.

Consultation Paper, Part 3, paragraph 3.40.

We agree that as a starting point the Code should not enable an occupier to create rights that exceed his or her own interest in the land. Where a Code Operator needs a right that exceeds what the occupier can grant, and the owner of the superior interest who can grant the right is not willing to do so, an application should be made.

We are content with the "priority provisions" described at paragraph 3.33 etc. but would suggest that further thought is given to amending the provisions described at paragraph 3.36 etc. which have the effect of binding those who have not agreed to the conferral of a right. A landlord should not be prevented from removing apparatus as a result of its tenant's agreement with a Code Operator, where the tenant is in breach of the terms of its lease by agreeing to the installation of the apparatus – and where the landlord has not agreed to it. Paragraph 2 (3) of the Code should be amended accordingly.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

Consultation Paper, Part 3, paragraph 3.53.

Paragraph 5(3) should be amended to provide a clear and readily understandable test which balances public benefit (i.e. access to an electronic communications network or services) against the prejudice caused to the affected private landowner.

If a landowner cannot be adequately compensated in money, it should only be possible to dispense with the landowner's agreement following due consideration of the balancing exercise described above.

The Access Principle requires amendment to confirm that the tribunal should always give due consideration to the prejudice caused to private interests; i.e. the tribunal still needs to consider the balancing exercise when the prejudice is capable of being adequately compensated for my money.

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

Consultation Paper, Part 3, paragraph 3.59.

We agree that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land, but only insofar as dealt with by the "priority provisions" – namely those other interests who agree to be bound, successors in title and derivative interests.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused.

Consultation Paper, Part 3, paragraph 3.67.

No comment

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus.

Consultation Paper, Part 3, paragraph 3.68.

No comment

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence.

Consultation Paper, Part 3, paragraph 3.69.

No comment

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended:

(1) to vegetation generally;

(2) to trees or vegetation wherever that interference takes place; and/or

(3) to cases where the interference is with a wireless signal rather than with tangible apparatus?

Consultation Paper, Part 3, paragraph 3.74.

We are of the view that the operator should be able, at its cost, to require trees and other vegetation to be removed. However, we are also of the view that such powers should not be able to be exercised against someone who is not a party to the contract.

This raises an interesting problem where the original landlord sells/gifts adjoining land. Should the operator be able to exercise lopping rights against the new owner? Does it make any difference whether the new owner is a bona fide purchaser for value? How should lopping rights be treated for registration purposes? Although we suspect that in reality this issue seldom arises.

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

(1) We do not believe that Code Operators should benefit from an ancillary right to upgrade their apparatus. It is important for landowners to understand what apparatus is on their land, and whether it remains the same as originally authorised. It is likely that the Code Operator's apparatus is not the only equipment on the land and if works need to be carried out to other pieces of equipment, or even other Code Operator's apparatus it is important the landowner knows what equipment is on its land so that any works required do not inadvertently interfere.

As most Code Operators occupy land either under a lease or a licence, it is likely the landowner will be liable for any interference with the equipment by third parties. If a landlord does not know what apparatus is installed and he grants licence to a third party to do works that inadvertently interferes with apparatus he did not know was installed he should be protected.

Further in circumstances where a Code Operator has obtained an order pursuant to paragraph 5 of the Code, a Code Operator should be restricted to the equipment he has sought an order for and should not be permitted to upgrade without the landowner's consent.

One of our members recently acted for the owner of a building who needed to carry out repairs to the buildings services such as the air conditioning. Much of the plant was on the roof. There were also a number of Code Operators who had apparatus installed on the roof. When the landlord came to carry out the works it soon became apparent that the Code Operators had installed new apparatus and new energy supplies that made it very difficult for the landlord to carry out necessary repairs to his own building. The landlord had to commission a roof top survey to understand what equipment was installed, where all the

cables ran and what equipment was redundant as the lease plans did not match with what was installed on the roof.

We believe that provided the Code Operators have an ability to alter the equipment, subject to landlord's consent this should be sufficient to balance the interests of both parties. Section 19 of t9he Landlord and Tenant Act 1927 means that where the landlord's consent is required, such consent is not to be unreasonably withheld.

We do not see any problems with the definition of alter being stated to include upgrades in equipment. However, again we believe this should be with the landowner's consent, such consent not to be unreasonably withheld.

(2) It is unusual in commercial leases for landlords to be able to demand payment for consent to alterations. However, there have been concerns recently in respect of site consolidation, in which landlord's would wish to see a payment for consent – see our response to question 10.16 below.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

(1) Our members did not report any difficulties in this regard.

(2) We do not believe that Code Operators should benefit from a general right to share their apparatus with another nor that any contractual term restricting that right would be void. For the reasons set out above in response to question 10.15 it is important that a landowners know who is in occupation on their land and what apparatus they have installed on their land.

It is open to the Code Operator and the landowner to agree the terms of the agreement permitting the installation of the equipment. This is an arms length commercial negotiation. If the Code Operator wishes to be able to share the equipment and or assign its rights to another Code Operator we do not consider that Code Operators are at any disadvantage in seeking to agree such terms. We do not consider that legislation should be passed that makes any term restricting such rights void. If the Law Commission were minded to recommend such a proposal, then any proposal should go no further than a requirement that any sharing / assignment is to be with landlords consent. This would mitigate against those agreement provisions that expressly prohibit sharing / assignment, whilst balancing the need for a landowners control over his land. Further in circumstances where a Code Operator has obtained an order pursuant to paragraph 5 of the Code, he should not be entitled to share without the landowner's consent.

As in relation to alterations, if sharing, assignment is permitted subject to the landlord's consent, any consent is not to be unreasonable withheld.

(3) Payment for sharing may be appropriate in certain circumstances. One member reported an occasion where a client had 5 Code Operators installed on the roof of its building. Due to a series of site sharing arrangements between the 5 Code Operators the client was left with 2 leases in place, thereby reducing the amount of rent received, yet with all 5 Code Operators operating from its roof.

That said, we do not consider payment should be enforced, but should rather be left to market forces and as a matter of negotiation between the parties. It should be open for landowners and Code Operators to agree that if site sharing is to be permitted then payment is to be made.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

We do not have any comments in response to this question.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

(1) Our members did not report any difficulties in this regard.

(2) We do not believe that Code Operators should benefit from a general right to assign their code rights to another nor that any contractual term restricting that right would be void. For the reasons set out above in response to question 10.15 it is important that landowners know who is in occupation on their land and what apparatus they have installed on their land.

It is open to the Code Operator and the landowner to agree the terms of the agreement permitting the installation of the equipment. This is an arms length commercial negotiation. If the Code Operator wishes to be able to share the equipment and or assign its rights to another Code Operator we do not consider that Code Operators are at any disadvantage to any other commercial occupier in seeking to agree such terms. We do not consider that legislation should be passed that makes any term restricting such rights void. If the Law Commission were minded to recommend such a proposal notwithstanding our comments, then any proposal should go no further than a requirement that any sharing / assignment is to be with landlords consent. This would mitigate against those agreement provisions that expressly prohibit sharing / assignment, whilst balancing the need for a landowner's control over his land.

As in relation to alterations, if sharing, assignment is permitted subject to the landlord's consent, any consent is not to be unreasonable withheld.

(3) Payment for an assignment may be appropriate in certain circumstances. One member reported an occasion a client had 5 Code Operators installed on the roof of its building. Due to a series of site sharing arrangements between the 5 Code Operators the client was left with 2 leases in place, thereby reducing the amount of rent received, yet with all 5 Code Operators operating from its roof.

That said, we do not consider payment should be enforced, but should rather be left to market forces and as a matter of negotiation between the parties. It should be open for landowners and Code Operators to agree that if assignment is to be permitted then payment is to be made.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

We do not consider that any ancillary rights are necessary. Code Operators are sophisticated commercial entities. If they require any rights they are capable of negotiating such rights with landowners.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.

Consultation Paper, Part 3, paragraph 3.100.

We are not aware of any difficulties.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties?

Consultation Paper, Part 3, paragraph 3.101.

No comment.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used?

Consultation Paper, Part 3, paragraph 3.102.

No.

10.23 We ask consultees:

(1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers;

(2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and

(3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights.

Consultation Paper, Part 3, paragraph 3.106.

No comment.

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator.

Consultation Paper, Part 3, paragraph 3.107.

No comment

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.11.

No comment

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests.

Consultation Paper, Part 4, paragraph 4.20.

No comment

10.27 We seek consultees' views on the following questions.

(1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime?

(2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why?

(3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands?

Consultation Paper, Part 4, paragraph 4.21.

No comment

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence, or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

No comment

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

No comment

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replaced in a revised code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

No comment

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.43

No comment

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.11.

The alteration regime in paragraph 20 was inserted at a time when a network was in the process of being established. It was therefore important that the Code Operator's network was not at risk. Things have changed considerably since then and networks are well established in the majority of England and Wales. We consider that the current regime is too weighted in favour of the Code Operators and that any revised code that has a similar emphasis is not striking the right balance.

The Landlord and Tenant Act 1954 permits a landlord to oppose a tenant's statutory right to a new lease on the grounds of redevelopment or by providing suitable alternative accommodation. The tenant's considerations are not taken into account. If the landlord succeeds then the tenant is entitled to statutory compensation by reference to the rateable value of the premises. The checks and balances are provided by the Court which has to be certain that the landlord has the necessary intention to redevelop or that the alternative accommodation is suitable. There is a wealth of case law on point so there need not be any concerns in understanding the provisions if they mirror the 1954 Act. We consider that a similar regime to that in the 1954 Act would balance the interests of both parties and provide a forum for resolving the issue.

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators?

Consultation Paper, Part 5, paragraph 5.12.

Our members reported that there were a number of issues with paragraph 20 of the Code. In the first instance there is uncertainty as to how the Courts will look at this provision. It therefore does not offer either party the certainty of protection it should.

Termination of the Lease
It is our view that a notice under paragraph 20 of the Code does not determine the property interest, particularly if a Code Operator occupies land under a lease. It is therefore difficult to see how paragraph 20 permits the outright removal of the Code apparatus notwithstanding the terms of the lease. This view has been supported by various Counsel members have been to over time. Therefore paragraph 20 is considered to be more about alterations of the apparatus on site, even then the provision is more akin to a shift and lift provision, rather than a right to terminate the lease.

Notice requirements
Technically, the notice requirements of paragraph 20 require the person serving the notice to be the person who intends to carry out the alteration. Often that person will not be the same. Removal of Code apparatus is usually required in connection with redevelopment of land. It is common for parties to enter into an agreement for sale of land to a developer conditional on vacant possession. If Code apparatus is present, the person serving the notice (i.e. the seller who has to procure vacant possession) will not be the same as the person carrying out the alteration (i.e. the purchasing developer). We are not aware that this point has been taken to the Courts as yet. However, significant time and money could be saved by altering

paragraph 20 so that it follows section 30(1)(f) of the Landlord and Tenant Act that simply requires the person to evidence the intention to redevelop at the Court hearing, thereby allowing a transfer in land after a notice has been served.

Proving alteration
We are not aware of any case law on what is required to prove that an alteration is required to be carried out. However, if the wording of section 30(1)(d) or (f) were followed, given the volumes of case law on this point all parties would understand what was required.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

The answer to this ultimately depends on the view relating to termination of the agreement permitting the installation of the apparatus, and whether exercise of paragraph 20 terminates such an agreement.
If the paragraph 20 regime were to work in a similar fashion to section 30(1)(f) of the 1954 Act then it would not be necessary to consider this question. The parties could simply include a provision in the agreement permitting the installation of the equipment allowing the parties to terminate the agreement if the landowner wishes to alter/redevelop in accordance with paragraph 20. Therefore we consider it would be best that the parties contract in to this right.

10.35 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code?

Consultation Paper, Part 5, paragraph 5.18.

No comment

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.47.

We consider that a fairer balance would be struck between the parties if the security provisions of the Code were akin to the Landlord and Tenant Act 1954. This would mean that Code Operators would be able to remain in situ at the expiry of a relevant agreement (unless the Code did not apply – see below) unless the landlord objected. If the Code does not apply then the landowner should be able to remove the apparatus without further consultation.

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.48.

No comment

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient?

Consultation Paper, Part 5, paragraph 5.49.

We consider a more structured timetable would assist the parties. Currently members have reported that an application under paragraph 21 can be very long and drawn out. By putting in place a statutory timetable the parties would have longstop dates by which time the issue should be addressed. Again, the Landlord and Tenant Act 1954 provides a model for this. This allows either party to commence the process for renewal / removal. A Code Operator could therefore seek a renewal agreement with a landowner and a landowner could either ask whether the code operator wanted a new agreement or seek to determine the same.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus.

Consultation Paper, Part 5, paragraph 5.50.

We consider that if an Operator keeps his apparatus in place after expiry of the relevant agreement then he should be required to reimburse the landowner for such period of occupation. Again, by way of analogy, the Landlord and Tenant Act provides for this by way of interim rent and we do not see any reason why this could not apply in this case.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.51.

We agree. Members reported that it is a common feature of negotiations with Code Operators that where the land on which apparatus is situated is ripe for redevelopment, Code Operators are willing to agree to liquidated damages clauses in the event they do not vacate at the lease / licence expiry. This is to prevent them relying on code rights. Given it is questionable whether such a provision is enforceable we consider it appropriate that the parties be able to contract out if they wish to do so. The regime works well under the 1954 Act and we see no reason why an exclusion regime should not apply to the Code Operators.

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code?

Consultation Paper, Part 5, paragraph 5.56.

Yes, we consider that to operate two regimes would cause confusion. Therefore any revised code should apply to all agreements, even if the apparatus was installed before the revised code came into force.

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights.

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.35.

No comment

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land.

Consultation Paper, Part 6, paragraph 6.36.

No comment

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator.

Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact.

Consultation Paper, Part 6, paragraph 6.73.

No comment

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable).

Consultation Paper, Part 6, paragraph 6.74.

No comment

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle.

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.78.

No comment

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid.

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.83.

No comment

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

We agree, for the reasons stated in the consultation paper, that the revised code should no longer specify the county court as the forum for most disputes.

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code:

(1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);

(2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

We would agree with the recommendation that the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber) is the appropriate forum for these disputes.

In order to expedite matters, however, we agree that it would be sensible to have some form of alternative dispute resolution also available. It may be sensible if a procedure similar to that contained in the Party Wall etc. Act 1996 is adopted, but we would also suggest that provision is allowed for the parties to mediate the dispute between them, as an alternative.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

We have some concerns about the proposal that it should be possible for code rights to be conferred at any stage in proceedings pending the resolution of dispute over payment. If Code Operators are given an effective right to take entry at an early stage of proceedings this could enable Code Operators to use this right to run rough-shod over resistant occupiers.

In the circumstances, we would suggest that it should only be possible where terms of occupation are fully agreed save for rent or whether the Code Operator can establish a cogent reason to the Lands Chamber to allow early access.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay.

Consultation Paper, Part 7, paragraph 7.32.

The proposals allowing alternative dispute resolution via a procedure akin to the Party Wall etc. Act, together with mediation, should mean that delays are reduced.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options:

(1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or

(2) that costs should be paid by the losing party.

Consultation Paper, Part 7, paragraph 7.37

We are of the view that the costs procedure should provide for a narrow category of costs to be payable by the Code Operator in any event (in a manner akin to that provided for by the leasehold enfranchisement provisions).Thereafter, costs should be at the tribunal's discretion following the usual "losing party pays" principle.

To allow landowners any more than a limited automatic right to certain costs could encourage landowners to litigate unnecessarily. On the other hand, given that the Code Operator has considerable statutory protection by virtue of the Code, it is right to balance this with a limited liability for the landowner's costs in any event.

If the proposal that the Code Operator be liable for certain limited costs *in all cases* is not adopted we would suggest, as an alternative, that the Code Operator should at least be liable for limited costs in all cases where it is seeking to acquire rights, without the landowner's agreement, pursuant to Paragraph 5.

In all cases, a procedure akin to Part 36 of the Civil Procedure Rules should be introduced to allow parties to make reasonable offers to thereafter give themselves costs protection, with the usual consequences to follow in costs if reasonable offers are not accepted.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute.

Consultation Paper, Part 7, paragraph 7.38.

Please see above.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.52.

Agreed.

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how?

Consultation Paper, Part 7, paragraph 7.53.

We are of the view that the form of notices available could benefit from being simplified including the warnings given to landowners. We also believe that it would be helpful for a suite of notices to be made available to landowners, although perhaps their use should not be mandatory.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided?

Consultation Paper, Part 7, paragraph 7.54.

No comment

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms.

Consultation Paper, Part 7, paragraph 7.60.

We believe that whilst it may be useful to have a standardised form of agreement and terms, it would not be practicable for the Code to facilitate an agreement on the basis of these terms and they should only be used on a voluntary basis.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.22.

The view of the overwhelming balance of members consulted is that the proposal to exempt the 1954 Act is correct.

As indicated in the consultation paper, many of our members have found numerous practical and legal difficulties with the application of two regimes, as currently applies. Fundamentally, the two regimes are incompatible with each other: there are different notice requirements; the grounds for possession are different; and in order for a landlord to serve notice under paragraph 21, the lease must already have ended – but, as the paper highlights, it is arguable that the lease does not end until such time as 1954 Act rights are determined.

We would also agree with the consultation paper that tenancies which are entered into primarily in order to place electronic communication apparatus on land are not typical of business tenancies and were not intended to be protected by the 1954 Act.

It is, in our view, not sufficient simply to say that parties are able to contract out of the 1954 Act – the lack of clarity that exists currently as a result of the two regimes being (potentially) applicable is unsatisfactory and causes additional delays and costs. This will not always be solved by the availability of the parties being able to contract out as this only happens sporadically with the parties' agreement.

We therefore agree that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus- and which is protected under the revised code - the 1954 Act should not apply.

We do not accept the suggestion that simply because on occasions Code leases can be assigned to non- Code Operators, this gives good reason for the 1954 Act to remain applicable. In these circumstances, the lease could become "unprotected" (by either the Code or 1954 Act); or this could be resolved by allowing for the 1954 Act to apply following assignment to a non-Code Operator.

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.33.

We do not agree that an interest in land created by the Code should be registrable under the land registration legislation, for this to be rendered meaningless if there is a failure to register, because the Code's provisions prevail. This will undermine the Land Registration Act 2002. Code rights could be treated in the same way as overriding interests, binding on successors and overriding interests only until they are registered. However, the intention of the Land Registration Act was to incorporate such rights in the register. If the interests created by the Code are required to be registered under the land registration legislation they should not be legal interests until registration has taken place, as is the case for other registrable interests.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us:

(1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon;

(2) what impact regulation 16 has on Code Operators and on Ofcom;

(3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and

(4) if the answer to (3) is yes, what form should it take?

Consultation Paper, Part 9, paragraph 9.14.

No comment

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required?

Consultation Paper, Part 9, paragraph 9.39.

No comment