Law Commission Consultation – "Leasehold Home Ownership: Buying your freehold or extending your lease"

A Response by

The Chartered Institute of Legal Executives (CILEx)

[January 2019]

1. Summary of Recommendations

1.1. Headlines

1.1.1. Three-quarters of CILEx members surveyed believe that landlords are treated more favourably than leaseholders under the current regime. The current enfranchisement regime does not sufficiently represent the interests of leaseholders, and reforms are needed to ensure that they are able to balance the interests of both landlords and leaseholders in an equitable manner. (Para 4.20-4.22, 13.5-13.9)

1.1.2. However, a 'one size fits all' approach is unsuitable. The reforms need to appropriately balance simplifying the current enfranchisement regime with recognising the divergences in land interests, properties, leaseholders and landlords. (Para 3.3, 8.1)

1.1.3. Improving consumer awareness of costs and processes within the enfranchisement regime should be a key area of reform. (Para 3.1)

1.1.4. There is also a need for clearer information for frontline practitioners on how the multitude of ongoing leasehold reforms shall interact and be prioritised. (Para 3.1)

1.1.5. Streamlining the enfranchisement regime for flats and houses is a necessary step in achieving parity; however, within wider leasehold reforms, the acute grievances faced by these different leaseholders should not be overlooked. (Para 3.2, 8.2-8.4)

1.2. Terms of Enfranchisement

1.2.1. Limiting the freedom of parties to negotiate the terms of their enfranchisement is not a solution to the underlying inequalities of arms between landlords and leaseholders. (Para 4.1)

1.2.2. Amendments to remove the incoherent distinctions between the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993, in adopting the more favourable position for leaseholders, are welcome. (Para 4.3-4.5, 6.1-6.2, 8.7)

1.2.3. Leaseholders of houses should have the right to longer lease extensions as the current 50 year-period is no longer fit for purpose. (Para 4.6)

1.2.4. The Leasehold Reform Act 1967 s.17 is in need of reform to provide leaseholders of houses with safety and stability in their own homes. (Para 4.7)

1.2.5. Landlord rights to repossession for the purposes of redevelopment should be limited to the end portion of a lease, and supplemented with a mandatory notice period that provides sufficient time for leaseholders to reorganise their affairs. (Para 4.8)

1.2.6. Enfranchisement reforms must take into consideration concurrent reforms within the leasehold and wider housing sector to ensure reforms are dovetailed together. (Para 4.9, 14.8)

1.2.7. Reforms should not place Aggio style leases in a more or less favourable position then regular leases. (Para 4.14)

1.2.8. Freehold acquisition claims should entitle leaseholders to acquire the freehold subject to the rights and obligations on which it is already held to stay truthful to the transaction. (Para 4.15)

1.2.9. A landlord should not be capable of unreasonably excluding land under his/her ownership from a freehold acquisition claim. (Para 4.19)

1.2.10. Leaseholders should be entitled to participate in collective enfranchisement claims at a later date (Para 4.44-4.47), and nominee purchaser companies should be mandated to take the form of a company limited by guarantee to facilitate this new right. (Para 4.26-4.37)

1.2.11. In determining whether collective enfranchisement should be permitted for houses on an estate, greater consideration should be made as to whether this would be of any practical benefit, and indeed whether it is practical at all in the context of particularly large estates. (Para 4.38-4.39)

1.2.12. Proposals introducing rights to insist that a landlord take leasebacks over a property/properties, needs to consider how this might complicate the process for non-participating leaseholders who wish to exercise their right to collective enfranchisement in future. (Para 4.42)

1.2.13. All freehold acquisition claims should enable enfranchising leaseholder/s to discharge any mortgage secured against the freehold directly, however obligations to pay the mortgage in full need to be supplemented with safeguards against abuse of process. (Para 6.3-6.7)

1.3. **Qualifying Criteria**

1.3.1. Whilst enfranchisement rights should be limited to leases which permit residential use (Para 8.5), they should not be dependent on the identities of either party involved in the transaction. (Para 8.28-8.31, 14.5-14.7)

1.3.2. Reforms should abolish the qualifying criteria based on financial limits (low rent test and rateable values) as well as the two-year limitation on exercising enfranchisement rights. (Para 8.8-8.11)

1.3.3. The two-thirds requirement for collective enfranchisement should be relaxed in the context of premises containing shared ownership leases. (Para 8.16-8.17)

1.3.4. The requirement for at least half of all qualifying leaseholders to take part in a collective freehold acquisition claim is no longer as relevant in light of proposals enabling leaseholders to exercise enfranchisement at a later date. (Para 8.18-8.22)

1.3.5. Circumstances in which the validity of notices can be challenged should be limited, including with regards to delivery of those notices. (Para 11.2-11.3)

1.3.6. There should be standardised simpler forms provided for commencing an enfranchisement claim. (Para 11.4)

1.3.7. Whilst leaseholders should be encouraged to notify all qualifying tenants of a collective enfranchisement claim, this should not be made a legal obligation. (11.5)

1.4. **Disputes and valuations**

1.4.1. The concurrent jurisdiction of both the Tribunal and County Courts to deal with enfranchisement-related disputes should be reformed as it has led to added costs, time delays and exploitation of legal process. This particular reform should take into account parallel proposals for a new Housing Court. (Para 12.1-12.2)

1.4.2. A single valuation expert would be useful in solving valuation disputes outside of the Tribunal. (Para 12.3)

1.4.3. Greater consideration should be made into whether the contributions requirement (to pay landlord non-litigation costs) should be retained; in any case standardised rates are needed to improve transparency and reasonableness of these costs. (Para 13.1-13.4)

1.4.4. Reforms are needed to remedy the current valuation process as it indirectly favours higher premiums. (Para 14.1)

1.4.5. The valuation methodology for premiums should be simplified so that both parties are better positioned to make an informed decision at the outset, and to help manage expectations. (Para 14.2)

1.4.6. Both options for reforming valuation would be favourable to the current system, provided it is made clearer and simpler. The option for introducing a simple formula is marginally preferred as being most effective in driving premiums down and avoiding the need for professional valuation costs. (Para 14.22-14.23)

1.4.7. In either case, marriage value should be removed from the valuation methodology. (Para 14.3, 14.8)

2. Introduction

2.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. Amongst these more than 5,800 specialise in conveyancing.

2.2. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

2.3. This response includes contributions from CILEx members working in conveyancing. CILEx liaised with practitioners through its Conveyancing Specialist Reference Group and conducted several surveys into member experience of laws relating to the current leasehold enfranchisement process. These are expanded in more detail below.

3. General Points

3.1. Survey results demonstrated a strong majority of CILEx members (75.86%) who believe that landlords are treated more favourably than leaseholders under the current regime. We acknowledge the efforts of different agencies, including the Law Commission, to address this, however reform must not be piecemeal or fragmented.

3.2. CILEx emphasises that the impact of leasehold reforms shall only be felt where both practitioners and consumers have an adequate level of awareness around the proposed changes.

3.2.1. Comments from survey respondents have emphasised that it is less than clear, with several concurrent and simultaneous projects taking place, how these shall all interact and ultimately impact leaseholders. Clearer information for frontline practitioners on the short term, mid-term and long-term solutions that are being proposed, along with their appropriate weighting of priority, would be welcome.

3.2.2. Survey results further indicate that CILEx members consider consumer awareness of costs and consumer awareness of processes to be the greatest problem with the current enfranchisement regime. Therein, notwithstanding the more substantive issues inherent within the various stages of enfranchisement (particularly with regards to the valuation methodology for calculating premiums), the success of these reforms shall be largely dependent on wider efforts to improve transparency and public awareness around leaseholder rights.

3.2.2.1. To this end, CILEx maintains that any person seeking to purchase land should be directed to resources and legal advice from the very beginning of the house buying process, so that they are well equipped to make an informed decision about what is likely to be one of the biggest purchases of their lives.

3.2.2.2. Improved consumer awareness of the proposed reforms shall also be beneficial in mitigating risks faced by existing leaseholders with regards to the reduction in value of their home resulting from leasehold reforms.

3.3. CILEx welcomes the efforts taken to streamline the treatment of houses and flats under the new proposed enfranchisement regime. The benefits that this shall have in eradicating arbitrary distinctions and securing parity between the two groups of leaseholders is notable. As such, almost half of survey respondents (47.37%) agreed with the notion of introducing one coherent set of criteria for identifying a premises.

3.3.1. It is important however, that this approach is not blindly adopted within other areas of leasehold reform, as it risks bundling together the acute grievances that leaseholders of flats and leaseholders of houses face. For example, there is a clear discord between the justifications at hand for carving out a leasehold interest in the context of flats, as compared with those of houses. Identifying the areas in which the treatment of flats and houses must necessarily diverge is just as important to solving many of the problems within the current leasehold sector.

3.4. CILEx recognises that a fine balance needs to be achieved (within these reforms) in attempting to streamline the regime such that the enfranchisement process can be simplified, whilst not falling into the trap of a ‘one size fits all’ approach which would

unrealistically group together various land arrangements with differing rights and interests to consider.[1]

3.4.1. In a similar vein, our members showed caution against grouping landlords together into one overarching category, overlooking the existence of individual landlords and small to medium sized enterprises who do not pose the same risks (e.g.: inequality of arms) as their larger counterparts.

3.4.2. CILEx stresses that along with recognising these nuances within the leasehold sector, and the disparate nature of different landlords; it is imperative that reforms do not unjustifiably shift the balance of favour onto leaseholders without due regard towards landlord interests. Some members did articulate apprehension that if this were to happen, there would be a risk of removing all incentives for becoming a landlord, which in turn could have major repercussions on the housing market and wider leasehold sector.[2]

4. Terms of Enfranchisement

Terms of Enfranchisement: General Comments

4.1. CILEx is not fully convinced by the argument that enfranchisement should not be utilised as a platform for addressing issues relating to onerous terms within existing leases.[3]

4.1.1. It is understood that this stance has been adopted predominantly on the premise that the imbalance of power that currently exists between leaseholders and landlords would be exacerbated if wider powers were given to both parties to negotiate the terms of enfranchisement.

4.1.2. It is conceded that amongst survey results, a majority of respondents (55.56%) agreed or strongly agreed that freedom for parties to negotiate the terms of enfranchisement (within the current statutory regime) is problematic in practice. Herein, survey comments did identify the imbalance in power between landlords and leaseholders as a contributing factor to these difficulties.

4.1.3. Nevertheless, CILEx would like to emphasise that limiting choice is not a solution for remedying the current inequality of arms that exists between both parties. CILEx hopes that the Law Commission's planned work on Unfair Terms in Residential Leasehold shall be able to assist in this regard by providing for effective redress mechanisms, coupled with the ongoing work to improve the home buying and selling process. Once these plans are realised, it is dubious whether the justifications put forth within these reforms for limiting parties' powers to negotiate their own enfranchisement terms would still be relevant.

4.1.3.1. It is recognised that limiting this power as proposed, could have the effect of creating perverse outcomes in reality; restricting amendments even where both parties are in agreement that the amendment is necessary or desirable.

---

[1] When asked what practical difficulties might arise in respect of some of the reform proposals, survey respondents raised this particular issue.

[2] Member comments included: *"I don't think that the law should be changed to make being a landlord completely unattractive as who would then be one, but at the present time the tenants have no powers at all meaning landlords can do/charge what they like."*
Although it is noted that surveys into parallel reforms for banning the supply of leasehold houses were not considered by majority of our members to pose a threat to the supply of housing from a developer's perspective.

[3] Consultation paper, p.66, para 4.65.

4.1.3.2. It should also be taken into consideration that as the length of leases generally span decades, it is not unlikely for a leaseholder exercising his/her rights of enfranchisement to be different from the original lessee. In these circumstances, there are arguments as to fairness in limiting the ability for the leaseholder to renegotiate the terms of the lease.

4.2. In either case, CILEx emphasises that proposals to limit additional terms of enfranchisement to prescribed lists, must ensure that the prescribed list is routinely updated in order to future-proof the regime. As the terms are intended to reflect best practices and market needs, there needs to be a mechanism in place for ensuring that terms are routinely reviewed and brought in line with conveyancing practices (especially in the context of lease extensions).

<u>Question 2. (Part 1) We provisionally propose that leaseholders of both houses and flats should be entitled, as often as they so wish (and on payment of a premium), to obtain a new, extended lease at a nominal ground rent. Do consultees agree?</u>

4.3. CILEx strongly welcomes the Law Commission's finding that there is "*no reason for a leaseholder of a flat to enjoy a more favourable right to a lease extension than a leaseholder of a house*."[4]

4.3.1. Survey results demonstrated that respondents were largely in agreement (70.18% in favour) of having one streamlined enfranchisement regime that applies the same to both flats and houses.

4.3.2. Survey comments showed additional support that one streamlined enfranchisement regime would not only be of benefit to leaseholders seeking to enfranchise, but also for landlords and practitioners.[5]

4.4. CILEx welcomes the decision to adopt the more favourable approach used in the 1993 Act as the general principle (whereby a premium is paid for a lease extension, followed by payment of a nominal ground rent).

4.4.1. 81.13% of survey respondents agreed or strongly agreed that lease extensions should not be subject to a ground rent. This was in keeping with findings from previous surveys in which 93.93% of CILEx members agreed or strongly agreed that ground rents should start and subsequently remain at a 'peppercorn' (zero financial) level.[6]

4.4.2. This is also in keeping with parallel reform proposals by the Ministry of Housing, Communities and Local Governments (MHCLG) to cap ground rents on all future leaseholds to a nominal figure.[7]

---

[4] Consultation paper, para 4.38.

[5] Member comments included: *"This can't come quickly enough. It MUST be VERY streamlined and remove all of the current obstacles and complexity."; "This has been a long time coming! At the moment, the process is complex and lawyers need specialist experience in this area to advise."; "A simple system would help both professionals and Clients and leave less room for misunderstanding and hopefully speed up the process which can take a long time."; "… a standardised process may be beneficial to both the lessee's in respect to understanding, but also to landlords as there will be no way to villainise or mistrust [their] intention..."; "The present regime is something of a mine field for practitioners and difficult for the lay person to understand."*

[6] CILEx Response: *Department of Communities and Local Government Consultation* on '*Tackling unfair practices in the leasehold market',* (September 2017), para 16.1.

[7] Ministry of Housing Communities and Local Government, *Implementing Reforms to the Leasehold System in England,* (October 2018).

4.4.2.1. Herein CILEx would like to draw the Law Commission's attention to MHCLG's quantification of 'nominal' ground rents as £10 per annum. 82.85% of respondents to a previous survey conducted by CILEx, agreed with this proposed rate for a 'nominal' cap.[8]

4.4.2.2. In line with MHCLG proposals, as it is intended that this cap would apply to any lease replacements, CILEx sees no reason why this should not encompass lease extensions within the enfranchisement process.

4.5. In addition, 84.91% of survey respondents agreed or strongly agreed that there should be no limit on the number of subsequent lease extensions permitted for leaseholders of houses. This directly echoes the proposed new stipulation for all leaseholders to obtain new, extended leases 'as often as they so wish.'[9]

Question 2. (Part 2) We invite the views of consultees as to:
(1) the appropriate length of such a lease extension; and
(2) the points at which the landlord should be entitled to terminate the lease (paying appropriate compensation to the leaseholder) for the purposes of redevelopment.

4.6. 88.68% of survey respondents were in favour of leaseholders of houses enjoying the right to a longer lease extension. This is in accordance with the Law Commission's findings that the current 50-year period is no longer sufficient; as well as once again highlighting the need for greater parity between leaseholders of houses and flats.

4.6.1. In voicing their agreement for extended lease terms, survey respondents had lease extensions of 125 or 250 years in consideration.

4.7. CILEx is in agreement that the rolling break clause contained within the Leasehold Reform Act 1967 (1967 Act) s.17, is in need of reform. The current system places leaseholders of houses in a precarious situation, with little power or predictability over the actual length of their lease extension.

4.7.1. This change is especially warranted in light of the aforementioned proposals for payment of premiums in *all* situations of lease extension, both for houses and flats.

4.8. With regards to the rights of repossession, 55.55% of survey respondents disagreed or strongly disagreed that landlords should continue to enjoy this right for the purposes of redevelopment.[10]

4.8.1. Survey comments indicated that where this right does continue to be enjoyed, it should only be exercised towards the end of the lease, with suggestions that there should be a mandatory notice period of a sufficient length for leaseholders to reorganise their personal affairs (herein a suggestion was made of 2 years as a sufficient notice period).

4.8.2. However, it was recognised that in situations where a property has been abandoned or neglected by the tenant then the right of repossession may be

[8] CILEx, *Response: The Ministry of Housing, Communities and Local Government Consultation* on '*Implementing Reforms to the leasehold system in England',* (November 2018), para 2.32.1
[9] Consultation paper; para 4.38.
[10] Only 14.82% of respondents advocated that landlords should continue to enjoy this right.

justified. On these grounds, parallel suggestions were made for this right to be exercised only where there has been a severe breach of covenant.

Question 3. We invite the views of consultees as to whether the right to a lease extension should in all cases be a right to an extended term at a nominal ground rent, or whether leaseholders should also have the choice:
(1) only to extend the lease (without changing the ground rent); or
(2) only to extinguish the ground rent (without extending the lease).

4.9. Whilst CILEx recognises that the ability to extend a lease without changing the ground rent may be justified (in circumstances where it would allow leaseholders to keep the premium low and thereby spread out costs incurred), it is cautioned that this approach could risk undermining the policy position taken by MHCLG in mandating ground rent caps for future leaseholds.

4.9.1. CILEx would urge that, to ensure consistency in approach and facilitate consumer awareness around ground rents, a nominal ground rent should continue to apply in all circumstances.

4.10. With regards to the option of extinguishing ground rents without extending a lease, CILEx recognises the practical benefits, however it would emphasise the perversity in labelling such an arrangement as a 'lease extension.' Given the aforementioned concerns of consumer awareness around the enfranchisement process, this may cause additional confusion amongst consumers and the general public.

Question 6. (Part 1) We provisionally propose that (except in the case of Aggio-style leases and cases where the common parts of a building are owned and managed by a third party) the terms of a lease extension (other than the length of the term and the ground rent) should be identical to the terms of the existing lease, save where either party has elected to include terms drawn from a prescribed list of non-contentious modernisations. Do consultees agree?
We invite the views of consultees as to the terms that should be included within such a prescribed list.

4.11. CILEx welcomes the flexibility to change terms relating to ground rents, in line with the above proposals for lease extensions to be automatically subjected to a nominal ground rent.

4.12. 77.78% of survey respondents agreed or strongly agreed with the proposal for lease extensions to replicate terms within the existing lease (except for length of term and ground rent). However, it was suggested that there should be a requirement for landlords to agree to any amendments which are necessary to address errors and omissions in the original lease as well as those which are necessary where circumstances have changed.

4.13. Member feedback provided the following terms that should be included within the prescribed list of non-contentious issues for lease extensions: a). covenants in respect of insurance which complies with the Council of Mortgage Lenders (to ensure comprehensive insurance cover); b). a covenant to enforce all other covenants; c). a covenant to take over management of the property should the management company

fail to do so; d). rights granted of support shelter and protection; e). rights granted of access services and entry; e). service charge arrangements where the existing schemes no longer work; f). amendments to incorporate any terms covered in new legislation since the lease was first granted, g). terms to correct defects as per U.K finance requirements.[11]

4.13.1. It was further suggested that user covenants should also be capable of being reviewed.

Question 6. (Part 2) Do consultees consider that it would be appropriate to adopt a standard or model lease for Aggio-style leases? Alternatively, would it be appropriate to use a standard or model lease as a starting point in such cases?

4.14. Exempting Aggio-style leases from this general approach is realistic and necessary given the unique characteristics of these leases.

4.14.1. Whilst 44% of survey respondents agreed or strongly agreed with limiting Aggio style leases to terms provided for within a standard or model lease; the same number of respondents neither agreed nor disagreed with this proposal.

4.14.2. CILEx asserts that if Aggio-style leases were given a standard or model lease purely as a starting point, then this would confer upon such leaseholders an advantage in having greater flexibility to alter the terms of their lease extension. The outcome, whereby Aggio-style leaseholders enjoy greater powers to negotiate the terms of their lease extension in comparison with regular leaseholders, does not seem justified. As such it is presumed that if flexibility to alter generic lease extension terms is limited to a prescribed list, the same should apply for Aggio-style leases for the purposes of parity.

15. We invite the views of consultees as to whether a leaseholder making an individual freehold acquisition claim should acquire the freehold subject to the rights and obligations on which the freehold is currently held, or on terms reflecting the rights and obligations contained in the existing lease.
We provisionally propose that, on an individual freehold acquisition claim, additional terms may only be added to the transfer where the leaseholder elects to include a term drawn from a prescribed list of terms. Do consultees agree?
We invite the views of consultees as to the types of additional terms that should be included within such a prescribed list.

4.15. CILEx concurs with the proposal for freehold acquisition claims to be acquired subject to the rights and obligations on which the freehold is currently held. This option ensures that an enfranchising leaseholder shall acquire the freehold in a manner that accurately reflects the asset being purchased. The Law Commission rightly observes that the alternative approach (endorsed by the 1967 Act) undermines the value of enfranchisement in denying a leaseholder from fully acquiring what the landlord has.

[11] CILEx notes some member comments which suggested that the freedom to alter terms within a lease extension should be somewhat wider: *"necessary amendments to deal with obvious deficiencies in [the] lease, [e.g.:] lack of mutual enforceability, up-dating insurance, covenant expanding service charge schedule…"; "any other terms that are incorrect should allow amendment – e.g. incorrect plan/s; incorrect clauses being referred to in other clauses etc."*

The result is to render the current enfranchisement regime for houses as somewhat artificial in nature.

4.15.1. 85.19% of survey respondents agreed or strongly agreed with this approach for both individual and collective freehold acquisition claims.

4.15.2. In addition, it is felt that acquiring the freehold subject to the rights and obligations on which the freehold is currently held has the benefit of clarity, ensuring that it may be better understood at a consumer level.

4.16. In addition to obtaining the freehold interest subject to the rights and obligations on which the freehold is currently held, member feedback provided the following terms that should be included within the prescribed list: a). Any of the landlord's existing covenants, b). A term allowing for other lessees to participate in enfranchisement at a later date (for collective freehold acquisitions), c). Rights of way, d). Service covenants.

16. We invite the views of consultees as to whether, where a leaseholder's existing lease contains rights and obligations in respect of land that is to be retained by the landlord, the leaseholder should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that:
(1) reflect the rights and obligations set out in the leaseholder's existing lease; or
(2) appear within a prescribed list of appropriate covenants.
We invite the view of consultees as to the types of terms that should be included within such a prescribed list.

29. We invite the views of consultees as to whether, on a collective freehold acquisition claim where the leaseholders' existing leases contain rights and obligations in respect of land that is to be retained by the landlord, the nominee purchaser should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that:
(1) reflect the rights and obligations set out in the leaseholders' existing leases; or
(2) appear within a prescribed list of appropriate covenants.
We invite the views of consultees as to the types of term that should be included within such a prescribed list.

4.17. 70.37% of survey respondents agreed or strongly agreed that freehold acquisition claims (both individual and collective), where only part of the freehold interest is acquired (and there is no estate management scheme) should be subject to only those terms provided within a prescribed list.

4.18. Member feedback provided the following terms that should be included within the prescribed list for both individual and collective freehold acquisitions (where only part of the landlord's interest is being acquired): a). Provision for a mandatory scheme of estate management, b). Future repairing obligations, c). Rights of way, d). A term allowing for other lessees to participate in enfranchisement at a later date (for collective freehold acquisitions).

4.19. In either case of individual or collective freehold acquisition, CILEx emphasises that a landlord should not be capable of unreasonably excluding certain land (which is under his/her ownership) from a freehold acquisition claim.

17. We provisionally propose that any obligation owed to a landlord of an estate by a leaseholder who has acquired the freehold of their premises should be enforceable whether or not the landlord has retained land that benefits from that obligation. Do consultees agree?
We invite the views of consultees as to whether unpaid sums due from a leaseholder who has acquired the freehold of their premises to a landlord of an estate should be capable of being charged against the freehold and enforced by the landlord as if he or she were a mortgagee of the property.

4.20. Survey results demonstrated a strong majority of CILEx members (75.86%) who believe that landlords are treated more favourably than leaseholders under the current regime.

4.20.1. That being said, some CILEx members did caution against the impact of reforms shifting favour too heavily onto leaseholders at the expense of landlords. It was pointed out that the nature of landlords can vary wildly, which in turn impacts the balance of powers and resources available to them.[12]

4.21. With this in mind, CILEx is in agreement that obligations owed to a landlord of an estate by an enfranchising leaseholder should be retained regardless of whether they confer a benefit to the landlord or not. This is important in recognising the vested interests of the landlord, and to ensure that arbitrary distinctions are not created between different groups of landlords which may only serve to overcomplicate the regime.

4.22. However, in ensuring a fair balance of interests between the leaseholder and landlord, CILEx disagrees that unpaid sums due from an enfranchised leaseholder to a landlord of an estate should be capable of being charged against the freehold. Such a reform would be a disproportionate solution in protecting the landlord's interests, given the likely discrepancy between the value of any outstanding sums in comparison with the value of the freehold interest.

18. We provisionally propose that where a leaseholder's existing lease does not contain rights and obligations in respect of land that is to be retained by the landlord, the leaseholder should (where there is no current estate management scheme in place) acquire the freehold subject to terms in respect of the retained land that appear within a prescribed list of appropriate covenants. Do consultees agree?

30. We provisionally propose that, on a collective freehold acquisition claim where the leaseholders' existing leases do not contain rights and obligations in respect of land that is to be retained by the landlord, the nominee purchaser should (where there is no current estate management scheme in place) acquire the freehold subject

[12] Member comments included: *"It depends on who the Landlord is. Large companies with managing agents (e[state] & m[anaging] etc.) seem to be very different to private landlords"; "In the private rental sector tenants have the upper hand."*

to terms in respect of the retained land that appear within a prescribed list of appropriate covenants. Do consultees agree?
We invite the views of consultees as to the types of terms that should be included within such a prescribed list.

4.23. CILEx recognises that such an approach is of practical benefit in safeguarding the rights and interests of the landlord with regards to any retained land which the enfranchising leaseholder may later interact with.

4.24. In addition, this may be necessary to protect the interests of any leaseholders who have not yet chosen to exercise their rights of enfranchisement.

4.25. If such a prescribed list is introduced, this list ought to be the same in relation to the situation within Question 16 and Question 29 as here.[13] (The concerns voiced in response to both these questions are also once again reiterated here).

21. We provisionally propose:
(1) a general requirement that a collective freehold acquisition claim must be carried out by a nominee purchaser which is a company; and
(2) an exception to the above requirement where:
(a) the premises to be acquired contain four residential units or fewer;
(b) all residential units are held on long leases;
(c) the leaseholders of all residential units are participating in the claim; and
(d) all those leaseholders agree.
Do consultees agree?
Do consultees consider that some of the requirements of company law are inappropriate or onerous for a nominee purchaser company and should be relaxed? If so, please tell us which.

4.26. 46.16% of respondents agreed or strongly agreed with the approach that a nominee purchaser should be required to take the form of a company, though 30.77% neither agreed nor disagreed.

4.27. Survey comments highlighted the following benefits that a corporate structure provides: the ability to persist following the death of the original enfranchising leaseholders, the ability to clearly stipulate obligations on behalf of new landlords, and crucially, facilitating for the future buy in of non-enfranchising leaseholders.

4.27.1. The latter point is significant, with there being a general consensus amongst survey respondents (75.47%) that leaseholders who did not previously participate in collective enfranchisement should have the right to do so at a later date.

4.27.2. Survey respondents voiced agreement with the Law Commission's finding that the best way to safeguard this right of future-enfranchisement, would be a general requirement for leaseholders exercising collective enfranchisement to do so in the form of a company. This was in acknowledgment of the fact that a nominee purchaser, in the form of a company, could easily provide mechanisms

[13] Para 4.17-19

for determining the relationship, duties and obligations of all leaseholders, irrespective of when they joined in on the freehold acquisition claim.[14]

4.28. Survey respondents further highlighted the benefits of introducing such a general requirement in countering unnecessary delays and costs, as well as avoiding logistical difficulties faced in practice (particularly with regards to TR1 forms).[15]

4.29. In recognition of the above viewpoints, CILEx welcomes the introduction of this proposed general requirement as a realistic solution to remedy impracticalities in the system, as well as to secure the rights and interests of all leaseholders to collective enfranchisement (including those unable to partake the first-time round).

4.29.1. However, it has been suggested by some of our members that there would need to be safeguards in place to prevent the nominee company from losing its title should it be struck off. One suggestion to overcome this issue was to appoint a professional officer to the board.

4.30. The exceptions listed are appreciated in that they do not undermine the right for leaseholders to exercise collective enfranchisement in future (exception 2(c)); and once again adopt a realistic approach in recognising that there are situations where a resident's management company may not be suitable. This accords with general member views cautioning against adopting an overly rigid approach, which would risk overlooking the diversity of land interests and arrangements that currently exist.[16]

4.31. Company law requirements that were identified as areas which could be relaxed in the context of nominee purchaser companies included matters relating to the provision of accounts and returns.

22. We provisionally propose that the nominee purchaser company used for a collective freehold acquisition claim must be a company limited by guarantee. Do consultees agree?

4.32. CILEx welcomes the provisional stance for a nominee purchaser company to be one of limited liability. As the Law Commission rightly points out, the relationship between leaseholders exercising collective enfranchisement is not necessarily built on trust, with leaseholders having very little control or choice in deciding who the other members of the company should be (exacerbated in situations where leases have been assigned to third parties). With this in mind, it would be unrealistic to expect enfranchising leaseholders to take on the risk of unlimited liability.

---

[14] Member comments included: *"Perhaps as part of buying freehold. the leaseholders had to set up their own management company and any late comers could have to right to buy into the freeholder company by way of a share. This would help to support the idea of a reserve fund for maintenance."; "The Company if properly formed should have a Shareholders agreement which should specify how any later acquired premiums should be calculated and divided between the original property owners who enfranchised."*

[15] Member comments included: *"[the] formation of a residents owned management company to hold the freehold estate and manage it. ..[means] On disposal this would avoid the need for constant updating of the freehold title."; "[currently] you need ID1s for everyone, you need them to sign the TR1 in advance. Often people are away and the delay can be horrendous."*

[16] Please see para 3.4 above.

4.33. 70.83% of survey respondents agreed that a company limited by guarantee was the most appropriate structure to utilise in this scenario (as opposed to an unlimited company or one limited by shares).

23. We provisionally propose that the articles of association of any nominee purchaser company exercising the right of collective freehold acquisition must contain certain prescribed articles. We also propose that those prescribed articles may only be departed from where:

(1) all the residential units within the premises are held on long leases; and
(2) the leaseholders of all residential units are members of the nominee purchaser company.

Do consultees agree?

We invite the views of consultees as to:

(1) the matters in respect of which it would be desirable for articles to be prescribed; and

(2) any matters in respect of which it would be desirable to require provision in the articles of association, albeit with some freedom as to that provision.

4.34. Comments from survey respondents highlighted that the articles of association for a nominee purchaser company should provide for the ways in which non-participating leaseholders would later take part in the original claim.

4.35. Where the leaseholders of all residential units are already members of the nominee purchaser company, it suffices that these provisos would no longer be necessary. Amongst the articles of association, it is recognised that there may well be other prescribed articles such as this, which would no longer be necessary should all leaseholders of the residential units already be members of the nominee purchaser company.

24. We provisionally propose that a nominee purchaser company, having carried out a collective freehold acquisition, be restricted from disposing of the premises acquired, save where:

(1) all the residential units within the premises are held on long leases;
(2) the leaseholders of all residential units are members of the nominee purchaser company; and
(3) all members of the company agree with the proposed disposition; OR
(4) the Tribunal makes an order permitting the proposed disposition.

Do consultees agree?

We invite the views of consultees as to the grounds on which the Tribunal should be empowered to permit a disposition of the premises acquired collectively by a nominee purchaser company.

4.36. As stated previously in response to Question 21, CILEx members indicated strong agreement with the proposition that leaseholders who did not previously participate in collective enfranchisement should have the right to do so at a later date. CILEx is therefore in agreement that there should not be an ability for a nominee purchaser company to dispose of the freehold at the expense of these rights.

4.37. It has been suggested that there are only very limited good faith scenarios in which the disposition of freehold interest may occur. Respondents identified the following foreseeable grounds on which the Tribunal should have the power to make an order permitting the proposed disposition: where it is for the purposes of redevelopment (so not to infringe on the rights of landlords to repossess for these purposes).

25. We provisionally propose that the right of collective freehold acquisition should extend to the acquisition of the freehold of an entire estate consisting of multiple buildings. Do consultees agree? We invite the views of consultees as to how such a right might operate.
Do consultees consider that there are any problems with the approach we have suggested at paragraph 6.95, or any other issues for which we would need to provide

4.38. 53.85% of survey respondents agreed or strongly agreed that collective enfranchisement should be permitted for houses on an estate. This is in alignment with the view that there ought to be parity in the treatment between houses and flats.

4.38.1. However, it is noted that 26.92% of respondents neither agreed nor disagreed with the proposition. Herein, a number of respondents voiced concerns about the practicality of implementing these proposals particularly in the context of larger estates[17]; whilst others were of the opinion that this would not be an attractive option for existing leaseholders as it would provide them with little benefit.[18] CILEx therefore suggests that further consideration of the benefits of this proposal may be warranted.

4.39. CILEx welcomes the express provision within paragraph 6.95(3), in recognising the importance of retaining the right to both individual and collective freehold acquisitions. This is in appreciation of the different circumstances that may render one of the two rights more favourable than the other despite leaseholders occupying the same estate.

28. We provisionally propose that, where a nominee purchaser making a collective freehold acquisition claim is to acquire the whole of the landlord's freehold interest, any rights and obligations that are not ordinarily discharged upon payment of the purchase price should be continued automatically. Do consultees agree? What do consultees consider would be the best statutory means by which this could be achieved?
We provisionally propose that, where a nominee purchaser making a collective freehold acquisition claim is to acquire the whole of the landlord's freehold interest,

17 Member comments included: *"Depends on the situation size of estate"; "Collective enfranchisement would be a logistical nightmare if there are a lot of houses on an estate. Owners may not realise how much it costs in time to complete the transaction and I can see there would be a lot of solicitors not prepared to take on the work."; "There is too much to understand in looking after an estate, need qualified persons doing so".*

18 Member comments included: "*It would be difficult if not impossible to have all such lessees agreeing and why should one or two prevent others. The individual right should be sufficient."; "I agree but I suspect a lot of the homeowners will have little interest in the running of the communal parts of the estate after they have enfranchised. This risks deterioration in the communal areas which frequently happens on leasehold developments where the residents have acquired the freehold."; "Not sure what the merit would be in them doing so""; "I don't see the need?"*

the parties should only be able to adopt additional covenants if those covenants are drawn from a list of prescribed covenants. Do consultees agree? Which covenants do consultees consider should be included within such a prescribed list?

4.40. It is only logical that any rights and obligations that would not ordinarily be discharged upon payment of the purchase price should automatically be transferred along with the freehold interest (i.e.: binding covenants and rent charges).

4.41. Survey comments made the following suggestions for covenants that should be included within the prescribed list for collective freehold acquisition (where the landlord's whole interest is being acquired): a). a covenant to indemnify, b) a covenant for the enforcement of other covenants and rent charges, c). a covenant to grant easements over retained land, free of charge, to any lessee that needs them.

31. We provisionally propose to introduce a new power for leaseholders exercising the right of collective freehold acquisition to insist, if they so choose, that the freeholder take a leaseback or leasebacks of all parts of the premises (other than common parts) which are not let to participating leaseholders. Do consultees agree?

4.42. Majority of survey respondents (53.85%) neither agreed nor disagreed with this proposal.

4.42.1. Amongst respondents, concerns were voiced that this new power may overcomplicate the enfranchisement process and may not be appropriate in all circumstances. In particular, it is noted that leasebacks could complicate the process later on for non-participating leaseholders who wish to exercise the right to collective enfranchisement in future.

4.42.2. CILEx would therefore welcome further information around this proposal, particularly: how this new power would operate in practice and how it may interact with the new right to exercise collective enfranchisement at a later date.

32. We provisionally propose that, where premises have been the subject of a collective freehold acquisition claim, the leaseholders in those premises should be prohibited from making a further collective freehold acquisition claim in respect of the same premises for a set period. Do consultees agree?
We provisionally propose that five years would be an appropriate duration for such a prohibition. Do consultees agree?

4.43. CILEx recognises that the 'ping pong' phenomenon, highlighted by the Law Commission, would likely cause frustration and aggravate problems for leaseholders. It is hoped however, that introducing the ability for non-participating leaseholders to take part in a collective enfranchisement at a later date should help to mitigate the likelihood of this happening.

4.43.1. It is therefore assumed that the proposed prohibition would not apply in such cases, i.e.: where the non-participating leaseholder's right of collective enfranchisement simply enables them to join in on the original claim that was made, as opposed to creating an entirely separate claim.

4.43.2. To supplement this, CILEx acknowledges the benefits of having a time limitation, however it has been suggested that a period set at 5 years would be too long, with some members advocating a period as short as 6 months. CILEx

thereby recommends reconsidering the length of the prohibition to ensure that it appropriately balances the risks of 'ping-pong' with the interests of leaseholders.

34. We provisionally propose a new right to participate: the right for leaseholders who did not participate in a prior collective freehold acquisition claim, or who did not qualify for the right at the time of the prior claim, subsequently to purchase a share of the freehold interest held by those who did participate. Do consultees agree? Do consultees consider that the right to participate should be available only in respect of collective freehold acquisition claims completed in the future, or also in respect of collective enfranchisement claims that completed before commencement of the new regime?

We have identified at paragraph 6.156 a number of issues which will need to be addressed in order for the right to participate to operate successfully. We invite consultees to share with us their views on how these issues might be resolved, and to tell us of any further difficulties they foresee with the operation of the proposed right.

4.44. 75.47% of survey respondent agreed or strongly agreed that leaseholders who did not participate in a prior collective freehold acquisition claim should have the right to do so at a later date.

4.45. Regarding 6.156 (1), the most straightforward solution suggested would be for nominee purchasers of completed enfranchisement claims to undergo conversion into a company (with a suitable mechanism in place to mitigate any additional costs that might be incurred).

4.45.1. CILEx cautions however, that the effect of this would be to render the proposal for the general requirement under Question 21 (and the subsequent provisions under Question 22, 23 & potentially 24) to be retrospectively applied.

4.46. Regarding 6.156 (6), CILEx would once again like to reiterate that efforts are needed beyond and before this point, in increasing consumer awareness around enfranchisement as there is a concern that many leaseholders are not aware of their rights to a collective enfranchisement, let alone of the issue of when a claim is taking place.[19]

4.47. Survey results identified an additional problem that may arise in this respect, with regards to the likelihood of tax issues emerging where a non-participating leaseholder becomes capable of exercising their right to collective enfranchisement at a later date. CILEx thereby recommends that this issue be considered more fully.[20]

[19] Please see para 3.2 above.

[20] Member comments included: "*There may be tax issues for house/flat owners who do not own their property as their main residence and for shareholders in collective companies who draw down their part of any later acquired funds from other owners that are distributed particularly if they are Directors of the Company.*"

5. Terms of Enfranchisement: Impacts

9. To what extent would our proposed uniform right to a lease extension at a nominal ground rent, for both houses and flats, increase the likelihood of leaseholders seeking lease extensions under (future) enfranchisement legislation?

5.1. As previously stated, survey results demonstrate general agreement with lease extensions at a nominal ground rent (upon payment of a premium in recognition of the landlord's interests); however greater efforts are needed in raising consumer awareness around leasehold enfranchisement for these reforms to generate maximum impact.

5.1.1. CILEx survey findings highlighted that consumer awareness of costs and consumer awareness of processes were the two biggest issues that our members identified with the current enfranchisement regime.

5.2. Crucially, the new regime needs to ensure that it simplifies the current system, as opposed to establishing more complexity. Conveyancers and legal professionals need to be made fully aware of the new processes, with sufficient time and guidance to do so.[21]

10. We welcome evidence as to whether, and if so, how, an increase in the length of a statutory lease extension would affect:
(1) the leasehold market; and
(2) the mortgageability of leases.

5.3. As a professional body for Chartered Legal Executive lawyers, CILEx does not feel best placed to comment on the impact that this might have on the wider sector or economy.

11. We have asked whether leaseholders should have the option of:
(1) extending their leases without changing the ground rent; or
(2) extinguishing their ground rent without extending the term of the lease.
We welcome evidence as to the likely uptake of these options by leaseholders.

5.4. Please refer back to CILEx's response to question 3.

12. To what extent does the current ability of parties negotiating a lease extension to include such terms as they may agree in the lease extension:
(1) increase the duration and cost of the enfranchisement process;
(2) increase the potential for disputes; and
(3) lead to the imposition of onerous or undesirable terms upon leaseholders under the lease extension, resulting in additional future costs to leaseholders?
To what extent would restricting parties' ability to introduce new terms into a lease extension to terms which are drawn from a prescribed list:
(1) reduce the time and cost involved in acquiring a lease extension;

[21] Member comments included: *"Homeowners and many lawyers struggle desperately with the process. It causes great frustration, distress and a lot of complaints."; "There needs to be a clear regime for lawyers and consumers to be able to understand"; "The system needs an overhaul to simplify the procedure"; "The current enfranchisement procedures under the LRA 9167 and LRHUDA 1993 are too cumbersome."*

(2) reduce the potential for disputes; and
(3) reduce future costs to leaseholders arising from the terms of the lease extension?

Would this reform lead to a higher proportion of leaseholders seeking to exercise their right to a lease extension?

20. To what extent does the current ability of parties negotiating the terms of a claim to acquire the freehold of a house to agree the terms of the freehold transfer without restriction:
(1) increase the duration and cost of the enfranchisement process;
(2) increase the potential for disputes; and
(3) lead to the inclusion of unusual terms within the freehold transfer, resulting in additional future costs to former leaseholders?

To what extent would limitations on the ability of parties to include new rights and obligations in a freehold transfer to an individual leaseholder:
(1) reduce the time and cost involved in acquiring the freehold individually;
(2) reduce the potential for disputes; and
(3) reduce future costs to former leaseholders arising from the terms of the freehold transfer?

Would this reform result in a higher proportion of leaseholders seeking to exercise their right of individual freehold acquisition?

36. To what extent does the current ability of parties negotiating the terms of a collective enfranchisement to agree the terms of the freehold transfer without restriction:
(1) increase the duration and cost of the enfranchisement process;
(2) increase the potential for disputes; and
(3) lead to future difficulties (financial or otherwise) resulting from the inclusion of unusual terms within the freehold transfer?

To what extent would limitations on the ability of parties to include new rights and obligations in a freehold transfer to a nominee purchaser:
(1) reduce the time and cost involved in acquiring the freehold collectively;
(2) reduce the potential for disputes; and
(3) reduce future difficulties (financial or otherwise) resulting from the inclusion of unusual terms within the freehold transfer?

Would this reform result in a higher proportion of leaseholders seeking to exercise the right of collective freehold acquisition?

5.5. CILEx members have noted that the current freedoms for leaseholders and landlords to negotiate the terms of enfranchisement (lease extension terms/freehold acquisition terms) can lead to delays as well as cause choke points which give rise to a greater potential for disputes.

5.5.1. Specifically, within the context of lease extensions, the ability of parties to negotiate terms has been noted to cause significant increases in costs on behalf of the leaseholder. This was attributed to the increased pressure and inequality of arms that is exacerbated in the context of lease extensions.

5.5.2. However, as mentioned previously, CILEx cautions against strong reliance on limiting choice as the answer to the underlying problem, i.e.: the imbalance of powers between landlord and leaseholder. Limiting choice may provide for an expedited process with less reliance on costly legal advice, but to help rebalance the favourable position that landlords currently enjoy, CILEx greatly

anticipates the work of the Law Commission on their project of Unfair Terms in Residential Leasehold.[22]

5.6. CILEx once again emphasises that greater efforts are needed to improve consumer awareness around costs and processes before these reforms lead to a higher proportion of leaseholders seeking enfranchisement.

5.6.1. Until consumers understand their rights under the law and are confident in the steps that they would need to take to exercise these rights, the impact of these reforms may be minimised.

5.6.2. One suggestion proposed, is for greater signposting so that leaseholders become aware of their right to enfranchisement earlier on. This is necessary both at the initial stage of purchasing the leasehold (i.e.: greater signposting by estate agents), as well as during the course of the lease (i.e.: greater signposting by managing agents, and perhaps signposting on rent demands). Future reforms for regulating the estate/letting/managing agent sector may be able to help in this regard.[23]

35. We welcome evidence as to the costs and benefits of requiring leaseholders pursuing a collective freehold acquisition claim to:

(1) use a company limited by guarantee as the nominee purchaser;
(2) comply with the applicable rules of company law; and
(3) use a set of partly-prescribed articles of association for the company limited by guarantee.

5.7. Please refer back to CILEx's response to question 21-23.

37. To what extent would our proposed new ability for leaseholders exercising the right of collective freehold acquisition to require the freeholder to take leasebacks of all parts of the premises (other than common parts) which are not let to participating leaseholders make collective freehold acquisition more affordable?
Would this reform result in a higher proportion of leaseholders seeking to exercise the right of collective freehold acquisition?

5.8. Please refer back to CILEx's response to question 31.

6. Discharge of Mortgage

5. We provisionally propose that a lease extension should automatically:
(1) be subject to any mortgage that is secured over the existing lease, and
(2) bind the landlord's mortgagee.
Do consultees agree?

6.1. CILEx advocates parity between leaseholders of houses and flats, such that the two types of leaseholder should not be treated more of less favourably than the other. Accordingly, it makes sense that if lease extensions for flats are already *automatically*

[22] This is especially given the sizeable majority of survey respondents (75.86%) who noted that the current imbalance in powers sees landlords treated more favourably than leaseholders within the current system.
[23] https://www.gov.uk/government/groups/regulation-of-property-agents-working-group

subject to any mortgage secured over the existing lease, then the same should apply to houses. This would help to simplify processes and eliminate capricious procedures which leaseholders of houses currently face for achieving the same ends.

6.2. CILEx welcomes this proposal under the assumption that the Law Commission's intentions are to automatically bind the landlord's mortgagee only in cases where the original lease was bound by the same.

6.2.1. To suggest otherwise, would be a departure from the existing exceptions contained within the 1967 Act s14(4) and the 1993 Act s58(1). With this assumption in mind, CILEx is once again in agreement with the proposal, as it simplifies the overall process, eradicating the time-consuming stage that leaseholders of houses currently face in having to seek consent from the landlord's mortgagee.

14. We provisionally propose that, where an individual freehold acquisition claim is made:

(1) any mortgage secured against the freehold title should automatically be discharged upon execution of the transfer; but

(2) the leaseholder should be under a duty to pay:

(a) the whole of the price; or

(b) (if less) the sum outstanding under the mortgage;
to the mortgagee or, alternatively, into court; and

(3) any sums due from the leaseholder to the landlord should be reduced by any sums paid under (2) above.

Do consultees agree?

We also provisionally propose that where an individual freehold acquisition claim is made – save in the case of estate rentcharges imposed to secure positive covenants – a landlord should be under a duty to use his or her best endeavours to redeem any rentcharge. Do consultees agree?

27. We provisionally propose that, on a collective freehold acquisition:

(1) any mortgage secured against the freehold title should automatically be discharged upon execution of the transfer; but

(2) the nominee purchaser should be under a duty to pay:

(a) the whole of the price, or

(b) (if less) the sum outstanding under the mortgage,
to the mortgagee or, alternatively, into court; and

(3) any sums due from the nominee purchaser to the landlord should be reduced by any sums paid under (2) above.

Do consultees agree?

We also provisionally propose that on a collective freehold acquisition – save in the case of estate rentcharges imposed to secure positive covenants – a landlord should be under a duty to use his or her best endeavours to redeem any rentcharge. Do consultees agree?

6.3. Survey respondents voiced an overarching consensus that the current enfranchisement regime is not friendly for those who seek to use it.

6.4. Accordingly, CILEx welcomes the Law Commission's proposal to simplify the process; eliminating the dependency of leaseholders on freeholders for discharging any mortgage secured against the freehold title. The reforms suggested would enable leaseholders to circumvent the unnecessary step of going through the landlord to discharge the mortgage, expediting the process and decreasing any costs that are presently sought by the freeholder to obtain mortgagee consent/evidence of discharge.

6.5. However, some concerns have been voiced that this system may be open to abuse from landlords. Member feedback highlighted that the requirement for a freehold acquisition claim to discharge any mortgage secured against the freehold title in full (subsection 2(b) of both questions) could provide scope for abuse whereby a landlord increases the sums payable to the mortgagee in the hope of impeding the freehold acquisition claim.

6.6. CILEx suggests that to mitigate this risk (which exists in cases of both individual and collective freehold acquisition; albeit less so in the former given greater presence of non-commercial landlords), the Law Commission's proposals could either:

a). retain the current position under the 1993 Act (i.e.: purchase monies paid over by the nominee purchaser which are less than the sum owed to the mortgagee, continue to be treated as discharging the mortgage, but with the landlord still liable to pay the outstanding sum to the mortgagee); or
b). Freeze lending upon notice served to the landlord of a freehold acquisition claim.

6.7. Furthermore, in the context of collective enfranchisements (where landlords are more likely to be larger commercial landlords), there is an added concern that the landlord may have a loan from his/her lender over several properties. Releasing the enfranchised premises or apportioning the loan could thereby lead to difficulties in practice for lenders.

7. Enfranchisement Outside the Statutory Regime

7. Do consultees consider that the ability of parties to enter into a lease extension outside the 1967 and 1993 Acts creates significant problems in practice? What steps, if any, do consultees consider could be taken to control or limit the use or impact of parties entering into a lease extension outside of a new statutory enfranchisement regime?

19. Do consultees believe that the ability of parties to enter into a transfer of the freehold of a house outside the 1967 Act creates significant problems in practice? What steps, if any, do consultees believe could be taken to control or limit the use or impact of parties entering into a freehold transfer to an individual leaseholder outside of a new statutory enfranchisement regime?

33. Do consultees believe that the ability of parties to enter into a transfer of the freehold of a block of flats outside the 1993 Act creates significant problems in practice? What steps, if any, do consultees believe could be taken to control or limit the use or impact of parties entering into a freehold transfer to a group of leaseholders outside of a new statutory enfranchisement regime?

7.1. CILEx shares the Law Commission's concerns that an overly prescriptive approach which restricts the flexibility for both parties to negotiate the terms of enfranchisement under the statutory regime, could result in an increase in voluntary arrangements.

7.2. 59.26% of survey respondents agreed or strongly agreed that voluntary enfranchisement agreements are problematic in practice. Member comments attributed two main factors to the problems encountered: 1). the inequality of arms between landlords and leaseholders,[24] and 2). the lack of consumer awareness around leaseholder rights. The outcome was frequently noted to negatively hinder leaseholders who unknowingly enter into lease agreements containing onerous terms.[25] In light of these concerns, CILEx recognises that the proposals put forward by the Law Commission to only permit voluntary agreements where leaseholders have been provided with notice of their entitlements under the statutory scheme, could help with this particular issue.

7.2.1. Although anecdotal evidence obtained from some members suggested that the prevalence of voluntary enfranchisement agreements is now on the decline.[26]

8. Qualifying Criteria

Qualifying Criteria: General Comments

8.1. CILEx is in agreement that the current restrictions and provisos in place for determining the qualifying criteria for leaseholders to bring enfranchisement claims are unnecessarily complicated.

8.1.1. Survey respondents highlighted that simplification of this criteria is necessary and should not amount to falling into the trap of a 'one size fits all' approach as has been previously cautioned against.

38. We provisionally propose to replace the language of "houses" and "flats" with the new concept of a "residential unit". Do consultees agree?
Do consultees think that our proposed definition of a "residential unit", set out at paragraphs 8.37 to 8.56, will work successfully in practice?
We provisionally propose to exclude business leases from enfranchisement rights. Do consultees agree? If so, do consultees agree that the best method of achieving this exclusion is by restricting enfranchisement rights to leases which permit residential use?

[24] Once again this reiterates that limiting choice under the statutory enfranchisement regime is not the answer to rebalancing the inequality of arms between landlords and leaseholders.

[25] Member comments included: *"Landlords are obstructive and tend to lack engagement with the process. Tenants are often persuaded to accept a lease extension at a higher premium than they should because they don't wish to embark upon the s.42 process. Landlords often add terms into the new lease/deed of variation which are to the detriment of the tenant and refuse to remove those plus they often refuse to allow the new lease/deed of variation to include terms to correct errors/omissions in the existing lease."; "I would imagine that the landlords take advantage of the tenants who don't know/understand their statutory rights."*

[26] Member comments included: *"They have been problematic however since the problems surrounding escalating ground rents have been more publicised and lenders changed their criteria, negotiations for voluntary lease term extensions have become less difficult and it is easier to put the case for reasonable ground rent reviews."*

8.2. CILEx recognises the practical benefits of a new integrated definition within the wider context of the Law Commission's proposals. 70.18% of survey respondents agreed or strongly agreed with the overarching aim to create a streamlined enfranchisement regime, and CILEx recognises the benefits to be had in supplementing this with a similarly streamlined definition such as 'residential unit.'

8.2.1. Survey findings further identified difficulties with the current definition of a 'house' under the 1967 Act, acknowledging that it can cause confusion in practice. 47.37% of survey respondents thereby agreed or strongly agreed that the distinction between 'houses' and 'flats' ought to be replaced with one coherent set of criteria for a premises within the enfranchisement regime (e.g.: 'residential unit.')

8.3. However, apprehensions were voiced amongst survey respondents of the impact that this overarching definition might have if applied to other areas of leasehold law.[27]

8.3.1. A notable concern was that the application of this streamlined approach within other areas of leasehold reform might encourage current practices of arbitrarily selling houses on a leasehold basis; something which our members continue to strongly oppose.[28]

8.3.2. With these points in mind, CILEx would like to reiterate caution against adopting an overly streamlined approach within other areas of leasehold reform, as this could risk overlooking important distinctions between leaseholders of flats and houses.

8.4. CILEx provisionally welcomes the proposed definition as set out at paragraphs 8.37 to 8.56. How successful this new definition will be, is however dependent on clear drafting of legislation to account for various nuances, as well as the application of existing precedent in helping to resolve any ambiguities which are still likely to arise.

8.5. CILEx concurs with the proposal to restrict enfranchisement rights to leases which permit residential use. The existence of these rights are specifically targeted to help people feel safe and secure within their own homes, providing them with stability in appreciation of: a). leasehold as a wasting asset, b). the imbalance of powers within the housing market between property developers and those living and relying on that property, and c). the lack of awareness amongst the general public of what a 'leasehold' interest is and how it differs from the freehold.

8.5.1. Survey findings had raised concerns that flats are often more susceptible of containing a range of different types of property (e.g.: commercial units), which might cause confusion when attempting to streamline the enfranchisement regime for both flats and houses. This proposal is therefore further welcomed in its ability to alleviate these concerns with a blanket approach.

<u>39. We provisionally propose to maintain the requirement that, in general, a leaseholder must have a lease which exceeds 21 years in order to qualify for any enfranchisement rights. Do consultees agree?</u>

[27] Member comments included: *"Flats and houses are different, and for a flat more detail is needed as to maintenance."; "management structures are very different alongside the rights given to Freeholders of houses rather than flats."*

[28] CILEx does recognise that the consultation paper published by the Ministry of Housing, Communities and Local Government: "*Implementing Reforms to the Leasehold System in England",* (published following CILEx's initial member survey on enfranchisement reforms) shall help to solve this particular issue.

40. We provisionally propose maintaining the current legal position that separate, concurrent long leases between the same landlord and leaseholder may be treated as if they were a single long lease. Do consultees agree?
We provisionally propose maintaining the current legal position that renewals or statutory continuations of long leases are also to be treated as long leases. Further, we propose adopting (across the board) the 1967 Act's approach to consecutive long leases, in treating them as a single long lease. Do consultees agree?

8.6. CILEx cautions against changes in the law where the accepted position is already effective and well understood.

8.6.1. As no issues have emerged relating to the current 21-year threshold for long leases, and the position is already well grounded in the context of both houses and flats, CILEx welcomes the decision to maintain this requirement.

8.6.2. The same applies to the current law concerned with treating concurrent long leases between the same landlord and leaseholder as one single long lease.

8.7. With regards to the proposition for renewals and statutory continuations of long leases to be treated as long leases, CILEx welcomes this change in simplifying procedures for leaseholders of houses and eliminating archaic limitations.

8.7.1. The proposition to adopt the 1967 Act's approach to consecutive long leases is also welcome for the same purposes of eliminating inconsistencies.

41. We provisionally propose that all qualifying criteria for enfranchisement rights based on financial limits (both the low rent test and rateable values) be removed. Do consultees agree?

8.8. 75.48% of survey respondents either agreed or strongly agreed that qualifying criteria based on financial limits should be removed. Survey findings indicated that these tests are outdated and arbitrary with little significance for modern day houses.[29]

42. We provisionally propose that the requirement to own premises for two years before exercising enfranchisement rights in respect of those premises be abolished. Do consultees agree?

8.9. 73.59% of survey respondents were in agreement that the two-year limitation on exercising enfranchisement rights ought to be abolished.

8.10. CILEx obtained findings in accords with the Law Commission, that the two-year requirement can be easily avoided through a transfer of benefit and is thereby of little to no benefit. Rather the requirement was criticised for complicating procedures and leading to delays, with practitioners having to prepare a greater number of transfers

[29] Member comments included: *"There is no need to apply archaic low rent tests or rateable value limits which no one really understands unless they have been in the profession for a long time."; "The tests are simply arbitrary"; "The low rent criteria is archaic and should simply be based on market value and the purchasers ability to afford it."* "*Purchasers are put off by these requirements*."

and coordinate exchanges in order to circumvent the restriction in the interests of assignees.[30]

8.10.1. In practice, the requirement may therefore be seen to jeopardise or discriminate against the interests of those leaseholders who are unaware that the limitation can be easily sidestepped. As such, CILEx welcomes its removal to re-level the playing field for all leaseholders.

8.11. Removal of this qualifying requirement is further welcome in empowering leaseholders to reduce their premiums earlier on by exercising their rights of enfranchisement. This is particularly useful given the current problems within the home buying and selling process where there is lack of consumer awareness around the differences between 'leasehold' and 'freehold.'

52. We provisionally propose the continuation of the 25% limit on non-residential use in collective freehold acquisition claims. Do consultees agree?

46. We provisionally propose that it is appropriate to apply a maximum percentage limit on non-residential use to individual freehold acquisition claims concerning premises containing multiple units. Do consultees agree?
We provisionally propose that that limit should be the same as that which applies to collective freehold acquisition claims. Do consultees agree?
We provisionally propose that the limit should be set at 25% of the internal floor space (excluding common parts). Do consultees agree

8.12. CILEx has not found any substantive issues against the continuation of the 25% limit on non-residential use in collective freehold acquisition claims.

8.13. However, 72% of survey respondents neither agreed nor disagreed with extending this 25% limit to individual freehold acquisitions of premises containing multiple units.

8.13.1. Survey comments had cautioned that extending the qualifying criteria in this way could create problems in practice.

47. We provisionally propose to maintain an equivalent of the current requirement that, for a collective enfranchisement, there must be a minimum of two or more flats held by qualifying tenants in the premises to be acquired. Do consultees agree?

8.14. As stated above (in response to question 39), CILEx cautions against amendments to the law where the current position does not appear to be problematic.

8.15. It is a logical requisite for 'collective' enfranchisement to involve 'collective' participation and by extension maintain the two-or-more requirement.

8.15.1. In the context of the aforementioned proposals for enabling collective enfranchisement of houses on an estate (of which our members held somewhat

[30] Member comments included: *"Conveyancers are frequently having to engineer a transfer of the benefit of a s42 notice in conjunction with an exchange of contracts and completion of a sale leaving the buyer to then proceed with the lease extension post completion (to avoid delays in getting the client moved). This adds complexity, cost and stress for the client and their lawyer. If these criteria were removed the client could extend when they liked."; "This appears outdated and no longer necessary and involves more costs for leaseholders and buyers who have to assign their right to a new owner" ; "This can cause issues on a sale of the property, in waiting to extend a lease."*; "*Somewhat arbitrary in nature and discriminates against the "run of the mill" lessee."*

divisive views),[31] the new phraseology proposed at paragraph 8.133 of the consultation paper is acknowledged.

48. We provisionally propose to maintain an equivalent of the current requirement that, for a collective enfranchisement, at least two-thirds of the flats in the premises to be acquired must be let on long leases. Do consultees agree?

8.16. CILEx has not received any opinions from members that the two-thirds minimum requirement poses any problems.

8.17. However, majority of survey respondents (48%) did agree or strongly agree that the two-thirds requirement should be relaxed in cases where a premises contains shared-ownership leases.

8.17.1. In the context of shared ownership leases, it was suggested that the two-thirds requirement be measured on a pro rata basis against non-shared ownership residences to determine who may qualify for collective enfranchisement.

49. We provisionally propose that the leaseholders of at least half of the total number of residential units in the premises to be acquired must participate in a collective freehold acquisition. Do consultees agree?

50. We provisionally propose to remove the requirement that, in the case of a building containing only two residential units, both leaseholders must participate in a collective freehold acquisition claim. Do consultees agree?

8.18. Whilst the underlying rationale for this limitation in the context of the 1993 Act is justified in that it prevents a minority group of leaseholders from exercising power over the freehold, it has been suggested that the above proposals for non-participating leaseholders to retain their right to a collective enfranchisement would lessen the need for this restriction.

8.19. Furthermore, there are concerns that when applied to collective freehold acquisitions on an estate, retaining the threshold for a minimum 50% of qualifying leaseholders to participate in a claim, would likely create practical and logistical difficulties where particularly large estates are concerned.

8.19.1. The situation becomes even more complicated where the premises contains shared ownership leases; with 48% of surveyed respondents suggesting that the requirement should be relaxed in such situations.

8.20. One option is for this restriction to be reduced or removed, with the impact mitigated by the continued right for non-participating leaseholders to participate in future.

8.20.1. After all it is been pointed out within the consultation paper[32] as well as by our members, that there are already inherent difficulties for leaseholders attempting to coordinate and converse with one another in collective enfranchisement claims. One CILEx member commented: *"Collective*

[31] Please see the response to question 25 above.

[32] Consultation Paper, para 6.145 & 6.146.

enfranchisement is particularly problematic under LRHUDA 1993 (for tenants of flats) given that the right must be exercised by at least half the qualifying tenants. The only realistic option is for a tenant to act individually and request a 90-year lease extension."

8.21. CILEx does acknowledge however that this may increase the likelihood of ping-ponging, although it is argued that this too may be mitigated by the former measures proposed in the consultation (question 32).

8.22. A majority of 38.46% of survey respondents disagreed with removing the current requirement (where a building contains only two residential units), for both leaseholders to participate in a collective freehold acquisition claim. Member comments opposed the idea of one leaseholder being entitled to unilaterally take ownership of the entire premises.[33]

53. We provisionally propose the continuation of the exceptions from collective freehold acquisition claims for resident landlords and operational railway tracks. Do consultees agree?

8.23. CILEx has not collected opinions from members that either of these restrictions pose any problems in practice. Our provisional stance would be that where the current position does not appear problematic, it would be better to maintain what has already been tried and tested.

54. We provisionally propose that the qualifying criteria for the collective freehold acquisition of an estate ought to correspond to those for the collective freehold acquisition of a single building. Do consultees agree?

8.24. With survey respondents identifying complex statutory provisions as the 4th most problematic issue within the enfranchisement regime, CILEx welcomes the decision for a streamlined set of qualifying criteria to be applied for both collective freehold acquisition of a single buildings and estates comprising multiple buildings.

8.25. However, as mentioned earlier in response to question 49, the qualifying criteria requirement for at least 50% of leaseholders to participate in the collective enfranchisement claim, would likely pose practical and logistical problems in the context of particularly large estates.

56. We provisionally propose that the 25% limit on non-residential use should apply to two-unit buildings as it does to any other multi-unit building. Do consultees agree? If consultees disagree, how should two-unit buildings be treated differently? Do consultees favour:

(1) a proviso to the effect that a non-residential unit can be treated as residential where its use is "ancillary" or "complementary" to residential use of another unit;
(2) a higher percentage limit; or

[33] Member comments included: *"it prevents one person from applying to be the freeholder, to their advantage, and the advantage of the other leaseholder who just doesn't want the hassle!"*

(3) a sunset clause?

Alternatively, is there another potential approach we should consider?

8.26. CILEx suggests, mirroring the above proposal laid out in question 45, that there should be a discretion for the Tribunal to authorise, in limited circumstances, a freehold acquisition claim where this would not otherwise be possible because the premises involved is a two-unit building with more than 25% used for non-residential purposes. This might enable the problematic circumstances identified by the Law Commission to be remedied in an equitable manner.[34]

57. Do consultees think that the ability of a head lessee of a block of flats to acquire the freehold of that block individually is a significant problem with our proposed scheme, compared with the reality under the current law?

8.27. CILEx does not see this as problematic. If any long sub-leases have been granted within the block, then the ability of the head lessee to exercise the right to an individual freehold acquisition would not be permitted. Where there are no long sub-leases, and the head lessee exercises the right of individual freehold acquisition over the block, the head lessee shall become the new freeholder of this block. Should this new freeholder (formerly the head lessee) then choose to grant any long leases within the block, the ability for those leaseholders to exercise collective enfranchisement may enable them to acquire the freehold in turn. Of course, it is recognised that the new freeholder (formerly the head lessee) may choose to strategically grant long leases in a manner that circumvents the qualifying criteria for exercising a collective freehold acquisition; however, this risk is no different to the current position between the landlord and leaseholders of a block.

58. Do consultees consider it desirable to attempt to restrict the enfranchisement rights of commercial investors further than the current law does?

If so, do consultees consider that it might be possible successfully to restrict the enfranchisement rights of commercial investors:

(1) by means of a residence test; or

(2) by the adoption of a reduced definition of a residential unit, to exclude units which are let on short residential tenancies?

Are there any other options we should consider?

8.28. CILEx has voiced agreement that enfranchisement rights are designed with residential leases in mind (mentioned in response to question 38 above). The justification for this stance stems from demarcations in the nature of different leases, recognising that leasehold interests within land may vary dependant on whether the interest is commercial or residential in nature. In turn, it becomes warranted that this may equally vary the rights and obligations that are attached to those interests, including the availability of enfranchisement rights.

8.29. However, survey respondents have articulated to CILEx the practical difficulties that would arise in situations of mixed ownership when attempting to distinguish rights on the basis of either party's identity (landlord or leaseholder).

[34] Consultation paper, para 8.168-8.17.

8.30. Our members have further cautioned against bundling commercial investors into one singular grouping, overlooking the existence of small to medium sized enterprises and other investors amongst their larger counterparts.

8.31. Whilst survey results demonstrated that our members hold divergent views concerning enfranchisement rights of commercial investors, we recognise that there are limited arguments necessitating that commercial leaseholders should be treated substantially differently to residential leaseholders within the statutory enfranchisement regime. However, given that situations involving particularly large commercial investors may see a reversal in the inequality of arms that typically exists between leaseholder and landlord, there may be a need to provide the Tribunal with additional powers to intervene in exceptional circumstances.

9. Qualifying Criteria: Impacts

59. How and to what extent has the exercise of enfranchisement rights been slowed down, prevented, or made more costly by:

(1) the qualifying criteria based on financial limits (the low rent test and rateable values) under the 1967 Act;

9.1. 75.48% of survey respondents agreed/strongly agreed that the qualifying criteria based on financial limits ought to be removed. CILEx members commented that these limits are 'outdated,' 'arbitrary' and 'archaic.'

(2) the difficulty in categorising premises as either flats or houses;
(3) the uncertainty surrounding the definition of a "house" under the 1967 Act and the definition of a "self-contained building" under the 1993 Act;

9.2. As stated above (in response to question 38), CILEx's survey findings did identify some comments which indicated difficulty in determining whether a premises constitutes a 'house' within the 1967 Act definition. That being said, these comments did not extend to identifying any difficulties in distinguishing between flats and houses per se.[35]

9.3. However, survey respondents did articulate that the introduction of a streamlined definition ('residential unit') would have a beneficial impact in: simplifying processes; allowing for a more flexible approach; and, helping consumers to better understand the law.

(4) the two-year ownership rule under the 1967 Act and (in respect of lease extensions) the 1993 Act; and

9.4. 73.59% of survey respondents agreed or strongly agreed that the two-year ownership rule ought to be removed. Whilst some members recognised that this rule has the

[35] Member comments included: *"It can be more difficult to decide when a house is actually a house. A flat is easier to identify"; "When is a house a house or not a house. Very confusing for anyone."*

benefit of protecting landlords and limiting enfranchisement to bona fide leaseholders, the limitation was considered to be problematic and faced fairly often.

9.4.1. In particular, anecdotal evidence was provided of leaseholders having to file a notice with their landlord prior to assigning their lease to another, giving rise to unnecessary delays and costs whilst emphasising that the two-year rule can be circumvented.

(5) the general complexity and inaccessibility of the qualifying criteria for enfranchisement rights?

9.5. Amongst common problems faced within the current enfranchisement regime, complex statutory provisions was voted the 4th most problematic (1st being consumer awareness of process, 2nd being consumer awareness of costs, 3rd being valuation methodology for calculating premiums). This was reiterated routinely, with many comments throughout the survey stating that the current enfranchisement regime is generally very complex and inaccessible.

9.5.1. With specific regards to qualifying criteria, suggestions to remove financial limits and the two-year ownership rule were welcomed in overcoming this current issue of complexity.[36]

60. We welcome evidence as to the likely effect of further restrictions on the ability of commercial leaseholders to enfranchise (whether at all, or at a higher premium than other leaseholders) on:

(1) the leasehold market;
(2) the wider housing market; and
(3) the economy more broadly.

9.6. As a professional body for Chartered Legal Executive lawyers, CILEx does not feel best placed to comment on the impact that this might have on the wider sector or economy.

10. Qualifying Criteria Exceptions

Question 61 – 69

10.1. CILEx has not gathered opinions from members with regards to these exceptions.

10.2. However, with regards to question 62, CILEx would like to iterate that with the increase in mixed development properties containing both standard and shared-ownership leases, CILEx welcomes the pragmatism of relaxing the qualifying criteria for a collective enfranchisement claim in these circumstances.

[36] However, it was cautioned by one CILEx member that: *"What we can't see happen is…eligibility criteria increasing the premiums further for the clients. It needs to be fair and equal for their personal ownership"*

11. Procedures

Questions: 70 – 93 (General Comments)

11.1. CILEx welcomes a standardised approach towards the procedural requirements of enfranchisement. This is in acknowledgement of survey findings which, as previously articulated, have demonstrated a strong consensus amongst CILEx members that the current procedures are onerous, outdated and too complex.

11.2. CILEx welcomes the decision to retain the current position for claim notices to be signed (either by the enfranchising leaseholder or by an authorised individual on their behalf).

11.2.1. Signing fulfils the important evidentiary function in signifying the intention to enfranchise, and in cases of collective freehold acquisition, in evidencing that the qualifying minimum number of enfranchising leaseholders have taken part.

11.2.2. It is emphasised that rules allowing for authorised individuals to sign on a leaseholder's behalf should be capable of clearly identifying that a leaseholder's legal practitioner has the capacity to do so.

11.3. 87.76% of respondents agreed or strongly agreed that given frequent contentions of whether notices have been properly served (due to the numerous technical requirements), circumstances in which the validity of notices can be challenged should be limited.

11.3.1. There was a general consensus amongst respondents of shared experiences in which landlords have been challenging enfranchisement notices as a means of frustrating the process on the basis of mere technicalities. Accordingly, CILEx welcomes proposals for limiting the capacity for notices to be arbitrarily challenged.

11.3.1.1. However, caution should be paid when limiting the right of challenge, so not to overlook the existence of certain technicalities, which although onerous, may well be relevant.[37]

11.3.2. On the same basis, CILEx similarly concurs with proposals for entitling leaseholders to give claim notices to their landlords at specified categories of address with this sufficiently amounting to service.

11.3.2.1. 86.27% of survey respondents agreed or strongly agreed with this suggestion, recognising the practical benefits this would bring as well as safeguarding against vexatious claims.

11.4. 82.53% of survey respondents agreed or strongly agreed that there should be standardised simpler forms provided for commencing an enfranchisement claim.

[37] Member comments included: *"The technical requirements may be onerous and it may be true that the two parties may look for loopholes, but this does not mean the technical requirements are unnecessary."*

11.4.1. CILEx members commented that standardised forms would be of benefit to both clients and practitioners, as well as helping to mitigate the risk of challenges being brought against the validity of notices served.[38]

11.4.2. However, as identified by the Law Commission,[39] survey findings did raise the issue that even with one standardised form for claim notices, it would still be difficult to avoid all complexity. CILEx cautions that whilst the enfranchisement regime is in need of greater simplification, there is an element to which the complexities involved within land interests and land transactions cannot and should not be unduly simplified.

11.5. CILEx is mindful that introducing a new obligation on leaseholders to serve notices on all qualifying tenants alerting them to a collective enfranchisement claim, would likely exacerbate the practical difficulties identified earlier[40] when attempting to coordinate leaseholders of particularly large estates. In addition, it is felt that this could aggravate issues around the validity of notices, making the issue of notice an even more litigious matter.

11.5.1. It is hoped that the new right for non-participating leaseholders to retain their right to a collective enfranchisement at a later date should be able to mitigate any problems currently faced with eligible leaseholders missing out on a collective enfranchisement claim due to lack of information.

11.5.2. That being said, it has been commented that whilst a mandatory obligation may not be warranted, notices served would have practical benefits in facilitating future relations between enfranchising leaseholders. With this in mind, CILEx welcomes efforts to encourage leaseholders in making their counterparts aware of collective enfranchisement claims, especially in cases where the premises concerned is not so large as to contain too many qualifying leaseholders.

11.6. With specific regard to question 90, it is suggested in the situation of individual freehold acquisition that there should be a responsibility on the mortgagee to provide their response (of either objection or consent) within a prescribed period. This is necessary for clarity's sake so that the leaseholder is aware of whether further action needs to be taken.

12. Dispute Resolution

94. We provisionally propose that the current division of responsibility for the resolution of enfranchisement disputes and issues between the county court and the Tribunal should end. All such matters should be determined by the Tribunal. Do consultees agree

[38] Member comments included: *"This would remove high levels of uncertainty as to: validity; whom to serve; apportionment of premium offered between landlord and superior landlord if applicable; terms of lease required (my experience is that landlords never agree to any requested improvements to lease terms); the process would be easier for less experienced lawyers."*

[39] Consultation paper, para 11.37

[40] Please see para 8.20.1 above.

12.1. 86% of survey respondents agreed or strongly agreed that all disputes relating to an enfranchisement claim should be dealt with by the Tribunal (not the County Court).

12.1.1. CILEx members commented that this clear separation in jurisdiction would help to expedite processes, whilst acknowledging that the current state of affairs tends to require the expertise of the Tribunal in any case.[41]

12.2. However, 68% of CILEx members responding to a survey on Housing Court Reform, have favoured proposals for establishing a new integrated housing court to deal with all property related matters.

12.2.1. CILEx hopes that when considering reforms to the leasehold enfranchisement regime, the Law Commission takes into consideration all parallel consultations including both the MHCLG consultation for a ban on leasehold houses and ground rent caps, along with the MHCLG Call for Evidence on Housing Court reform.

12.2.2. Once again CILEx urges that with several concurrent and simultaneous projects taking place in respect of the leasehold and wider housing sector, it is paramount that reforms put forward are dovetailed together to ensure synchronicity.

95. We invite the views of consultees as to whether it would be desirable for certain valuation-only disputes to be determined by a single valuation expert rather than by the Tribunal at a full hearing. If so, we invite consultees' views as to:
(1) the types of case in which such an alternative track for dispute resolution would be appropriate (in particular, whether it should operate only in respect of low value claims, or wherever the difference between the parties' positions is such that it would be disproportionate to proceed with a full hearing); and
(2) the rules that should govern its operation.

12.3. Comments from survey respondents suggested that the use of a single valuation expert would be a realistic and cost-efficient way of solving valuation disputes without having to undergo the lengthy process of involving the Tribunal.[42]

12.3.1. CILEx stresses the importance for this valuation expert to be an independent third party so that the valuation process does not become unduly weighted in favour of either party.

[41] Member comments included: *"Agreed. Better to have property lawyers and agents qualified in enfranchisement (who should be in the Tribunal) dealing with matters rather than a County Court Judge who may not have the expertise in that field and will call for such expert evidence anyway." ; "The tribunal specialises the county court does not."*

[42] Member comments included: *"One outcome from a contested case which goes to county court may be a court order for the parties jointly to arrange an independent valuation. This in itself can lead to years of argument over costs and documents provided. If the court were able to directly arrange the instruction of an independent valuer whose decision were final, this would be avoided."; "[There should be] 3 valuations: 1 by the L[andlord], 1 by the T[enant] and 1 by both or RICS if [the parties] do not agree in a week."*

96. We welcome evidence as to the typical cost and duration of an enfranchisement dispute:

(1) in the county court; and

(2) in the Tribunal.

How and to what extent has the exercise of enfranchisement rights been slowed down, prevented or made more costly by:

(1) the threat of lengthy and potentially expensive litigation; and

(2) the fact that some disputes arising during an enfranchisement claim may need to be resolved by the Tribunal, whilst others fall to be determined by the court?

To what extent would our proposal that all enfranchisement disputes be dealt with in a single forum save landlords and leaseholders time and money?

12.4. CILEx survey findings suggested that the divergence in having cases heard either in the Tribunal or in the County Court can lead to added expense. Survey respondents with experience in both the County Courts and Tribunals (for a range of property related matters including enfranchisement claims), identified several issues with this two-tiered system.

12.4.1. Majority of survey respondents felt the current system by which housing disputes may be heard in either the County Court or First Tier Tribunal (Property Chamber) is: a). time consuming (62.86%); b). difficult for consumers to understand (67.64%); c). complicated (55.88%) and d). costly (76.47%).

97. We welcome evidence as to the proportion of leases likely to be suitable for resolution by a single valuation expert. Do consultees consider that dealing with cases on this alternative track is likely to save landlords and leaseholders time and money?

12.5. CILEx has not obtained quantifiable data on this matter.

13. Costs

98. We invite the views of consultees as to whether leaseholders should be required to make any contribution to their landlord's non-litigation costs.

13.1. CILEx survey findings highlighted a discord of agreement on whether leaseholders should still be required to contribute to a landlord's non-litigation costs. Respondents were presented with the three options of: removing the contributions requirement; standardising the level of contribution; or, determining contributions on a fixed-costs regime. Having been asked to rate these options on the basis of their favourability, the option for removing the contributions requirement was selected as both the most favourable option (44.68%) and least favourable option (46.81%) amongst respondents.

13.1.1. Members in agreement of removing the contributions requirement commented that it is currently open to abuse by landlords and is precedented on an unfair premise requiring the party who is often in the weaker bargaining position to pay a sum which they were not consulted on and have no control over. Even where costs are reasonable, the obligation on leaseholders to cover

their landlord's non-litigation costs was seen as inherently unfair given that the landlord is still conferred fair compensation in the form of a premium.[43]

13.1.2. However, members who preferred to retain the contributions requirement (albeit subject to either standardised fees or fixed costs regimes), were of the opinion that the obligation is necessary in acknowledgement of costs that landlords may incur in good faith. It was additionally pointed out that where a leaseholder had already been provided with an opportunity to acquire the freehold from the outset, the added costs to the landlord as a direct consequence of choosing to exercise this right later on, ought to be fairly compensated.[44]

13.1.3. In acknowledgement of survey findings on both sides of the fence, CILEx is tentatively of the opinion that the contributions requirement should be retained, provided that there are mechanisms in place to protect leaseholders from any costs which are unreasonable or excessive. As such, it is recommended that there should be a system in place for standardising costs (i.e.: a flexible fixed cost approach), which would further improve transparency within the current system.

99. We invite the views of consultees as to how any contribution that is to be made by leaseholders to their landlord's non-litigation costs should be calculated. Should the contribution be based on:

(1) fixed costs;
(2) capped costs;
(3) fixed costs subject to a cap on the total costs payable;
(4) the price paid for the interest in land acquired by the leaseholder;
(5) the landlord's response to the Claim Notice, and/or whether the landlord succeeds in relation to any points raised in his or her Response Notice;
(6) fewer categories of recoverable costs than currently set out in the 1967 and 1993 Acts;
(7) the same categories of recoverable costs set out in the Acts, but with a reformed assessment procedure; or
(8) wider categories of recoverable costs than currently set out in the Acts?

We also invite consultees' views as to whether, if a fixed costs regime were to be adopted:

(1) such a regime should apply to collective freehold acquisition claims as well as individual enfranchisement claims; and
(2) if a fixed costs regime were to apply to collective freehold acquisition claims:
(a) what additional features might justify the recovery of additional sums; and

[43] Member comments included: *"Leaseholders should not be held responsible for the landlord's expenses that the leaseholder was not consulted about."; "Historically, I feel that Landlord's professional costs have been high and Tenants have been unable financially to challenge this and so Landlords have got away with them. Landlords benefit from a premium and should therefore be responsible for their own professional costs."; "The freeholder is already getting proceeds from sale of freehold interest."*

[44] *"Landlords may have genuine and reasonable non-litigation costs and be able to provide evidence." ; "I think it is dependent on the situation. If the lessee is not given the opportunity on initial acquisition of the property I would agree that the cost should be reduced/waived, but if they have refused then I do not see why they should not contribute. Landlord's purchase these site as a safe investment demonstrated by many of these portfolio's being normally sold to pension funds. After the development is passed on, why should these costs be incurred by the Landlord? I do appreciate that these waters are somewhat muddied by assignment of these leases at a later point."*

(b) whether landlords should be able to recover all their reasonably incurred costs in respect of those additional features (subject to assessment), or only further fixed sums.

We provisionally propose that:

(1) no additional costs should be recoverable in the case of split freeholds or other reversions, or where there are intermediate landlords; and

(2) a small additional sum should be recoverable where a management company seeks advice in relation to an enfranchisement claim.

Do consultees agree?

13.2. Anecdotal data from members demonstrated a trend of non-litigation costs being rather exuberant in nature and thereby proving to be unjustifiably onerous for leaseholders.[45] Accordingly, CILEx would support the notion of introducing a standardised process for calculating the level of contribution that leaseholders should pay, so as to minimise the risk of any unreasonable or excessive costs being charged upon the leaseholder.

13.3. A fair proportion of survey respondents voiced apprehension against the use of a basic fixed costs regime on the grounds that there would be practical difficulties when attempting to fix costs for all scenarios.[46]

13.3.1. This once again reiterates CILEx's reservations in that an appropriate balance must be achieved when simplifying enfranchisement, to ensure that on the one hand, complex provisions and processes are streamlined to avoid incoherent distinctions, and on the other hand, that the law is still able to appreciate the differences between different types of premises, land interests, landlords and leaseholders.

13.3.2. Nevertheless, it was conceded that the impact of aforementioned proposals to streamline the enfranchisement process and valuation methodology for calculating premiums, could help in making a basic fixed cost scheme plausible.

13.4. On average the option for standardised rates was preferred by survey respondents as a way of curtailing the extent to which a leaseholder will be liable for their landlord's non-litigation costs. CILEx thereby concurs with the Law Commission's suggestion for a more nuanced fixed cost regime as a method for standardising fees.[47]

13.4.1. CILEx further recommends that the approach utilised for standardising the level of contribution be made applicable to collective enfranchisement claims, in accordance with the overall objective of simplifying enfranchisement. This could be achieved with the additional feature of economies of scale.

[45] Please see footnote 43.

[46] Member comments included: "*If the leaseholders want enfranchisement they should pay. It is reasonable that if the whole system is streamlined then this [fixed costs] could be possible. The cases I have in local government can run for years and cannot usually be fixed."*

[47] Consultation Paper, para 13.64. Member comments in support of a more nuanced fixed costs regime included: *"Landlords can pay their own costs out of any premium received but the formula for the calculation of the premium could specify an amount to be included in the premium for costs based on a scale."*; "*The level of contribution could be standardised, as long as the fee is not standardised as some cases are not standard."*

100. We provisionally propose that where an enfranchisement claim fails or is withdrawn, or the Claim Notice is struck out, leaseholders should be liable to pay a percentage of the fixed non-litigation costs that would have been payable had the claim completed. Do consultees agree?

We also provisionally propose that the percentage of the fixed non-litigation costs that should be payable in those circumstances should vary depending on the stage that the claim has reached. Do consultees agree? If so, what percentages should apply at particular stages of the claim?

13.5. CILEx recognises that this measure shall be necessary for protecting landlords in situations where an enfranchisement claim has ceased for reasons that were under the sole control of the leaseholder. It is only proper that in such situations, only where there has been no inappropriate or unreasonable behaviour on behalf of the landlord to have prompted withdrawal or failure of the claim, that a leaseholder should be expected to compensate the landlord for losses incurred.

13.6. To ensure that the level of compensation owed is not excessive, CILEx further agrees that the costs payable should factor into account the stage at which the claim had reached. Compensation should, after all, be both proximate and proportional.

101. We provisionally propose that a landlord should have a right to seek security for his or her non-litigation costs. Do consultees agree?

13.7. CILEx provisionally agrees with this proposal in the hope that it shall help to expedite processes and safeguard the landlord's interest against any vexatious claims. However, it is paramount that this should not leave leaseholders vulnerable to any abuse by landlords, or to place a heavy onus on leaseholders to reclaim the security where a landlord's own unreasonable or unacceptable behaviour denies him of the right to claim back his/her non-litigation costs.

102. We provisionally propose that a landlord should have a right to apply to the Tribunal for an order prohibiting named leaseholders from serving any further Claim Notice without the permission of the Tribunal. Do consultees agree?

13.8. CILEx recognises that there needs to be protections in place for both parties, where the other party is acting in a vexatious or unreasonable manner.[48] However, CILEx would urge extreme caution in the Tribunal's ability to prohibit leaseholders from serving further Claim Notices. This power should be exercised with care so that it does not open itself up to abuse from landlords who are simply attempting to evade enfranchisement claims. Where former Claim Notices had been struck out wholly or partly owing to the landlord's own unreasonable or inappropriate conduct, then it is hoped that such a prohibition would not be exercised.

[48] As previously articulated, survey comments did warn against shifting favour too heavily onto leaseholders without due regard for the landlord's interests.

103. We provisionally propose that the existing limited powers of the Tribunal to order one party to pay the litigation costs of another party in an enfranchisement claim should apply to all disputes and issues that it is to decide (except in respect of orders made under the No Service Route, orders permitting a landlord to participate in a claim or to set aside a determination, and orders striking out a Claim Notice). Do consultees agree?

If not, what types of disputes and/or issues should be excluded from such restrictions and why? What powers to make orders in respect of litigation costs should apply in such excluded cases? Should parties be able to agree that costs shifting will apply to all or part of a claim?

13.9. CILEx welcomes the extension of the Tribunal's powers in this way, as it shall help to safeguard an innocent party in situations where the other party has taken unreasonable steps or exploited their greater bargaining power to the detriment of the party who had acted in good faith. Moreover, it is recognised from a practical standpoint that this extension of the Tribunal's powers is no doubt precursory to the extension of the Tribunal's jurisdiction in the aforementioned proposal under question 94.

104. We provisionally propose that the scope of the Tribunal's existing power to order one party to pay any of the litigation costs of another party should not be extended. Do consultees agree?

13.10. CILEx appreciates the Law Commission's stance to retain the powers of the Tribunal to order a party who has behaved unreasonably to pay the other party's litigation costs. This is acts as a necessary backstop against inappropriate behaviours.

13.11. CILEx has not obtained any views as to whether this power ought to be extended.

105. We welcome evidence as to:

(1) the typical costs incurred by landlords in dealing with enfranchisement claims; and

(2) the proportion of those costs which can be recovered from leaseholders.

To what extent does the obligation on leaseholders to pay their landlords' reasonable costs arising from the enfranchisement process have an impact on leaseholders' willingness to bring or pursue enfranchisement claims?

Do consultees consider that any of the options we have set out at paragraphs 13.56 to 13.77 for reforming non-litigation costs would make leaseholders more willing to bring and pursue enfranchisement claims?

What would be the impact on landlords of removing, or capping, their entitlement to recover their non-litigation costs from leaseholders (other than the fact that they would have to meet those costs themselves)?

13.12. Please refer to question 99 above. As mentioned previously, CILEx members have voiced anecdotal evidence to suggest that costs incurred by landlords during enfranchisement have been noted to be higher than would be reasonably expected.

13.13. In addition, it has been suggested that the current requirement for leaseholders to pay their landlord's non-litigation costs (with little control or awareness of what this might

amount to), is unjust and can exacerbate issues relating to unequal bargaining power between both parties.

106. How and to what extent do the different powers of the Tribunal and the county court to award litigation costs in enfranchisement disputes have an impact on the behaviour of both landlords and leaseholders with respect to such disputes?

13.14. CILEx has obtained second-hand anecdotal information to suggest that this distinction is currently open to abuse, with parties able to exploit the difference for their benefit.

14. Valuation Methodology

Valuation Methodology: General Comments

14.1. In line with the Law Commission's terms of reference, 63.27% of survey respondents were in agreement that there is currently a need for premiums to be reduced. The main concerns voiced by our members were that premiums payable to date have not been respective to the individual circumstances of the leaseholder, which in turn has resulted in the valuation process indirectly favouring higher premiums.[49]

14.1.1. However, some members did pay caution to the retrospective impact that this valuation methodology might have on landlords, and consequently lenders.[50]

14.2. Essential to the new valuation methodology is the way in which it can be simplified to prevent any ambiguities or uncertainties as to how premiums shall be calculated, so that both parties are better positioned to make an informed decision at the outset.

14.2.1. 83.67% of survey respondents agreed or strongly agreed that the valuation methodology for calculating premiums needs simplifying, evidencing the struggle that even practitioners face in respect of the current process. This has been noted to push up costs, with anecdotal information suggesting that specialist surveyors in leasehold valuation are needed to navigate the current complexity.

14.2.2. One respondent shared their own experiences of the manner in which ambiguities and complexity within the valuation process has impacted leaseholders: *"There is constantly changing case law on valuations and when prospective enfranchisees obtain legal advice before making their decision, that advice has a very limited lifetime. They also have very little certainty over the premium depending on how the case law and various ratios applied to the pricing calculation."*

[49] Member comments included: *"The premiums for the purchase of the Freehold estate can be huge in some instances. This needs to be tailored to the individual house and land etc."; "I represent a client whom has been very much at the forefront of ensuring that premiums are calculated in a way that is respective to lessees. This conscientious nature should be across the board."; "A landlord is entitled to a fair premium-this may be a long term investment and has the right of the correct return on the investment-there is however more and more discussion on the valuation process leading to claims for higher premiums on the basis of valuations using data not quite applicable to the property in question."*

[50] Member comments included: *"The Landlord has set its budgets on the basis of this income and often their secured charges are on the basis of this asset. It should not be backdated as it affects the lenders of the landlords."*

14.2.3. Crucially, the complexity within the valuation methodology has resulted in a vacuum of consumer awareness surrounding the costs of enfranchisement (something our members identified as the second most problematic issue with the enfranchisement regime, shortly after consumer awareness of processes).[51]

14.2.4. CILEx thereby urges that the new valuation methodology needs to introduce a water-tight formula that can be easily understood by consumers, easily applied by practitioners and which may provide a consensus so that less time and costs are wasted on disputing premiums before the Tribunal.

107. We invite the views of consultees as to:

(1) whether the section 9(1) valuation methodology should be retained indefinitely or temporarily, and if so for how long; or

(2) whether the section 9(1) valuation methodology should be replaced with a fixed proportion of a "term and reversion" valuation or another simplified methodology; and

(3) whether the test for whether section 9(1) (or a simplified methodology) applies should be determined:

a) by reference to capital value;
b) by reference to council tax banding;
c) by reference to the location of the property;
d) by reference to an amended version of the current test for leases granted after 1 April 1990 (in other words, calculating "R" under section 1(1)(a)(ii) of the 1967 Act); or
e) by some other means.

108. We invite the views of consultees as to:

(1) whether a separate, simplified valuation regime should be created for low value and/or straightforward enfranchisement claims; and

(2) how such low value and/or straightforward claims should be identified.

14.3. 34.09% of survey respondents agreed or strongly agreed that the benefits provided by the "original valuation basis" under section 9(1) of the 1967 Act should be retained within the new regime.[52]

14.3.1. However, it is acknowledged that more than half of all survey respondents neither agreed nor disagreed with the proposal.

14.4. If retained, 83.33% of respondents preferred the option that a separate regime, similarly applying to low value/straightforward cases, be developed. This was selected primarily on the basis that section 9(1) in its current form, is very complex and costly.

14.4.1. However, CILEx does recognise that depending on the ways in which the new valuation methodology is simplified, creation of a separate valuation regime

[51] Member comments included: *"Standardisation of the amount of a premium would be helpful as it is clear from amounts offered by Tenants and Counter Offer figures from Landlords are sometimes far apart."; "[Valuation] should be more understandable and the necessity for two valuers to dispute in tribunal should be limited by a more watertight formula."; "[Valuation] is complicated, tenants don't understand it and takes up much of the time in negotiating a lease extension."; "Homeowners need to understand [valuation] without having to pay legal fees to do so."; "[simplifying valuation is] absolutely essential this is a major daily problem*."

[52] Member comments included: *"Existing rights should not be lessened"; "The legislation was a momentous step forward in 67 and the benefits should be retained"*

may be unnecessary. E.g.: where council tax bands are taken into consideration within the reformed methodology.

109. Do consultees consider it desirable to seek to treat commercial investors differently from owner-occupier leaseholders in respect of the premium payable for the exercise of enfranchisement rights? If so:

(1) do consultees consider that it might be possible to distinguish between such leaseholders:

a) by reference to whether the leaseholder is exercising enfranchisement rights for the first time;
b) by reference to whether the leaseholder is exercising enfranchisement rights in respect of his or her only or main home; or
c) by some other means?

(2) how might the valuation methodology be varied so as to produce different premiums for different types of leaseholder?

14.5. 62.22% of survey respondents agreed or strongly agreed that the new valuation methodology should not differentiate between buy-to-let investors and owner-occupiers; with only 22.23% suggesting that it should.

14.5.1. 43% of survey comments justified the reasons for opposing this suggestion as being founded on the basis of promoting fairness and simplicity.

14.5.2. It was voiced that the valuation methodology for calculating premiums is and should be directly reflective of the loss incurred to the landlord, irrespective of either parties' identity. This is owing to the nature of a 'premium' as a price paid in exchange for the property. To calculate this loss on the basis of the leaseholder's identity was seen as both an unfair and arbitrary suggestion.[53]

14.6. CILEx once again reiterates the practical difficulties in attempting to distinguish rights based on the identity of the parties involved.[54] For instance, it would be difficult to distinguish between owner occupiers and buy-to-let investors in situations of mixed ownership.

14.6.1. Survey respondents commented that distinguishing enfranchisement rights in this manner would further undermine the overriding objective of the new regime, in attempting to simplify and standardise the enfranchisement process.[55]

14.7. In addition, CILEx is mindful that reforms to the enfranchisement regime must be careful not to collectively group commercial investors into one singular category when attempting to standardise rights and procedures.

14.7.1. Respondents pointed out throughout the survey that whilst there may be larger commercial investors holding many properties within their profile, there still exists small to medium enterprises and, in the case of buy-to-let investment, individuals, who choose to utilise their properties in a commercial manner. In

[53] Member comments included: *"Why should buy to let be any different? The original price is no different."; "Irrespective of your views on BTL, consumers must be treated fairly and the same"; "There should be no differentiation. It would be seen as unfair."*

[54] Please see para 8.29 above.

[55] Member comments included: *"The calculations represent the loss to the landlord. Also, it would complicate collective enfranchisement where there is a mix of ownership, and where properties are bought and sold during the process, and there is not always a clear distinction e.g. owners who later let out their properties."; "I think that setting an addition layer of complexity will only undo the standardisation process."*

such scenarios, the imbalance in bargaining power (the main policy position justifying the decision to treat commercial and residential leaseholders differently), becomes less apparent, as to does the rationale for differential treatment.

110. We invite the views of consultees as to whether the treatment of ground rent reviews in any valuation methodology should be restricted in any of the ways set out at paragraphs 15.59 to 15.66.

14.8. 41.86% of survey respondents had indicated that if a simple formula was introduced, it should be based on a multiple of the ground rent (e.g.: ten times the ground rent).

14.8.1. However, given the proposals rightly put forward by MHCLG to cap ground rents at £10 (published following our survey results), it is recognised that this simple formula would no longer be suitable as it would have the effect of rendering the premium for all properties (irrespective of their location, size and market value) as of an equivalent price.[56]

14.8.1.1. CILEx welcomes MHCLG's proposition for ground rent caps, urging enfranchisement reforms to be considered alongside all such relevant proposals.

14.8.2. In addition, CILEx acknowledges (as identified by the Law Commission),[57] that using a multiple of the ground rent to calculate premiums would pose very real risks to existing leaseholders facing doubling ground rents/ground rents imposed in an arbitrary manner. In such circumstances, this methodology would be likely to obscure the premium and lead to perverse outcomes in practice. More to the point, this methodology would only exacerbate current issues of leaseholders being charged excessive rents; preventing those most in need of exercising their enfranchisement rights from doing so, and placing landlords in a greater position for evading the enfranchisement process.

14.8.3. CILEx thereby agrees that whilst ground rent may have a place within the valuation methodology,[58] it is necessary that there are restrictions in place to protect those currently struggling with onerous rent terms within calculations.

111. We invite the views of consultees as to whether capitalisation rates for enfranchisement valuations should be prescribed and, if so:

(1) how;
(2) by whom;
(3) how often; and
(4) in respect of what different types of interest.

14.9. 67.44% of survey respondents agreed or strongly agreed that, if options based on the current valuation methodology were adopted, standardised rates should be prescribed for Capitalisation Rates.

14.9.1. However, it was pointed out that the practicality of doing so may be rather difficult given the variance in house prices across England and Wales.

---

[56] In line with the suggestion put forward by the Private Members' Bill, this would have the effect of rendering that all new leases could be enfranchised at a premium of £100, an absurdly low figure in the case of many properties.

[57] Consultation paper, para 15.49.

[58] One survey respondent suggested that the valuation methodology be calculated as: *"a fixed percentage less a deduction (up to a max/min) which takes account of the number of years that an applicant has paid ground rent - akin to R[ight] T[o] B[uy]."*

14.9.2. It was further emphasised that upon standardising capitalisation rates, a consensus would need to be found between the relevant professional bodies to determine rates which were both realistic and sensible.

14.10. CILEx emphasises that where capitalisation rates are standardised, periodic reviews shall be essential to future-proofing leasehold law and ensuring that the valuation methodology remains up to date with the evolution of the property market. The manner in which periodic reviews are conducted needs to be transparent and well known to conveyancers, leaseholders and landlords well in advance, so that the impact that they might have on transactions in progress are mitigated and all parties are made aware of how their rights and interest might be impacted.

14.10.1. Suggestions were put forward for capitalisation rates to be periodically reviewed against the property value index or the retail price index.[59]

14.11. CILEx would additionally like to draw the Law Commission's attention to the fact that the MHCLG's proposals for standardising ground rents, shall in turn be likely to standardise capitalisation rates in future. Accordingly, the impact of MHCLG's proposals must once again be considered when developing this new regime.

112. We invite the views of consultees as to whether deferment rates for enfranchisement valuations should be prescribed and, if so:

(1) how;
(2) by whom;
(3) how often; and
(4) in respect of which geographical areas.

14.12. Whilst there were only very few survey respondents who disagreed with standardisation of deferment rates (13.33%), just over half of all respondents were unsure about this proposal.

113. We invite the views of consultees as to whether relativity or a no Act deduction should be prescribed for enfranchisement valuations and, if so:

(1) how;
(2) by whom;
(3) how often;
(4) in respect of which geographical areas; and
(5) whether the 80-year cut-off should be removed

14.13. 71.43% of survey respondents preferred Option 2A amongst options based on the current valuation methodology, i.e.: that standardised rates should be prescribed and supplemented with the removal of marriage value from calculations.

14.13.1. 71.11% of survey respondents welcomed the removal of marriage value irrespective of whether a simple formula (Option 1), or, options based on the current valuation methodology (Option 2), are adopted.

[59] 24% of comments identified RPI as a suitable index to review standardised capitalisation rates against.

14.13.2. Accordingly, in either case, CILEx members showed support for eradicating marriage value, and thereby the requirement for calculating relativity.

14.14. Should requirements for calculating relativity be retained, CILEx welcomes proposals for this to be set to a fixed relativity model. This shall help to simplify the valuation methodology, eliminate cause for disputes and help to improve consumer awareness around the costs involved within the enfranchisement process.

14.14.1. 62.22% of survey respondents agreed or strongly agreed that where this is the case, there should be a set relativity model used to overcome discrepancies over premium values.

114. We invite the views of consultees as to whether the possible right to hold over at the end of a long lease should be disregarded on an enfranchisement valuation.

14.15. CILEx has not obtained any member data on this point.

115. We invite the views of consultees as to whether a discount for leaseholder's improvements on an enfranchisement valuation should be retained.

14.16. CILEx recognises that calculating discounts for leaseholder improvements may add complexity to the valuation methodology, however finds that this variable needs to be taken into account when calculating premiums in acknowledgement of the time, costs and efforts that a leaseholder will have invested into the property (an investment for the benefit of both the landlord and leaseholder). This is provided that said improvements were within the ambit of the leaseholder agreement.

116. We invite the views of consultees as to whether it should be possible for leaseholders to elect to accept a restriction on development to prevent development value from being payable as part of an enfranchisement valuation.

14.17. CILEx provisionally accepts this proposal, provided that it is possible to release the restriction at a later date where both parties consent.

117. We invite the views of consultees as to which, if any, of the valuation options we have discussed (set out at Options 2A to C in Chapter 15) are preferable and, so far as any preferred option contains a range of possible reforms, which of those reforms should be adopted.

14.18. As previously articulated in response to question 113, 71.43% of survey respondents were of the opinion that (where options based on the current valuation methodology are adopted) standardised rates should be prescribed and marriage value removed from premium calculations. Accordingly, our members showed strong support in favour of option 2A: term and reversion with prescription of rates.

118. We invite the views of consultees as to the desirability of an online calculator for enfranchisement valuations and the types of claim for which it could be appropriate.

14.19. 74.42% of survey respondents agreed or strongly agreed that standardising rates could allow for the use of an online valuation calculator and indicated that this would be desirable for a range of reasons.

14.19.1. 38% of survey comments identified that an online calculator would improve the accessibility and simplicity of calculating premiums for all involved. It was acknowledged that this would be a particularly useful tool for conveyancers who are usually the first to be contacted on valuation matters despite the fact that valuations lie outside their remit, and within the duties of a valuation expert.

14.19.2. The use of an online calculator was additionally recognised for the benefits it could have on improving client relationships, along with expediting processes, improving consumer awareness around costs, and helping to manage expectations (provided that additional unforeseen costs are not then later incurred).[60]

14.20. However, survey respondents did caution against sole reliance on online calculators, emphasising that valuations would still need to be cross referenced by a practising surveyor. Accordingly, CILEx agrees with the proposals put forward, however emphasises that landlords and leaseholders would need to be made aware of the fact that the online calculator provides only an indicative value.

119. How and to what extent has the current methodology for calculating premiums payable on enfranchisement slowed down, prevented or made more costly the exercise of enfranchisement rights?

14.21. CILEx members identified the method for calculating premiums as the third most problematic issue with the current enfranchisement regime.

14.21.1. Survey comments identified the current methodology as complex, lengthy, expensive, litigious and unclear for consumers to understand.

14.21.2. This coupled with issues around consumer awareness of enfranchisement costs, were identified to have led to problems of consumer expectation when entering into an enfranchisement claim. Worryingly, these skewed expectations were identified as contributing to the influx in consumers purchasing their properties as leasehold, unaware of the cost implications for doing so.[61]

120. We have set out the following options for the reform of valuation:
(1) the adoption of a simple formula; and

[60] Member comments included: *"Simple for everyone to use. Generally, it is the conveyancer rather than any other party that is first approached by a homeowner on the topic and matters of value are not something that a conveyancing lawyer is able to advise upon in the main."; "This would help tenants understand the process and likely costs better and reduce negotiation and in turn costs"; "In principal this seems like a good idea, but if additional costs are incurred frustration of client's is highly likely."*

[61] Anecdotal data obtained through survey findings included: *"I have found that the public expect to upgrade to a freehold for very small cost, i.e.: not more than £5,000 and very little legal cost so that from the outset the expectation is not close to the reality."*

(2) options based on current valuation methodology, involving different combinations of current valuation components and/or the prescription of certain rates.

To what extent would each of these options reduce the duration and cost of the enfranchisement process, and the number of disputes arising?

14.22. Comments from survey respondents articulated that both of these options would be favourable to the current situation, as they would be capable of providing clearer and more simple formulae for calculating premiums. In turn, this could reduce the time and costs for both parties engaged in an enfranchisement claim, as well as helping conveyancers to better manage their client's cases.

14.23. Of the two options, just over half of all survey respondents indicated that introducing a simple formula, that is not based on market value, would be the better option to take. Respondents also indicated that this option (Option 1) would be most effective in driving premiums down (53.49%) and in avoiding the need for professional valuation costs (62.79%).

14.23.1. Nevertheless, CILEx does recognise that Option 1 was largely preferred on the basis of using a multiple of the ground rent; an approach which is no longer likely to be practical in light of the welcomed proposals by MHCLG for ground rent caps.

14.23.2. In addition, CILEx recognises concerns raised by some respondents that market value cannot be ignored, as this would operate against the nature of a premium as essentially the 'price' owed for the remaining interest.[62]

121. We welcome evidence as to the likely impact of the possible valuation methodologies set out in Chapter 15 on different sectors of the economy – in particular, the institutional investment sector, the charitable sector and the leasehold market (for both owner-occupiers and buy-to-let leaseholders).

14.24. As a professional body for Chartered Legal Executive lawyers, CILEx has not obtained data on the impacts that the proposed valuation methodologies might have on different sectors within the economy.

122. We welcome evidence as to:

(1) the proportion of existing leases which are currently eligible for section 9(1) valuations; and

(2) the likely impact on landlords and leaseholders of (a) retaining the section 9(1) valuation methodology for a limited period, or (b) replacing it with a simplified valuation methodology.

14.25. CILEx has not gathered any quantifiable data on this point.

[62] Member comments included*: "Market value is still a factor in calculating the landlord's loss*."; *"I don't know if enough about the current formula as it's so complicated to give an informed response but paying the same for a property valued at £80,000 or £800,000 doesn't seem fair if you ignore market value."; "Option 1 would be ideal but would be unfair to landlords. Option 2 is therefore likely to be fairer."*

123. We welcome evidence as to the likely impact on the leasehold market (and wider housing market) of differentiating between classes of enfranchising leaseholder (for example, those who occupy the property as a residence and those who do not) in respect of the premium payable.

14.26. Please refer back to CILEx's response to question 109.

14.26.1. Distinguishing between different classes of enfranchising leaseholder runs the risk of distorting the market and altering land prices on the arbitrary basis of party identity as opposed to the land interest itself. Furthermore, there are likely to be practical difficulties in the context of mixed ownership properties, which could run the risk of unfairly discriminating against these types of premises.

124. We welcome evidence as to the costs, benefits and practicalities of constituting and maintaining a body whose function is to prescribe certain rates for a reformed valuation methodology.

14.27. Should options based on the current valuation methodology be implemented, CILEx welcomes the proposal for creating a body tasked with routinely prescribing standardised rates for valuation. This shall ensure that the valuation methodology is future-proofed; an important element of leasehold reforms in light of observations that the current law is archaic. To prevent the law from falling foul of this same fault in future, it is thereby imperative that mechanisms are in place so that a repeat overhaul of the leasehold sector is not once again warranted.

125. We welcome evidence as to the costs, benefits and practicalities of setting up and maintaining an online valuation calculator.

14.28. Please refer back to CILEx's response to question 118 as to the benefits of these proposals.

14.29. Whilst CILEx has not obtained direct findings with regards to costs or practicality, it is assumed that this should not be difficult or costly providing that the new formulae adopted has been clearly laid out.

15. Intermediate and Common-parts leases

Question 126 – 134

15.1. CILEx has not obtained data from members regarding intermediate leases and common-parts leases. Survey results indicated that many of our members have not engaged with these types of leases, and the minority who have done so, did so only on an occasional basis.[63]

[63] Regarding intermediate leases: 35.71% of survey respondents 'occasionally' dealt with enfranchisement of such leases (with the remaining 64.29% having rarely to never dealt with them). Regarding common parts leases: 20% of survey respondents 'occasionally' dealt with enfranchisement of such leases (with the remaining 80% having rarely to never dealt with them).

For further details

Should you require any further information, please contact;

Chandni Patel
Policy & Research Officer

chandni.patel@cilex.org.uk
01234 845740