Law Commission Consultation – "Reinvigorating Commonhold: the alternative to leasehold ownership"

A Response by

The Chartered Institute of Legal Executives (CILEx)

[March 2019]

1. Summary of Recommendations

1.1. Headlines

1.1.1. CILEx welcomes these reforms for reinvigorating commonhold, as they shall provide consumers (particularly those looking to purchase flats) with wider options for homeownership. (Para 3.1).

1.1.2. However, CILEx is conscious that existing leaseholders should not be expected to convert their tenure to commonhold in order to have their rights and interests protected. Efforts should be focused on reforming the leasehold sector first and foremost to provide a present-day solution for those in need, (Para 3.1) including the abolition of forfeiture. (Para 3.1.1)

1.1.3. Members have cautioned against a mix of commonhold and leasehold tenure within a single building/block as this is likely to create practical difficulties and risks a two-tiered system. (Para 3.2)

1.1.4. Three quarters of surveyed CILEx members preferred the principle of standardisation over flexibility within commonhold reforms (Para 3.2, 5.2), but only where this is able to simplify and streamline procedures. (Para 5.7, 5.16)

1.1.5. Until commonhold increases in popularity, it is difficult to tell the extent to which consumers shall be interested in, or capable of, contributing to their commonhold. (Para 3.3, 5.8) Raising consumer and sector-wide awareness of commonhold shall be key to this (Para 3.5), as will the creation of training and educational materials for commonhold members. (Para 3.3)

1.1.6. The unwillingness of mortgage lenders to lend on commonhold was identified by CILEx members as the biggest barrier to commonholds since the passing of the Commonhold and Leasehold Reform Act 2002**.** (Para 3.4)

1.1.7. For commonhold to be successful, it is important that these proposals are considered alongside, and complemented by, parallel work on the regulation of property agents (Para 3.6), and reforms for a new integrated housing court (Para 3.7, 11.7-11.8).

1.1.8. The role of the First-tier Tribunal (Property Chamber) in safeguarding minority interests and protecting against unfair management in commonhold is welcome throughout these proposals. However, further reforms are needed to overcome the barriers of access to the tribunal. (Para 3.7, 4.10)

1.1.9. When implementing these reforms, the Government may wish to be mindful that the costs associated with establishing/joining a commonhold association and for enforcing rights and protections under it are not prohibitively high. (Para 3.7)

1.1.10. To help legitimise and future-proof commonhold, 87.5% of CILEx members agreed that there should be an independent regulator established to oversee commonhold practices. (Para 3.8)

1.1.11. The Government may wish to reassure itself that it has reviewed alternative arrangements to the leasehold model for accommodating shared ownership schemes. This would allow for shared ownership within commonholds without the complication of mixed tenure. (Para 10.1-10.6)

1.2. Commonhold Conversions

1.2.1. The right of collective enfranchisement should be retained alongside commonhold conversions to facilitate market transition. (Para 4.1)

1.2.2. Two-thirds of surveyed CILEx members agreed that a new streamlined ‘enfranchise and convert’ procedure would be effective in securing early commitment to commonhold, reducing costs and avoiding duplication. (Para

4.1, 4.6, 4.21-4.24, 4.30) Government guidelines, standards fees, fixed timelines and the use of consolidated forms would all be beneficial in facilitating this new procedure. (Para 4.31)

1.2.3. The issue of obtaining unanimous consent for a commonhold conversion is divisive in nature. CILEx suggests that this may be subject to a review once commonhold conversions become more popular in practice. (Para 4.3-4.5)

1.2.4. A majority of CILEx members favoured the approach under Option 2 whereby non-consenting leaseholders are required to convert to commonhold where there is a requisite majority of 80% consent (Para 4.2, 4.12), provided that approval is first sought from the First-tier Tribunal (Property Chamber) to protect the minority interests. (Para 4.7-4.9, 4.18)

1.2.5. Alternative funding streams should be available for the purchase of the non-consenting leaseholder's unit (Para 4.14-4.16), and property valuation should be capable of offsetting any grant subsequently charged over the non-consenting leaseholder's unit. (Para 4.9)

1.2.6. In the event that a non-consenting leaseholder finds themselves in negative equity or at a financial loss as a direct result of the charge levied against them for conversion, special arrangements for remedial action may be warranted. (Para 4.9)

1.2.7. If Option 1 were implemented, and non-consenting leaseholders retain their leasehold following conversion, this should be complemented with a statutory right to purchase the commonhold interest at a later date. (Para 4.11)

1.2.8. In the interests of natural justice, CILEx agrees that a freeholder should be expected to take new 999-year leases, automatically granted over flats let to statutorily protected non-qualifying tenants. (Para 4.11, 4.13)

1.2.9. Non-qualifying tenants should have the same rights as unit owners in challenging commonhold contributions, as should customers of lease-based home purchase plans and shared-ownership leaseholders. (Para 4.17, 10.4, 10.11)

1.2.10. It should be possible for charges to transfer automatically from the leasehold title to the commonhold unit title upon conversion to commonhold without requiring lenders' consent. (Para 4.20, 4.27) However, it may be necessary to evaluate the impact, and implement certain safeguards, where Deeds of Substituted Security are removed. (Para 4.28)

1.2.11. CILEx welcomes proposals to empower leaseholders who are in the process of a collective freehold acquisition to apply directly to HM Land Registry for the creation of a new commonhold. (Para 4.26)

1.3. Mixed-Use and Multi-block developments

1.3.1. A majority of surveyed members agreed with the proposed objectives for a new management structure in mixed-use and multi-block developments. (Para 5.1)

1.3.2. CILEx welcomes the use of 'sections' within the commonhold framework (Para 5.4, 12.3) in instances where unit holders utilise their properties in a sufficiently different manner (Para 5.13-5.14). This framework shall also be helpful in protecting vulnerable persons. (Para 8.17)

1.3.3. However, there is some ambiguity as to how Sections would be effectively managed, on which we would welcome clarity. (Para 5.5, 5.9)

1.3.4. The Law Commission may wish to reassure itself that there is an alternative, phased approach for converting to commonhold in particularly large complex estates. (Para 5.6)

1.3.5. Over three quarters of surveyed CILEx members agreed sections should be created by special resolution. (Para 5.12)
1.3.6. CILEx agrees that sections should be created by a developer at the outset, with flexibility to vary this at a later stage. (Para 5.11)
1.3.7. CILEx suggests that procedures around creating, amending or combining sections could be relaxed within a fixed period after unit owners have taken effective control of the commonhold. (Para 5.11)
1.3.8. Three quarters of CILEx members agreed that a director should be able to alter or revoke the powers delegated to Section committees, provided that this is well regulated. (Para 5.10)

1.4. **The Commonhold Association & Commonhold Community Statement**

1.4.1. CILEx provisionally agrees that it should be possible to impose restrictions on the short-term letting of commonhold units, provided this local rule was created at the outset of the commonhold (following development). (Para 7.3-7.4)
1.4.2. CILEx continues to call for an end to unjustified exit and event fees for improving transparency and fairness within the market. (Para 7.5)
1.4.3. Member opinion was divisive on whether an ordinary resolution, in accordance with the current system, should be retained for amending local rules. (Para 7.7)
1.4.4. CILEx welcomes the new right to apply to the Tribunal in relation to amendments made to the Commonhold Community Statement (CCS). (Para 7.8)
1.4.5. CILEx is conscious that differentiated rules within the local rules of the commonhold association would overcomplicate the system making it harder and more inaccessible for the average homeowner to navigate. (Para 7.9)
1.4.6. CILEx agrees that mandatory provisions of the CCS should be contained in the regulations and not reproduced within the CCS itself (Para 7.10). This is provided that there is sufficient signposting for unit owners. (Para 7.11)
1.4.7. Compartmentalising relevant CCS provisions which apply to different Sections would be beneficial. (Para 7.12)

1.5. **Management and Maintenance Issues**

1.5.1. Majority of surveyed CILEx members agreed that it should be possible to create a local rule requiring a higher standard of repair, although the difficulties in defining 'higher standard' were noted. (Para 8.4)
1.5.2. Majority of surveyed CILEx members agreed that rights of entry should be prescribed for but should not differentiate between horizontally-divided and vertically-divided buildings in the commonhold. (Para 8.5)
1.5.3. Directors of the commonhold should be able to authorise alternations to an internal unit where this requires only some minor incidental alteration affecting the common parts. (Para 8.6-8.7)
1.5.4. A new requirement for commonhold associations to have a certain level of insurance would be sensible (Para 8.1-8.2), although the Law Commission should be mindful of the potential barriers commonholds could face in accessing competitive insurance. (Para 3.4.1)
1.5.5. Three quarters of survey respondents agreed that commonhold associations should have a right, within a set period from the date the unit owners take effective control, to cancel contracts that were previously entered into. (Para 8.9-8.10)

1.6. **Financing the Commonhold**

1.6.1. CILEx agrees that approval for proposed contributions to shared costs should be given by ordinary resolution, although there may be scope for differentiating between major and minor works. (Para 9.3) Unit owners should subsequently be able to give consent via a general meeting or written procedure. (Para 9.1)

1.6.2. Where approval has not been secured, CILEx agrees that the level of contributions required in the previous financial year should continue to apply. (Para 9.2)

1.6.3. CILEx agrees that it should be possible to include, as a local rule, an index-linked “cap” on the amount of expenditure which can be incurred on the cost of improvements (Para 9.4), with flexibility to vary this at a later date. (Para 9.5)

1.6.4. Three quarters of CILEx members agreed that reserve funds should be compulsory for a commonhold association (Para 9.8-9.9), with the possibility of establishing designated reserve funds for specific purposes subject to change. (Para 9.10-9.11)

1.6.5. A majority of surveyed CILEx members disagreed with directors of the commonhold association being permitted to 'borrow' from designated reserve funds to meet an unrelated shortfall. (Para 9.12)

1.6.6. CILEx welcomes proposals for annual contributions to the reserve fund to be approved by members in the same way and at the same time as contributions to current expenditure. (Para 9.13)

1.6.7. A majority of surveyed CILEx members agreed that the allocation of commonhold cost contributions should generally be prescribed for in regulation, although CILEx welcomes flexibility for this to differ depending on how the costs incurred relate with the property interests of individual unit owners. (Para 9.14-9.15)

1.6.8. CILEx agrees that internal floor areas would provide a satisfactory starting point for allocating financial contributions. (Para 9.17)

1.6.9. CILEx welcomes the role of the Commonhold Unit Information Certificate (CUIC) in ensuring transparency within the home buying and selling process. (Para 9.18)

1.6.10. CILEx agrees that an incoming purchaser should not be liable for outstanding contributions which fall due unless they have received prior notice of this. (Para 9.19)

1.6.11. CILEx agrees that a maximum fee for issuing a CUIC should be set by regulation and kept under review to mitigate any risk of abuse. (para 9.20)

1.6.12. Sanctions should be made available where a commonhold association has failed to comply with the 14-day time limit for issuing CUICs. (Para 9.21)

1.6.13. Where there has been a ‘genuine error’, a majority of CILEx members agreed that it should be possible to amend the CUIC after it has been issued. (Para 9.22)

1.6.14. A majority of surveyed CILEx members agreed that 80% consent and approval from the tribunal should be obtained where a commonhold association is seeking to grant a charge over a unit for outstanding contributions. (Para 9.25) CILEx further agrees that the Tribunal should be able to override a lender's refusal to consent in such circumstances. (Para 9.23)

1.7. **Exceptions**

1.7.1. CILEx would welcome further research into alternative models for shared-ownership, which do not rely on the creation of leasehold interests. (Para 10.1-10.6)

1.7.2. Other than social housing, members did not identify any other forms of affordable housing which would be difficult to accommodate within commonhold. (Para 10.8)

1.7.3. CILEx agrees that customers of lease-based home purchase plans should be exempt from the prohibition on residential long leases in commonhold. (Para 10.9-10.10)

1.8. **Dispute Resolution**

1.8.1. It should be a matter for the courts/tribunal to decide whether a claim is frivolous, vexatious or trivial, not the commonhold association. (Para 11.1)

1.8.2. A majority of CILEx members felt that the requirement for a commonhold association to join an approved ombudsman scheme should be retained. (Para 11.3)

1.8.3. CILEx agrees with introducing protections to prevent legitimate claims from being frustrated on the basis of mere technicality (Para 11.4), however there must be some degree of consistency in the formalities expected within dispute resolution. (Para 11.2)

1.8.4. CILEx welcomes the introduction of a pre-action protocol for dispute resolution, provided this does not overlap with, or duplicate, other existing protocols. (Para 11.5-11.6)

1.8.5. Nearly all surveyed CILEx members agreed that indemnity clauses for losses reasonably incurred where a unit owner/tenant breaches the CCS should be prescribed for in regulation. (Para 11.9)

1.8.6. CILEx agrees that a unit owner should be able to challenge a decision taken by the commonhold association in most situations where that decision was prejudicial to their interests, (Para 11.10-11.11) taking consideration of what is fair and reasonable in the circumstances. (Para 11.12)

1.8.7. CILEx agrees that the tribunal should be able to attach conditions on its decisions when adjudicating on a challenge made against the commonhold association. (Para 11.13)

1.8.8. Just under three quarters of surveyed CILEx members agreed with enhancing the commonhold association's powers to address non-financial breaches of the CCS. (Para 11.14)

1.8.9. The rate of interest charged by the commonhold association on late payments, for financial breaches of the CCS, should be capped by statute. (Para 11.15)

1.8.10. Nearly all surveyed CILEx members agreed with introducing an automatic charge over a commonhold unit for the payment of outstanding contributions (Para 11.16); where this charge is distinguished from that of a mortgage provider. (Para 11.19)

1.8.11. In the interests of natural justice, the power of sale enforced against this charge should only be exercised as a last resort (Para 11.17-11.18, 12.2) and should be subject to prior approval from the courts/tribunal. (Para 11.20-11.22)

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 some of CILEx's members working in conveyancing. CILEx liaised with practitioners through its Conveyancing Specialist Reference Group and conducted a survey of members into their opinions of commonhold and the proposals put forth. These are expanded in more detail below.

3. General Points

3.1. CILEx recognises the benefits of introducing commonhold, supplementing the current leasehold framework with an alternative form of tenure so that consumers have a wider choice in homeownership.[1] However, our members have indicated that whilst commonhold may be suitable for new build developments, in the context of existing properties, efforts should be concentrated on reforming the leasehold sector first and foremost. Members were conscious that leasehold tenure is already well established, and that an increased uptake of commonhold shall require an adjustment period rendering it a longer-term option for remedying the injustices in homeownership.[2] In considering these reforms the Government may wish to be mindful of the importance in leasehold reform to help those in need of a present-day shorter-term solution, as CILEx is conscious that existing leaseholders should not be expected to convert their tenure to commonhold in order to have their rights and interests protected.

3.1.1. For instance, whilst CILEx agrees with the Law Commission's finding that the absence of forfeiture within commonhold is a benefit over the current leasehold model, 70.8% of survey respondents agreed that this right should be abolished altogether including within leasehold properties. The right of forfeiture has been criticised as draconian in providing a landlord with the windfall from the sale of a property, and CILEx members are largely in agreement that it is unfair and archaic for all homeowners.[3]

3.2. Members have further cautioned against a mix of leasehold and commonhold tenure within a single building which could cause difficulties in the management and regulation of property. The patchwork approach to developing land law in England and Wales has created a complex network of varying land interests which exacerbate deficits in consumer awareness of conveyancing costs and processes.[4] In turn this has caused difficulties for practitioners when advising consumers on homeownership decisions and further alienates the consumer from the home buying process. CILEx has received consistent feedback calling for simplicity and streamlining of processes to ensure that this patchwork approach is not repeated, and a holistic approach is taken towards law reform.

3.2.1. In the interests of simplicity and greater streamlining, 76.2% of members preferred the general principle of standardisation within reforms so that there is some uniformity between different commonholds, and a safeguard that commonhold interests will not drastically alter further down the line.

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[1] Member comments included: *"The general principle of commonhold seems to lean towards making a fairer, more consumer-based arrangement and relieves residents from the burden of disinterested and/or overbearing/unreasonable landlords."; "Buyers would always be 'happier' with freehold than leasehold."; "[Commonhold] is a much more democratic and modern form of ownership and aligns with many other international jurisdictions."*

[2] In the longer-term, majority of members agreed that leasehold interests should eventually be abolished by phasing these types of interest out. This was with the exception of certain types of leases that are used for specialist purposes, such as: residential leases.

[3] Member comments included: *"On long leases the principle of forfeiture seems antiquated."; "The lessee/commonholder should be allowed to be able to enjoy the property without the risk of forfeiture for non-payment of ground rent or even more worrying when the Lease converts to an AST [Assured shorthold tenancy] when the rent is more than £250 outside London."; "Why should a landlord take the benefit of the premium when the lease is created and have another bite at the cherry later on? It is not equitable."*

[4] CILEx Submission, *Law Commission Consultation: Leasehold Home Ownership – Buying your freehold or extending your lease,* (January 2019), para 3.1.

3.2.2. Nonetheless, members recognised that flexibility may be relevant at times, where standardisation would be overly prescriptive and thereby undermine the underlying objective of simplicity. In addition, CILEx notes that a degree of flexibility can help in promoting the necessary culture change for commonhold to work effectively.[5] If the procedures and rules around commonhold are too heavily prescribed there is a risk of undermining the self-sufficiency of commonhold members to govern their own internal affairs and the focus on a shared 'community of interests' may inadvertently shift.

3.3. Whilst 69.6% of survey respondents agreed that commonhold in principle is less adversarial than leasehold, concerns were voiced that a lack of engagement by unit holders within the Commonhold Association (CA) and when making management decisions could undermine the greater community of interest.[6] Members were divided, judging from their own experiences, as to whether an average purchaser would be interested in or capable of managing their own blocks, with a slight majority indicating that this would not often be the case.[7] One member commented:

"My experience is that many residents are disengaged with the management of their development and are often reluctant to participate even when they are shareholders in the company that owns the freehold. You do come across some residents who like to participate and enjoy the ability to join in decision making but a great many do not and simply see their landlord/management company as an adversary who is constantly demanding money from them. Residents are frequently resentful about major works on their developments including about having to pay towards works on the wider estate which they feel do not benefit them directly. Whilst it can be argued that a greater opportunity for control and input should be welcomed, I am not convinced it will happen in practice."

3.3.1. One particular concern was situations where a commonhold unit owner has let out their property on a short-term basis, thus creating a degree of separation

[5] Member comments from the current and previous surveys suggested that there is a need for culture change within homeownership to cultivate commonhold: *"It could work BUT it will need a change of attitude…"; "…Commonhold will not change the fact that residents are frequently disinterested in getting together to run a building/estate communally."; "People will be people. [I]n theory it's perfect but in practice, human nature as it is, there will always be some who try the system and don't want to be involved."*

[6] Member comments included: "*There will always be people who do not join in, thus negating the "Community Interest". Rather like the trade unions a development could be hijacked by a few who turn up to meetings, making decisions and leaving the majority high and dry. At least with leaseholds there is some protection."; "Some clients will be happy to take on the responsibility of managing as they have good communication skills and access to computers to actually take on the role, many are quite capable and would be interested in taking on the role , I can confirm this as I helped manage the block of flats I lived in. On the flip side many clients would shy away from responsibility due to work commitments and many just would not want the hassle of it."; "I think there will still be problems in the same way that we already have with management companies although it might give homeowners the impetus to all get involved."; "I think there aren't enough commonholds to say for certain but think commonhold could just become adversarial in a different way."*

[7] 37.1% of survey respondents disagreed/strongly disagreed that buyers are likely to be capable of, or interested in, managing their blocks, in comparison with 29.2% who agreed/strongly agreed and 33.3% who remained impartial.

which could interfere with the unit-owner's engagement in commonhold decisions.[8]

3.3.2. CILEx is conscious that until commonhold increases in popularity, and there is a growing consumer awareness around the differences between leasehold and commonhold interests, there may be a hesitancy for consumers to get involved in a CA and/or a lack of confidence in assuming management responsibilities.

3.3.3. One potential solution for increasing consumer confidence, interest and capacity to take on management functions could be the publication of training and educational materials for CA directors and wider commonhold members.[9] This would replicate the proposals put forth by the Law Commission in their ongoing work on reforming Right to Manage, recognising the issues that have currently undermined the ability for residents to collectively manage their own blocks.[10]

3.4. An unwillingness of mortgage lenders to lend on commonhold was identified by members as the most likely reason for why only a handful of commonholds have been created to date.[11] The Law Commission rightly focus on reducing the risk of insolvency within a CA in order to overcome this problem and make commonhold more workable.

3.4.1. Amongst proposals for achieving this aim, is a focus on the role of insurance. However, CILEx is alert to the issues identified by the Law Commission in its parallel work on Right to Manage which pre-empt potential difficulties that may arise for a CA in this regard, including: a). The absence of a credit history to secure a competitive deal, b). the likelihood of landlords cancelling existing insurance policies upon commonhold conversion, and c). a lack of awareness around the importance of regular insurance valuations leading to under-insurance.[12] Safeguarding the availability of insurance for CAs may therefore be equally as relevant owing to its interplay with lending practices.

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[8] Member comments included: *"[One] difficulty will be with those blocks that have a high number of buy-[to]-let unit owners where the units are let on an AST and therefore the AST Landlord may have little interest in getting involved in the management of the block and potentially neither would a short-term AST tenant."; "It depends on the person involved. Some will wish to be able to manage some will not be bothered at all. If the property is rented out, then the tenants will not be interested at all."*

[9] Member comments frequently voiced the importance of increasing public education around commonhold for this to be workable: *"There is a general apathy amongst buyers. They want someone else to manage the block. This is about educating buyers as to the benefits of commonhold."; "Not all commonholder's would understand their responsibilities and [this] would cause issues between commonholder's."; "A Commonhold Association requires tenants to act impartially for the good of the building and not just for their own benefit and some parties find it difficult to differentiate between the two."*

[10] Law Commission, *Leasehold Home Ownership: Exercising the right to manage,* Consultation Paper 243, (January 2019), p.109, para 5.118.

[11] This was selected as the most likely reason amongst the following options provided to survey respondents: 1). General shortcomings in how the law of commonhold was drafted, 2). Difficulties in converting existing long leaseholds into commonhold, 3). Inflexibility of commonhold to apply to mixed-use properties, larger developments and shared ownership, 4). Unwillingness of mortgage lenders to lend on commonhold, 5). Unwillingness of developers to sell properties as commonhold, 6). Lack of consumer and sector-wide awareness of commonhold.

[12] See footnote 10, (Law Commission Right to Manage), p197-207.

3.5. Following this, the second biggest barrier identified by members was a lack of consumer and sector-wide awareness of commonhold. This concern was mirrored in CILEx's earlier response to the Law Commission's work on Leasehold Enfranchisement and can be taken as a wider issue within the conveyancing sector; prompting support for greater streamlining and simplification of conveyancing processes.

3.5.1. To overcome this issue, 80.3% of survey respondents agreed that all advertisements on properties for sale should be required to contain basic details of their tenure to improve public awareness of different land interests and help inform homeownership decisions. Two thirds of respondents agreed that this should be further supplemented with a Government website bringing together relevant information around commonhold and leasehold interests as well as an increase in advertisement campaigns to improve public understanding.[13] For example, CILEx suggests that this could be an area covered in the Government's upcoming How to Buy and How to Sell Guides.

3.6. CILEx welcomes the work anticipated this year by the Regulation of Property Agents: Working Group and stresses the importance for these reforms to be properly supplemented with ongoing work for regulating the property agent sector.

3.6.1. Regulation of estate agents shall be relevant in securing transparency within the home buying and selling process and in improving the aforementioned problems with consumer awareness of varying land interests (particularly in the context of flats[14]). Consistent information disclosure at point of sale will be paramount in making prospective buyers aware of, and able to, make an informed decision about whether to purchase a property on a leasehold or commonhold basis.

3.6.2. The regulation of managing agents shall also be relevant in mitigating any issues that might arise where a CA has delegated its management functions to external third-parties (albeit it is recognised that the commonhold owners, as members of the CA, would be better placed to prevent any misconduct). CILEx considers that there is a strong likelihood of this happening in the short-term, given the need for a cultural shift in thinking for commonhold's success.[15] As such, despite any incentives put in place to encourage market uptake, it is unlikely that self-management of commonholds by its members will take place overnight. CILEx is therefore mindful that where CAs have sought to delegate management functions, managing agents should not be in a position to abuse this dependency.

3.6.2.1. It is also essential for the members of a CA to be capable of holding its directors to account, particularly where a director is an external professional and therefore does not share the commonality of interest that CA members do.

[13] 57.2% of respondents considered that offering some incentive on Stamp Duty Land Tax could also help to make commonhold more attractive to buyers as compared with leasehold. However, members were conscious that this would only be a short-term incentive as opposed to a sustainable solution for fixing the broken market.

[14] As fewer options will be available for the future purchase of houses, in light of parallel proposals to ban houses sold as leasehold.

[15] See footnote 5; Law Commission, *Reinvigorating Commonhold: the alternative to leasehold ownership,* Consultation paper 241, p.18, para 1.35.

3.7. The role of the tribunal in safeguarding minority interests and protecting against unfair management within the commonhold is welcome throughout these proposals. Nevertheless, Government may wish to be mindful of the current barriers of access within the First-Tier Tribunal (Property Chamber). CILEx members have brought to our attention issues of prohibitively high fees, complex processes, and a lack of public awareness around the role of tribunals which could prevent their use as a legitimate safeguard in these instances.[16]

3.7.1. In addition, it is relevant that the costs associated with establishing a CA, or indeed joining one, are not also prohibitively high such that consumers are dissuaded from choosing the commonhold path. One member succinctly stated the issues relating to costs and financing of commonhold as follows:

"Commonhold is a great idea in principle e.g. the commonhold association are likely to manage the estate far more effectively than a landlord/management company, given that the commonhold owners have a direct interest in doing so. However, the associated costs of setting up a commonhold association and registering the commonhold with HM Land Registry has acted as a disincentive for setting up commonhold property developments. In addition, most developers don't fully understand why commonhold may be better than leasehold, and most institutional lenders are reluctant to lend against commonhold."

3.7.2. Once again, CILEx emphasises the role that estate agents have to play in providing full disclosure of associated costs with both leasehold and commonhold; including upfront and more crucially, ongoing costs under both options.

3.8. To help legitimise and future-proof commonhold, 87.5% of survey respondents agreed that there should be an independent regulator established to oversee commonhold and ensure that good practice is followed. Majority of respondents further felt that this should include taking on an advisory function for unit holders, and even playing a mediatory or adjudicatory role in attempting to resolve commonhold disputes before they escalate to the Tribunal/Court.

3.8.1. In addition it was suggested that the regulator take on the additional task of approving articles of association for new commonholds to ensure they comply with commonhold legislation and do not include any unfair terms.

3.8.2. The Law Commission may wish to explore whether there is any ambit for the anticipated new regulator of property agents to take on some of these functions, so that the regulatory framework may be better streamlined.

[16] CILEx Submission, *Ministry of Housing, Communities and Local Government Consultation – Housing Courts Call for Evidence,* (January 2019).

4. Commonhold Conversions

Q1. In order to protect freeholders, we provisionally propose that it should only be possible to convert to commonhold if either:

(1) the freeholder consents; or

(2) the leaseholders satisfy the qualifying criteria for collective enfranchisement and acquire the freehold as part of the process of converting to commonhold.

Do consultees agree?

4.1. CILEx recognises the practical benefits of mirroring the qualifying criteria for a collective enfranchisement in the context of commonhold conversions. Two-thirds of survey respondents agreed that a new streamlined approach of 'enfranchise and convert' would be effective, particularly in securing early commitment to commonhold, reducing costs and avoiding duplication.

4.1.1. Nonetheless, just under 60% of surveyed members indicated that whilst commonhold may provide a suitable alternative to enfranchisement, there is still a need to retain both options. This was, at the very least, to facilitate a transition period for adjustment and longer-term efforts which shall be critical in rebuilding confidence within the commonhold model. One member commented:

"I agree with the principle that the two should remain for the time being until commonhold became more widely understood and accepted. Provision for it to be phased out in the future might be something to consider although I am hesitant about a fixed deadline for stopping collective enfranchisement because experience shows that deadlines of that nature create a huge headache for conveyancers."[17]

4.2. CILEx concurs with the Law Commission's finding that the qualifying criteria for a commonhold conversion should not be less stringent than that of collective enfranchisement so as to circumvent previous policy considerations at the expense of the freeholder. In fact, majority of members were of the opinion that the 50% consent threshold may be too low in the context of a commonhold conversion, and thus disproportionate to the level of change.[18]

4.2.1. It is relevant to note that this was largely predicated on member views which supported Option 2 for dealing with non-consenting leaseholders. Given the practical application of Option 2, in forcing non-consenting leaseholders to convert to commonhold, and given issues of financing, it was felt that a much higher consent threshold should be required before a commonhold conversion is permitted (such as the 80% threshold proposed in question 5).

[17] Other relevant comments included: *"If leaseholds are to remain alongside Commonhold then there needs to be the right to Enfranchise….[and] Leaseholds will need to remain for the foreseeable future."; "The existing system is unweildy but works. If commonhold is used more widely then people will understand it but anything will have to be flexible to work for existing developments."; "There will be a need for Commonhold to evolve further over time."*

[18] Member comments included: *"I believe that 50% would be insufficient to justify such a significant change."; It is a major change to your biggest asset…"; "I don't see how you can force the non-consenting 50% to join in and agree to pay their share of the freehold purchase costs."; "It could victimise those who strongly disagree, forcing them to contribute to costs they perhaps cannot afford."*

Q2. We provisionally propose that it should be possible to convert to commonhold without the unanimous consent of leaseholders. Do consultees agree?

4.3. Majority of survey respondents disagreed with this proposal in principle, choosing to uphold the current requirements for unanimous consent. Members distinguished this circumstance from that of a collective enfranchisement in that commonhold must be grounded on a 'community of interest' and contributions from all unit holders to operate effectively.

4.3.1. However, CILEx notes that this opinion was only shared by a slight majority, representing 55.6% of survey respondents. Taking member comments into consideration, there was a significant dissenting opinion that a lower consent threshold would be more realistic and could be of benefit in facilitating greater uptake of commonhold.[19] Members recognised the difficulties in securing 100% support for the conversion and CILEx has previously gathered feedback on the practical difficulties of obtaining consent in larger properties.[20]

4.4. As recognised by the Law Commission, the issue of whether to eliminate unanimous consent for commonhold conversions is rather divisive.[21] This issue can be better articulated as a question of policy on how to prioritise the reinvigoration of commonhold for greater uptake. As mentioned previously, CILEx members have indicated that the biggest concern around the uptake of commonholds has been an unwillingness of mortgage providers to lend against it. On this basis, member support was given to proposals designed for changing the market, such as forcing developers to sell new build properties as commonhold rather than leasehold.[22] However, in the context of existing leaseholds, members identified a lack of consumer awareness as a bigger barrier than difficulties in the current conversion process. As such, it is arguable that even where this requirement for unanimous consent is removed, uptake of commonhold may not be guaranteed unless and until wider changes are made.

4.4.1. Notably, CILEx members support the view that for existing leaseholders, Government efforts should be focused on reforming the leasehold sector rather than attempting to promote commonhold as the alternative.

4.5. The Law Commission may wish to reassure itself with a review of this matter around unanimous consent, once commonhold and commonhold conversions become more prominent following reforms. This is so that the impact of conversions on existing leaseholders can be more accurately assessed and evaluated against an evidence base, to ensure that the law is able to adequately protect the interests of non-consenting leaseholders.

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[19] Member comments included: *"A percentage of, say, 75% would offer the take up of Commonhold a better chance of getting established."; "This is a matter which affects all parties, and their mortgage lenders. However, if it is a voluntary matter then for an existing block this might rule out the majority of blocks as you rarely get 100% participating in the right to buy, so this would be the same for commonhold. Some people just don't want to get involved."; "I think it should be a majority vote so that the best interests of most are included. Some people may not be able to vote…"*

[20] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms), para 8.19-8.20.

[21] See footnote 15, (Law Commission Reinvigorating Commonhold Consultation), p.54, para 3.39.

[22] Presented with options of whether the Government should be: a). looking at incentivising developers to sell more properties as commonhold, b). forcing developers to sell more properties as commonhold, or c). not be trying to promote commonhold over leasehold, majority of members opted for option b.

Q3. We provisionally propose that only leaseholders who are eligible to participate in a collective enfranchisement claim should take a commonhold unit and should be able to participate in a decision to convert to commonhold. Do consultees agree?

4.6. CILEx welcomes this proposal (see para 4.1 above), and reiterates earlier recommendations made to the Law Commission on enfranchisement reforms should this stance be adopted. This includes:

- Removal of qualifying criteria based on financial limits (low rent test and rateable values) as these tests are outdated and arbitrary with little significance for modern day housing.[23]
- Removal of the two-year limitation for initiating an enfranchisement claim as this can be easily avoided through a transfer of benefit and only exacerbates complication and delays.[24]
- The two-thirds requirement for collective enfranchisement should be relaxed in the context of premises containing shared ownership leases and measured instead on a pro rata basis against non-shared ownership residences to determine who may qualify.[25]
- Circumstances in which the validity of notices can be challenged should be limited, including with regards to delivery of those notices, as numerous technical requirements currently give way to frequent contentions aggravating the conveyancing process.[26]

Q10. We have set out two options for setting the threshold of leaseholder support which should be required to convert to commonhold. The first would be to require leaseholders (who are qualifying tenants under enfranchisement legislation) owning at least 50% of the flats in the building to consent, provided non-consenting leaseholders are able to retain their leasehold interest on conversion to commonhold (Option 1). The second would be to require leaseholders (who are qualifying tenants under enfranchisement legislation) owning at least 80% of the flats in the building to consent, on the basis that non-consenting leaseholders are required to take a commonhold unit on conversion (Option 2).

We invite consultees' views as to whether they prefer Option 1 or Option 2.

We invite consultees' views as to any other options for setting the threshold of leaseholder support for conversion, other than Options 1 and 2, which strike an appropriate balance between the interests of those wishing to convert and non-consenting leaseholders, and provide a mechanism for financing the freehold purchase.

4.7. 81% of survey respondents favoured Option 2 provided that approval is first sought from the First-tier Tribunal (Property Chamber) confirming that the Commonhold

[23] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms), para 8.8: 75.48% of survey respondents agreed that these should be removed.
[24] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms), para 8.9-8.11: 73.59% of survey respondents agreed that these should be removed.
[25] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms), para 8.16-8.17.
[26] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms), para 11.2-11.3: 87.76% of respondents agreed or strongly agreed that circumstances in which the validity of notices can be challenged should be limited.

Community Statement (CCS) are able to sufficiently protect the minority non-consenting interest.[27] Member comments highlighted concerns about the regulation and management of mixed-tenure properties comprising of both commonhold and leasehold interests, and once again stressed the importance of simplification for commonhold to be successful. Members were concerned that Option 1 could threaten creating a two-tiered system, exacerbating, as opposed to eradicating, the adversarial nature of leasehold which the Law Commission hopes to overcome through commonhold reforms.[28]

4.8. CILEx recognises that Option 2 would be more intrusive for non-consenting leaseholders and emphasises the importance of the First-Tier Tribunal as a necessary safeguard. 86.7% of members agreed that the tribunal should have power to propose amendments to the CCS where necessary, as well as having responsibility for confirming the articles to authorise a commonhold conversion.[29] For ease of process and to save on costs and time, it was also suggested by one member that it may be *reasonable "that if a standard form of articles were used then the right to Tribunal's approval could be dispensed with."* With these safeguards in place, Option 2 can protect non-consenting leaseholders as well as provide them with greater control over their properties and more benefits in comparison to their former leasehold tenure, such as preventing their property interests from diminishing over time (as commonhold, unlike leasehold, is not a wasting asset).

4.9. CILEx has taken into consideration the arguments put forth in para 3.122 of the Law Commission consultation paper as to why a commonhold tenure may not be preferable to a leasehold.

4.9.1. With regards to funding, alternative funding streams should be available so that a non-consenting leaseholder is not required to pay for their share of the freehold upfront, and the method of valuation must be capable of realising an increase in the property value as a result of acquiring the freehold tenure to offset any grant charged over it. Where the valuation methodology further down the line fails to achieve this, then there are serious concerns that this would in effect financially penalise a non-consenting leaseholder for events over which they had no control. The Law Commission may wish to reassure itself of the

[27] Although 82.4% of survey respondents did agreed that if an independent regulator for commonholds is created, the regulator may be well placed to take on this task in approving articles of association to ensure they comply with commonhold legislation and do not include any unfair terms.

[28] Member comments included: *"Otherwise you would have a mixed leasehold/commonhold with commonholders having to take on the responsibility of freeholder to the non-consenting leaseholders."; "Option 1 makes for a two-tier system which is counter-productive."; "It would be a nightmare, and counterproductive, to have commonhold and leasehold interests in one building."; "Simplicity is key and having developments with some leases and some commonholds will result in more complexity and defeat the object of reform."; "This is the lesser of two evils, as you can't have part of a block commonhold and other parts not. It would add confusion to still have a freeholder involved in the block."; "I think option 2 is the preferred option so all leaseholders would have commonhold at the same time otherwise it will be confusing as to what title different leaseholders had."*

[29] Members were conscious that the laws regulating a CCS should already have safeguards in place to protect against terms/provisions which would unreasonably favour the majority interest, and therefore the Tribunal's power to propose amendments should not be frequently required.

suitability of valuation processes to determine how the value of commonhold interests shall favour in comparison to leasehold interests to further understand this how this would operate in practice.

4.9.1.1. In the event that a non-consenting leaseholder did find themselves in negative equity or at a financial loss as a direct result of the charge levied against them for conversion, then there may be arguments to consider remedial action. These would be for the Government to consider, however bearing in mind that the number of persons likely fall into such circumstances would be small, there may be scope for special arrangements such as a compensation fund or additional powers for the tribunal.

4.9.2. With regards to management responsibilities, CILEx notes that a leaseholder may prefer not to be involved in the management of their building. However, the extent to which they actively or passively contribute to management decisions will still largely be down to the individual, and the option of appointing a professional management company and/or director is still available in the context of a CA.

4.9.3. With regards to obtaining lender consent, it is recognised that this may be an issue for non-consenting leaseholders and present logistical barriers which make Option 2 unworkable.[30] However, given the feedback obtained from our members suggesting that lender consent is the biggest barrier to commonholds, this is arguably a larger issue around why the entire commonhold system has been unworkable to date (i.e.: even for consenting leaseholders). To overcome this, reforms may wish to focus on encouraging greater willingness from lenders to finance these types of tenure so that this is no longer a practical issue.

4.10. CILEx would like to iterate at this point, the importance of eliminating barriers of access within the First-Tier Tribunal (Property Chamber). 76.5% of respondents to a former survey felt that the current system for solving property related disputes is costly with different fee scales to navigate and cumbersome procedures that have increased costs of counsel. Regardless, of whether Option 1 or 2 are pursued, CILEx is concerned that these barriers could cause difficulties in practice and increase the time and costs associated with managing, and belonging to, a CA. The Law Commission may therefore wish to reassure themselves that these proposals can be easily adapted to fit parallel proposals for a new Housing Court.[31]

Q4. If non-consenting leaseholders retain their leases following conversion to commonhold (which we call “Option 1”):

1. We provisionally propose that it should be possible for conversion to take place with the support of long leaseholders of 50% of the flats in the building. Do consultees agree?
2. We provisionally propose that non-consenting leaseholders should be provided with a statutory right to purchase the commonhold interest in their unit at a later date. Do consultees agree?

[30] See footnote 15, (Law Commission Reinvigorating Commonhold Consultation), p.90, para 3.180.

[31] See footnote 16, (CILEx Submission to Housing Court Reforms).

3. We provisionally propose that the right to purchase the commonhold interest should replace non-consenting leaseholders' statutory rights to obtain a lease extension and to participate in a collective enfranchisement. Do consultees agree?
4. We invite the views of consultees as to whether a purchaser from a non-consenting leaseholder should be required to purchase the commonhold interest, as well as the leasehold interest.
5. We provisionally propose that the leaseholders should be able to require the freeholder to take new 999-year leases over any flats not let to qualifying tenants and that such leases should automatically be granted over flats let to statutorily protected non-qualifying tenants and shared ownership leaseholders. Do consultees agree?
6. We invite the views of consultees as to whether the non-consenting leaseholders' share of the freehold purchase should be capable of being funded:
    a. by the consenting leaseholders, through the commonhold association which holds the commonhold interest;
    b. by the consenting leaseholders, through a company (owned by them) which acquires the commonhold interest;
    c. by a third-party investor, who acquires a long lease of the commonhold unit superior to the non-consenting leaseholder's lease;
    d. by granting a leaseback to the freeholder (who may be compelled to accept the lease), who acquires a long lease of the commonhold unit superior to the non-consenting leaseholder's lease; and/or
    e. by any other means.

4.11. As stated previously, there was an overwhelming consensus of support from our members for Option 2 over Option 1 (see para 4.7 above). Nonetheless, should Option 1 be implemented:

4.11.1. CILEx agrees that non-consenting leaseholders who retain their leasehold following conversion should be provided with a statutory right to purchase the commonhold interest of their unit at a later date. This would not only benefit existing leaseholders but prospective buyers too, future-proofing the system and recognising the impracticalities of limiting a commonhold conversion to a one-time opportunity.

4.11.1.1. This also mirrors the approach postulated by the Law Commission in earlier enfranchisement consultations, in which 75.5% of survey respondents agreed that leaseholders should be empowered to exercise collective freehold acquisitions at a later date. It is CILEx's view that these same underlying justifications apply in the context of conversion to commonhold.[32]

4.11.2. CILEx recognises the 50% threshold is intended, once again, to mirror the threshold used for collective freehold acquisition claims under leasehold enfranchisement which has the benefit of simplification and streamlining. However, as articulated in response to the Law Commission's earlier consultation on enfranchisement reforms, CILEx no longer sees the 50% threshold as necessary where non-participating leaseholders have retained their right to exercise collective enfranchisement at a later date. It is arguable that the same logic is applicable to commonhold conversions under Option 1

[32] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms), para 4.44-4.47.

where leaseholders are provided with a statutory right to purchase the commonhold interest in their unit at a later date.[33]

4.11.3. CILEx is mindful about the practical difficulties and complexities that would arise if non-consenting leaseholders to a commonhold conversion were entitled to exercise collective enfranchisement of their properties. In order to simplify processes, and remove any potential risk of 'ping-pong' (which the Law Commission previously identified as an issue in the context of leasehold enfranchisement), CILEx provisionally accepts the decision to replace the right to collective enfranchisement with the right to purchase the commonhold interest at a later date. However, of the minority surveyed who supported Option 1 over Option 2, 75% disagreed that the right to a lease extension should be removed.

4.11.4. In the interests of natural justice and to ensure that the protections provided to vulnerable persons are not in any way hampered by a commonhold conversion, CILEx fully accords with the Law Commission's proposal that a freeholder should be expected to take new 999-year leases, automatically granted over flats let to statutorily protected non-qualifying tenants. With regards to shared ownership leases, CILEx considers that there may be alternative arrangements available for accommodating shared-ownership within commonhold, which does not rely on leasehold interests (please see CILEx's response to question 66 below).

Q5. If non-consenting leaseholders are to be required to take a commonhold unit following conversion to commonhold (which we call "Option 2"):

1. We provisionally propose that that qualifying leaseholders of 80% of the flats in the building should be required to support the decision to convert. Do consultees agree?
2. We provisionally propose that the leaseholders should be able to require the freeholder to take the commonhold unit of any flats not let to qualifying tenants and that freeholders should automatically become the unit owner in respect of any flats let to statutorily protected non-qualifying tenants and shared ownership leaseholders. Do consultees agree?
3. We provisionally propose that it should be possible to place a charge over a non-consenting leaseholders' unit to recover their share of the initial freehold purchase price upon future sale of their commonhold unit. Do consultees agree?
4. If consultees do not agree, how should non-consenting leaseholders' share of the purchase price be financed?
5. We invite the views of consultees as to who should be able to provide such finance and take the benefit of the charge.
6. We invite the views of consultees as to whether the charge should be set:
    a. as a fixed amount, representing the non-consenting leaseholder's share of the initial freehold purchase;
    b. as that fixed amount, with interest;
    c. as that fixed amount, adjusted in line with house price inflation;
    d. as a percentage of the final sale price, representing the percentage increase in value of the non-consenting leaseholder's property interest (from leasehold to commonhold) on conversion; or
    e. in some other way.

[33] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms), para 8.18-8.20.

7. We invite the views of consultees as to what priority this charge should have in relation to any pre-existing charges.

4.12. As stated previously, there was an overwhelming consensus of support from our members for Option 2 over Option 1. Members agreed that as well as the safeguards proposed with regards to the Tribunal, there should be a requisite consent threshold to protect minority interests, and CILEx provisionally welcomes the Law Commission's proposal of an 80% majority.[34]

4.12.1. Once again it will be important that there are a variety of funding streams available, so that consenting leaseholders who wish to convert to commonhold, but who may find this financially difficult, would still have options available to facilitate the conversion.

4.13. As articulated in response to question 4 above: In the interests of natural justice and to ensure that the protections provided to vulnerable persons are not in any way hampered by a commonhold conversion, CILEx fully accords with the Law Commission's proposal that under Option 2, a freeholder should be expected to become the unit owner in respect of any flats let to statutorily protected non-qualifying tenants. With regards to shared ownership leases, CILEx considers that there may be alternative arrangements available for accommodating shared-ownership within commonhold, which does not rely on leasehold interests (please see CILEx's response to question 66 below).

4.14. 80% of survey respondents agreed that where a non-consenting leaseholder is required to convert to commonhold and cannot afford to pay the premium, a charge should be placed over their units to recover their share of the initial freehold purchase price upon future sale of the commonhold unit. To ensure that this is managed fairly, it was suggested that this charge should be "*a charge put over the property for the benefit of the common holders in general and their company for future sale of that property and funds go towards the upkeep, repair, etc. in the future.*"

4.15. Members generally opposed the ability for the original freeholder to provide this finance and take the benefit of the charge, although largely agreed with this being the case for the CA or any other qualifying leaseholder (working as individuals or in a collective). With regards to whether third-party investors should be allowed to take benefit of the charge, members were more divisive; although it was acknowledged that lending institutions may be well placed to provide this additional funding.

4.15.1. In any case, CILEx reiterates the importance of protections to safeguard the non-consenting leaseholder from a forced sale and to regulate the creation of such a charge.[35]

[34] Although it is worth noting that the average threshold our members deemed appropriate was slightly below this at 75%.

[35] Member comments included: *"The non-consenting leaseholders must be protected from any possibility of any party attempting to force a sale to seek gain by recovering the finance."; "So long as the rules around the creation of the charge are fair to the non-consenting leaseholder it should be immaterial where the finance comes from."*

4.16. Majority of members identified a charge set as a fixed amount, representing the non-consenting leaseholder's share of the initial freehold purchase, as the most favourable option; with the second most favourable option being that the charge is set as a percentage of the final sale price, representing the percentage increase in value of the non-consenting leaseholder's property interest (from leasehold to commonhold) on conversion.

4.16.1. In terms what priority the charge should have in relation to pre-existing charges, half of all members suggested that it should take first priority, whilst the other half felt that this might compromise mortgage lending and thereby should be prioritised as second or determined based on date order.

Q6. Where a freeholder or non-consenting leaseholder, who has let his or her flat to a non-qualifying tenant on a variable service charge, is required to take a commonhold unit on conversion under Option 2, we invite consultees' views as to whether:

(1) a cap should be placed on the amount of commonhold costs which are recoverable from the former leaseholder or freeholder, to reflect the costs that are recoverable from the non-qualifying tenant;
(2) the non-qualifying tenant's rights should be altered so that he or she no longer has the right to challenge service charge costs after they have been incurred, but instead has the same rights to challenge commonhold costs as other unit owners; or
(3) any other approach would fairly protect and balance the competing interests of the leaseholder or freeholder, and the non-qualifying tenant.

4.17. CILEx provisionally welcomes the second proposal (for the non-qualifying tenant's rights to be altered so that they may challenge commonhold costs). It makes sense that those who are ultimately expected to finance these costs would have a direct means by which to challenge the body responsible for determining what those costs actually are (i.e.: direct recourse to the Commonhold Association).

4.17.1. The alternative (placing caps on the costs recoverable from former leaseholders/freeholders), could have the impact of creating subdivisions of interest with different members of the Commonhold Association subject to different rules and expectations. Given feedback received by CILEx, indicating that commonholds may not always be less adversarial than leaseholds[36]; CILEx is concerned that these additional subdivisions could undermine the important policy objectives for establishing a level playing field and real community of interest for commonhold's success.

4.17.2. However, CILEx is conscious that the proposed solution to provide non-qualifying tenants with all the same rights to challenge commonhold costs as other unit owners, would fail to recognise the differences in land interests between non-qualifying tenants as tenants, and unit owners as freeholders.

36 Member comments included: *"People will be people - in theory it's perfect but in practice human nature as it is there will always be some who try the system and don't want to be involved."; "There will always be people who do not join in, thus negating the "Community Interest". Rather like the trade unions a development could be hijacked by a few who turn up to meetings, making decisions and leaving the majority high and dry. At least with leaseholds there is some protection."; "I think there aren't enough commonholds to say for certain but think commonhold could just become adversarial in a different way."*

Q7. Under Option 2, we provisionally propose that:

(1) those wishing to convert (with less than unanimous consent) should be required to seek the prior authorisation of the First-tier Tribunal (Property Chamber) or Residential Property Tribunal in Wales ("the Tribunal"); and
(2) the Tribunal should be required to authorise a conversion to commonhold unless:
    a. the necessary consents have not been obtained;
    b. the terms of the CCS do not adequately protect the interests of non-consenting leaseholders; and/or
    c. the applicants refuse to adopt the Tribunal's proposed revisions to ensure the CCS sufficiently protects the interests of non-consenting leaseholders.

Do consultees agree?

4.18. Please see paragraph 4.8 above for CILEx's response to this question.

Q8. We provisionally propose that on conversion to commonhold, tenancies granted for 21 years or less should continue automatically on conversion and that the consent of such tenants should not be required in order to convert to commonhold. Do consultees agree?

4.19. CILEx does not see any substantive issues with this proposal as the rights and interests of these tenants is unlikely to be affected by the freehold change in ownership.

Q9. We invite consultees' views as to whether it should be possible for charges to transfer automatically from the leasehold title to the commonhold unit title on conversion to commonhold, without requiring lenders' consent.

4.20. As mentioned previously, CILEx has received consistent feedback that current conveyancing processes are overtly complex and reforms should be aimed towards simplification. [37] As such, proposals to streamline lender requirements with those for exercising freehold acquisition under leasehold enfranchisement are welcome.
    4.20.1. This is in keeping with the Law Commission's overall proposals for an 'enfranchise and convert' procedure that streamlines both processes and their respective qualifying criteria.

Q11. We provisionally propose that, where the freeholder refuses to consent to conversion, the leaseholders will need to follow the collective enfranchisement process to purchase the freehold in order to convert to commonhold. Do consultees agree?

4.21. Streamlining of processes is necessary in achieving a workable solution to commonhold which is familiar to consumers, legal practitioners and other relevant parties. In turn, this shall invariably hope to reduce costs by eradicating unnecessary complications and arbitrary distinctions between buying your freehold under enfranchisement laws and buying your freehold under commonhold laws.

[37] See para 3.2 above.

4.22. Given the support of CILEx members for the proposals under Question 1 and 3 above (i.e. for commonhold conversion to adopt majority of the same qualifying criteria as enfranchisement, except for the 50% consent threshold[38]) it makes sense to streamline these two processes to prevent duplication.

4.22.1. This has the added benefit of providing leaseholders with flexibility to change their mind half way through the process should they wish to continue onto a commonhold conversion where they had initially only planned to enfranchise or vice versa.

4.22.2. In addition, having one streamlined process is also likely to improve consumer awareness of leaseholder rights, as the differences in the two ownership models only begin to arise towards the latter stages of the process and are limited to differences in property management. In turn, it shall become easier for practitioners to advise leaseholders on the options available to them.

4.23. However, as voiced within CILEx's response to the Law Commission's earlier consultation on Leasehold Enfranchisement, it is hoped that the enfranchisement regime is firstly reformed so that:

- Consumer awareness of the relevant costs and processes involved is improved (as this was identified as the two biggest problems associated with the current regime);
- Work is done to rebalance the inequality of arms identified by three-quarters of CILEx members in favouring landlords;
- The enfranchisement regime is made quicker and easier for leaseholders, with anecdotal evidence suggesting it is currently very complex and inaccessible;
- As stated in response to question 3 above, that qualifying criteria based on financial limits (low rent test and rateable values) along with the two-year limitation on initiating a claim are removed; and
- That the valuation methodology is reformed to reduce premiums, safeguarding against prohibitively high upfront costs.[39]

Q12. We provisionally propose that, to simplify the procedure for converting to commonhold, any consents given in support of the conversion should not automatically lapse after 12 months. Do consultees agree?

We invite consultees' views as to whether leaseholders should be able to withdraw their individual consent to conversion after the Claim Notice has been served, or whether leaseholders should be required to make a collective decision no longer to proceed with the conversion.

[38] The Law Commission's proposed 'enfranchise and convert' process should be able to account for these differences in consent thresholds. Where leaseholders know from the outset that they wish to pursue a commonhold conversion, then they may obtain the necessary 80% threshold from the beginning. Where the decision to convert to commonhold comes much later, then this would simply require an added step of obtaining the extra 30% support from qualifying leaseholders to continue the process.

[39] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms).

4.24. CILEx recognises the practical justifications for eradicating the 12-month limitation on leaseholder consent for commonhold conversion so that one streamlined procedure can be established.

4.25. If 'Option 1' is implemented (i.e.: non-consenting leaseholders are entitled to retain their leases following conversion), then provided there is no impact on funding, CILEx does not see why an individual leaseholder should not be capable of withdrawing their consent to conversion after the Claim Notice has been served. As mentioned in response to question 4 above, the 50% consent threshold becomes unnecessary where non-consenting leaseholders are provided with a statutory right to purchase the commonhold interest in their unit at a later date. As a result, choosing to withdraw individual consent, should not hinder the ability for other leaseholders to continue onwards with their claim of conversion.

4.25.1. With regards to funding, it is additionally noted that withdrawing consent of conversion should not impact too heavily on funding as the leaseholder would still be bound under current enfranchisement laws to collectively enfranchise and finance the requisite premium. As such, CILEx does not see a substantive reason why individually withdrawing consent to conversion under Option 1 would impede the rights of others to a conversion.

Q13. We provisionally propose that (in addition to the freeholder) it should be possible for leaseholders who are in the process of acquiring the freehold by collective enfranchisement, to apply to HM Land registry to create a new commonhold. Do consultees agree?

We provisionally propose that, where a lender has consented to a conversion to commonhold on the condition that it will be granted new security over the commonhold unit after conversion, a deed of substituted security provided to HM Land Registry will act as sufficient evidence that this condition has been fulfilled. Do consultees agree?

4.26. CILEx welcomes the proposals put forward to empower leaseholders who are in the process of a collective freehold acquisition to apply directly to HM Land Registry for the creation of a new commonhold. As previously mentioned in response to question 11, it is important that a streamlined 'enfranchise and convert' procedure is able to rebalance the current inequality of arms between landlords and leaseholders within such regimes. Enabling leaseholders to deal with the registration of their commonhold directly, without having to go through the landlord, shall help in this regard, as well as removing any risk of landlords abusing processes to delay or profit from the conversion.

4.27. As articulated in response to question 9, a streamlined approach to lender requirements would be welcome. As such CILEx finds that reforms to remove the arbitrary distinction requiring leaseholders of houses to obtain a deed of substituted security for leasehold enfranchisement, ought to extend in principle to commonhold conversion.

4.28. The Law Commission may wish to reassure itself however, that if Deeds of Substituted Security are removed, as consulted on in the recent Leasehold Enfranchisement consultation, this would not have a detrimental impact to residents

wishing to convert, and that lenders can still be assured with the relevant guarantees or further information.

Q14. Where the freehold of the building is owned by the leaseholders collectively through a freehold management company (a "FMC"), we provisionally propose that the common parts of the building should be transferred to a new commonhold association as part of the process of conversion to commonhold (rather than the FMC changing its articles to become a commonhold association, where this is possible). Do consultees agree?

4.29. CILEx provisionally welcomes this approach in adopting a simpler and more pragmatic approach for dealing with commonhold conversions. This is provided that the procedures for transferring the freehold to the new commonhold association are not prohibitively costly or complex.

Q15. We invite consultees' views as to whether, taking into account our provisional proposals set out in questions 11 to 14, the conversion procedure would operate satisfactorily. We invite consultees' view on what changes could be made to simplify the procedure and make it more cost-effective.

4.30. Two thirds of survey respondents agreed that a streamlined 'enfranchise and convert' procedure would be effective, as well as reducing costs and making the conversion process more attractive for consumers. Members additionally voiced the benefits of this approach, in that the enfranchisement procedure is already well known to practitioners, who would therefore be able to advise more easily on commonhold conversions notwithstanding the lack of these in practice.[40]

4.31. Members made the following suggestions in order to ensure the streamlined procedure is simple and cost effective: 1). Published government guidelines, 2). A standard fee charged by all conveyancers, 3). Consolidation of standardised forms, 4). Remove possibilities of frustrating the process on mere technicalities (e.g.: contentions around notice), 5). Fixed timelines, 6). Efforts to raise consumer awareness.

5. Mixed-Use and Multi-block developments

Q16. We provisionally propose that any new management structure needs to meet the following objectives:

(1) Provide the ability to separate out the management of a variety of different interests within the same development, in particular by:

[40] Member comments included: *"Integration would be more cost effective and less intrusive from a practical perspective in that one set of legal work would be needed, albeit a lot of work."; "Any measure to simplify the process should be supported."; "People would not understand [a commonhold] process, meaning it would have to be explained in great detail and there would be a cost. The leasehold enfranchisement model is well established and familiar to advisors, and consequently less expensive to explain."*

(a) differentiating voting rights, so that those affected by a decision are entitled to participate in making that decision, and no one else is able to do so; and
(b) allowing shared costs to be allocated in different ways to ensure that only those benefitting from a service pay for it.

(2) Provide a framework which can be used to regulate the relationship between more than one building where there are shared areas, such as shared car parks or gardens.
(3) Strike an appropriate balance between standardisation and flexibility.
(4) Facilitate consumer protection to ensure that abuses that have arisen in the residential leasehold context cannot be transposed into commonhold. Do consultees agree?

Are there any other objectives which should be added to the list above?

5.1. Majority of surveyed members agreed with the proposed objectives for a new management structure, namely: to be able to differentiate voting rights (i.e.: only those affected by a decision are entitled to participate); to be able to allocate costs so that only those benefitting from a service are expected to pay for them; and, to be able to regulate the relationship between more than one building where there are shared areas, such as car parks or gardens. Members did not identify any additional objectives that would be necessary in facilitating greater commonhold within mixed-use and multi-block developments.

5.2. CILEx fully agrees that the proposals need to strike a careful balance between standardisation and flexibility. Member opinion largely favoured standardisation as most important for commonhold to be effective, however did so whilst recognising the role of flexibility in overcoming practical challenges, given the wide divergences in land interests and properties.[41] CILEx endorsed a similar approach in respect of the Law Commission's earlier consultation on leasehold enfranchisement,[42] and it is believed that this principle should similarly be applied in the context of commonhold reforms.

5.3. In addition, CILEx concurs with the Law Commission's finding that consumer protection ought to be at the heart of reforms in acknowledgement of the multitude of housing problems currently facing homeowners. Three-quarters of CILEx members previously surveyed found that the current options available to leaseholders in purchasing their freehold under the enfranchisement regime treated

[41] 76% of surveyed members identified standardisation as more important than flexibility within commonhold.

Nonetheless, member comments acknowledged that flexibility still has a significant role to play within these reforms. Relevant member comments included: *"There needs to be a form of standardisation but with the ability for differing blocks to take account of their individual circumstances e.g. a large block of 100 + units and communal land would have differing requirements to a block of 2 or 4 with their own individual gardens allocated."; "Ownership of non-freehold is complex and standardisation (which allows for variants to cover different types of development) will make life simpler for all."; "Too much variation would cause confusion."; "It must be standardised to ensure everyone actually understands."*

[42] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms) para 1.1.2: amongst CILEx's headline recommendations, was the need to recognise that *"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."*

landlords more favourably than leaseholders. Greater efforts are thereby needed for helping empower leaseholders within leasehold home ownership.

Q17. We provisionally propose that commonholds with sections (which are not individual corporate bodies) should be introduced as a management structure to make commonhold workable for more complex developments. Do consultees agree?

If consultees do not agree, do consultees prefer either the flying commonhold model or layered commonhold model? If so, how do consultees suggest addressing the issues with these models?

Are consultees aware of any other options we should be considering?

5.4. CILEx welcomes the suggestion of incorporating 'sections' within a CA to accommodate more complex developments in appreciation of the growing trends within property development. Members have previously voiced concerns around the alternative suggestion of imposing 'flying freeholds,' and the creation of 'sub-commonholds' risks overcomplicating the commonhold structure at the expense of increased time and costs.

5.4.1. Almost three quarters of all survey respondents preferred the option of creating 'Sections' as compared with the other two options that were put forth by the Law Commission, commenting that it would be fairer, more user-friendly and the most efficient method of administration.[43]

5.4.2. One member suggested that an alternative model that could be adopted in this regard is *"ownership of freehold and perpetual leases with enforceable covenants."* No other suggestions were put forward for alternative models, however several members did reiterate the importance of reforming leasehold first and foremost for existing leaseholders rather than relying on commonhold conversions.

5.5. However, there are still ambiguities as to how Sections would be effectively managed. For instance, CILEx is unclear as to who would have the deciding vote or take on the role of mediator/adjudicator in situations where two or more Sections fall into dispute, such as in instances where a decision made by one section has a direct or indirect impact on the interests of another (including situations where this was both foreseeable and unforeseeable).

5.5.1. One potential solution, as referenced earlier, is for the establishment of an independent regulator who would take on the role of providing alternative dispute resolution in such instances.

5.6. Additionally, it is noted that in particularly large estates, members have voiced difficulties in obtaining collective consent for changes to homeownership (such as with collective enfranchisement),[44] and it may therefore be relevant to introduce a system by which commonhold conversion could take place using a phased

[43] See footnote 15, (Law Commission Reinvigorating Commonhold Consultation), p.117-129.

[44] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms) para 8.19-8.20.

approach to accommodate for the larger more complex developments in existence.[45]

Q18. We provisionally propose that it should be optional, rather than mandatory, for a section committee to be set up for each section in a commonhold. Do consultees agree?

If consultees disagree, which powers do consultees think should be given compulsorily to those committees?

5.7. As stated previously, CILEx recognises the importance of balancing standardisation with flexibility to account for divergences in different properties. Whilst survey respondents typically favoured the principle of standardisation for the simplicity it brings, mandating that all sections have a section committee could risk the exact opposite in the context of smaller, less diverse properties.

5.8. In addition, members drawing from their own experiences, highlighted that the extent to which clients may be capable or interested in managing their commonhold is likely to be nuanced, rendering an overly prescriptive approach unsuitable. As such, CILEx agrees with the Law Commission's proposals for section committees to be optional so that commonhold members can determine the extent of involvement or separation that they prefer, in line with their own needs and the nature of their commonhold.[46]

Q19. We invite consultees' views as to whether delegation to section committees should be collateral or exclusive; whether this should vary for different powers; or whether it should be for each commonhold to decide.

5.9. In the interests of consumer protection, there needs to be sufficient oversight of the different Sections to the CA to ensure that they are operating in accordance with the CCS. In addition, it is important to recognise that not all unit-owners will be fully aware of, nor fully understand, the technicalities contained within the CCS. Passive involvement by the CA's director may therefore be useful for all involved in providing assurances that decisions made do not contravene any of the statutory protections or elements contained within the CCS. CILEx thereby provisionally welcomes a general approach of collateral delegation to section committees.

5.9.1. Nonetheless, as mentioned in response to question 17, there are still ambiguities as to how disputes between Sections would ultimately be resolved.

Q20. We invite consultees' views as to whether:

(1) directors should be able to revoke or alter the powers delegated to a section committee as they wish;

(2) section committees affected by an alteration of delegated powers should be given the ability to apply to the Tribunal; or

[45] CILEx notes the Law Commission's parallel work on Right to Manage reforms, in which 'estate' is extended to cover situations where there is a shared service charge, and therefore is likely to create difficulties in meeting the consent thresholds and qualifying criteria for a commonhold conversion.

[46] See paragraph 3.3 above.

(3) the directors should have to apply to the Tribunal in order to alter or revoke a delegation.

5.10. 77.8% of survey respondents agreed that a director should be able to alter or revoke the powers delegated to a section committee especially as sections are not legal entities. However, it was cautioned that this would need to be carefully regulated to ensure that the decision was justified, and thereby 61% of members felt that a director should have to apply to the Tribunal first in order to do so.

5.10.1. As articulated previously, CILEx is concerned that until barriers of access within the First-Tier Tribunal (Property Chamber) are remedied, mandating approval from the tribunal may cause difficulties in practice and increase the time and costs associated with commonhold.

Q21. We provisionally propose that a new section should be able to be created by:
(1) the developer, at the outset; and
(2) the commonhold association at a later date.
Do consultees agree?

If the commonhold association is allowed to create sections after it has been set up, we provisionally propose that this decision should be approved by special resolution, with the additional requirement that at least 75% of the total votes held by the unit owners who would be part of the new section must have been cast in favour of creating the section. Do consultees agree?

We provisionally propose that unit owners affected by the introduction of a new section should be given the option of applying to the Tribunal. Do consultees agree?

5.11. 82.4% of members agreed that a new section should be able to be created by a developer at the outset, and a further 70.6% agreed that this should also be possible by the CA at a later date to account for changing circumstances.

5.11.1. Notably, one member pointed out the importance of this as a safeguard, and in encouraging good practices amongst property developers: *"allowing the CA to make a change within a fixed period of set up might prevent a developer organising the scheme in a particular way which might not be favoured by the residents."* It may also be worth considering whether the procedures around creating, amending or combining sections could be relaxed within a fixed period after unit owners have taken effective control of the CA (such as the period proposed under question 54).

5.12. Three quarters of surveyed members agreed with proposals requiring sections to be created following a special resolution, and 83% of members further agreed with the additional requirement to obtain at least 75% of the total votes held by the unit owners who would be part of the new section. This was justified on the basis of fairness and *"to preserve the principle of commonality of decisions."*

Q22. We provisionally propose that qualifying criteria for sections should be introduced, so that sections can only be created to give separate classes of vote to:
(1) residential and non-residential units;
(2) non-residential units, which use their units for significantly different purposes;

(3) different types of residential units (such as flats and terraced houses);
(4) separate blocks in the same development; and
(5) other premises falling within the commonhold which, in the interests of practicality and fairness, should form a separate section.

Do consultees agree? Are there any other criteria which consultees feel should be added to the list?

5.13. CILEx agrees that sections should only be created to provide separate classes of vote in instances where unit holders utilise their properties in a sufficiently different manner that it would be practical to do so. The introduction of 'Sections' should not be treated as a gateway for a CA to subdivide itself for any alternative reasons, such as because of internal relationships or personal differences. This would run the risk overcomplicating the commonhold structure unnecessarily as well as undermining collective interest and exacerbating tensions between neighbours.

5.14. However, CILEx does caution that qualifying criteria based on the interests of 'practicality and fairness' may be difficult to implement owing to the subjective nature of these terms. Appropriate guidance for practitioners on what this might mean in practice, in the absence of common law precedent, would be useful.

Q23. We provisionally propose that it should be possible for sections to consist of a single unit. Do consultees agree?

5.15. Provided the mechanism for establishing a 'Section' within the CA has requisite consent thresholds, CILEx does not see any reason why there should be a barrier on the minimum number of units that can comprise a section. Accordingly, CILEx agrees that it should be possible for sections to consist of a single unit.

Q24. We provisionally propose that to combine two or more sections, a special resolution of the commonhold association should be required. Additionally, 75% of the votes cast by the unit owners in the sections that are to be combined must have been in favour. Do consultees agree?

We provisionally propose that unit owners affected by sections being combined should be given the right to apply to the Tribunal as an additional protection. Do consultees agree?

We provisionally propose that there should be no criteria which must be met before two or more sections in a commonhold can be combined. Do consultees agree?

5.16. CILEx supports the streamlining of processes where possible to help simplify conveyancing procedures. CILEx members have previously articulated the complexity inherent in certain areas of conveyancing and the prohibitive effect that this can have on consumers by fuelling additional costs and alienating them from the process. The decision to adopt the same framework for combining sections, as with creating sections, is thereby welcome.

5.17. CILEx recognises the justifications put forth by the Law Commission for why it is unnecessary for there to be criteria which must be met before combining two or more sections and sees no substantive issues with this proposal.

6. Commonhold Developments and Development Rights

Q25 – 29.

6.1. As a professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals, CILEx does not feel best placed to comment on how effective these proposals may be in remedying the current issues faced by property developers with respect to development rights.

7. The Commonhold Association & Commonhold Community Statement

Q30. We invite consultees' views as to whether any requirements of company law (such as to make an annual confirmation statement, and to file accounts) should be relaxed for commonhold associations.

7.1. Members identified only one area of company law which could be relaxed for CAs: namely, the deadlines faced for an ordinary company (e.g.: striking off if not filed etc.) All other member comments suggested that the requirements of company law should continue to apply to a CA just the same as with any other company, and acknowledged the argument put forth under paragraph 7.28 of the Law Commission's consultation paper (with regards to a CA's likely classification as a micro-entity).[47]

7.1.1. The Law Commission may wish to reassure itself that company requirements around filing accounts and auditing are suitable for the variety of CAs that will emerge. It could be envisaged that some CAs will oversee large and possibly highly valuable common areas and contracts, but the companies would still be administered by residents. They may face additional costs therefore in preparing audited accounts than the majority of CAs if they exceed the prescribed thresholds.

Q31 – 34.

7.2. CILEx has not obtained any member feedback relating to how the insolvency of commonholds should best be handled. However, as referenced previously, CILEx endorses the streamlining of processes given the complexity of land law and the different interests within it. As such, efforts to bring parity in the handling of insolvency within a commonhold association and freehold management company are welcome.

Q35. We provisionally propose that it should be possible for the CCS to impose restrictions on the short-term letting of units. Do consultees agree?

[47] Member comments included: *"No relaxation of Company Law requirements [are needed] as would consider these not to be unduly onerous."; "Relaxing the requirements may make for an unruly commonhold."; "They should be subject to the same requirements to ensure that they are run correctly."; "I don't think that there should be too little regulation as if there is it is likely to lead to mismanagement.*

We invite consultees' views as to how to ensure that any restriction on short-term letting does not prevent units being rented in the private or social rented sector. In particular:

(1) in relation to the private rented sector, we invite views on whether any restriction imposed by a CCS should be confined to lettings made for less than six-months, or for any other specified period;

(2) in relation to the social rented sector, we invite views on whether any restriction imposed by a CCS should not be able to apply to particular landlords, such as registered providers of social housing and housing associations, or whether there are other ways of ensuring that such lettings cannot be prohibited in the CCS.

7.3. Majority of surveyed members provisionally agreed that it should be possible for the CCS to impose restrictions on the short-term letting of units in light of the problems that this can cause in practice. However, a fair proportion of respondents argued that it should only be possible to create this local rule at the outset of the commonhold (following development), so that purchasers of the commonhold unit are aware of this restriction on their use and enjoyment of the property upon making the initial purchase, and that it is not subject to abuse later on.[48]

7.4. Members suggested that it should be fairly straightforward to draft the wording of the local rule in such a manner as to distinguish between holiday lets and short-term tenancies in the private or social rented sector.

7.4.1. One member further suggested that the method of registering tenancies within the Belgian model could be replicated and aid in this regard.

Q36. We provisionally propose that event fees should be prohibited within commonhold, except for any specific circumstances expressly permitted by statute. Do consultees agree?

We invite consultees' views as to whether an exception to the proposed prohibition on event fees should be made for specialist retirement properties within commonhold.

We invite consultees' views as to whether there are any other circumstances (apart from specialist retirement properties) in which event fees should be permitted within commonhold.

7.5. CILEx members have previously called for an end to exit and event fees (including within retirement villages), voting this as the second top priority amongst other proposals for improving transparency and fairness within the market.[49] As such,

[48] Member comments included: *"This is often dealt with by covenants in leases at present of course and is frequently breached. It does seem somewhat unfair to prevent a commonhold owner from renting out their property. In answering this question I debated about stating that it should only be allowed as a rule from the point of creation of a new commonhold development rather than being implemented later down the line."; "Only if decided from the creation of the commonhold. It should not be something which can be changed at a later date, as this could leave some investors having to sell."; "Property owners should, within reason, be allowed to do what they like with the property that they own."*

[49] Members were asked to prioritise the following potential reform areas: Reasonable fees and guaranteed timescales; mandatory redress schemes; end to exit fees; simplification of freehold acquisitions; lease extensions overhaul; right to manage overhaul; section 20 notice levels increase; comprehensive insurance of properties; management regulation; marketing information at the point of sale; end to rent charge lease conversions. Members chose 'end to exit fees' as the second highest priority issue out of this list.

CILEx welcomes the Law Commission's provisional stance to prohibit these fees within commonhold.

Q37. We invite consultees' views as to whether any further restrictions should be put in place to limit which local rules may be added to the CCS.

7.6. CILEx has not received any feedback suggesting that further restrictions should be put in place to limit local rules.

Q38. We provisionally propose that a higher threshold for amending the CCS should be introduced, which may apply to some or all local rules. Do consultees agree?
We invite consultees' views as to:

(1) what voting threshold should be required to amend local rules;
(2) when there should be a right to apply to the Tribunal in relation to amendments of the CCS; and
(3) whether the threshold should be the same for amending all local rules, or whether rules should be differentiated. If consultees are of the view that rules should be differentiated, we invite views as to how the threshold for introducing a rule in an area on which the CCS is currently silent should be determined.

7.7. Member opinion was divisive on whether an ordinary resolution, in accordance with the current system, should be retained for amending local rules. Members considered that where there is ease of voting, i.e.: voting electronically or by post, this may warrant a higher consent threshold (closer to the requirements under a special resolution). Nonetheless, members also recognised that there may be difficulties in achieving these higher thresholds where there is low participation from unit holders.

7.8. CILEx provisionally welcomes the new right to apply to the Tribunal in relation to amendments made to the CCS.[50] In principle, this should be permitted where an individual or minority group can show that they have a significant interest relating to the amendment, to ensure that this right is only exercised in special circumstances where the minority's reasonable enjoyment of their property is at risk.

7.8.1. However, there may be a need to introduce a phased approach to establishing the CCS in situations where a much larger complex development is attempting to convert to commonhold and can only realistically do so in phases (see para 4.37 above).

7.9. With regards to differentiated rules, CILEx members have previously called for simplification within commonhold and leasehold owing to the highly complex nature of land interests within England and Wales and the impact that this has on alienating homeowners from the law. Members have voiced the need to improve consumer awareness of costs and processes, stressing that this lack of understanding currently inhibits the effectiveness of attempts to empower homeowners in taking control over their properties. In the context of commonhold, this call has been echoed with members supporting the principle of standardisation over flexibility where this is able to simplify procedures.

[50] Please see paragraph 3.7 above for CILEx's concerns around the barriers of access in the First-Tier Tribunal (Property Chamber).

7.9.1. CILEx is conscious that creating subdivisions in local rules, with different voting thresholds applied for different categories of rule, would overcomplicate the system making it harder and more inaccessible for the average homeowner to navigate. This could have the inverse effect of what commonhold is trying to achieve: stifling rather than liberating the ability for homeowners to have a say over their properties and how they are managed. If the system is made too complicated, the dependency of homeowners on professionals (such as directors outsourced from management companies) will increase, making it less of a choice to appoint third party persons and more of a necessity. This in turn risks increasing the level of costs that homeowners face for managing a CA and decreasing transparency in the housing sector.

Q39. We provisionally propose that the mandatory provisions of the CCS should be contained in the regulations, but not be reproduced in the CCS. Do consultees agree?

If so, we invite consultees' views as to whether the directors of the commonhold association should be under a duty to provide copies of the most up-to-date standard provisions contained in the regulations, along with a copy of the CCS, to any new purchasers, and should provide copies of the updated standard provisions to all unit owners as and when changes are made.

7.10. CILEx finds these proposals to be sensible in removing any risk of ambiguity or unnecessary duplication which might confuse members of the CA. As the Law Commission rightly states it would also aid in removing the need to update the Articles of Association, and re-register the CCS at HM Land Registry, every time the underlying regulations are changed.

7.10.1. A clearer layout is not only beneficial for conveyancers when advising their clients on the impacts of the CCS, but also for homeowners when referring back to the CCS in future. The time spent navigating the CCS would undoubtedly be shortened by removing duplication of terms already prescribed for in regulations, provided that those prescribed for terms are collated together for ease of access.

7.11. However, homeowners would need to be made aware of the fact that the CCS does not contain all the relevant provisions affecting their commonhold and should be provided with a copy of these provisions as prescribed by regulation. Accordingly, in the interests of improving transparency and consumer awareness, CILEx fully supports the proposals requiring a CA's director to provide copies of these provisions, along with a copy of the CCS, to all relevant persons.

Q40. Should our provisional proposals to introduce sections be implemented, we provisionally propose that it should be possible to add schedules to the CCS, where the rights and obligations applying to a specific section can be collated. Do consultees agree?

7.12. As stated previously, it is important that the procedures around CAs and the CCS are not overly burdensome to homeowners that they feel required to take on third party professionals to manage the commonhold or feel alienated from relevant processes. Allowing the CCS to add schedules containing specific information on different Sections would be helpful in compartmentalising information so that it is more accessible for homeowners to navigate.

Q41. We invite consultees' views as to whether there are any new terms, other than those we have asked about in this Consultation Paper, which should be added to the prescribed terms of the CCS (that is, rules which should apply to every commonhold, rather than local rules which can optionally be adopted by individual commonholds).

7.13. Survey respondents did not identify any additional terms which should be added to the prescribed terms of the CCS. The magnitude of changes taking place within land law reforms are already intended to resolve some of the more persistent issues within homeownership. CILEx recognises that following these reforms, there may be a need to increase or amend the prescribed terms accordingly, and as mentioned in response to question 39, proposals for mandatory provisions of the CCS to be contained in regulations shall help to entrench these changes quickly and easily.

Q42. We provisionally propose that the procedure for the election of directors of a commonhold should be simplified, so that the prescribed articles of association provide that directors should be elected at a general meeting, and also may be co-opted by the existing directors. Do consultees agree?

7.14. As stated previously, CILEx welcomes proposals to simplify the procedures and rules governing the CA so that the overall system is more accessible and transparent for homeowners.

Q43. We provisionally propose that, if a commonhold association cannot find members able and willing to serve as directors, and is also unwilling to appoint professional directors, any member of the association should be able to apply to a court or tribunal for professional directors to be appointed, who would then be paid by the association. Do consultees agree?

We provisionally propose that, if members should be able to make such an application, then someone with a mortgage or other charge over a unit should also be able to do so. Do consultees agree?

We provisionally propose that, if it should be possible for an application to appoint directors to be made, it should be heard by the First-tier Tribunal (Property Chamber) (in Wales, the Residential Property Tribunal). Do consultees agree?

7.15. CILEx does not see any substantive issues with these proposals. Referring to the First-Tier Tribunal (Property Chamber) shall ensure that the situation is dealt with from a land law perspective, recognising the CA as distinct from other corporate entities. This is provided that the approach suggested is confined to CAs alone and does not open up a dangerous precedent for other companies to utilise.

7.16. In addition, CILEx thinks it is highly unlikely that such a situation would arise, particularly when refusal to appoint a new director would allow a single member to unilaterally have one appointed. In such circumstances, it is more probable that the CA would recognise the benefits of making this determination amongst themselves without requiring intervention of the Tribunal.

Q44. We invite consultees' views as to whether a problem is likely to arise whereby a single investor, or a group of investors, who own a majority of units, run a block in their own interests in order to "squeeze out" other owners.
If it is felt that problems are likely to arise, then we invite consultees' views as to the following:

(1) whether the concept of "persistent failure to comply with the CCS in some material respect", offers a satisfactory basis upon which a court or tribunal could intervene on an application by a unit owner;
(2) whether such applications should be made to the court or the Tribunal;
(3) whether, the court or Tribunal should have the power to appoint directors, and to make the supplementary orders set out in paragraph 9.48 above, should they be required;
(4) whether it would be necessary for the court or tribunal to exercise continuing supervision over the directors who were appointed; and
(5) whether other solutions could be used to address the difficulty.

7.17. CILEx has not obtained any member comments on the likelihood of this occurring, however recognises the existence of this risk and the need to safeguard against it. CILEx agrees that the test for exercising this proposed safeguard should be one where there has been a 'persistent failure' to comply in some 'material respect'; this threshold ensures that a unit owner may only use this safeguard as a last resort option and thus protects against abuse of process.

7.18. CILEx would like to draw the Law Commission's attention to parallel proposals for a new Housing Court to deal with all property related disputes. If these proposals are realised, then it may be more prudent for the integrated Housing Court to deal with said applications.

7.19. CILEx also considers that parallel efforts for the regulation of property agents may be able to dovetail with these proposals, particularly where new redress mechanisms have been provided for homeowners. These redress mechanisms may be of some benefit to unit-owners caught in the described situation and could provide a faster and more cost-effective solution without requiring intervention of the Courts or Tribunal.

Q45. We seek consultees' views on whether their experience with other leaseholder-controlled companies (Freehold Management Companies, Residents' Management Companies and right to manage companies) leads them to believe that provisions for proxy voting may be abused, and, if so, in what way or ways.
We further seek consultees' views on whether any such abuses could be prevented or mitigated by:

(1) a restriction on the number of proxy votes that any individual might hold; or
(2) some other device (please specify).

7.20. CILEx received minimal feedback from surveyed members on their experience of proxy voting within leaseholder-controlled companies. The feedback received however, acknowledged the benefits of proxy voting for those who do not reside full time within their property.

8. Management and Maintenance Issues

Q46 – 49.

8.1. Homeowners should be made to feel safe in their own homes and know that if damage befalls their property through no fault of their own, then there is appropriate insurance cover to help resolve the issue. CILEx concurs that it would be sensible to include a requirement for CAs to have a certain level of insurance protection, in compliance with the requirements of UK Finance and the Building Societies Association Lender's handbook.

8.1.1. 88.9% of survey respondents agreed with this proposal, and CILEx additionally recognises the benefits of appropriate insurance cover in safeguarding against insolvency.

8.2. However, the Law Commission may wish to be mindful of the potential barriers commonhold associations could face when attempting to purchase competitive insurance, drawing from the current criticisms in insuring Right to Manage companies. (See para 3.4.1 above).

8.2.1. In addition, safeguards should be implemented to ensure that the relevant insurance policies do not inadvertently create ambiguities at the expense of innocent unit-owners.

Q50. We provisionally propose that the provisions in the prescribed commonhold community statement requiring the repair of the common parts should be extended to require also "renewals"; that is, the replacement of "like with like" if something should be beyond economic repair. Do consultees agree?

We provisionally propose that the installation of adequate thermal insulation should be deemed to be a repair. Do consultees agree?

We provisionally propose that it should be possible for the repairing obligations required by the CCS to be supplemented by a local rule requiring a higher standard of repair, if appropriate. Do consultees agree?

We provisionally propose that, with horizontally-divided buildings (so including all flats), matters relating to the internal repair of units should be left to local rules. Do consultees agree?

We provisionally propose that with vertically-divided buildings (that is, all houses, whether detached, semi-detached or terraced) all matters relating to repair (whether internal or external) of the units should be left to local rules. Do consultees agree?

8.3. CILEx provisionally welcomes the extension of 'repair' to include 'renewals' to clarify this potential area of ambiguity.

8.4. 61% of survey respondents agreed that it should be possible for the repairing obligations required by the CCS to be supplemented by a local rule requiring a

higher standard of repair. However, some members did point out the practical difficulties that might arise in defining a 'higher standard of repair' and were conscious of the need to protect minority interests should some unit holders be unable to afford the higher costs that would be associated with this rule.

Q51. We invite consultees' views as to whether rights of entry are best left to local rules, or whether rights of entry should be prescribed.

If rights of entry are prescribed, we invite consultees' views as to whether it is necessary to make a distinction between different types of buildings.

If it is necessary to distinguish between different types of building, we invite consultees' views as to:

(1) whether the distinction should be between those that are horizontally-divided, and those that are vertically-divided; and
(2) if some other distinction is more appropriate, what that should be.
We invite consultees' views as to what, in each case, the appropriate rights of entry would be.

8.5. 83.3% of survey respondents agreed that rights of entry should be prescribed for, and majority of members disagreed with differentiating between horizontally-divided and vertically-divided buildings in the commonhold.

Q52. We provisionally propose that the commonhold community statement should be amended to provide that alterations to the common parts which are incidental to internal alterations made by a unit owner to his or her own unit should not require the consent of the members by an ordinary resolution. Do consultees agree?

We provisionally propose that the giving of consent to such proposals should be delegated to the directors. Do consultees agree?

We invite consultees' views as to whether:

(1) "minor alterations to the common parts" should be defined as we have outlined at paragraph 9.137 above; or
(2) some other criterion could be adopted to distinguish minor alterations from those which should continue to require the consent of an ordinary resolution by the members.

8.6. CILEx concurs with the Law Commission's findings that an ordinary resolution should not be needed in circumstances where alternations to an internal unit requires some minor incidental alterations affecting the common parts. This would be a disproportionate requirement in the circumstances and could create unnecessary tensions and grievances for homeowners.

8.7. Delegating this duty to directors of the commonhold is a more practical solution as permissions can be sought quickly and easily. However, there may be minor temporary alterations where even this would be unnecessary. CILEx would thereby suggest that in defining "minor alterations to the common parts", the degree of permanency of the alteration, as well as its scale, is taken into consideration.

8.7.1. Safeguards should be implemented, in the interests of unit owners, to ensure that consent is not unreasonably withheld nor subject to unreasonably high

consent fees (both of which are problems currently present in the leasehold framework).

Q53. We invite consultees' views as to whether existing long-term contracts have been a problem which leaseholders have encountered. If they have, then we further invite leaseholders to let us have examples.

Q54. We provisionally propose that commonhold associations should be given the right, within a set period from the date when the unit owners take effective control of the commonhold association, to cancel contracts which were entered into by the association before that date. (It would be necessary to define these terms so as to exclude the scenario where the units were "sold" to associates of the developer). Do consultees agree?

We provisionally propose that a "long-term contract" should be defined as a contract which must run for more than 12 months. Do consultees agree? If not, what longer or shorter period would be appropriate?

We provisionally propose that a commonhold association should have to exercise this right within six months from the commonhold coming under the effective control of the unit owners (being actual "arms-length" purchasers of the units). Do consultees agree? If not, what longer or shorter period would be appropriate?

8.8. CILEx obtained some anecdotal evidence to suggest that this problem has been encountered in the context of management company land: "*Yes, when you have Management Company land rather than leasehold. A recent site I've acted on had gas tanks and the developer had already entered into a contract with the gas supplier that the owners were stuck with for 2 years once the builder had finished the site and then could only change supplier if 100% of owners agreed.*"

8.9. 76.5% of survey respondents agreed with the solution proposed in providing CAs with a right, within a set period from the date when the unit owners take effective control, to cancel contracts that were entered into by the association before that date. CILEx supports this proposal as key in empowering unit holders to take control of their properties, thus realising the underlying policy consideration driving commonhold reforms, and as an important measure for protecting homeowners against unscrupulous business practices.[51]

8.10. Nevertheless, it is also recognised that there are inherent risks in altering pre-existing contracts following the completion of sale, as this may undermine the confidence that purchasers have within the home buying and selling process. To protect purchaser interests, it was suggested by members that the decision to alter

[51] Member comments included: *"So that the commonhold association can actually manage itself and control its own destiny. Otherwise the developer could set up the Management Co and set up a long-term contract in order to continue to rake in a profit from the development in years to come."; "The commonhold association should be free to set up their own long-term contracts."; "The idea is to have responsibility and the power to manage."*

contracts retrospectively could be subject to prior approval from the Tribunal, and at the very least should require a high threshold of consent.[52]

Q55. We invite consultees' views as to the difficulties that can arise when the long-term contract includes the hire of equipment which remains the property of the contractor and which they have reserved the right to remove if the contract should be terminated. We would appreciate any examples of contracts involving the hire of equipment, or of long-term contracts generally, that consultees are able to provide.

8.11. CILEx has not obtained any member feedback or anecdotal evidence on this point.

9. Financing the Commonhold

Q56. We provisionally propose that the proposed contributions to shared costs should require the approval of the members of the commonhold association. This approval would generally be given by a resolution passed in a general meeting, though it could be passed by the written procedure. Do consultees agree?

We provisionally propose that this approval should be given by an ordinary resolution (over 50% majority), rather than by a special resolution (at least 75% majority). Do consultees agree?

We invite consultees' views as to the suggestion that if the proposed level of contributions failed to secure approval, the level of contributions required in the previous financial year should continue to apply.

We invite consultees' alternative proposals to address the issue of what should happen if the directors' proposed level of commonhold contributions fail to obtain approval.

9.1. CILEx welcomes the flexibility for this resolution to take place either in a general meeting or by a written procedure. This flexibility shall ensure that commonhold requirements are suitable in a wide variety of commonhold developments, including larger developments containing many unit-owners.

9.2. Where approval has not been secured, CILEx agrees that the level of contributions required in the previous financial year should continue to apply as a realistic safety net and precaution against shortfall. This should in no way hamper the ability for the director to amend the level of proposed contributions and resubmit them to the commonhold association for approval.

9.3. 70.6% of survey respondents agreed with the Law Commission's proposal that the approval process should be given by ordinary resolution. One suggestion put forth

[52] Member comments included: *"Where…would that leave you? Changing the rules after everyone has committed on the basis of what was disclosed at the time only to find that the goal posts have been moved."; "Subject to agreement by relevant majority of unit holders."; "Not fair to contractor but should be able to ask tribunal."*

amongst member comments, was for a differential between minor and major works, in which the latter may warrant a special resolution.[53]

Q57. We provisionally propose that it should be possible for the CCS to include, as a local rule, an index-linked "cap" on the amount of expenditure which could be incurred on the cost of improvements. Do consultees agree?

We provisionally propose that it should be possible for the CCS to include, as a local rule, an index-linked "cap" on the amount of expenditure which could be incurred annually on the cost of "enhanced services", as described in paragraph 10.40(1). Do consultees agree?

We provisionally propose that if a CCS contained such a "cap", then it could be removed only with the unanimous consent of the unit owners, or with the support of 80% of the available votes, and the approval of the Tribunal. Do consultees agree?

We provisionally propose that any application by a unit owner to challenge proposed expenditure should be made before it was incurred, and expenditure should not be open to challenge later. Do consultees agree?

9.4. CILEx does not see any substantive issues with providing unit-owners the flexibility to create such caps. As the index-linked caps shall only apply in the context of improvements to the fabric of the common parts, and the provision of substantially enhanced services, there is no risk that they would prevent proper maintenance or repair of the commons parts so as to threaten reasonable enjoyment of the building.

9.5. CILEx agrees that there may be situations in which the caps set are no longer fit for purpose (e.g.: the unit-owners of multiple units has changed, or certain members are willing to contribute additional funds to cover the excess fees chargeable, or members of the commonhold association have changed their mind). In such circumstances, it is only right that members of the CA have the power to remove these caps. CILEx feels that it would be best for the manner and level of voting majority required to do so, to be determined by the CA from the outset when first creating the local rule. Should this lead to any acute grievances in which minority interests are significantly impaired, there should be recourse to the Tribunal to block the decision where reasonable.

9.5.1. CILEx is of the opinion that relying on the Tribunal for protections (as opposed to for specific permissions) is practical and can be more broadly applied to various situations. Accordingly, rather than complicating processes by creating case-specific requirements, homeowners should be assured that they may turn to the tribunal in situations where their minority interests are significantly

[53] Member comments included: *"But only for contributions over a fixed amount, as is the case for the s20 procedure for leasehold property."; "75% in certain circumstances but where most units are buy[-to-]lets the unit owners are unlikely to wish to spend any more than absolutely necessary which could be prejudicial to those that wish to make the most of their owner/occupied home. I think there needs to be a differential between minor and major works."*

impaired in some material way as a result of decisions to create, amend or remove various types of local rules.[54]

9.6. CILEx would further add that the ability to create Sections which segment membership interests within the CA might be able to provide some safeguard within mixed-use buildings for vulnerable persons, such as units dedicated to social housing or shared-ownership schemes.

9.7. CILEx provisionally agrees that a unit owner should be expected to challenge proposed expenditure before it has been incurred rather than later to minimise disruptions and safeguard against budgeting shortfalls.

Q58. We provisionally propose that it should be compulsory for a commonhold association to have some form of reserve fund. Do consultees agree?

We provisionally propose that the scheme for the financing of the commonhold should continue to distinguish between contributions for shared (current) expenditure, and contributions to the reserve fund or funds. Do consultees agree?

We provisionally propose that no minimum annual contribution towards the reserve fund should be specified. Do consultees agree?

We invite consultees who do not agree to suggest how a requirement for minimum contributions might operate.

We provisionally propose that the directors of commonhold associations should be able to set up such designated reserve funds as they see fit. Do consultees agree?

We provisionally propose that it should also be possible for the members of a commonhold association to require, by ordinary resolution, that a designated reserve fund or funds should be set up. Do consultees agree?

We provisionally propose that designated reserve funds should be protected from enforcement action by creditors, unless their claim relates to the specific purpose for which the designated reserve fund was set up. Do consultees agree?

We provisionally propose that designated reserve funds should continue to receive equivalent protection if the commonhold association should be subject to insolvency proceedings. Do consultees agree?

We provisionally propose that it should be possible to change the designation of a designated reserve fund only by a resolution supported by 80% of the members, and with the approval of the Tribunal. Do consultees agree?

We invite consultees' views as to whether the directors (or the members in a general meeting) should be able to "borrow" from a reserve fund in order to meet a shortfall in meeting other expenditure, and, if so, what safeguards, if any, would be appropriate.

[54] However, please note paragraph 3.7 above regarding CILEx's concerns around the barriers of access in the First-Tier Tribunal (Property Chamber).

We provisionally propose that the proposed annual contributions to the reserve fund or funds should be approved by the members in the same way as the contributions to current expenditure, and, if possible, at the same time. Do consultees agree?

9.8. CILEx, along with other stakeholders, has previously called for reserve funds to be mandatory in the context of leasehold schemes to safeguard against sudden and excessive emergency fees and to provide homeowners with greater transparency around cost contributions. CILEx is of the opinion that the same should apply in the context of commonhold contributions, with 72.2% of survey respondents voicing their agreement that reserve funds should be compulsory for a CA.[55]

9.8.1. The Law Commission rightly articulate that whilst reserve funds should be made compulsory, it would be impractical and unhelpful to set a minimum contribution level that must be paid into these funds. As previously articulated, "*reforms need to appropriately balance simplifying the current…regime with recognising the divergences in land interests [and] properties"* and thereby cannot be overly prescriptive. Nevertheless, unit-owners should be made aware of the existence of the reserve fund and what reserve funds are intended to do, so that members of the CA can make an informed decision about whether and how much to invest into one.

9.9. CILEx provisionally concurs with the proposal for distinguishing between current expenditures and reserve funds so that the internal management of costs paid into the CA are clearly organised and more transparent.

9.10. 88.2% of survey respondents agreed that a commonhold association should be permitted to set up designated reserve funds for specific purposes and that these funds should be protected from enforcement action by creditors, unless their claim relates to the specific purpose for which it was set up.

9.10.1. Member opinion was split on whether the establishment of this fund should require an ordinary or special resolution, but it was suggested, once again, that there could be a differential between minor and major works or based on the limit of financial contributions that would be required.

9.11. CILEx sees no substantive problems with the proposal for permitting changes to the designated reserve fund only where there is 80% member consent and the approval of the Tribunal. The involvement of the Tribunal should help protect against directors abusing this process to escape creditor action.[56]

9.12. Majority of survey respondents disagreed with directors/members 'borrowing' from the reserve fund in order to meet a shortfall in another expenditure. Members were concerned that this could promote bad management of the commonhold, and that adequate protections and safeguards would be paramount if this power were to be implemented. Members suggested that if this were to be the case, there should be a consent requirement attached to exercising the right to 'borrow' so that members of the CA are not only aware of the redistribution of finances but have the power to block or approve it.

[55] Legal Sector Group, *Leasehold Reform Proposals,* (2017) para 7. <<https://www.cilex.org.uk/~/media/pdf_documents/main_cilex/communications/media_releases/legal_sector_group_leasehold_reform_proposals_june_2017.pdf?la=en>>

[56] However, please note paragraph 3.7 above regarding CILEx's concerns around the barriers of access in the First-Tier Tribunal (Property Chamber).

9.13. CILEx welcomes simplification of processes and thereby the proposal for annual contributions to the reserve fund to be approved by members in the same way and at the same time as contributions to current expenditure. Given concerns raised by some respondents around unit-owners being capable of, or interested in, managing their blocks, this shall additionally be useful in decreasing the practical burdens of belonging to a CA.

Q59. We provisionally propose that it should be possible to allocate to individual units within a commonhold different percentages that it must contribute towards different "heads" of cost. Do consultees agree?

We invite consultees' views as to whether each commonhold should have total flexibility in how different costs are allocated, or whether there should be any limitations on their ability to do so.

9.14. 88.9% of survey respondents agreed that the method by which cost contributions are allocated between unit-owners should generally be prescribed for in regulation. Nonetheless, CILEx welcomes the flexibility for the allocation of costs between unit-owners to differ depending on how the costs incurred relate with their property interests (e.g.: commercial or residential). This shall be necessary in particularly large scale or mixed-use buildings. However, CILEx is not fully convinced that establishing divided contributions would be a more straightforward solution as compared with utilising the framework for Sections. This proposal appears to duplicate mechanisms for segmenting member interests and risks complicating procedures and causing confusion amongst unit-owners.

9.14.1. The Law Commission contend that *"Sections would allow costs to be separated out, but would additionally mean that unit owners would be allowed to vote only on expenditure which was relevant to them."*[57] Generally speaking, CILEx counters that there ought to be a relationship between the level of contribution that a unit-owner makes and the level of influence that they have over the associated repairs/renovations in question. CILEx acknowledges that there may be exceptions to this rule and considers that there are possible work-arounds using the Sections framework which could assist. For instance, to enjoy voting rights it may be required that all sections contribute towards a certain renovation but to varying degrees. In turn, those Sections less affected by the repairs/renovation would only be expected to contribute a nominal amount whilst enjoying voting rights over the matter (as the expenditure is still shared).

9.15. CILEx once again stresses the importance of a 'culture change' for commonhold to effectively operate. The concept of commonhold rests on a 'community of interests.' Whilst Sections may be created to group different communities of interest, the ability to fragment and further sub-divide pockets of the commonhold association should not run so deep as to negate the 'community' aspect of commonhold. For instance, in the example provided by the Law Commission, the owners of flats without parking spaces might well object to having to pay the costs associated with

[57] See footnote 15, (Law Commission Reinvigorating Commonhold Consultation), p.263, para 10.93.

them, however improvements to shared spaces is still of benefit in improving the overall value of the building and this should not go unnoticed.

Q60. We provisionally propose to retain the possibility of varying the percentage of expenditure allocated to each unit, by amending the CCS by special resolution. Such amendments would remain subject to a unit owner's right not to have a significantly disproportionate amount of the contributions to shared costs, or the reserve funds, allocated to his or her unit. Do consultees agree?

We invite consultees' views as to whether:

(1) it is likely to be fair and workable to consider any proposed variations to contributions to shared costs, and the reserve funds, on the basis that the originally allocated percentage was fair; and

(2) safeguards need apply only if the allocated percentage is altered.

We invite consultees' views as to whether internal floor area would offer a satisfactory default basis on which to allocate financial contributions in purely residential commonholds. We invite consultees' views as to whether internal floor area would offer a satisfactory default basis on which to allocate financial contributions in commonholds which include (a) commercial and residential units and (b) commercial units of different kinds. If not, we invite views on alternative methods.

9.16. CILEx has not found any substantive issues with these proposals.

9.17. 58.9% of survey respondents agreed that internal floor area would provide a satisfactory starting point for allocating financial contributions. There was some concern that this would not always be appropriate, and therefore CILEx welcomes the flexibility to vary these allocations as proposed. CILEx also recognises the advantages that this would have in protecting against commonhold developments which have been established to allocate costs in a manner that would unfairly benefit the developer.

9.17.1. In the context of mixed use commonholds (residential and commercial) member comments suggested this could also provide a useful starting point, but that the flexibility to deviate from this default position would become even more relevant.

Q61. We provisionally propose that the current scheme for the issue of a Commonhold Unit Information Certificate ("CUIC") on the sale of a unit should in its essentials be retained. Do consultees agree?

We invite consultees' views as to whether the possibility of further contributions (emergency contributions, or contributions to the reserve fund or funds) falling due after the issue of a CUIC is likely to present practical problems to conveyancers.

We provisionally propose that, once a CUIC has been issued, an incoming unit owner should not be liable for further contributions which fall due, unless the commonhold association or its agent has notified the current owner's conveyancers of the further liabilities. Do consultees agree?

We provisionally propose that the maximum fee for a commonhold association to issue a CUIC should be set by regulation, and kept under review. Do consultees agree?

We invite consultees' views as to whether the lack of any sanction or convenient remedy for the failure on the part of the commonhold association to issue a Commonhold Unit Information Certificate within the prescribed 14-day period is likely to cause problems in practice. We further invite consultees' views on how best this may be resolved.

We invite consultees' views as to whether a Commonhold Unit Information Certificate should be conclusive once issued; or whether it should be possible for it to be amended if an error is spotted after it has been issued.

We further invite consultees' views on what problems would arise in practice if a Commonhold Unit Information Certificate could be amended; and on how these might be addressed.

9.18. CILEx welcomes the role of the Commonhold Unit Information Certificate (CUIC) in ensuring transparency within the home buying and selling process. CILEx has called for wider efforts to improve transparency and public awareness within leasehold law and believes that the same is needed for commonhold given the lack of uptake, popularity and awareness of commonhold since the Commonhold and Leasehold Reform Act 2002 came into force.

9.19. CILEx supports proposals for compulsory reserve funds.[58] Accordingly, it is anticipated that there should not be a high risk of emergency requests arising which would catch prospective buyers unawares. Nonetheless, in recognition of this risk CILEx agrees that the incoming unit owner should not be liable for further contributions which fall due, unless the CA or its agent has notified the current owner's conveyancers of these liabilities. In exceptional circumstances where unforeseen costs have emerged prior to completing the sale, this measure shall be useful in incentivising the CA to disclose all relevant information in a timely manner, safeguarding transparency within the conveyancing process. In addition, it may further incentivise the CA to take out appropriate insurance cover to safeguard against such risks.

9.20. CILEx additionally agrees, in the interests of transparency, that the maximum fee for a CA to issue a CUIC should be set by regulation and kept under review to mitigate any risk of abuse.

9.21. All survey respondents agreed that the lack of sanction to comply with the CUIC within the prescribed 14-day period is likely to cause problems in practice. Members suggested that to remedy this issue, penalties related to the length of delay could be imposed, or alternatively the fee owed for provision of the pack could be waived.[59]

[58] Please see CILEx's response to question 58 above.

[59] Although members did acknowledge that this might have a cyclical effect in ultimately penalising the purchaser: *"However a fine would just be shared out between the unit holders in the next service charge invoice so all are losers"; "Unsure as fines would then just be passed on to the owners."*

9.22. 81.3% of survey respondents agreed that it should be possible to amend the CUIC if an error is spotted after it has been issued, however this should only be the case in instances where there has been a 'genuine error.' To protect purchasers, it was suggested that these amendments should be subject to appropriate time limits so that a purchaser can have confidence in the information disclosed, and the costs for issuing a replacement CUIC should not be recoverable (or at the very least ought to be capped).

Q62. We invite consultees' views as to whether the need for unit owners to obtain the consent of their mortgage lender to support the commonhold association granting a fixed or floating charge is likely to be a significant difficulty in raising emergency funding.

If consultees consider that there might be difficulties, we invite views on what measures could be put in place to alleviate these difficulties, including whether the Tribunal should be able to override a mortgage lender's refusal to give consent.

9.23. All members responding to CILEx's survey agreed that this requirement (for unit owners to obtain consent from their mortgage lenders in support of the charge) would cause significant difficulties in practice. Majority of respondents thereby agreed that the Tribunal should be able to override the mortgage lender's refusal to give consent. However, some members did express concern that this could exacerbate the current problems around the mortgageability of commonhold and act as another deterrent against this form of lending.

Q63. We provisionally propose that express provision should be made for a commonhold association to grant a floating charge. Do consultees agree?
We provisionally propose that a charge over the common parts or a floating charge should only be able to be granted when either:

(1) The unit owners unanimously consent to the charge: or
(2) 80% of the unit owners consent to the charge, and approval is obtained from the First-tier Tribunal (Property Chamber) or the Residential Property Tribunal Wales.

Do consultees agree?

9.24. CILEx agrees with introducing an express provision for the CA to grant a floating charge. This shall address the current ambiguity which has left scope for abuse and shall ensure that the creation of a floating charge is appropriately regulated to protect homeowners' interests.

9.25. 82.4% of survey respondents agreed that unanimous consent should be required to authorise the granting of this charge, as it was felt that this would be proportionate given the significance of such a decision, as well as being able to protect against corruption. Nonetheless, members acknowledged the practical difficulties that this could cause, and consequently agreed with the proposed compromise of 80% consent complimented with further approval from the First-tier Tribunal (Property Chamber).

Q64. We provisionally propose that it should be possible for a commonhold association (having obtained the requisite consent) to grant a charge over part of the common parts.

Where such a charge is granted, the part of the common parts so charged may be registered with a separate title number. Do consultees agree?

9.26. CILEx had not obtained any member feedback on this point.

10. Exceptions

Q65. We provisionally propose making an exception to the prohibition on residential leases over seven years, and leases granted at a premium, for shared ownership leases which contain the fundamental clauses prescribed by Homes England in England or the Welsh Government in Wales. Do consultees agree?

10.1. As stated previously, CILEx members have strongly opposed the mixing of leasehold and commonhold tenure within a single building/block owing to the level of complexity this would cause in subsequent regulation and management of the property, coupled with the risk of a two-tiered system.[60] It has been suggested that shared ownership could be provided for under alternative arrangements (instead of leasehold) to overcome this problem. For instance, one member suggested that:

"*you could have the dwelling as a commonhold [unit] owned jointly by the Housing Association and the "tenant" with a Trust Deed that set out their beneficial interests…[or alternatively] another option would be to use the type of scheme where the "tenant" owns the property in their own name but with a charge back to the Housing Association for their "share". There could then, possibly, be built-in terms obliging the "tenant" to offer the dwelling back to the Housing Association if it were an area for which affordable housing must be preserved and offered back."*

10.2. Given these potential solutions, along with earlier engagement with CILEx members that suggested commonhold could aid in facilitating shared-ownership,[61] the Government may wish to reassure itself with a review of alternative arrangements for accommodating these schemes so that they are compatible with commonhold without requiring mixed tenure.

Q66. We provisionally propose that in new commonhold developments, the model shared ownership lease should require the shared ownership leaseholder to comply with all terms of the CCS. Do consultees agree?

We provisionally propose that shared ownership leaseholders in new commonhold developments should be able to exercise all the votes of the commonhold association in place of the shared ownership provider, apart from a decision to terminate, which should be exercised jointly with the provider. Do consultees agree?

We provisionally propose that shared ownership leaseholders in new commonhold developments should not have the same statutory rights as other leaseholders to challenge

[60] Please see paragraph 3.2 above.

[61] CILEx Response, *Ministry of Housing, Communities and Local Government Consultation – Implementing reforms to the leasehold system in England,* November (2018), para 3.18-3.20.

service charge costs or to be consulted on works and contracts exceeding a certain amount. Do consultees agree?

We provisionally propose that, in new commonhold developments, on purchasing 100% of the value of the commonhold unit, the shared ownership leaseholder should be transferred the commonhold title of the unit and should become a member of the commonhold association. Do consultees agree?

10.3. As stated in response to question 65, CILEx would welcome further research into alternative models for shared-ownership, which are not solely limited to the creation of leasehold interests.

10.4. Nonetheless, if an exception is made for shared-ownership leases within commonhold, CILEx provisionally agrees with all the proposals put forth as realistic and sensible, providing shared ownership leaseholders with superior rights in terms of: voting, challenging commonhold costs before they are incurred etc. However, there may need to be additional protections in place for the provider of the shared ownership scheme where the shared ownership leaseholder enjoys voting rights to add, remove or amend local rules of the CCS and to vote on the grant of a charge over the common parts.

Q67. We provisionally propose that in a building which has converted to commonhold, the shared ownership provider should have voting rights in the commonhold association. Delegation of voting rights to the shared owner will be possible on a voluntary basis, but not mandatory. Do consultees agree?

We provisionally propose that, in a building which has converted to commonhold, the staircasing provisions of any existing shared ownership leases should continue to operate in the same way. On staircasing to 100%, the shared owner will therefore remain a leaseholder. Do consultees agree?

We provisionally propose that after having staircased to 100% of the value of the leasehold flat, the shared ownership leaseholder should have a statutory right to purchase the commonhold unit and become a member of the commonhold association. Do consultees agree?

10.5. CILEx is mindful that there are a handful of key factors at play here including: 1). The need to secure parity for shared-ownership leaseholders so far as is possible (so that treatment of shared-ownership does not significantly differ based on how the commonhold came to be created), 2). The impact that staircasing may have on voting rights and the level of influence that shared-ownership leaseholders should expect to enjoy over the building, 3). The policy considerations underpinning shared-ownership schemes in which providers should ultimately expect to relinquish their freehold interest, and 4). The nature of shared-ownership providers generally as not-for profit entities.

10.6. Nonetheless, given that majority of shared-ownership schemes are under the auspices of Housing Associations, CILEx finds that Housing Associations may be better placed to comment on how these proposals would impact upon existing arrangements.

10.6.1. Once again, it may be worth considering how alternative arrangements to the leasehold model of shared ownership could provide a better solution.

Q68. We invite consultees' views as to whether an exception to the ban on residential leases over seven years is needed to accommodate better community land trusts and co-operatives within the commonhold model.

10.7. Previous surveys conducted on the issue of community land trusts, cohousing and cooperatives as residential long leases, demonstrated that member opinion on this matter is largely disparate. This was mostly owing to the varying levels of exposure that respondents have had with these developments, coupled with the fact that 'community-led housing' may encompass many different types of initiative.

10.7.1. Amidst member comments, was the suggestion that (except for cases of shared-ownership) these initiatives should predominantly focus on the granting of short-term leases, so that housing becomes routinely available for those in need of assistance.[62]

Q69. Aside from shared ownership leases, community land trusts and housing cooperatives, are consultees aware of any other forms of affordable housing which it is not possible, or would be difficult, to accommodate in the current commonhold system?

10.8. Other than social housing, members did not identify any other forms of affordable housing which would be difficult to accommodate in the current commonhold system.

Q70. We provisionally propose that an exception to the prohibition on residential leases of over seven years or granted at a premium should be made for lease-based home purchase plans regulated by the Financial Conduct Authority. Do consultees agree?

10.9. CILEx fully agrees with this exception to ensure that the legislation is in accords with the Human Rights Act 1998, and that relevant organisations would not separately find themselves in breach of the Equality Act 2010 under which religion is a protected characteristic. The exception is necessary in order to provide equal access to a commonhold purchase in accordance with Islamic Law.

10.10. Nevertheless, in light of the concerns raised about mixing leasehold and commonhold interests within a single building/block, once again it may be appropriate to consider whether there are any other alternatives for providing equal access to Islamic finance which does not rely on lease-based arrangements.

Q71. We provisionally propose that customers of lease-based home purchase plans in new commonhold developments should not have the same statutory rights as other leaseholders

[62] See footnote 61, (CILEx Submission to Implementing Leasehold Reforms in England and Wales consultation), para 3.2.1.

to challenge service charge costs or to be consulted on works and contracts exceeding a certain amount. Do consultees agree?

10.11. As determined in response to Question 66 above (relating to shared-ownership schemes), CILEx provisionally agrees with this proposal in providing customers of lease-based home purchase plans with superior rights instead (i.e.: having the same right as unit owners to challenge commonhold costs before they have even been incurred).

Q72. We ask consultees for their views and experience of how the relationship between a bank and a customer who is purchasing property through a lease-based home purchase plan is, or can be, preserved following a collective enfranchisement.

10.12. CILEx has not obtained any member feedback on this point and feels that mortgage providers may be better suited to providing anecdotal evidence on how this relationship would be affected following collective enfranchisement.

11. Dispute Resolution

Q73. We provisionally propose that the commonhold association should not be able to prevent a unit owner or tenant from pursuing direct legal action against another unit owner or tenant. Instead, the association should have the right to notify the unit owner or tenant that it reasonably considers the claim to be frivolous, vexatious or trivial or that the matter complained of is not a breach of the CCS. Do consultees agree?

11.1. CILEx welcomes this departure from the current law in recognising that whether a claim is frivolous, vexatious or trivial should be a matter for the courts to decide rather than extending this jurisdiction to a CA.

Q74. We provisionally propose that a failure to use the forms which accompany the commonhold dispute resolution procedure, or forms to the same effect, should not automatically prevent a claim from progressing. Do consultees agree?

11.2. CILEx agrees that legitimate disputes should not be prevented from progressing for bureaucratic reasons, however there should remain a legitimate expectation that parties will complete the correct forms to ensure a degree of consistency in the process. Members have previously highlighted that the complexity within conveyancing processes has exacerbated the lack of consumer awareness around the protocols involved. As a result, members have called for simplification where possible, and for the ability to challenge the validity of administrative tasks, such as notices and forms, to be limited so that this is not abused as a means of frustrating processes on the basis of mere technicality.[63]

[63] See footnote 4, (CILEx Submission to Leasehold Enfranchisement reforms), para 11.3.

Q75. We provisionally propose that referral to an ombudsman should not be a mandatory part of commonhold's dispute resolution procedure. Instead, it could be used on an optional basis, instead of, or alongside, other forms of alternative dispute resolution. Do consultees agree?

We provisionally propose that membership of an approved ombudsman scheme should no longer be a requirement for commonhold associations, and that, instead, commonhold associations should be able to decide whether or not to become a member of an ombudsman scheme. Do consultees agree?

11.3. Majority of survey respondents felt that the mandatory requirement for a commonhold's dispute resolution procedure to refer to an approved ombudsman scheme should be retained.[64] Members felt that this requirement can help to bolster consumer trust in the commonhold system (despite the rarity of commonholds to date) and help to ensure effective management as well as protecting unit-holders where third parties (such as unregulated management companies) are involved.

11.3.1. CILEx considers that given the lack of evidence to suggest this requirement is detrimental[65] it may be necessary to review this policy position following an increased uptake of commonhold before reforming the current position.

Q76. We provisionally propose that, where the dispute resolution procedure has not been followed, any court or tribunal, which subsequently considers the dispute, should have full discretion to disregard the non-compliance, or to order the parties to take any steps it considers appropriate, in accordance with its general case management powers. Do consultees agree?

11.4. CILEx welcomes this flexible approach given the wide variety of variables which may impact dispute handling within commonholds. The role of the Courts/Tribunal shall act as a safeguard in protecting any vulnerable or minority interests in this regard and ensuring that the non-compliance is handled in a proportionate manner.

Q77. We invite consultees' views as to whether the current commonhold dispute resolution procedure should be transferred to a pre-action protocol.

11.5. As stated previously, CILEx members have shown support for standardisation over flexibility where this can help to simplify processes. If a specific pre-action protocol can avoid the risk of overlap with other existing protocols, then this would be of benefit to practitioners in streamlining procedures as well as making legal processes more accessible for consumers. However, care must be taken when implementing this proposal to prevent risk of duplication which would have the opposite effect during the transition period.

[64] Member comments: *"I think that [this should be retained] as if the property owners are in disagreement amongst themselves they need someone to go to for arbitration that doesn't cost a lot."; "I think this is a good idea to ensure fairness and so that it is run correctly."; "It seems sensible that external regulation should exist."; "This [requirement] would encourage peoples trust in commonhold."*

[65] See footnote 15, (Law Commission Reinvigorating Commonhold Consultation), p.312, para 13.43.

11.6. Whilst the pre-action protocol would not be recognised within the Tribunal, CILEx endorses earlier proposals for a new integrated housing court which would take charge over these matters (as well as all other commonhold-related matters where the Tribunal's involvement has been endorsed). It is assumed that the pre-action protocol would be applicable in the context of this new housing court, and therefore this should no longer act as a barrier.

Q78. We provisionally propose that the jurisdiction of the First-tier Tribunal (Property Chamber) in England and the Residential Property Tribunal Wales should be extended to cover disputes arising within a commonhold. Do consultees agree?

11.7. CILEx provisionally agrees with this proposal in recognition of the expertise that Tribunals currently have, however, it has been brought to CILEx's attention that there is "*a lack of public awareness around tribunals and the rights that litigants have within tribunal processes [which creates] barriers of access."*[66] As stated previously, CILEx would thereby recommend that where parallel proposals for a new Housing Court are realised, it may be more prudent for the integrated Housing Court to deal with such disputes.

11.8. In addition, CILEx welcomes the decision not to create a specialist tribunal to deal with commonhold disputes as this runs the risk of further complicating the court and tribunal structure relating to housing disputes. Members have previously called for simplification of this framework which 55.9% of respondents to a former survey found to be complicated and 67.6% identified as difficult for consumers to understand.[67]

Q79. We invite consultees' views as to whether the prescribed CCS should include a provision that, where a unit owner or tenant breaches the rules of the CCS, the unit owner, or tenant, should be required to indemnify the other unit owners and the commonhold association for any losses they reasonably incur as a result of the breach.

11.9. 94.4% of survey respondents agreed that indemnity clauses for losses reasonably incurred where a unit owner/tenant breaches the rules of the CCS should be prescribed for in regulation.

Q80. Elsewhere in this Consultation Paper we provisionally propose that it should be possible for a unit owner (or owners) to apply to the First-tier Tribunal (Property Chamber) in England or the Residential Property Tribunal Wales to challenge a decision of the commonhold association in the following circumstances:

(1) Where the commonhold association approves a budget, which will result in costs above a threshold (set in the CCS) being incurred on works or enhanced services;

[66] See footnote 16, (CILEx Submission to Housing Court Reforms), para 4.5. CILEx cautions that this should only be the case where the new housing court has been adequately resourced with specialist judges, court staff and court locations to ensure meaningful access to justice.

[67] See footnote 16, (CILEx Submission to Housing Court Reforms), para 4.2. Our members articulated the current difficulties in trying to explain to clients why there are such discrepancies within the court structure and why procedures for resolving property disputes takes so long.

(2) Where the minority are outvoted on a decision to vary the local rules of the CCS;
(3) If the directors of the association delegate powers to a committee which has been set up to represent a section of the commonhold, and the unit owners in the section wish to prevent the directors revoking or amending these powers;
(4) Where the unit owner, or owners, are opposed to the introduction of a new section or the combination of two or more sections.

We invite consultees' views as to whether there are any other circumstances in which it would be appropriate to provide a unit owner (or owners) with a right to challenge a decision taken by the commonhold association.

11.10. Member feedback suggested that a unit owner/s should have the right to challenge a decision taken by the CA in majority of cases where the vote was prejudicial to their interests.

Q81. We invite consultees' views as to the extent to which the following factors should be taken into account by the First-tier Tribunal (Property Chamber) and the Residential Property Tribunal Wales when deciding whether or not to grant a remedy to a unit owner who challenges a decision taken by the commonhold association:

(1) Whether or not the unit owner(s) making the application voted against the decision complained of, or had a good reason for not doing so.
(2) Whether the decision complained of needs to have a particular impact on the unit owner (or owners) and if so, what degree of impact.
(3) The reason behind the decision taken by the commonhold association, for example, whether the decision is in the best interests of the commonhold and/or is proportionate to the impact on the unit owner in question.

We also invite consultees' views on whether the same factors would be relevant in all of the circumstances set out in Consultation Question 80 where a unit owner may have the right to apply to the First-tier Tribunal (Property Chamber) or the Residential Property Tribunal (Wales).

11.11. All members agreed that the extent to which the contested decision had a particular impact on the unit owner/s bringing the claim would be relevant in making this determination. The reason behind the CA's decision was also considered to be important, but by a slightly lesser majority (94.6% member agreement). Finally, whilst majority of members agreed that the unit owner/s original vote should be considered, only 77.8% of respondents agreed with this. Consequently, CILEx agrees that all these factors shall be relevant and can be weighted in order of the above. Reference: i.e. the weighting should apply as follows: 1). The impact of the decision on the complainant, 2). The justification and reasoning of the CA in making the decision, and 3). The complainant's original vote.

11.12. Members identified the following considerations which might also be important in making the Tribunal's determination: a). what is fair and reasonable in accordance with the CCS, b). the nature of the detriment faced by the challenging party.

Q82. We provisionally propose that on an application by a unit owner challenging a decision of the commonhold association, the First-tier Tribunal (Property Chamber) or the Residential Property Tribunal (Wales) should be able to allow the decision to stand or annul the

decision. If the First-tier Tribunal (Property Chamber) or the Residential Property Tribunal (Wales) allows the decision to stand, we propose that the Tribunal should be able to attach conditions to its decision. Do consultees agree?

11.13. CILEx provisionally agrees with this proposal as in keeping with the Tribunals current case management powers. CILEx trusts that the Tribunal would be well placed to impose such conditions where it thinks fit and would do so with the interests of fairness and reasonableness at heart.

Q83. We invite consultees' views as to whether the commonhold association should be provided with enhanced powers to address non-financial breaches of the CCS. If so, what should these powers be?

11.14. 70.6% of survey respondents agreed with enhancing the CAs powers to address non-financial breaches of the CCS, including: powers to impose fines; powers to impose access restrictions to recreational facilities; and, powers of self-help. Nevertheless, it was challenged that there may be problems in reality with trying to enforce these matters on neighbours, where personal relationships and relationships of proximity need to be considered. Accordingly, the power to impose fines is favoured as the most appropriate remedy, capable of enforcement and with the least risk of exacerbating tensions within a neighbourhood. Subsequently, where fines remained unpaid, enforcement could proceed in line with established debt recovery processes.

Q84. We provisionally propose that a statutory cap should be introduced on the rate of interest which may be charged by the commonhold association on late payments of commonhold contributions. Do consultees agree?

11.15. CILEx welcomes these proposals as a necessary safeguard to prevent abuse of process.

11.15.1. CILEx is further pleased to see that the Law Commission does not intend to replicate the power of forfeiture within commonhold, with 70.8% of survey respondents agreeing that this right should be abolished altogether.

Q85. We provisionally propose that a commonhold association should have an automatic statutory charge over commonhold units for the payment of commonhold costs. Do consultees agree?

We provisionally propose that if the commonhold association has an automatic statutory charge over commonhold units for the payment of commonhold contributions, this charge should take priority over all other charges (such as a mortgage over the property). Do consultees agree?

11.16. 94.1% of survey respondents agreed with proposals for the CA to have an automatic statutory charge over commonhold units for the payment of outstanding contributions. However, steps need to be taken to ensure that the administrative burden placed on the CA to achieve this is not disproportionately high.

11.16.1. CILEx recognises that whilst this might provide a deterrent for unit owners against defaulting on commonhold contributions, it would not provide the CA with a short-term solution nor a timely way in which to recoup the lost charges. It may therefore be possible, to allow for financing the commonhold in the short term, for other unit owner/s (acting in a group or individually) to step in to meet the shortfall and take benefit of the charge.

11.17. Nonetheless, in the interests of natural justice and the public interest, CILEx cautions that power of sale should only be used as a remedy of last resort and subject to prior court approval. There are concerns that the alternative would replicate some of the current problems relating to forfeiture, in that a homeowner should be made to feel safe and secure in their own home.[68]

11.18. Should these additional powers be introduced, a clearly defined procedure will be essential so that all involved are aware of their rights and obligations, whilst clearly setting out all alternative options that are available for dispute resolution. This should be supplemented with realistic timeframes in the interests of both parties and for clarity sake.

Q86. We provisionally propose that, before taking action to enforce a charge over a commonhold unit, the commonhold association should be required to follow a preaction protocol. We envisage that the protocol will require the association to provide prescribed information to the defaulting unit owner and make reasonable attempts to agree a repayment plan. Do consultees agree?

We invite consultees' views as to what steps the association should be required to take as part of this protocol.
We provisionally propose that where the commonhold association wishes to enforce a charge over a commonhold unit by selling the unit, it should always be necessary for the association to apply to court for an order for sale. Do consultees agree?

We provisionally propose that the court should only be able to order the sale of a unit where the amount owing to the commonhold association exceeds a certain amount. Do consultees agree?

We invite consultees' views as to what this amount should be and on what factors the court should take into account when deciding whether to order the sale of a unit.

We provisionally propose that where the sale of a unit is ordered, the court should appoint a receiver to sell the unit and distribute the proceeds of sale. Do consultees agree?

We provisionally propose that where a receiver is appointed to sell a commonhold unit, the receiver should distribute the proceeds of sale in the following way.

(1) The receiver should be paid his or her costs of arranging the sale of the property.
(2) The commonhold association should be repaid any outstanding amounts of commonhold contributions, plus any interest and costs awarded by the court.
(3) Any other party who has an interest secured against the unit, such as a mortgage lender, should be repaid.
(4) Any remaining amount should then be returned to the defaulting unit owner.

[68] 88.2% of survey respondents agreed that power of sale should only be used as a remedy of last resort, and 70.6% agreed that the association should be required to apply to the court for approval before an order for sale commences.

Do consultees agree?

We provisionally propose that any tenancies granted out of a unit should continue to exist following an order for sale. Do consultees agree?

11.19. CILEx agrees with the Law Commission's reasoning for why the imposition of this charge should be distinguished from the procedures and rights of mortgage providers.[69] It is imperative that the power to force a sale of a unit is rigidly prescribed for and that adequate safeguards are in place to protect the interests of the defaulting owner. As such, the pre-action protocol must demand an adequate level of transparency and ensure that measures are in place so that this right is enforced only as a last resort.

11.20. CILEx strongly endorses that it should be necessary for a CA to apply to the courts for approval prior to an order for sale. Homeowners need to be able to feel safe in their own homes, whether that is under a leasehold or commonhold scheme, and the ability to forcibly remove a person from their property requires very careful assessment of overarching natural justice principles.

11.21. CILEx recognises that a minimum threshold could be prescribed for by Government to establish the level of outstanding contributions which would need to have accrued before this action is taken. This shall ensure that enforcement actions remain proportionate as well as improving transparency and predictability for homeowners around the operation of this power. However, exceptions shall be warranted to take note of the more substantive issues present. Courts are well placed to manage these considerations and would do well to take account of relevant factors such as: a). the interests of vulnerable persons, b). whether alternative enforcement actions would provide a more proportionate response, c). the relationship between the unit owner and the CA to date, d). any exceptional circumstances which may have contributed to the default.

11.22. CILEx sees no substantive problems with the court appointing a receiver to sell the unit where an order for sale is made, nor with the proposed manner in which to distribute proceeds. It is right that the defaulting unit-owner should be entitled to any remaining funds borne out of the proceeds, and that the rights and interests of any tenancies granted out of the unit in question should remain unaffected.

12. Termination of a Commonhold

Q87 – 92.

12.1. CILEx recognises that a number of these questions are premised on the need to protect the rights and secured interests of lenders in the context of voluntary termination. As such, CILEx does not feel best placed to comment on the impact that these reforms might have on mortgage providers nor on the level of assurances they might provide.

[69] See footnote 15, (Law Commission Reinvigorating Commonhold Consultation), p.339-340, para 14.56.

12.2. However, with respect to the interests of minority unit-owners, CILEx reiterates the importance of natural justice principles and a careful assessment of competing interests before a forcible sale of property is permitted by law. Accordingly, CILEx endorses a high threshold of consent for the voluntary termination of a CA, coupled with intervention by the courts (where the decision is not unanimous) as an added layer of protection.

12.2.1. CILEx provisionally agrees with the non-exhaustive list of proposed factors to guide the exercise of the court's discretion on this matter.[70] However, it was suggested that the wording of the 3rd proposed factor ("the fact that an individual unit had been extensively adapted to take account of a disability") may be too narrow. Member feedback suggested that a dwelling may be important for wider reasons for someone with a disability which would not fall under the scope of this wording, e.g.: owing to its location.

12.2.1.1. Additional factors which may be appropriate include: 1). Whether any previous attempts had been made for voluntarily termination, and 2). Any impacts this might have on the division of an estate by a personal representative (where this is not already covered under the fifth factor proposed by the Law Commission).[71]

12.2.2. CILEx once again highlights parallel proposals for a new integrated housing court in making this determination.

12.3. CILEx welcomes the application of Sections, allowing for certain divisions of units to be severed from the whole commonhold during a voluntary termination. By making commonholds more flexible in this way, the rights of all involved can be better protected, and the application of voluntary termination can be safeguarded as proportionate in a greater variety of situations.

13. Impacts of Reforms

Q93 – 107.

13.1. Please refer back to the general principles outlined above.

[70] See footnote 15, (Law Commission Reinvigorating Commonhold Consultation), p.358-359, para 15.52.

[71] See footnote 15, (Law Commission Reinvigorating Commonhold Consultation), p.358, para 15.52(5).

For further details

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