Law Commission

Reinvigorating commonhold: the alternative to leasehold ownership. Response to Consultation paper

The British Property Federation

1. The BPF represents the commercial real estate sector. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help provides essential infrastructure and create great places where people can live, work and relax.

2. The UK's commercial real estate sector contributes about 5.4% of GDP, and directly employs 1 million people, or 6.8% of the labour force. It provides the nation's built environment and is diversifying from its core investment in the nation's offices, shops, leisure facilities and factories, to support the new economy through investments in logistics, healthcare, student accommodation, infrastructure, residential and increasingly through Build to Rent investment in new housing.

3. The Law Commission is conducting a major review of the current law on Commonhold, very aware that although the Commonhold Act was introduced in 2002, it has not made any material impact in the property market, with fewer than 20 commonholds being created since the commonhold legislation came into force. The consultation attempts to find out which aspects of the law of commonhold have so far impeded commonhold's success and 'to propose reforms to invigorate commonhold as a workable alternative to leasehold for both existing and new homes'. This is a major consultation, running to over 450 pages with over 100 specific questions. In this response, we attempt to answer these questions within the context of the BPF membership. This membership includes both landlords of large London estates, smaller private investors and developers who have differing concerns.

4. We understand fully that commonhold, or close variants to it have been almost universally adopted in other jurisdictions and an obvious question is 'why not here'? Whilst we wish to be helpful and constructive in our responses, our membership feel strongly that leasehold is not a broken tenure and it is flexible enough to deal well with most situations, however complex. We accept that theoretically a regime where there is no landlord and tenant relationship, as in commonhold, can be less adversarial as all parties are 'in it together,' but as we point out is some of our responses, we question whether disputes will evaporate to the degree that is suggested in the consultation, and where there is no freeholder as duty holder.

5. As we point out in our responses, we consider that there are likely to be difficulties in conversion from existing structures where there is less than unanimous consent. Retaining leases within a commonhold structure rather defeats the object of commonhold, whereas alternatively giving commonhold status to non-participating leaseholders, where the ability to recoup their investment by the third-party investors appears to be less than guaranteed, suggests that both options put forward in the consultation are flawed.

6. A great deal of thought has gone into the proposals for complex new structures with mixed tenures and developments over several phases. If such structures are to gain traction it is important that both developers and funders are comfortable with these proposals and can set up the necessary structures from the outset. There must still be some doubt whether the proposals go far enough to satisfy funders and provide the necessary flexibility for developers in larger and more complex schemes The

overwhelming reaction of our membership is that they wish to continue to have freedom of choice in the tenure they use on their schemes.

7. We welcome the chance to respond to this consultation and look forward to working with the Government on developing the policy proposals into real actions.

Q. 1. In order to protect freeholders, we 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?

We agree. Leasehold Reform legislation sets out criteria for the acquisition of a freeholder's interest and we do not consider it necessary or appropriate to widen this for the purposes of creating a commonhold, unless as suggested here, the freeholder consents.

Q. 2. We propose that it should be possible to convert to commonhold without the unanimous consent of leaseholders.

Do consultees agree?

We understand that the unanimous consent requirement under the existing legislation has created a serious barrier to conversion. We are concerned however that if the unanimity requirement is set aside it will leave non-participating leaseholders with their existing leases within the commonhold, or alternatively require them to take up commonhold title. As we comment in subsequent responses, this may involve extension to unlimited title, which may require third party funding, and the provision for securing repayment of such funding appears to be uncertain.

Q. 3. We propose that only leaseholders who are eligible to participate in a collective enfranchisement claim should take a commonhold unit and should be in a position to participate in a decision to convert to commonhold.

Do consultees agree?

We agree. It is right that only those leaseholders with a material financial stake in the building should be able to make this decision which will have legal and financial consequences.

Q.4. 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?

(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

by any other means.

We understand that this is not the preferred option put forward in this consultation but if nonconsenting leaseholders are to retain their leases under Option 1, then these provisions appear to be the best way of protecting their interests. The proposal however will maintain a hybrid management structure which could seriously complicate the smooth running of the service charge regime as the leaseholders will retain all of their existing Landlord and Tenant Act rights to challenge service charge expenditure, whereas the commonhold unit holders will operate under the provisions of the CCS.

Q.5. 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 non-consenting leaseholders' units 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

in some other way.

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

This is a complicated set of proposals. In essence we agree that an 80% majority is reasonable for quorum for Option 2 which requires those non-consenting owners to convert to commonhold. We are concerned however whether a charge as anticipated in (3) above is fully enforceable. This was discussed at some length at the recent Consultation Seminar held at UCL, where concern was expressed that such charges could not be enforced within the context of a company limited by guarantee. If third party funders of non-consenting owners converting to commonhold do not have a secure route to recoup their investment, then Option 2 will not work in practice.

Q.6. 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.

These options show the potential difficulty with changing shared cost recovery regimes in cases of non-unanimity. On balance we consider that option 2 is to be preferred as otherwise there could be a shortfall in recovery by the commonhold association.

Q.7. 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?

We agree. These provisions should provide the necessary protection in cases of less than unanimous consent. As we comment elsewhere, for Option 2 to work in practice it will be necessary for third party funders to be satisfied that their investment is secure.

Q.8. 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?

We agree.

Q.9. 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.

The options are very fully explored in the consultation. Mortgage lenders need to be convinced that a commonhold unit title offers enhanced or at least equivalent security over a leasehold title. It may initially be necessary for Government to underwrite or guarantee such title (as occurred in America when condominium was introduced, and mortgagees were suspicious of commonhold-equivalent units). Here as there it is anticipated that once the title is understood, mortgagees may well recognise commonhold as adequate security.

Q.10. 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.

We consider that Option 2, with the safeguards for non-consenting leaseholders that are set out in the consultation, is to be preferred. If commonhold is to work as a tenure going forward then maintaining leasehold title within this new structure is likely to cause difficulties, as differing statutory regimes apply in areas such as service charge consultation and recovery, amongst others.

In the light of the difficulties outlined in our previous responses to both Option 1 and Option 2, it has been suggested that an Option 3, that is retaining the status quo of requiring unanimous consent, might in the end be the preferred route for conversion.

Q.11. 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?

We agree. The enfranchisement process will allow the leaseholders to acquire freehold title to the building and they then can then decide whether to convert this to commonhold title.

Q.12. 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.

We are well aware of the time delays that can occur in a collective enfranchisement process and the procedure of acquiring the freehold and converting to commonhold is likely to be subject to similar or more delays. In any group enterprise there may be changes in ownership and intended participation over time. As is pointed out in the consultation, the participation agreement will often dictate individual's rights in the process. Substitution may be possible if an individual withdraws consent and withdrawal from the conversion should be a collective not an individual decision.

Q.13. 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?

We agree.

Q.14. 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?

We agree. As the consultation points out, this is the simplest solution in these circumstances.

Q.15. 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.

We consider that the conversion procedure should operate satisfactorily based on the provisional proposals. We do query however whether in practice there will be a major take up of conversion to commonhold where leaseholders have already acquired long leases and have effective freehold ownership through a freehold company. This has been referred to as 'commonhold lite'

Q.16.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:

(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?

We agree. One of the main failings of the existing commonhold legislation is the inability to segregate costs and recovery into separate columns so that services are only paid for by those who benefit from them. In more complex developments the need for multi column service charges is unavoidable and decision making on expenditure must equitably follow the liability for specific costs.

Q.17. 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?

The consultation correctly points out the difficulties that are likely to arise either with the flying commonhold model or the layered commonhold model. We agree that a commonhold with sections, as explained, is likely to prove the simplest and most workable structure for more complex developments.

Q.18. 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?

We agree. The options are fully explored in the consultation and we agree with the conclusion.

Q.19. 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.

The consultation argues, to us convincingly, that collateral delegation provides a framework for oversight of section committees by directors, which may help encourage good management by section committees.

Q.20. 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

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

On balance we favour option (2).

(Q.21) 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?

We agree to these proposals. The creation of sections within commonholds avoids the need for additional directors as there will only be one commonhold for an entire development. This being the case, there needs to be both flexibility in the ability to create new sections where appropriate, but also to provide protection to those affected by such new sections.

Q.22. 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?

We agree and reiterate our answer to Q. 21 above.

Q.23. We provisionally propose that it should be possible for sections to consist of a single unit.

Do consultees agree?

We agree. As is pointed out, this would cover a development where there is only one commercial unit but a number of residential units.

Q.24. 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?

We agree. These provisions should provide for flexibility but also protect those who may be adversely affected.

Q.25. We invite consultees' views as to whether statutory development rights should apply automatically so as to avoid the need to reserve express rights in the CCS.

We invite consultees' views as to whether such statutory rights should be drawn widely to include all matters which are likely to apply in commonhold developments, including (but not limited to) the right to add land, to make consequential variations to commonhold contributions and voting rights, and rights of access.

The options are explored in the consultation and we agree with the conclusion that statutory development rights should be drawn widely and would include matters which are likely to apply in all commonhold developments as set out.

Q.26. We provisionally propose that there should be no specific statutory provisions for the appointment of developers' directors. Instead, a developer's ability to appoint directors should depend on the number of units it retains.

Do consultees agree?

We provisionally propose that developers should be able to exercise all voting rights associated with the units of which they are the registered owners.

Do consultees agree?

We agree.

Q.27. Currently, the Commonhold Regulations place certain restrictions on a developer's exercise of development rights:

(1) the developer must not exercise rights in a way which would interfere unreasonably with unit owners' enjoyment of their units or their ability to exercise rights granted by the CCS;

(2) the developer may not remove land from the commonhold which forms part of a unit unless the owner of that unit provides written consent;

(3) any damage caused to the commonhold land by the developer should be remedied as soon as reasonably practicable; and

(4) The developer may not exercise development rights if the works for which the right was granted have been completed (excluding the developer's right to market units).

We invite consultees' views as to whether any further restrictions should be introduced on the use of development rights: in particular, whether a time limit should be imposed on the exercise of these rights (and if so, what this time limit should be).

We agree with the restrictions outlined. In (4) the development rights cannot be exercised when the works for which the right was granted have been finished. We agree that these rights should be time limited to end when the works to a particular phase of the development have been completed. There may however need to be easements or other mechanisms in place to allow for additional statutory services etc to be laid in completed sections of a multi-phase development. Funders will not lend on such developments if developers can be held to ransom on completed development phases when supplementary works or passage of services are required on or under completed development phases.

Q.28. We provisionally propose that "anti-avoidance" provisions should be introduced to ensure that the developer does not attempt to secure a greater degree of control by:

(1) taking powers of attorney from the purchasers (or seeking to control votes in any other way); or

(2) attempting to control how unit owners vote by inserting terms in the purchase contracts.

Do consultees agree?

We agree.

Q.29. We invite consultees' views as to what advantages there are (if any) of the transitional period in the registration procedure for new commonhold developments.

As we understand it, such a transitional period in the registration procedure allows for flexibility in the final scope and timing of a multi-phase development. This appears sensible with the vagaries of planning, funding and the state of the market.

Q.30. 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.

It is understated that directors must comply with company law, but this should be subject to the lowest level requirements. It is crucial that very effort should be made to avoid a commonhold association being struck off for non-compliance.

Q.31. We invite consultees' views as to whether there are particular difficulties in applying CVAs to commonhold associations.

We invite consultees' views as to whether the CVA procedure needs any adaptations to make it more relevant and effective in dealing with commonhold associations in financial difficulties.

A CVA, as explained in the consultation could well be an appropriate mechanism in cases of likely insolvency, as it should give more time and opportunity to resolve financial difficulties without a commonhold becoming irretrievably insolvent.

Q.32. We provisionally propose that it should not be possible for creditors directly to petition for a commonhold association to be wound-up, and a liquidator appointed. Instead, a petition could lead to the court appointing a commonhold administrator, who would carry out the necessary duties.

Do consultees agree?

We provisionally propose that a commonhold administrator should then be able to petition for the association to be wound-up only if the commonhold association is irretrievably insolvent.

Do consultees agree?

We agree and echo our response to Q.31 above.

Q.33. We provisionally propose that the law should be clarified to ensure that there is a presumption that, on the insolvency of a commonhold association, a successor association should usually be appointed.

Do consultees agree?

We invite consultees' views as to whether there are circumstances in which it would not be appropriate for the court to appoint a successor association and, if so, what these circumstances are.

We provisionally propose that the court should have discretion as to whether to impose conditions for a successor association to be appointed.

Do consultees agree?

We invite consultees' views as to:

(1) what conditions might be imposed; and

(2) if the court's discretion is to be structured, what factors the court should take into account.

We have no specific proposals to put forward but agree that every attempt should be made or allowed for a successor association to be appointed.

Q.34. We provisionally propose that, if a liquidator is appointed to wind up a commonhold association, he or she should not be able to demand further contributions from the unit owners to reduce the level of indebtedness of the association.

Do consultees agree?

We provisionally propose that, if a liquidator is appointed to wind up a commonhold association, he or she should not be able to demand further contributions from the unit owners to make up for the shortfall in contributions from members who are bankrupt or from whom it is impossible to recover their contributions.

Do consultees agree?

We agree.

The limited liability concept is central to these proposals.

Q.35. We provisionally propose that it should be possible for the CCS to impose restrictions on the short-term letting of units.

Do consultees agree?

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.

One of the main purposes of commonhold is to give democratic rights to the management of a shared building. If the CCS is drawn up to effectively prevent Airbnb style subletting, then this a democratic choice. It should not however be used to prevent social housing within a development as operated by registered providers.

In the spirit of democratic choice, if due to changing ownership within the commonhold and a greater understanding of the 'sharing economy' the local rules should allow for a change of policy on this subject if it is voted for.

Q.36. 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.

We agree provided a reasonable charge can be made for assembling and providing information packs for sale.

Q.37. 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.

We do not consider that further restrictions should be put in place such as those to limit permitted use or ownership of a unit. The protection is that a majority would be required to effect any changes.

Q.38. 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.

There is considerable discussion in the consultation on this issue. Whereas in a lease the relationships and 'rules' are set out and are essentially immutable, under commonhold it is possible by democratic vote to change some of the local rules. The threshold on each type of issue should be catered for in the CCS.

Q.39. 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.

We agree. The provision of this information is important so that all unit holders are aware of the standard provisions.

Q.40. 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?

We agree.

Q.41. 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).

We have no specific terms to add.

Q.42. 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?

We agree.

Q.43. 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?

We consider that the likely difficulty in appointing or maintaining directors may well be the most challenging issue in these proposals. We understand from our consultation with our membership, particularly with the residential management committee, that the issue of personal liability of directors (uninsurable in the case of criminal Health and Safety issues) makes such an appointment unattractive to many.

We understand that Company Law requires the appointment of directors and without such the company cannot continue, so the appointment and maintenance of directors is crucial to the workability of commonhold, but we feel it necessary to express our concern as indicated above.

Q.44. 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.

We agree that the Tribunal is best placed to deal with these difficult situations.

Q.45. 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).

We have no specific knowledge of these problems.

Q.46. We provisionally propose that legislation should deem that the commonhold association has an insurable interest in the parts of the building which are owned by the unit owners.

Do consultees agree?

We provisionally propose that legislation should require the commonhold association to reinstate or rebuild (as appropriate) the whole of a horizontally-divided building – including the parts owned by the unit owners – in order to satisfy the indemnity principle within insurance law.

Do consultees agree?

We invite consultees' views as to whether any other legal difficulties would arise in arranging buildings insurance for commonholds which have not been addressed by these proposals.

We agree with these proposals.

Q.47. We provisionally propose that the CCS should be amended so as to require that either a copy of the buildings policy and schedule, or sufficient details of it, should be supplied to all unit owners on or before they acquire a unit, and whenever the terms of the policy change.

Do consultees agree?

We provisionally propose that the commonhold association should confirm to unit owners and their mortgage lenders that the insurance is in existence on an annual basis, and when reasonably required at other times.

Do consultees agree?

We agree as amongst other things this information will be required by mortgagees lending on a commonhold unit.

Q.48. We invite consultees' views as to whether public liability insurance (that is, insurance against liability as an occupier and also as a property owner) is likely to be generally available for commonhold associations.

If it is generally available, we provisionally propose that details of minimum cover, permissible exclusions and excesses, and so on, should be prescribed in regulations to be made by the Secretary of State.

Do consultees agree?

We agree as this will be required as a minimum comfort for the protection of the directors.

Q.49. We provisionally propose that the commonhold community statement should contain an express power for the commonhold association to take out directors' and officers' insurance.

Do consultees agree?

We agree.

Q.50. 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?

We agree in principle to these provisions. The distinction between repair and improvement in leasehold service charges has often led to litigation and prevented a sensible level of upgrading and modernisation of blocks, such as installing double glazing and other thermal insulation measures. These provisions seek to avoid such arguments going forward and are to be welcomed.

Q.51. 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:

whether the distinction should be between those that are horizontally-divided, and those that are vertically-divided; and

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.

We consider that the right of entry is a necessary management requirement when other units are or are likely to be damaged by incidences within another unit. Provided such rights are used in the course of proper management then there should not be a difficulty in framing these rights according to particular buildings,

Q.52. 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:

"minor alterations to the common parts" should be defined as we have outlined at paragraph 9.137 above; or

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.

We agree.

Q.53. 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.

Long term contracts should provide value for money as well as continuity. We are aware of cases where such contracts have become uncompetitive over time with annual cost increment and in such cases, there should be provision for termination or early retendering.

Q.54. 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?

We agree.

Q.55. 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.

We are aware of incidences of items of electronic equipment such as entry phones and electronic cabling being leased on long term contracts by developers rather than forming part of the development cost. This is clearly inappropriate as it should properly form part of their build cost expenditure rather than falling on the occupiers going forward.

Q.56. 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.

We agree these proposals which appear to be sensible and democratic. In our experience cash flow is the issue that most concerns those who are responsible for organising and for the payment of shared costs and delay or prevarication in settling an agreed budget should be avoided by the implementation of these sensible provisions.

Q.57. 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?

We agree to all the above proposals. Whilst there should be the ability to implement 'enhanced services' in some cases, there must likewise be protection from overambitious proposals without proper consultation and support.

It is a common theme in these proposals on expenditure that a challenge can be made before expenditure is incurred but not after. This is intended to prevent protracted contention on expenditure and the withholding of contributions which has been all too often been the case in leasehold service charge regimes.

Q.58. 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.

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?

We consider these proposals sensible. Reserve funds are an important element in the smooth running of shared costs and solve many cash flow issues if properly constituted. There should also be the ability to "borrow" from such funds in extremis if there is no other cash flow available to settle accounts.

Q.59. 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.

Differential or multi column service charge schedules are commonplace in complex leasehold arrangements and provided they are equitable this should cause no difficulty within commonholds.

Q.60. 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:

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

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.

We would need to be persuaded that floor area apportionment was not the fairest method of apportionment of cost.

Q.61. 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.

[This is more of a legal issue but from a management perspective it appears reasonable that an incoming unit holder is protected from unquantified costs he had not been appraised of]

Q.62. 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.

[Again, this is more of a legal issue, but one must assume that mortgagees will be disincentivised to lend on commonholds if the Tribunal has powers to override their lending protocols]

Q.63. 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:

The unit owners unanimously consent to the charge: or

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?

We agree.

Q.64. 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?

We agree.

Q.65. 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?

We agree.

Q.66. 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 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?

On the basis that commonholds are likely to include shared ownership leaseholders, these provisions appear to be sensible in giving those occupiers voting rights and the ability to challenge expenditure but these voting rights to be limited to reflect their status as 'part owners'. When they have staircased to 100% it is equally right that they should become members of the commonhold association.

Q.67. 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?

We agree.

Q.68. 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.

We have no knowledge and experience of these and can make no relevant comment.

Q.69. Aside from shared ownership leases, community land trusts and housing co-operatives, 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?

See our answer to Q.68

Q.70. 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?

See our answer to Q.68

Q.71. 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 to challenge service charge costs or to be consulted on works and contracts exceeding a certain amount.

Do consultees agree?

We agree.

Q.72. 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.

We have no particular knowledge of this type of tenure, but we reiterate our answer to Q.71 that part owners should not necessarily have the same rights as unit owners in a commonhold.

Q.73. 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?

We agree.

Q.74. 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?

We agree.

Q.75. 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?

We agree.

Q.76. 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?

We agree.

Q.77. We invite consultees' views as to whether the current commonhold dispute resolution procedure should be transferred to a pre-action protocol.

We support this proposal.

Q.78. 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?

We agree. If the Tribunal is to be used in the various ways proposed in this consultation it will be necessary for it to be staffed up appropriately to deal with such matters.

Q.79. 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.

We agree.

Q.80. 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:

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;

Where the minority are outvoted on a decision to vary the local rules of the CCS;

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;

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.

We reiterate our answer to Q.78

Q.81. 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:

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.

Whether the decision complained of needs to have a particular impact on the unit owner (or owners) and if so, what degree of impact.

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).

We consider that the factors set out above should be taken into account.

Q.82. 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.

We agree.

Q.83. 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?

A range of powers provided to the equivalent of commonhold associations in other jurisdictions is explored in the consultation. These range from fines, to exclusion from recreational facilities, to injunctions. It is conceded that powers available under general law may not be sufficient but the power to force the sale of a unit for a 'gross breach' is considered too draconian.

Q.84. 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?

We agree

Q.85. 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?

We understand that this provision is probably necessary for an association to enforce recovery of costs. It remains to be seen whether mortgagees are enthusiastic in becoming second chargees in such circumstances. The consultation suggests that mortgagees will see the sense in this proposal, as it could help prevent insolvency of an association and ought to allow the building to be kept in good repair and condition, which

shortage of funds due to non-payment by unit holders might prevent. Unless mortgagees are happy to provide funding to unit holders however, the popularity of commonhold as a tenure must be in some doubt.

Q.86. We provisionally propose that, before taking action to enforce a charge over a commonhold unit, the commonhold association should be required to follow a pre-action 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.

The receiver should be paid his or her costs of arranging the sale of the property.

The commonhold association should be repaid any outstanding amounts of commonhold contributions, plus any interest and costs awarded by the court.

Any other party who has an interest secured against the unit, such as a mortgage lender, should be repaid.

Any remaining amount should then be returned to the defaulting unit owner.

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?

We agree these proposals.

Q.87. We provisionally propose that voluntary termination of a commonhold should be possible with either:

(1) unanimous support; or

(2) the support of 80% of the available votes plus the approval of the court.

Do consultees agree?

We provisionally propose that on an application for voluntary termination the court should have discretion to decide whether to allow the voluntary termination to take place, as well as the terms on which it may do so.

Do consultees agree?

If the court has discretion as to whether to allow voluntary termination, we invite consultees' views as to the following issues:

(1 whether it would be useful to include factors to guide the court's discretion;

(2) whether the factors mentioned in paragraph 15.52 should be taken into account;

(3) whether the court should be directed to consider the amount of support there is for voluntary termination over and above the 80% required; and

(4) whether others should also be included.

We invite consultees' views as to whether increasing the role of the court would sufficiently address the issue of the final terms of the termination statement not being acceptable to those who supported the termination resolution.

We provisionally propose that an application for voluntary termination should be heard by the court (rather than by the First-tier Tribunal (Property Chamber), or in Wales the Residential Property Tribunal Wales).

Do consultees agree?

We agree these proposals.

Q.88. We provisionally propose that where a commonhold is divided into sections, any vote on voluntary termination would need to be taken in sections, and whether it was unanimous or received at least 80% support would have to be determined by section.

Do consultees agree?

Where a commonhold is not divided into sections, we provisionally propose that it should be possible for part of the commonhold to be reconstituted following voluntary termination.

Do consultees agree?

We provisionally propose that reconstitution should require 100% support of the unit owners in the part to be reconstituted, or at least 80% support and an application to the court.

Do consultees agree?

We agree.

Q.89. We provisionally propose that if any statute provides that a landlord should be entitled to recover possession of a property if he or she can prove an intention to demolish or reconstruct the building, such a requirement should also be satisfied if it can be proved that the commonhold association has that intention.

Do consultees agree?

We invite consultees' views as to what further provision, if any, should be made to address the position of tenants on voluntary termination of the commonhold

We agree. We assume that tenants would have a right to compensation for any loss.

Q.90. We provisionally propose that it should be clarified that mortgage lenders and other secured lenders will retain their secured interest in the commonhold units until the commonhold in its entirety is sold.

Do consultees agree?

We provisionally propose that mortgage lenders and other secured lenders should automatically have legal standing to make applications to the court during the termination process with a view to protecting their interests.

Do consultees agree?

We provisionally propose that it should be made clear that, if a unit is subject to negative equity, any shortfall should be met personally by the owner of the unit and should not be covered by other unit owners.

Do consultees agree?

We invite consultees' views as to any other ways in which the interests of mortgage lenders and other secured lenders may require protection on the voluntary termination of a commonhold.

If commonhold as a tenure is to be attractive to mortgage lenders it will be necessary to protect their interests on insolvency of a commonhold. It is also necessary to protect unit holders against the insolvency of other unit holders.

Q.91. We provisionally propose that the CCS should not be required to specify the share of the proceeds of termination that each unit owner is to receive on termination.

Do consultees agree?

We provisionally propose that it should be possible for the unit owners to specify the share of the proceeds of termination that each unit owner is to receive on termination (or some method of ascertaining it) in the CCS.

Do consultees agree?

We provisionally propose that the power to decide an application to disapply a provision in the CCS which determines the distribution of proceeds of sale on termination should lie with the Tribunal.

Do consultees agree?

We invite consultees' views as to whether:

guidance should be provided to the court or Tribunal as to how it should exercise its discretion; and

if guidance should be provided, what factors the court or Tribunal should take into account.

We invite consultees' views as to whether:

the existing rules of the Insolvency Court would be adequate to deal with valuation issues which arise on the voluntary termination of a commonhold, or need to be supplemented by Commonhold Insolvency Rules;

all issues involving the valuation of commonhold units on termination should be referred to the Tribunal (and, if so, whether that would cause any unnecessary delays);

if valuation issues are referred to the Tribunal, the Tribunal should be able to appoint a single valuer.

We provisionally propose that, if a commonhold is substantially destroyed, but remains solvent, for the purposes of the termination statement, the units should be valued on the basis of the best estimate that can be made of their pre-damage value.

Do consultees agree?

We invite consultees' views as to any other issues that might occur in the valuation of units if all or some of them have been partly or entirely destroyed. We also invite any suggested solutions.

This is a complex series of questions on difficult subject. It is a legal issue, but it may have to invoke the Insolvency Court in such circumstances if the issues are beyond the experience of the Tribunal.

Q.92. We provisionally propose that if the process of voluntary termination should begin, but it should subsequently turn out that the commonhold is in fact insolvent, the same protections should be given to the assets of the individual unit owners as would have applied if the process had begun as an involuntary insolvency.

Do consultees agree?

We invite consultees' views as to whether the value of the individual units should be preserved for the unit owners if the commonhold is substantially destroyed; and, if so, how this can be achieved.

We agree. Every effort should be made to reconstitute the commonhold to preserve the value of the unit owner's investment. The threat of frozen or unsaleable units should act as a spur to find resolution in such cases.

Q.93. We invite consultees' views as to whether, and how, any aspects of our provisional proposals to reform the law of commonhold will affect the position of existing owners of commonhold units, either positively or negatively.

As is suggested the number of existing commonholds is so small, any effect of the new proposals will be minimal, but insofar as the new proposals make the management tasks easier such as enforcement of the payment of commonhold contributions and the necessity of sinking funds, then the effect should be positive.

Q.94. What advantages do you think commonhold could offer over leasehold?

As is extensively pointed out in the consultation, the revised commonhold proposals should make the ownership and management of multi-occupied properties simpler and less contentious and the conveyancing of units should be quicker and cheaper. Leasehold has served the English ownership system reasonably well, but it is no coincidence that almost all of the rest of the world operates a commonhold based ownership system, and there appears to be little animus to convert or reconvert to a leasehold system.

Q.95. We ask consultees to provide us with information about the time spent in reading through and considering the terms of leases of residential flats:

when acting for a prospective purchaser;

when acting for a prospective purchaser and mortgage lender;

when acting for a mortgage lender on a re-mortgage;

when some dispute arises within a leasehold block of flats as to responsibility for repairs and maintenance, calculation of the service charge, and similar disputes.

In each case we also invite consultees to give us some idea of the cost that would thereby be incurred to the client.

We further invite their views as to whether time is likely to be saved in reading through and considering the terms of the parts of the CCS which may be varied.

We invite consultees to share with us their experience of commonhold-type arrangements in other countries. Is there scope for savings of time to be made? If so, what would be the estimated time saved on a typical transaction?

We are not in a position to supply specific data, but we must assume that standardised documentation will make conveyancing quicker and cheaper as the time involvement by conveyancers should be materially reduced. Our membership has commented that an alternative would be to standardise leasehold documentation, but this seems unlikely unless some form of statutory provision is introduced.

Q.96. We ask consultees to provide us with information about the prevalence of, and costs incurred in, disputes caused by the terms of one or more residential leases being inconsistent with the terms of another lease (or other leases) within a building or development. We further invite their views as to whether our provisional proposals for commonhold will reduce the scope for costs to be incurred in interpreting a commonhold community statement.

[As above]

Q.97. We ask consultees to provide us with information about the sort of difficulties that can arise owing to the difficulty in varying and updating the terms of leases:

if the leases are varied as a conveyancing transaction which does not give rise to a dispute; and

if the leases are varied as a result of an application to the Tribunal (whether the application was made because it was contested, or because it was the most convenient way of implementing the variation).

If you have figures – whether they relate to the costs incurred, or the amount of time spent – then please let us have them.

We further invite consultees' views as to whether our proposals regarding the amendment of local rules by resolution of the commonhold association will reduce the costs which are incurred, when compared with the costs incurred under (1) or (2) above.

[As above]

Q.98. We invite consultees to provide us with information about costs generated by service charge disputes. We further invite their views as to whether, and by how much, our provisional proposals for commonhold will reduce the incidence of disputes and the costs that will be incurred in equivalent disputes over contributions to shared costs.

There is a virtually open-ended ability of lessees to query or prevaricate on payment of service charge costs, which can lead to a tribunal hearing with detailed expert witness statements. The costs of such can outweigh the principle sum at issue. It is to be hoped that the commonhold proposals will sidestep such a process and if so, they are be welcomed.

Q.99. We invite consultees to provide us with information about costs generated when forfeiture proceedings need to be used to enforce payment of service charges. We further invite their views as to whether our provisional proposals for commonhold will reduce the costs that will be incurred if a commonhold association needs to seek an order for sale.

In our experience the threat of forfeiture will cause mortgagees to pay up which is generally a quick and easy solution. Under a commonhold regime this option does not exist and seeking an order for sale is likely to be a more complicated procedure. It remains to be seen whether mortgagees will react to such a threat in the same timely and low-cost manner as under the current regime. Actual forfeiture is rare, but the threat of such acts as a spur to payment.

Q.100. We invite consultees' views as to:

whether cases before tribunals are likely to prove more or less expensive than similar cases before courts; and

whether (apart from service charge disputes, which we have already addressed in Consultation Question 98) there appears to be more or less scope for disputes within commonholds which result in litigation, when compared with leasehold developments.

Cases before tribunals should be cheaper and quicker than before courts and it is to be hoped that there is less scope litigation within commonholds than with leasehold developments.

Q.101. We are provisionally proposing several new grounds upon which it would be possible for someone to make an application to the Tribunal. We invite consultees' views as to:

what they consider that the likely impact of these will be on the number of applications made to the Tribunals; and

whether any particular proposals are likely to result in a large number of new applications being made.

There seems to be considerable scope for dissatisfied minorities to approach the tribunal in the commonhold regime. This may well lead to an increase in applications. We assume that if this is the case, tribunals will soon work out protocols to deal with most of these applications and thus deal with the majority of them in a timely fashion.

Q.102. We invite the views of consultees as to how any other aspects of our provisional proposals for reform of commonhold will affect the position of future owners of commonhold units, either positively or negatively.

We understand this to refer to costs and benefits of commonhold generally. If the proposed democratic regime operates successfully, the parties are aligned, and the directors are representative of the unit holders as a whole, one can foresee positive benefits and, in all likelihood, reduced costs against a comparable leasehold structure. The ownership documentation is likely to be simpler, more standardised and easier to understand and interpret. The costs of conveyancing should likewise be reduced due to this standardisation.

However, one can similarly foresee situations where directors are hard to appoint or are not aligned with the membership and where there is no freeholder as duty holder to act in last resort. In such cases the advantages of commonhold may be considerably more marginal.

Q.103. We ask consultees to provide us with any information that they may have of:

examples of planning agreements which are practicable under leasehold, but which would not appear to be feasible under our reinvigorated model of commonhold; and

services within leasehold developments which are being provided at the residents' expense, but which, if the development had been set up on a commonhold basis, would have been provided, if at all, at public expense.

We have no specific information, but we note the comments made by Berkeley Group in response to the Call for Evidence and which are set out in paras 16.36 and 16.37 of the Consultation.

Q.104. We ask consultees to provide us with any evidence they have of management difficulties which may arise where a leaseholder-controlled company is the landlord of (or responsible for the management of) commercial units; and whether this has affected their rental or capital value.

It is obviously extremely undesirable if predominantly commercial investments are managed by residential managing agents appointed by a residentially controlled company. Inevitably managing agents will follow the instructions of their instructing client, which if this is residential committee will inevitably be slanted towards their aspirations, rather than the commercial parts. It is quite invidious to expect managing agents to act as arbitrators between sections, as they owe their professional duty to their instructing client in such circumstances.

Q.105. Which of the following statements best reflects your views on the provisional proposals in this Consultation Paper?

(1) If these proposals are adopted, then developers will be willing to use commonhold for a substantial number of developments.

(2) Even if these proposals are adopted, developers will not be willing to use commonhold unless Government introduces financial incentives for them to do so, either directly by offering financial incentives for the developers, or indirectly, by offering incentives for purchasers of commonhold units.

(3) Even if these proposals are adopted, and financial incentives are given, developers will not use commonhold for developments unless they are prohibited from selling flats on a leasehold basis and they are thus forced to use commonhold.

Despite the attractions of commonhold which are well set out in this consultation, we reluctantly conclude that (2) best reflects our views. It may well be that once such incentives have shown the benefits of this new tenure in the market then it will be possible to row back on such incentives, but we do not think that commonhold will be the preferred method of marketing developments without initial incentives.

Q.106. We invite consultees' views as to:

what issues prevent the uptake of commonhold; and

what could or should be done to promote the adoption of commonhold.

We invite consultees' views as to the extent to which the suggestions for the invigoration of commonhold set out in paragraph 16.47 above, and any other suggestions that they may make, are likely to result in commonhold being used instead of leasehold.

As we have suggested throughout this response, the current leasehold system is well embedded and is generally fit for purpose. The existing commonhold legislation has failed to find significant support although the current proposals go a long way to mitigate some of the existing barriers. We believe that the most likely use of commonhold will be with new developments but there is a need to convince developers and mortgagees of the benefits of this tenure. If, as is suggested in this consultation, these benefits are material as to cost of transfer, democratic input in the management of buildings and the reduced likelihood of litigation because the tenure is designed to be cooperative rather than adversarial, then there seems every reason that once commonholds are operating under the new system, then new leasehold developments may fall away as

consumer choice will dictate the preferred tenure. This situation is still some considerable distance in the future. Our membership feels very strongly that prescription requiring the use of commonhold is not the solution.

Q.107. We invite consultees' views as to whether a reformed commonhold regime should treat particular issues differently in England and in Wales. Consultees are welcome to share their views as to this point here, or in response to questions which we ask throughout the Consultation Paper about particular issues.

We have no comment to make on this.