



**Law
Commission**
Reforming the law

REINVIGORATING COMMONHOLD: THE ALTERNATIVE TO LEASEHOLD OWNERSHIP

Summary of Consultation Paper

THIS CONSULTATION

What are we doing?	Conducting a public consultation on our provisional proposals to reform the law of commonhold.
What is it about?	“Commonhold” – an alternative form of property ownership, which allows homeowners to own the freehold of their flats.
Why are we consulting?	We are seeking views on our provisional proposals. Your views will be carefully considered when we decide on our final recommendations.
Who do we want to hear from?	We are keen to receive comments from as many stakeholders – including homeowners and members of the public – as possible, whether they agree or disagree with our provisional proposals.
What is the deadline?	The consultation closes on 10 March 2019.
What happens next?	After reviewing all responses, we will decide on our final recommendations for law reform, which we will publish in a report.

THIS SUMMARY

This summary does not summarise all of the provisional proposals in our detailed Consultation Paper. Instead, it explains what the project is about, provides some context, and then highlights key issues discussed in the Consultation Paper which might be of interest to different people. This summary only provides an overview of those key issues.

Before responding, you are encouraged to read our full Consultation Paper, or the relevant parts of it.

References in this summary are to the chapters of the Consultation Paper.

RESPONDING TO OUR CONSULTATION

The Consultation Paper is available on our website at <https://www.lawcom.gov.uk/project/commonhold/>.

The deadline for responses is 10 March 2019.

Comments may be sent to us using the online response form, available on our website. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:

1. by email to propertyandtrust@lawcommission.gov.uk; or
2. by post to Commonhold Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.)

For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality of consultees' responses, please see page ii of the Consultation Paper.



SUMMARY

INTRODUCTION

Commonhold was introduced in 2002 as a new way to own property. Commonhold enables a person to own the freehold of a “unit” (such as a flat) within a building or development and also become a member of a company which owns and manages the shared areas.

However, fewer than 20 commonholds have been created since the commonhold legislation came into force. Our project attempts to find out which aspects of the law of commonhold have so far impeded commonhold’s success and our Terms of Reference require us to “propose reforms to reinvigorate commonhold as a workable alternative to leasehold, for both existing and new homes”. Separately, Government will be considering wider measures to reinvigorate commonhold, such as raising consumer awareness and whether commonhold should be incentivised or compelled.

Currently, flats are almost universally sold on a leasehold basis, as difficulties arise where flats are sold as freehold. However, leasehold ownership presents a number of problems. In particular, leasehold ownership is time-limited and leaseholders have less control over their properties. The Law Commission is currently carrying out two additional projects which will improve leaseholders’ rights. Whilst these projects will improve the position in leasehold, they cannot remove the inherent problems with leasehold ownership.

Our commonhold project is different. Commonhold provides a structure which enables the freehold ownership of flats and, as such, offers an alternative way of owning property which avoids the shortcomings of leasehold ownership.

Bolstered by calls for leasehold reform from the public and media, commonhold has been brought back on to the political agenda.

“We also want to look at ways to reinvigorate commonhold. ... This will help ensure that the market puts consumers’ needs ahead of those of developers or investors. We will also look at what more we can and should do to support commonhold to get off the ground working across the sector, including with mortgage lenders.”

UK Government, 21 December 2017.

Our Consultation Paper sets out provisional proposals to reform the law of commonhold to make it a workable alternative to leasehold.

How is commonhold different from leasehold?



		
Ownership doesn't run out	You don't have a landlord	Owners are in control

FREEHOLD AND LEASEHOLD OWNERSHIP

In England and Wales, property may be owned on a freehold or a leasehold basis.

Freehold:

- ownership that lasts forever
- generally gives fairly extensive control

Leasehold:

- time-limited ownership (for example, a 99-year lease)
- control of the property is shared with, and limited by, the freehold owner (the landlord)



WHY ARE FLATS SOLD ON A LEASEHOLD BASIS?

Flats are sold on a leasehold basis for practical reasons.

Freehold ownership of flats creates a number of problems. In particular, “positive obligations” to pay money or perform an action in relation to a property (such as to repair a wall or a roof, or to pay towards the costs of repair) cannot easily be passed to future owners of freehold property. Under leasehold ownership, by contrast, positive obligations can be passed to future owners.

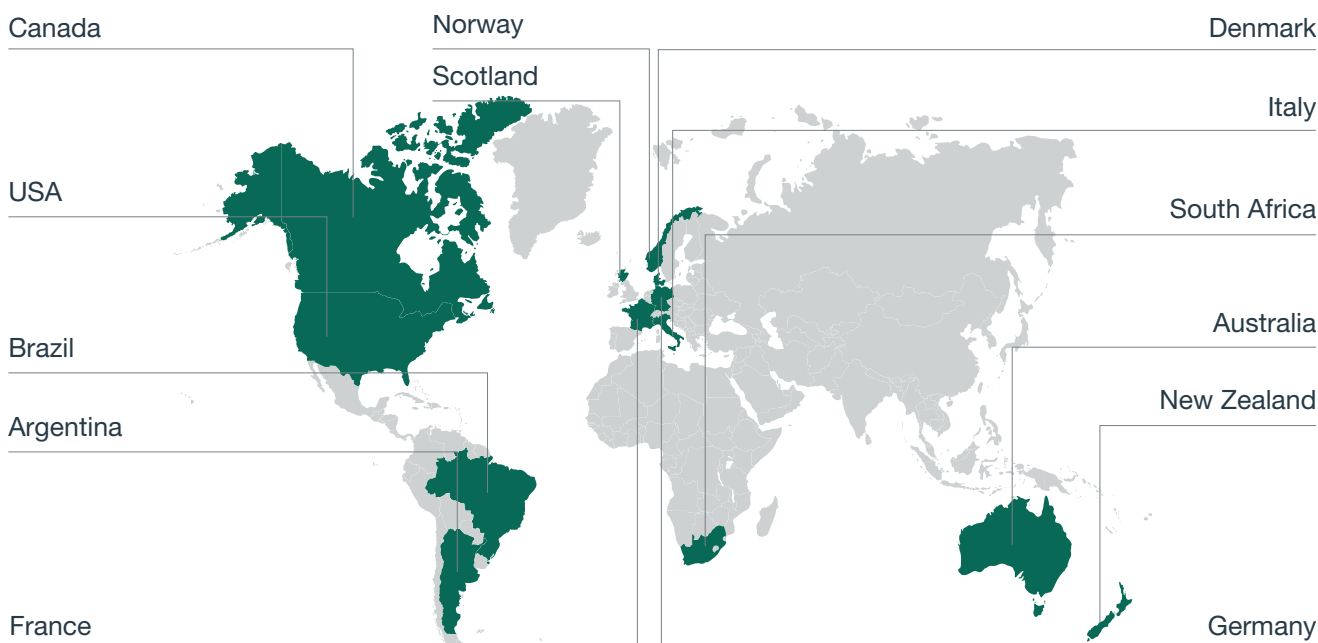
The ability to enforce positive obligations is especially important in blocks of flats, because the flats are structurally interdependent. Flats are therefore sold on a leasehold basis which allows repairing (as well as other) positive obligations to be transferred to future owners.

“Leasehold does not provide outright ownership. The experience of leasehold owners has been summed up as being that of “owners yet tenants”.”

Para 1.17

Flats are almost always sold on a leasehold basis. Houses are sold on a freehold or leasehold basis.

Some other countries with equivalent regimes



In most other countries, structures have been put in place to enable the freehold ownership of flats: for instance, “strata title” in Australia and “condominium” in America. Commonhold offers a similar structure to strata and condominium for England and Wales.

PROBLEMS WITH LEASEHOLD OWNERSHIP

Wasting asset

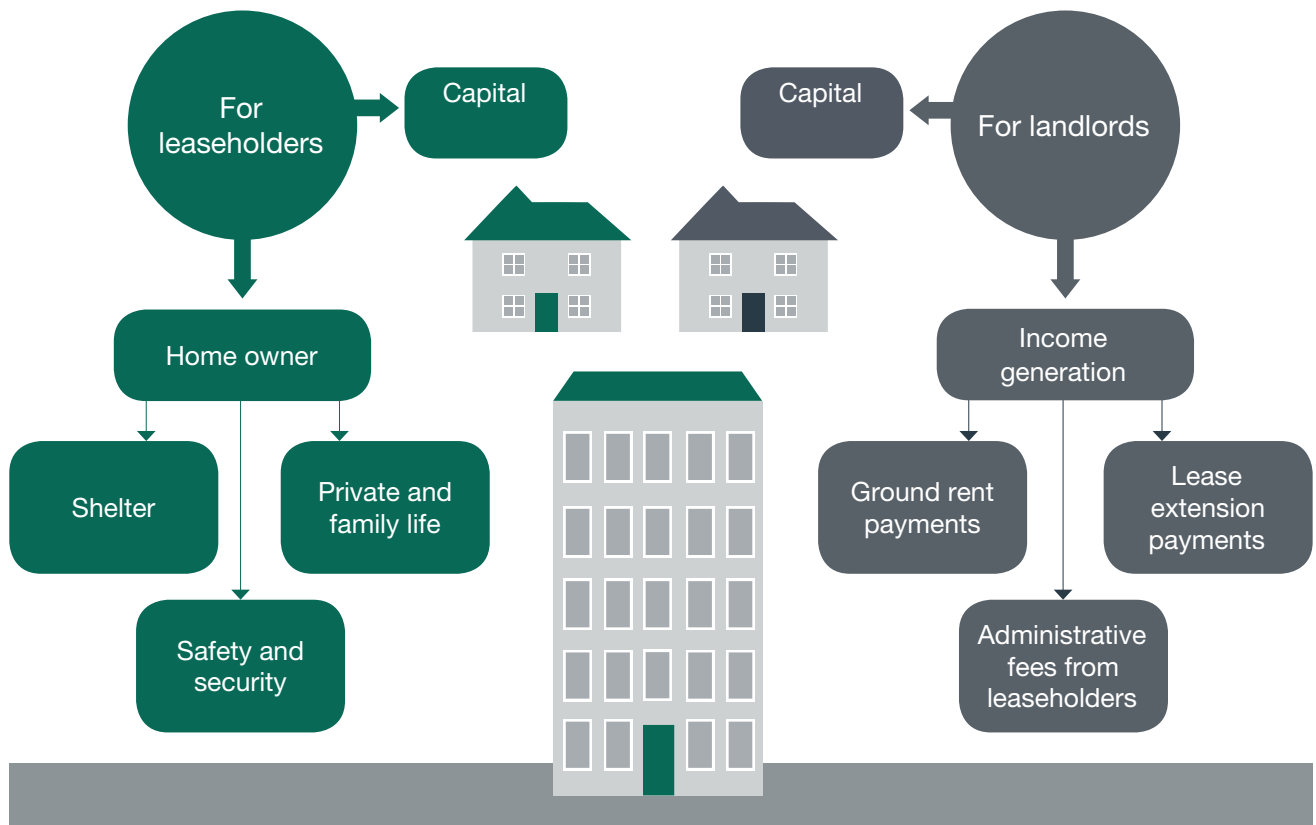
We often refer to “buying” or “owning” a house or a flat. But when we buy on a leasehold basis, we are in fact buying the property for a certain number of years, after which time the property goes back to the landlord. A leasehold interest is therefore often referred to as a “wasting asset”: whilst a long lease may increase in value in line with property prices, its value also tends to reduce over time as its length reduces. There comes a point when the remaining length of the lease makes it unsaleable, because purchasers cannot obtain a mortgage (since lenders will not provide a mortgage for the purchase of a short lease). It is therefore necessary to pay the landlord to extend the lease or buy the freehold. While legislation gives many leaseholders a statutory right to extend a lease or buy the freehold through enfranchisement (which we discuss further below), it can be expensive to do so.

Lack of control

Leasehold owners often do not have the same control over their homes as freehold owners. For example, they may not be able to make alterations to their homes without obtaining the permission of their landlord. The balance of power between leasehold owners and their landlord is governed by the terms of the lease and by legislation.



The purpose of a leasehold home



Differing interests

A landlord may have different interests from the leaseholders, which can foster an attitude of “them and us”.

Summary

The experience of leasehold owners has been summed up as being that of “owners yet tenants”. On the one hand, leaseholders are homeowners, with some of the benefits that ownership brings (such as a financial stake in the home). On the other hand, they have a landlord who maintains some control over their use of their home, and who will ultimately take back the home when the lease expires.

Many purchasers do not understand what leasehold ownership involves. Further, even when they do, there is often no choice over the form of ownership. As explained above, flats are almost always sold on a leasehold basis.

LAW COMMISSION PROJECTS ON RESIDENTIAL LEASEHOLD REFORM

We are currently working on two projects which aim to improve leasehold: reforming the right to manage, and reforming leasehold enfranchisement. These projects will improve the options available to leaseholders to gain more control over, and security in, their properties.

Terms of Reference for Law Commission projects on leasehold and commonhold reform.

Policy objectives identified by Government

We have been asked to recommend reforms:

- “to promote transparency and fairness in the residential leasehold sector”
- “to provide a better deal for leaseholders as consumers”

The right to manage

If a sufficient number of leaseholders wish to take over the management of their building without buying the freehold, they may be able to exercise the right to manage. The right to manage gives leaseholders the right to acquire the management functions in respect of their building, being functions relating to services, repairs, maintenance, improvements, insurance and management.

Our project aims to improve access to this right and make the procedure simpler, quicker and more flexible.

A full consultation on reforms to the right to manage will be launched in early 2019.

Further details are available on our website, at www.lawcom.gov.uk

Leasehold enfranchisement

Enfranchisement is the statutory right of:

- leaseholders of houses to buy their freehold or obtain a lease extension;
- leaseholders of flats to obtain a lease extension of their flat; and
- leaseholders of flats to join together with their neighbours to buy the freehold of their block (a process called “collective enfranchisement”).

A leaseholder may seek a lease extension if the term of his or her lease has reduced to a length which makes the flat difficult to sell. Leaseholders may decide to exercise the right to buy the freehold if they want to take over the management of their building *and* own the freehold.

Our leasehold enfranchisement project is aimed at simplifying the enfranchisement legislation so that the exercise of enfranchisement rights is made easier, quicker and cheaper.

Our consultation on enfranchisement reform was launched in September 2018 and closes on 7 January 2019.

Further details are available on our website, at www.lawcom.gov.uk.



Separately, Government is undertaking work on other aspects of leasehold reform. Throughout 2017 and 2018, the UK and Welsh Governments announced various reforms, including proposals to ban the sale of houses on a leasehold basis and proposals to limit ground rents to a nominal value when homes are sold on a leasehold basis.

Our projects on leasehold reform, and Government's own measures, can improve the position in leasehold. But they cannot remove the inherent problems with leasehold ownership identified above. The answer to those problems lies in commonhold.

COMMONHOLD OWNERSHIP

Commonhold provides a structure to manage the relationship between separate, individually owned freehold properties and avoids the difficulties with leasehold ownership discussed above.

By enabling the freehold ownership of flats, commonhold can provide an alternative to leasehold ownership.

In more detail: what is commonhold?

Commonhold provides a structure to manage the relationship between separate, individually owned properties within a larger building or development. It can be used to manage the relationship between flats within a block of flats, although it has wider potential. Commonhold is equally capable of applying in a commercial context, for instance to regulate the relationship between offices in an office block.

Freehold ownership of a unit

The freehold of an individual property, referred to as a "unit", is owned by a "unit owner".

A "unit" can be:

- part of a larger building, such as a flat within a block of flats, or an office within a block;
- a separate building within a larger development, such as a house on an estate with shared gardens, or an individual shop within a retail park; or
- an area of land not connected to a building, such as an allocated car parking space.

Membership of a "commonhold association"

Anyone who buys a unit in a commonhold will become a member of a company which owns and manages the common parts of the building or development (such as communal areas shared between the unit owners). This company is called the "commonhold association". Unit owners, as members of the commonhold association, can vote on decisions which affect the commonhold.



The commonhold association must have at least two directors who carry out the management functions of the commonhold. These directors can either be unit owners themselves or external professionals.

The commonhold rulebook

Each commonhold has a "commonhold community statement" ("CCS"), which:

- defines the physical boundaries of the commonhold units; and
- sets out the rights and obligations of the unit owners and the commonhold association.

For example, the CCS will set out unit owners' voting rights and their requirement to contribute towards the costs of the commonhold ("commonhold contributions").



Additionally, each commonhold must adopt “articles of association” – the legal name given to the rules that govern a company. In the commonhold context, these rules govern:

- how the commonhold association operates; and
- how management decisions about the commonhold can be made.

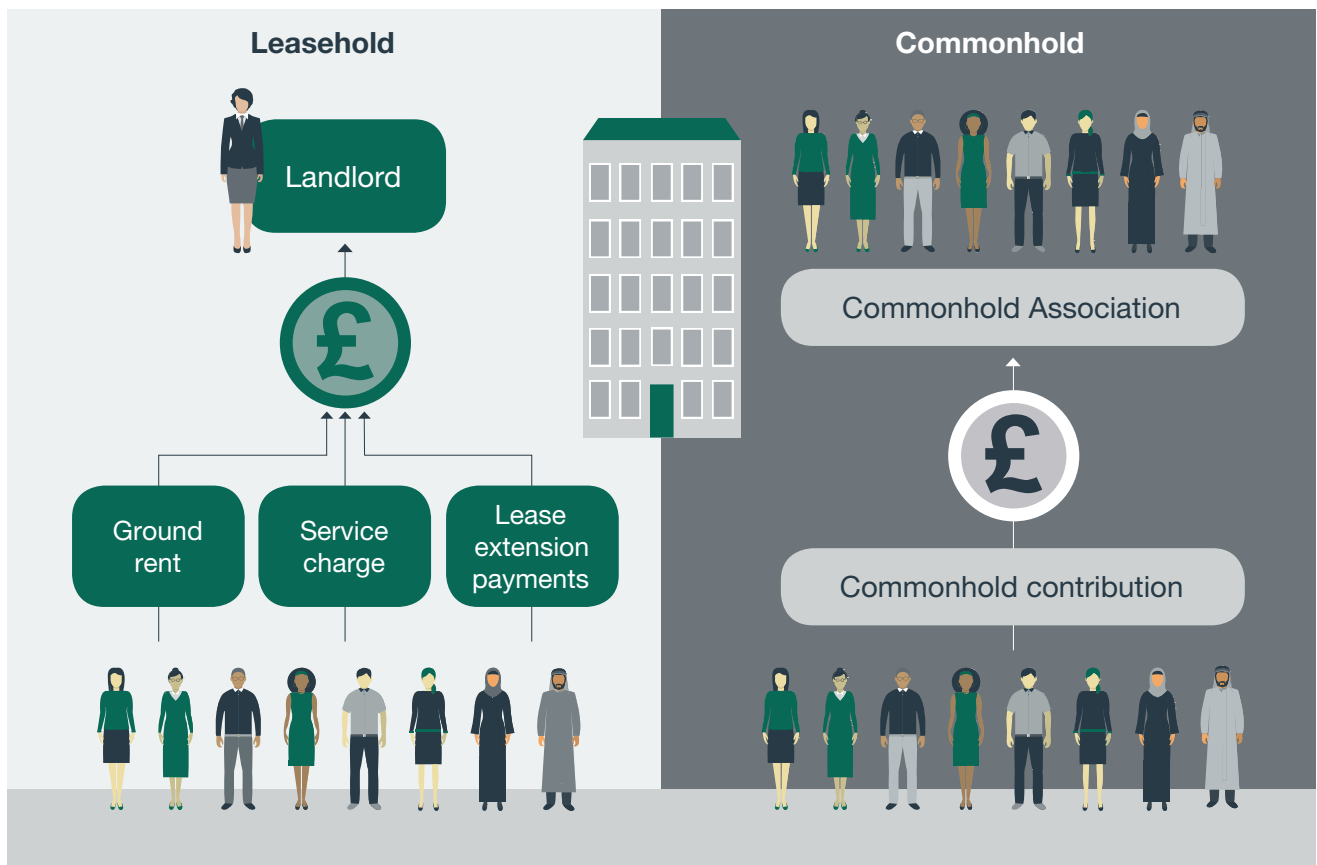
For example, the articles will set out how directors are appointed and what their duties are, how meetings of members are called, and how unit owners’ votes are cast.

There are certain terms (referred to as “prescribed terms”) which must by law be included in every CCS and the articles of association of a commonhold association. These terms create a level of consistency across all commonholds.

How is commonhold different from leasehold?

Commonhold provides an opportunity to think afresh and provide a specifically-designed democratic system for managing buildings. Commonhold contains bespoke provisions which cover every aspect of management. For example, leasehold owners pay a service charge set by their landlord towards the cost of managing and maintaining the building. Service charges are based on the assumption that the landlord of the building is an external party. In commonhold, however, there is no external landlord. Shared services are funded through commonhold contributions, which, importantly, the unit owners control themselves.

Payments in leasehold and commonhold



What are the benefits of commonhold?

“Commonhold should not be looked at through the lens of leasehold. Commonhold involves a culture change. It moves away from an “us and them” mindset, towards “us and ourselves”.

Prof Nick Hopkins, Law Commissioner

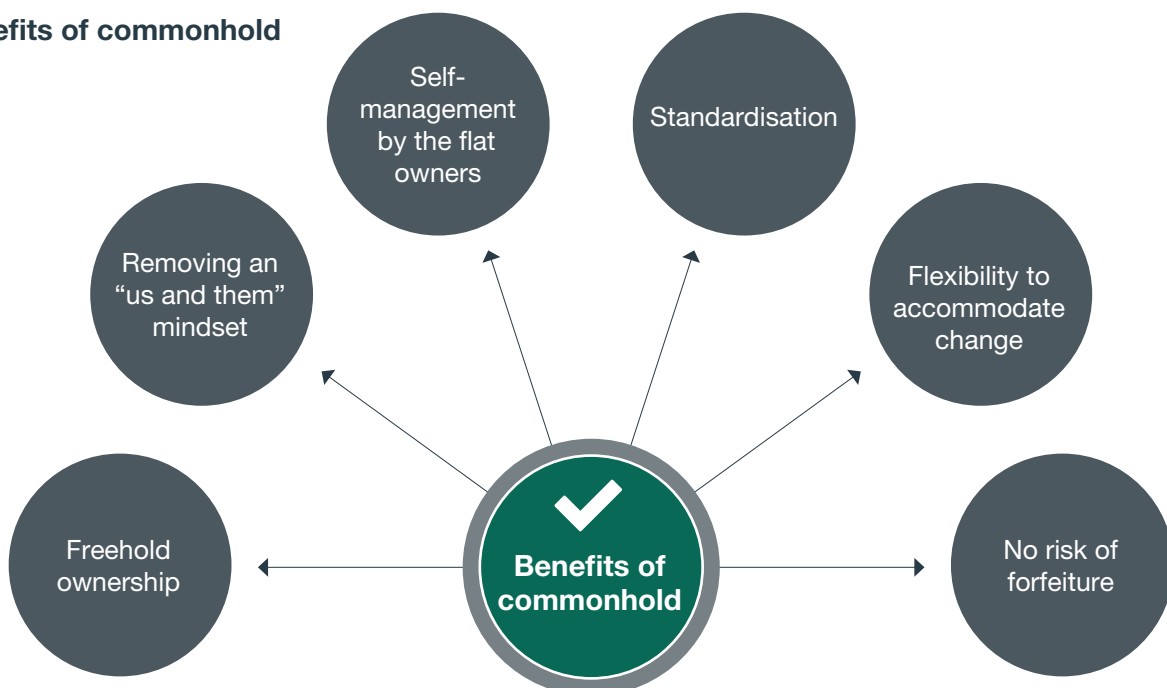
Commonhold has a number of advantages over leasehold ownership.

1. **Freehold ownership:** units are owned forever, overcoming the problem in leasehold of a lease being a wasting asset.
2. **Removing an “us and them” mindset.** Commonhold provides a specifically-designed democratic system for managing buildings.
3. **Self-management by the flat owners:** Commonhold gives ownership and control of the block to the unit owners – the block is managed by a company made up of the unit owners. The interests of the unit owners and the company which manages the commonhold are

therefore the same. This alignment of interests has practical benefits, including reducing the potential for disputes.

4. **Standardisation:** commonholds have standard rules and regulations which should make conveyancing simpler and cheaper. It should also be easier for homeowners to understand their rights and obligations. The main rights and obligations will be contained in the CCS which will include terms that apply to all commonholds.
5. **Flexibility to accommodate change:** many of the terms of the CCS are prescribed by law, and therefore Government can respond relatively easily to changing needs by amending these terms (including in existing commonholds). For example, terms could be introduced to facilitate greater consumer protection, to improve health and safety or fire safety measures, and to encourage “green” energy initiatives. Other terms (known as “local rules”) are decided by the unit owners and can be changed and updated when the unit owners wish to do so.
6. **No risk of forfeiture:** where a leaseholder breaches the terms of the lease, forfeiture enables the landlord to bring the lease to an end and take back the property. The landlord is not required to pay any money to the leaseholder even when the property is worth more than the debt owed. There is no forfeiture within commonhold because unit owners have a freehold.

Benefits of commonhold



Underpinning these advantages is the fact that commonhold involves a different way of thinking about the ownership of flats. In leasehold, every flat or unit is owned by two people – the landlord and leaseholder – who have different rights over the same property and whose interests may not be aligned.

In commonhold, by contrast, the starting point is that people own their own unit by themselves. The unit owners collectively own and manage the common parts by virtue of their ownership of the units. The interests of the unit owners and of the commonhold association are therefore inherently aligned.

The table below demonstrates how various leasehold structures compare with commonhold.

Leasehold structures can operate in various ways. The common feature of all of these structures is that there is always a landlord.

- Sometimes the landlord will be unrelated to the leaseholders – such as an investor, private family estate, or charity – which we refer to as an “external landlord”.
- Leaseholders who have exercised the “right to manage” (see above) will have taken over the management functions of their landlord, but the landlord remains (and is entitled, for example, to receive ground rent). The right to manage is controlled by the leaseholders who joined in the claim (“the participators”) – which may only be half of the leaseholders in the block.
- Leaseholders who have purchased the freehold by exercising the right to “collective enfranchisement” (see above) will, together, become the landlord. They “wear two hats” by owning their lease, and also owning a share in the company that owns the freehold. The landlord company will be controlled by the leaseholders who joined in the claim (“the participators”) – which may only be half of the leaseholders in the block.

Issue	Leasehold with external landlord	Leasehold following right to manage	Leasehold following collective enfranchisement	Commonhold
Ownership lasts forever	✗	✗	✗	✓
Ground rent	✓	✓	✗	✗
More control over your home	✗	✓	✓	✓
Existence of landlord	✓	✓	✓	✗
Payments for shared facilities etc	Service charge, regulated by lease and leasehold legislation			Commonhold contributions, regulated by CCS and commonhold legislation
Rules	Individual leases			CCS for all
Enforcement of financial contributions	Money claim, then forfeiture of lease by the landlord			Money claim, then charge (with priority)
Disputes	Designed for adversarial approach			Designed for co-operative approach

While Commonhold has a range of advantages over leasehold, we have also heard about a number of problems in the current law which need to be addressed for commonhold to succeed.

“The single biggest opportunity for the Government is the introduction of a commonhold law that works. ... We should learn from similar jurisdictions, such as Australia”.

Ruth Cadbury MP, 21 December 2017

Our project: legal issues with commonhold

Terms of Reference for commonhold reform:

Policy objective identified by Government

We have been asked to recommend reforms “to reinvigorate commonhold as a workable alternative to leasehold, for both existing and new homes”.

Various theories exist as to why commonhold has not taken off. It has been attributed to:

1. shortcomings in the law governing commonhold, leading to a lack of confidence in commonhold as a form of ownership.
2. mortgage lenders’ unwillingness to lend on commonhold units.
3. a lack of consumer and sector-wide awareness of what is a relatively unfamiliar form of ownership.
4. the existing financial incentives for developers to use leasehold, rather than commonhold, because leasehold offers landlords the ability to secure ongoing income-streams on top of the initial purchase price paid by the leaseholders.
5. inertia among professionals and developers, and insufficient incentive (financial or otherwise) for those involved in building homes and commercial property to change their practices and adopt a whole new system while the existing one (from their perspective) does the job.

Our commonhold project seeks to address the first suggested barrier to the uptake of commonhold above: perceived shortcomings in the legal design of the commonhold scheme. We make provisional proposals for reform to address those legal issues in our Consultation Paper.

Other barriers to the uptake of commonhold, including those identified above, are not problems with the law and do not fall within our Terms of Reference. These issues are therefore outside the scope of our project, but they are issues which Government is considering. Our project has provided an opportunity to gather evidence on these wider measures to reinvigorate commonhold which we have passed on to Government. Separately, Government has already confirmed its intention to introduce reforms which will have the effect of reducing some of the financial incentives for developers to prefer leasehold over commonhold; for example limiting ground rents to £10 a year.

Our work so far

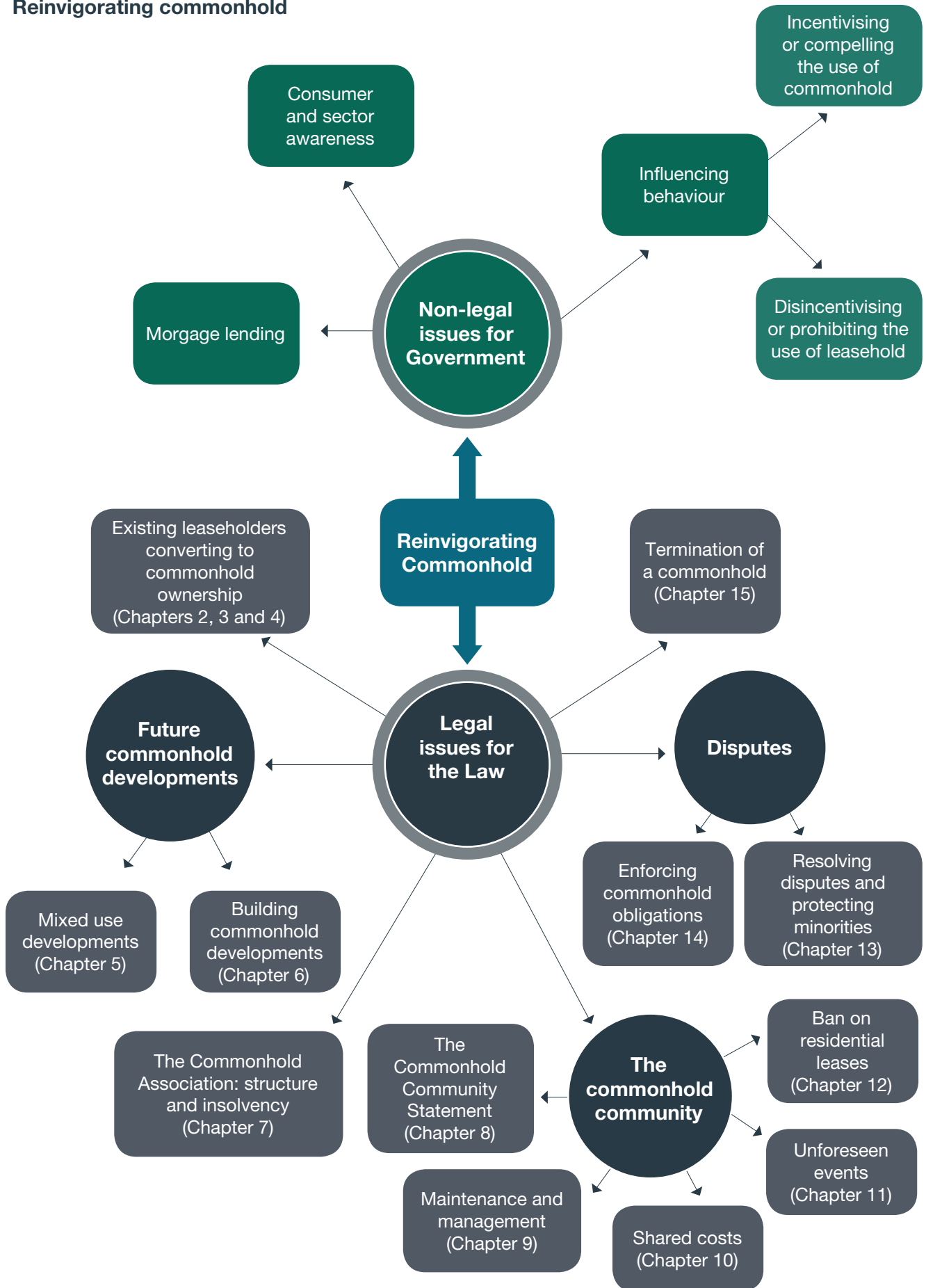
The first stage of our project was a Call for Evidence, published in February 2018, and a survey of existing commonhold unit owners and those managing commonholds to find out about their personal experience of commonhold. Respondents shared their invaluable experience of, and views on, how the issues raised would create problems in practice. We have drawn on those responses as we have prepared the Consultation Paper.

We summarise the responses that we received to our Call for Evidence and our commonhold survey in an Analysis of Responses which we have published alongside the Consultation Paper.

COMMONHOLD REFORM: THE CONSULTATION PAPER

We now summarise some of the main legal issues, and our provisionally proposed solutions to them, that are set out in the Consultation Paper. We draw together the key provisional proposals from the Consultation Paper in so far as they are likely to be of particular interest to homeowners, developers, mortgage lenders, and others in the property sector.

Reinvigorating commonhold



ISSUES OF INTEREST TO HOMEOWNERS

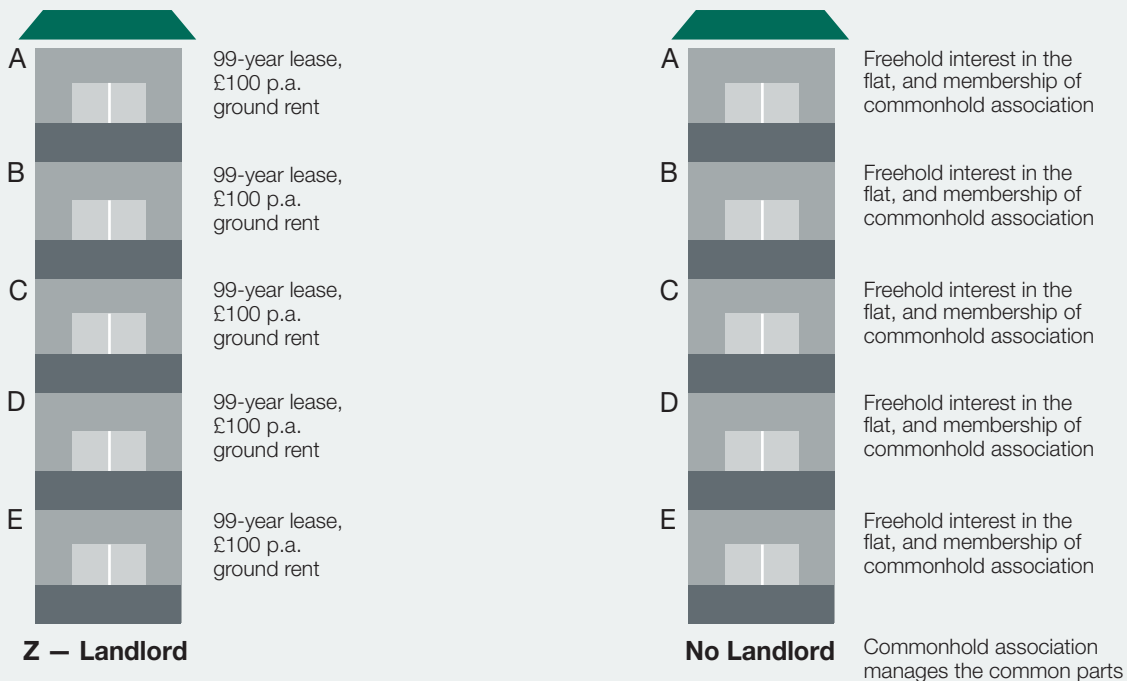
The Consultation Paper raises a number of issues that might be of particular interest to homeowners. These key issues include:

1. the conversion of existing buildings to commonhold;
2. changing the rules of a commonhold;
3. how costs are shared in a commonhold;
4. ensuring the commonhold has sufficient enforcement powers;

5. preventing and responding to emergencies; and
6. resolving disputes in a commonhold.

Converting existing buildings to commonhold

Stakeholders responding to our Call for Evidence highlighted how difficult it is to convert from leasehold to commonhold ownership. We explain the meaning of “converting to commonhold” in Chapter 2, as well as how it compares with a collective enfranchisement claim by the leaseholders to purchase the freehold.



Following conversion:

- the leaseholders would each own the freehold interest in their flat (they would become commonhold “unit owners”);
- the leaseholders’ property interests would no longer be time-limited, and they would not be required to pay ground rent;
- unit owners would become members of a commonhold association, which owns and manages the common parts of the building;
- there would be no requirement to pay service charges; rather, the commonhold association would demand “commonhold contributions” from the unit owners to cover the shared costs of (for example) maintaining the block and reserve fund contributions;
- the leases, and the statutory regulation of leasehold ownership, would disappear. The mutual rights and obligations between the unit owners would instead be governed by the terms of a CCS, and by the statutory regulation of commonhold. (Under our provisional proposals for reform, some leases may in future remain, to enable a conversion to commonhold without the consent of all leaseholders);
- there would be no landlord controlling the building;
- two directors would be appointed by the unit owners (who could be the unit owners themselves or external third parties) to carry out the management functions of the association; and
- the unit owners would be able to vote on decisions about the management of the building by majority.

Under the current law, to convert to commonhold it is necessary to obtain the consent of everyone with a significant interest in the property, including all long leaseholders. In practice, it is almost impossible to obtain the agreement of all leaseholders in all but the smallest blocks.

Our Terms of Reference require us to make recommendations that would enable commonhold to become a viable alternative to leasehold, not only for prospective homeowners, but also for existing leasehold homeowners. Under the current law, most existing leaseholders will not be able to benefit from commonhold due to the difficulty of converting. In Chapter 3, we therefore consider how the consent requirement could be made easier to satisfy. We explore two alternative ways in which a building might be converted to commonhold without the consent of all long leaseholders:

1. Option 1: Leaseholders who do not consent could be permitted to retain their long lease after conversion; or alternatively
2. Option 2: Leaseholders who do not consent could be given a commonhold interest which would have to be paid for when the unit was sold to the next owner.

Both options have advantages, but also some drawbacks. In our Consultation Paper we discuss the potential operation of these two options and their advantages and disadvantages, before asking for consultees' views on how conversion should operate.

Changing the rules of a commonhold

Every commonhold will have a set of rules governing the rights and obligations of the commonhold association, and the unit owners. These rules are set out in the CCS. Some of these rules are prescribed by legislation, and cannot be changed. However, every commonhold has the option to create local rules, which supplement these standard provisions. Under the current law, such local rules can be changed with the support of over 50% of the unit owners.

Stakeholders have expressed concerns that the current law of commonhold does not offer unit owners sufficient certainty. Whilst an often-cited advantage of commonhold is the flexibility to amend the rules of the commonhold, we are concerned that too much flexibility could lead to a lack of certainty and protection for unit owners. In Chapter 8, we therefore consider ways of increasing the voting threshold

necessary to change the local rules and a possible role for the Tribunal to review certain decisions, in order to protect the minority. We also consider whether there should be any limits on what bespoke rules can be created by a commonhold.

Costs that are shared between unit owners



Unit owners in a commonhold must pay a “commonhold contribution”, which is a payment towards the shared costs of the commonhold such as:

1. insuring and maintaining the building;
2. heating, lighting and cleaning the common parts;
3. maintaining the car park and lift; and
4. keeping a reserve fund for future expenditure.

Stakeholders highlighted a number of legal issues in relation to the costs of a commonhold.

First, they referred to a lack of flexibility in how commonhold costs are shared. While currently it is possible to require different units to contribute different percentages towards commonhold costs, an individual unit owner must contribute the same percentage towards every single cost. For example, if a unit owner is required to pay 10% towards commonhold costs, he or she would have to pay 10% towards every single cost, regardless of the extent to which these costs benefit him or her.

To provide greater flexibility in how costs may be shared, in Chapter 5 we provisionally propose that it should be possible to create separate “pools” of costs.

Second, stakeholders said that unit owners did not have enough control over how the shared costs are set. To provide owners with greater control over commonhold costs, in Chapter 10, we suggest providing commonhold unit owners with a right to vote on the commonhold budget set by directors.



Third, several stakeholders raised concerns that there is no effective way for the commonhold association to enforce payment of commonhold contributions against those who fail to pay their share.

Consequences of inability to recover commonhold contributions

- The failure of one unit owner to pay his or her share could increase the sums payable by others.
- In extreme cases, such as where a number of unit owners persistently fail to pay their contributions, the solvency of the commonhold association could be put at risk.

In Chapter 14 we provisionally propose that a commonhold association should have an automatic statutory charge over commonhold units for the payment of commonhold costs, in the event that a unit owner fails to pay his or her share of the commonhold contributions. We also propose that any such charge in favour of the association should take priority over other charges, such as mortgages. The charge would prevent the unit owner from selling the unit without paying the debt. Moreover, as a last resort and subject to certain safeguards, the charge would allow the commonhold association to ask the court to order the unit to be sold in order to pay the debt, with the balance going to the unit owner.

These provisional proposals are designed to reduce the risk of the commonhold becoming insolvent, or the risk of other owners having to meet the shortfall.

Preventing and responding to emergencies

In the light of the Grenfell Tower disaster on 14 June 2017, we have considered how commonhold may be able to respond to such tragedies. In Chapter 8 we consider how Government will be able to respond to

changing health and safety standards more readily, by amending the prescribed rules set out in the CCS. An independent regulator could also play a role in ensuring that buildings standards have been met. Additionally, in Chapter 11, we consider the options that will be available to a commonhold association to raise financing to pay for costs arising from emergencies or unexpected events. These options should place a commonhold association in a better position to respond to emergencies than leaseholders who own the building collectively.

Resolving disputes



“A commonhold association is not a business; it is a community.”

D Clarke, L Crabb and N Roberts,
Clarke on Commonhold (loose-leaf ed 2006)

Stakeholders have advised us of the importance of an effective dispute resolution procedure in commonhold. We are mindful of the social dynamic of commonhold, which will often involve people living in close proximity. We are aware of the importance of preventing disputes from arising and, when they do arise, from escalating. Regardless of the form of property ownership, however, tensions can and will arise – commonhold cannot of itself completely prevent disputes from arising. Nevertheless, in Chapter 13 we set out provisional proposals to make the dispute resolution procedure more effective, in response to particular criticisms of the current procedure.

ISSUES OF INTEREST TO DEVELOPERS

“I’ve been a leaseholder and seen the problems that the outdated leasehold system causes. We’re building a commonhold development because we want to give our buyers real ownership and real control of their homes – not just a right to live there which is controlled by someone else. We’re selling homes, not leases.”

Stewart Moxon, Hopton Build (Yorkshire) Limited,
currently building five commonhold units
in Liversedge, near Leeds



The Consultation Paper raises a number of issues that might be of particular interest to developers. These key issues include:

1. making commonhold workable for mixed-use and multi-block developments;
2. enabling developments to be built in phases; and
3. the ability to incorporate shared ownership properties within a commonhold.

“Developers and purchasers should choose commonhold, because that means that the property gets developed, it gets sold, and people then have self-determination.”

Sir Peter Bottomley MP, Co-Chair of the All-Party
Parliamentary Group on Leasehold and
Commonhold Reform, 5 November 2018.

Mixed-use and multi-block developments

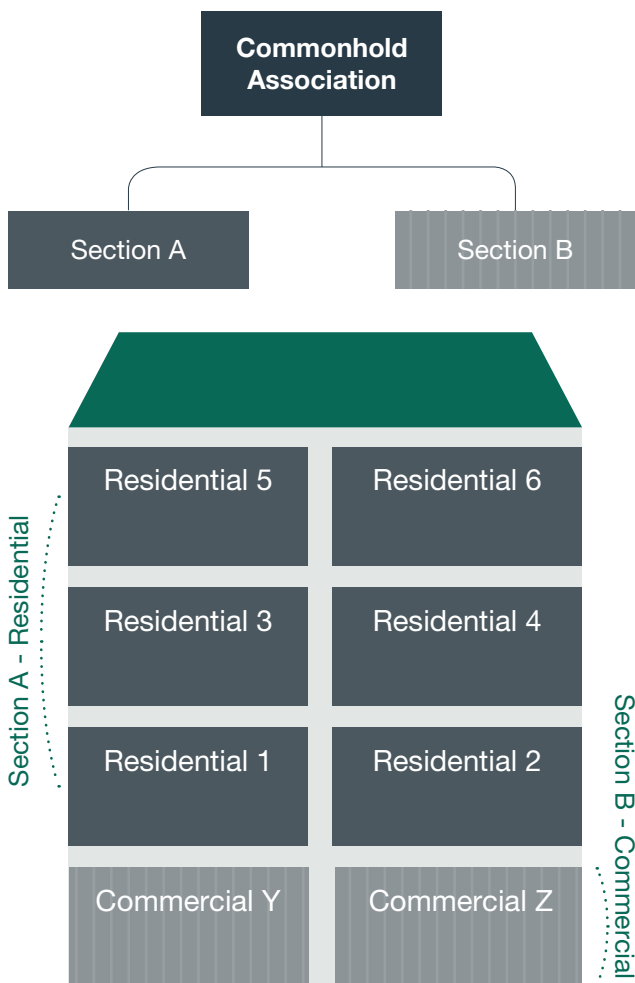


Developers responding to the Call for Evidence stated that commonhold was not currently sufficiently flexible to cater for larger developments, which combine both residential and non-residential elements, such as shops and leisure facilities. There was a concern, for example, that commercial owners could be outvoted by residential owners, and vice versa.

We want commonhold to have as wide an application as possible. As mixed-use developments are increasingly common, we want to facilitate the creation of commonhold “communities” which can accommodate not only living spaces but also shops, restaurants, leisure and other facilities for those who live there. We also want commonhold to be able to accommodate different tenure types within the same development, such as shared ownership and other affordable housing. In order for commonhold to be a viable alternative for leasehold, we think that it must be able to accommodate these types of development.

In response to developers' concerns, in Chapter, 5 we provisionally propose the introduction of "sections" within commonhold, based on company law principles of class-voting. This provisional proposal aims to introduce a more sophisticated management structure into commonhold, which would allow different interests within the same commonhold to be separated out. Unit owners would be entitled to vote on, and be responsible to pay for, matters which affect their section, but would not vote on or pay for issues affecting other sections.

A block with six residential flats above two commercial units



Building developments in phases



Currently, on the sale of the first unit in a new development, the commonhold association becomes the registered owner of all the common parts of the commonhold. In order to complete works on the development, the developer must reserve certain rights, called "development rights", in the CCS.

Our main concern with the current law is that development rights do not meet the needs of modern developments. To developers, they appear to limit flexibility, while at the same time for purchasers they do not necessarily provide certainty. It also seems to us that development rights were intended to cover smaller-scale developments, rather than today's modern developments. We understand that residential leasehold provides developers with a great deal of flexibility as to how they complete the development once the first properties have been sold. For instance, the lease may reserve the right for developers to add land to the common parts at a later date or build on adjoining land.

In Chapter 6 we consider how developers might be able to continue developing once some, but not all, of the units on a commonhold development have been sold. We set out provisional proposals for a new way of developing commonholds in phases. However, we note that the need for developer flexibility should be balanced against the certainty and protection that must be provided to unit owners who buy before the development is complete.

Shared ownership



Developers responding to the Call for Evidence explained that the inability to incorporate shared ownership leases within commonhold made it difficult to use commonhold for some developments. Shared ownership leases are long leases used to deliver Government-backed affordable home ownership schemes. Currently, the commonhold legislation prevents residential leases of longer than seven years from being granted within commonhold (although non-residential leases of any length are permitted). In Chapter 12 we provisionally propose that a limited exception to the ban on residential leases should be permitted for shared ownership leases, and make several provisional proposals for how these leases should operate within a commonhold.

ISSUES OF INTEREST TO MORTGAGE LENDERS

The Consultation Paper raises a number of issues that might be of particular interest to mortgage lenders. These key issues include:

1. the position of mortgage lenders should a commonhold association become insolvent, and measures to avoid insolvency from occurring;
2. ensuring the ongoing maintenance of the commonhold; and
3. the position of mortgage lenders if a commonhold is brought to an end by the unit owners.

Solvency of a commonhold association



Most people require the assistance of a mortgage to purchase a home. Commonhold cannot therefore succeed unless mortgage lenders are willing to provide mortgages secured against commonhold units, and lenders will not lend unless they know that the commonhold unit provides good security.

Lenders have reported a lack of certainty about the effect of a commonhold association's insolvency on their security. To address these concerns, in Chapter 7 we suggest measures which will better protect lenders in the unlikely event of the association's insolvency.

It is preferable, however, to avoid an insolvency situation in the first place. Throughout the Consultation Paper, we make a number of provisional proposals which are aimed at preserving the solvency of the commonhold association.

We suggest in Chapter 10 that it should be mandatory for directors of the commonhold association to maintain a reserve fund for emergency and major works, and to hold adequate public liability insurance.



As explained above, we also provisionally propose that a commonhold association should have an automatic statutory charge over commonhold units for the payment of commonhold costs, and that any such charge should take priority over other charges, such as mortgages.

Whilst at first glance, providing the commonhold association with a charge which takes priority over first legal mortgages may appear unattractive to lenders, we discuss in Chapter 14 how enhancing the association's enforcement powers is in the interests of lenders. It makes the commonhold association less likely to become insolvent, which benefits lenders (as well as of course benefitting the unit owners).

Moreover, we noted above that the enforcement mechanism in leasehold is "forfeiture", which involves the termination of the lease. On forfeiture, leaseholders lose their lease, and lenders lose their security. By contrast, our provisionally proposed reforms to enforcement methods in commonhold still put lenders in a better position than leasehold, because they do not stand to lose their security through forfeiture.

Ongoing maintenance



Lenders emphasised the importance of commonholds being adequately maintained in order to preserve the value of the asset over which they have a secured interest. Although the prescribed terms of the CCS make provision for the repair and maintenance of the commonhold, it has been suggested to us that this provision should be more effective. In Chapter 9 we make provisional proposals to address this concern, including a proposal to make it clearer that a commonhold may add bespoke rules supplementing the prescribed maintenance and repair terms, to require a higher standard of repair.

Our provisional proposal to provide the commonhold association with greater enforcement powers (discussed above) would also assist in addressing lenders' concerns about the proper maintenance of commonholds as insufficient funds could lead to the deterioration of the property.

Termination of a commonhold

We are aware of concerns over a lack of certainty for mortgage lenders should a commonhold be brought to an end by the unit owners. In Chapter 15 we consider mortgage lenders' interests on the termination of a commonhold and set out provisional proposals to make the position clearer. These proposals include clarifying that lenders will retain their secured interest in a unit until the commonhold is actually sold, and giving lenders the right to participate in any legal proceedings relating to the termination.

ISSUES OF INTEREST TO OTHER PARTS OF THE PROPERTY SECTOR

The Consultation Paper also raises a number of issues that might be of particular interest to other parts of the property sector, including:

1. the affordable housing sector;
2. conveyancers;
3. commercial property owners and tenants; and
4. insurers.

The affordable housing sector

We are aware of the concerns raised by housing associations, amongst others, that shared ownership leases cannot currently be incorporated within commonhold. As explained above, in Chapter 12 we provisionally propose that a limited exception to the ban on residential leases should be permitted for shared ownership leases.

In Chapter 12 we also consider how other forms of affordable housing may be accommodated within commonhold, such as community land trusts and co-operative housing schemes, which seek to provide affordable homes to those in the local community. We invite consultees' views as to whether commonhold causes problems for other forms of affordable housing.

Conveyancers



In response to the Call for Evidence, conveyancers explained that they had not been involved in commonhold because they did not think buyers or their lenders would be willing to use commonhold, as it is a relatively unknown form of ownership. They added, however, that commonhold had the potential to improve the conveyancing process.

“If [commonhold] could streamline the process of the conveyancing of flats it would be very welcome indeed. So much time and money is wasted on the current model.”

Heather Keates, Conveyancer, Pirie Palmann Ltd,
in response to our Call for Evidence

As noted above, the fact that commonholds have standard rules and regulations, which must be provided in a certain format, should make conveyancing easier and cheaper. In Chapter 8 we explain in more detail how the CCS can assist conveyancers. We go on to make a provisional proposal to streamline the layout of the CCS, making it even easier for conveyancers (as well as potential purchasers) to identify the bespoke provisions specific to an individual commonhold.

Commercial owners

Consultees responding to the Call for Evidence explained that commercial tenants might be easily outvoted by residential owners in mixed-use developments, where the residential owners are likely

to outnumber the commercial owners. In particular, consultees were concerned that the potential to be outvoted could lead to unfavourable changes being made to the CCS.

For instance, commercial owners might be able to attract commercial tenants on the basis that certain services, such as 24-hour security, are in place. If commercial owners feel that those services could be removed by a vote of the commonhold association at a later date, without their consent, they may be reluctant to move into the commonhold in the first place.



In Chapter 5 we explain how our provisional proposals for a more sophisticated management structure in commonhold would allow the interests of commercial tenants to be protected in mixed-use developments. In Chapter 8 we also make provisional proposals to make it harder to alter any bespoke provisions of the CCS (“local rules”) after the commonhold has been set up, increasing certainty for commercial owners.

Insurers



Within any commonhold, there will be a need for the commonhold association to take out various forms of insurance. In Chapter 9 we consider buildings insurance, public liability insurance and directors' and officers' insurance. We make provisional proposals to clarify what insurable interests a commonhold association should be deemed to have, and invite views as to whether public liability insurance would be available for commonhold associations.

CONCLUSION

We hope that you will read the full chapters in the Consultation Paper on the topics of interest to you, and respond to the questions in the paper.

The full Consultation Paper, and the online response form, can be found at www.lawcom.gov.uk.

