



## **Commonhold Call for Evidence Response**

Law Commission February 2018

**April 2018**





## Commonhold Call for Evidence Response

### Introduction

This form accompanies the commonhold call for evidence, available at <https://www.lawcom.gov.uk/project/residential-leasehold-and-commonhold/>. Please answer as many questions as you can, in as much detail as you can. However, you do not need to answer all the questions.

Please save a copy of your completed form and email it back to us at [propertyandtrust@lawcommission.gov.uk](mailto:propertyandtrust@lawcommission.gov.uk) by **19 April 2018**.

We would prefer it if you could use this form to send us your comments. However, comments can also be sent in an email to [propertyandtrust@lawcommission.gov.uk](mailto:propertyandtrust@lawcommission.gov.uk), or by post to: Rachel Preston, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

### **Consultation principles**

*The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at:*

*<https://www.gov.uk/government/publications/consultation-principles-guidance>*

*We treat all responses as public documents in accordance with the **Freedom of Information Act** and we may include the names of respondents and attribute comments in any publication relating to this consultation. If you want your submission to remain confidential, you should contact us before sending your response. (Please note that we disregard automatic IT-generated confidentiality statements.)*

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**Role:** *(Please tick one or more box)*

<input type="checkbox"/> Member of the public	
<input type="checkbox"/> Third sector/voluntary sector	Nature of organisation:
<input type="checkbox"/> Commercial sector/business	Nature of business:
<input type="checkbox"/> Practising lawyer	Specialist area:
<input type="checkbox"/> Academic	Specialist area:
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<input type="checkbox"/> Local authority staff member	
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	<b>X Local Law Society</b>

## Chapter 2, Section A: Difficulties creating or converting to commonhold

### Question 1.

(a) **If you have previously tried to convert to commonhold:** Did the requirement to obtain everyone's consent prevent you from converting to commonhold? What was your experience and what difficulties did you come across?

(b) **If you have never tried to convert to commonhold:** Do you think the requirement to obtain everyone's consent would prevent you from converting to commonhold in your building or development? If so, why and what difficulties could you foresee?

*Please provide details about your particular building or development, for instance the size and number of units (such as flats) within each building.*

As lawyers, we have seen the difficulties arising from the management of a block of flats. These range from a complete lack of interest from a remote freeholder, resulting in the leasehold owners having to band together on an informal basis to carry out work for the mutual protection of their flats, to the hands-on (and in some cases 'in your face') approach of professional managing agents who often seem to believe that their job is to improve the block at the expense of the leaseholders only.

Commonhold could be a viable alternative to flat owners owning the freehold of the block via a management company ie by way of enfranchisement. Whilst some of the Committee expressed doubts as to whether tenants would take care of a commonhold block either because of ignorance or lack of interest, a commonhold association would not necessarily depend on all commonholders being 'hands-on' ie attending every meeting. Voting rights can also be weighted within a commonhold association.

### Question 2.

Are you aware of any difficulties in the process of creating a commonhold as a new development or any other difficulties in the process of converting to commonhold (other than the consent requirement)?

*Please give as much detail as you can.*

The difficulties of financing a new property for the end user are high and then asking them to understand and become engaged in the complexities of managing the block of which their property is a part would perhaps reduce the attractiveness of the development.

It could work where the building was of 2 storeys so that the impact is more immediate and there is more likely to be a working relationship between the 2 owners. Long term maintenance of a multi storey and multi unit block with more complex requirements, such as lifts, communal fire alarms and sprinkler systems with legal duties are generally perceived to be too demanding, even if the Council of Mortgage Lenders (CML) were to agree that the long term management arrangements were satisfactory. There is also a question as to whether the CML could or would impose a duty on their mortgage holder to be actively engaged in the management of the block or require the supply of an annual statement relating to finance and a maintenance programme.

Finally, in light of the Grenfell Tower disaster, the issue of replacement cladding should be considered for all new commonhold developments and in the process of converting to commonhold. This should hopefully avoid such costly mistakes in the future.

## Chapter 2, Section B: Making commonhold work for homeowners

### Question 3.

*There are a number of issues which may need to be addressed to make commonhold work for homeowners. These include issues relating to:*

*Application of company law. Stakeholders tell us that company law is too complex and that the commonhold association may require a different corporate structure.*

*Consumer protection in new developments. Stakeholders tell us that the right balance has not been struck between providing flexibility to the developer and protecting consumers.*

*Degree of flexibility in the commonhold community statement. Stakeholders tell us that the right balance has not been struck between the terms which must apply to all commonholds and those which can be changed.*

*Commonhold costs. Stakeholders tell us that there should be more flexibility in the way costs of managing and maintaining the commonhold can be shared.*

*Dispute resolution. Stakeholders tell us that the dispute resolution procedure is ineffective and that a body other than the county court should assist with resolving disputes.*

*Termination and insolvency. Stakeholders tell us that the law surrounding termination is unclear and that homeowners may not be adequately protected if the commonhold association becomes insolvent.*

**(a) If you have previous involvement with commonhold:** Have you encountered problems in practice relating to any of the above aspects of commonhold?

*Please provide as much detail as you can about your experience.*

**(b) If you do not have previous involvement with commonhold:** Have any of the issues above deterred you from using commonhold? If so, why?

**(c)** Are you aware of any issues not referred to above which might make commonhold undesirable for homeowners?

*Please provide as much detail as possible.*

Company Law is well understood with a weight of jurisprudence behind it and the Committee would recommend retaining a Company Law environment. A model framework with dispute resolution, management costs cap and appropriate provisions for insolvency / liquidation should be the way forward for Commonhold.

Provision needs to be made for compulsory collection of maintenance contributions with access to the Courts to recover as a debt with costs. A certificate of the amount owing signed and counter-signed by 2 officers of the maintenance company should be required to avoid an action for recovery becoming a dispute about the value of work undertaken and whether in fact it was necessary.

#### **Question 4.**

*There are similarities between commonhold associations and leaseholder-owned companies which own and/or manage their building.*

#### **If you have experience of a leaseholder-owned company:**

(a) Has the application of general company law to leaseholder-owned companies caused any issues in practice?

(b) Do you have any experience of a leaseholder-owned company becoming insolvent? What was the situation, and to what extent (if at all) were the leaseholders responsible for paying the debts of the company?

*Please give as much detail as possible.*

Some leaseholder companies morph into a very small group of people with strong personalities which may or may not prove beneficial to all concerned. These also change with changes in ownership / succession and towards the expiry of the lease term the companies can become geared to short term costs savings.

There also needs to be some provision covering the Management Company failing to file accounts or otherwise 'offending' Companies House leading to it being struck off. The usual manner of restoring the company might prove impractical with a gap in knowledge about the former officers (sold up or deceased) and potentially uninterested Treasury Solicitors.

The Committee discussed the fact that most management Companies are limited by guarantee so that the former members are only liable for their £1.00 and the debts remain unpaid.

It should be noted that commonhold associations would also be limited by guarantee so it cannot be argued that a commonhold system would be a 'disadvantage' in this regard.

## Chapter 2, Section C: Making commonhold work across the property sector

### Question 5.

#### **If you are involved in creating residential or mixed-use developments:**

- (a) Have you previously considered using commonhold or would you consider using it for a new development?
- (b) Did (or would) commonhold offer sufficient flexibility to meet the needs of your development?
- (c) Were you (or would you be) affected by the incompatibility of commonhold with shared ownership?
- (d) What other factors influenced (or would influence) your decision whether or not to use commonhold?
- (e) What aspects of commonhold could be improved to make it more usable for new developments?

*Please provide a description of the development in question, for instance the number of buildings in the development, the number of units within each building, and specifying the use of such units.*

Whilst none of the Committee are actively involved in creating residential or mixed-use developments, it has been noted that the need to sometimes offer shared ownership in a development as a condition of planning would rule out commonhold in this scenario.

The engagement of the Council of Mortgage Lenders in accepting the tenure is critical to acceptance as would an element of "step-in" rights for the Lender in cases of Borrower default. The Royal Institution of Chartered Surveyors will also need to be engaged and onside from the stand point of property valuation to support the sale price with this different form of tenure.

### Question 6.

#### **If you have experience with affordable housing schemes:**

Do you foresee any issues within the current commonhold model which could make it difficult to incorporate forms of affordable housing other than shared ownership?

No. The affordable nature of the housing relates to the capital structure involved and not to the day to day issues of maintenance and periodic repairs (e.g. flat roofs and lifts) so a clear distinction should exist without conflict.

### **Question 7.**

**If you are a mortgage lender:**

- (a) Do you currently lend on commonhold?
- (b) What influenced your decision to lend or not to lend on commonhold property?
- (c) What would make commonhold more satisfactory security?

### **Question 8.**

Are you aware of any other issues which makes commonhold unsuitable or unattractive to any part of the property sector (for example, mortgage lenders, developers, commercial tenants, landlords)?

The main reasons why commonhold has probably struggled to take off thus far are that developers cannot make as much money as they can with building leasehold properties (with leasehold, they can retain the freehold and sell it off to other investors and companies, whilst also collecting a ground rent from the tenants at the same time) and not all lenders were prepared to lend on commonhold. Somewhat peculiarly, Scotland does have an equivalent of freehold flats and lenders have been lending on them. Government will more than likely have to step in to make commonhold a real possibility for prospective buyers in England and Wales.

From a legal perspective, it should be noted that with residential accommodation being constructed above ground level with commercial or leisure facilities on the ground floor, the definition of Freehold contained within Commonhold does not work. English law has always had difficulty with the concept of 'flying freehold' as the obligation to maintain the ground and sub basement structures to ensure that the 'flying freehold' remains "flying" creates another order of magnitude of complexity. However, this can be a problem for Leasehold tenure too, and it should be noted that in the Condominium system in North America for example (similar to commonhold), this form of ownership can also be used for hotel rooms, retail shops, offices etc.

## Chapter 2, Section D: Wider issues creating a barrier to commonhold's success

### Question 9.

*Government is considering wider issues which may affect the success of commonhold including:*

- *financial incentives to prefer leasehold*
- *lack of consumer awareness*
- *difficulty obtaining finance*

(a) Do you think these issues may prevent the take up of commonhold?

(b) What other issues need to be addressed in order to re-invigorate commonhold?

(c) Should there be incentives to use commonhold (financial or otherwise), if so what should those incentives be?

(d) Should commonhold be compelled? If so, in what circumstances?

Q9 a) As alluded to in Q8, a developer in the current market can secure a better capital return by using leasehold. Even if the freehold is not sold on to a third party by the developer, they can normally count on the slow uptake of leasehold enfranchisement to produce a long term income.

Q9 b) Like anything new, there is little experience of the use of Commonhold and there will need to be increased public awareness, as there has been with the recent leasehold scandals which have come to light and which has perhaps created a renewed impetus for Commonhold, and incentives for the developers (unless this can be legislated for).

The logistics of acquiring a freehold block of apartments at the same time as the individual commonhold apartments will also need to be a smooth process in order to boost the takeup of Commonhold, certainly if the Government have the ambition of abolishing leasehold. Presumably, a developer will have to complete a development and sell it to a Commonhold Association whilst the tenants making up the Association complete their purchase of their own 'units' simultaneously.

Q9 c) Financial incentives are for the market to decide but there is a distinct advantage to the consumer in that they do not have the depreciating asset of a lease.

If the Government does not act boldly and simply opts to improve the Leasehold system, then there at least needs to be proper and tight regulation of the role and charges made by Managing Agents with 'upfront' transparency.

Q9 d) Whilst it is clear that Commonhold is, overall, more advantageous to the consumer than Leasehold, the Committee feel it would be difficult to make it compulsory as it is not currently compatible with Shared Ownership leases and Mixed Residential Leases with leisure or commercial outlets in the same block.

## Chapter 3: General Questions

### Question 10.

**If you have experience of both commonhold and leasehold:**

How does your experience of commonhold compare to your experience of leasehold?

### Question 11.

**If you only have experience of commonhold:**

How would you describe your experience?

### Question 12.

**If you only have experience of leasehold:**

What advantages do you think commonhold could offer?

Whilst some members of the Committee feel that the leasehold system is an adequate form of tenure for the most part, and that what really needs to be looked at is the lack of protection for the consumer / buyer against the aggressive Managing Agents, their grasping mercantile approach to the questions of fees and the lopsided wording in many residential leases seeking to enforce a more feudal view of the rights of the freehold to control everything, others feel that Commonhold, while not necessarily a perfect alternative to leasehold, does have distinct advantages.

From the consumer's point of view, the main advantage is that they do not have a depreciating asset i.e. a lease and therefore will enjoy similar benefits to a freehold owner in this respect. This means that they will have protection from the worst leasehold abuses such as escalating ground rents, extortionate management fees and manipulated service charges. Indeed if the consumer realises the benefits of Commonhold and the tenure

becomes popular, the Government would have to consider any effect on the future sales and purchases of leasehold property.

Commonhold would also be advantageous to lawyers. The leasehold system can be complex and complicated for the most experienced lawyer, let alone the general public, whose knowledge can come from programmes like The One Show and The Victoria Derbyshire Show, which have shed light on recent leasehold issues such as the costs of purchasing the freehold from the Landlord and escalating ground rents. Conveyancing solicitors should find the transfer of flats easier, as there would be no need to wade through a lengthy lease each time. Instead community associations and statements will have to be in standard forms (similar to the 'Declaration' in the Condominium system in North America) in accordance with the Commonhold and Leasehold Reform Act 2002.

The possibility of having one codified system would be a huge plus for everybody.