HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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Leasehold and commonhold reform

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Summary

Leasehold tenure is growing

The Department for Communities and Local Government (DCLG) estimates that there are around 4 million leasehold homes in the private sector in England, of which 70% are flats. In 2016, around 27% of residential property transactions in England and Wales were leasehold. Because almost all flats sell as leasehold, leasehold transactions are more common in London, where 60% of transactions were leasehold in 2016. The practice is also more common for new-build properties: 46% of new build transactions were leasehold.

Leasehold houses are rarer. However, leasehold sales of new-build houses are up from 7% of transactions in 1995 to 15% in 2016. Leasehold houses are particularly common in the North West, where 32% of house transactions were leasehold in 2016. There is some evidence that developers are opting to sell new-build houses on long lease agreements as this can represent a lucrative future income stream.

Leaseholders are owner-occupiers who are in a landlord and tenant relationship

Owners of long leasehold properties do not necessarily appreciate that, although they are owner-occupiers, they are in a landlord and tenant relationship with the freeholder. The rights and obligations of the respective parties are governed by the terms of the lease agreement, which is supplemented by statutory provisions. The freeholder (landlord) retains ownership of the land on which the property is built. Essentially, long leaseholders buy the right to live in the property for a given period of time.

Problems associated with leasehold ownership

According to a survey conducted by the Leasehold Advisory Service (LEASE) with Brady Solicitors in 2016, 57% of the 1,244 leaseholders surveyed regretted buying a leasehold property. Leaseholders report a whole range of problems, including: high service charges and a lack of transparency over what they are being charged for; freeholders who block attempts by leaseholders to exercise the Right to Manage; excessive costs associated with administration charges and applications to extend lease agreements or enfranchise; and a lack of knowledge over their rights and obligations. The recent trend of developers selling houses on a leasehold basis has been accompanied by lease agreements that set ground rents at a relatively high level and which are subject to regular reviews, resulting in the accrual of significant ground rent liabilities for long leaseholders.

Despite a good deal of legislative actively in this area over the last 50 years, much of which has been aimed at strengthening long leaseholders' rights, they remain reluctant to seek dispute resolution through the tribunal system. An unfair balance of power, and potential to become liable for the freeholder's costs, are cited as barriers.

Government proposals – ongoing consultation

The Housing White Paper, Fixing our broken housing market (February 2017), included a commitment to "improve consumer choice and fairness in leasehold" and to consider "whether and how to reinvigorate commonhold." The consultation paper, Tackling unfair practices in the leasehold market, marks the first step in fulfilling this commitment. The paper includes, amongst other things, proposals to tackle the sale of new-build houses on a leasehold basis and to control ground rent levels in new lease agreements. Consultation is open until 19 September 2017.

Commonhold

The *Commonhold and Leasehold Reform Act 2002* introduced a new form of commonhold tenure. This form of ownership already operates around the world; for example, the Australian Strata Title system and the condominium system in America.

One of the key aims of the Act was to overcome the disadvantages of leasehold ownership. It was assumed that, once in place, commonhold would become the standard form of tenure for new-build blocks of flats. In practice, it has failed to take-off – there are very few blocks in commonhold ownership. Given ongoing issues associated with leasehold tenure, there have been many calls to review the legislation and implement changes in order to make it a workable and attractive option in England and Wales.

An urgent review is supported by the All Party Parliamentary Group (APPG) on Leasehold and Commonhold (established in 2016). In Tackling unfair practices in the leasehold market, the Government has said it will carry out a wide ranging project which will look at several issues including "improving commonhold."

Additional leasehold reform

In Tackling unfair practices in the leasehold market the Government has signalled an appetite for further leasehold reform:

> We will be looking ahead to further steps needed to ensure transparency and fairness, and considering the outcome of the Law Commission's consultation on its 13th programme of law reform over the coming months which included residential leasehold. Our intention is for a wide ranging project.

In addition to commonhold, this project will include how managing agents operate and leasehold terms and enfranchisement.

This paper considers recent trends in leasehold ownership and ongoing problems associated with the sector. Areas identified for possible reform are summarised, including Government proposals.

Housing policy is a devolved matter. The Government's proposals, if implemented, will only apply in England, although existing legislation *does* currently apply in both Wales and England. Scotland operates a separate regime for interdependent units – there are very few leasehold properties in Scotland.

1. The nature of leasehold ownership

Most flats in England and Wales are owned on a long leasehold basis.

In England and Wales, most owner-occupied flats are owned on a long leasehold basis (i.e. with a lease of at least 21 years when first granted). Houses can also be owned on a long lease, this is not as common as it used to be but there are indications that it is on the increase. All shared ownership properties (part own/part rent) are sold on a long lease.

Owners of long leasehold properties do not necessarily appreciate that, although they are owner-occupiers, they are in a landlord and tenant relationship with the freeholder. The rights and obligations of the respective parties are governed by the terms of the lease agreement, which is supplemented by statutory provisions. The freeholder (landlord) retains ownership of the land on which the property is built.

Long leaseholders are owner-occupiers who are in a landlord and tenant relationship with the freeholder.

Essentially, long leaseholders buy the right to live in their property for a given period of time. In the case of flat-owners, management of the block, including its maintenance and insurance, normally remains in the hands of the freeholder. In turn, the freeholder may employ a managing agent to carry out the day-to-day management of the block. The lease agreement usually makes provision for the costs of the freeholder, or his/her agent, in discharging these management functions to be met in full by the leaseholders; these payments are referred to as service charges.[1]

On expiry of a long lease leaseholders may lose their rights of ownership.

When a lease expires the landlord and tenant relationship continues. Unless either the tenant or the landlord takes specific steps to end the tenancy, it continues on the same terms. It is open to the tenant to surrender the tenancy. There are a limited number of grounds on which a landlord (freeholder) can regain possession; a tenant can only be made to leave by a court order. A landlord can also end the tenancy by replacing it with an assured periodic tenancy. At this point the tenant no longer has any rights of ownership and is subject to the terms of the new assured periodic tenancy.[2]

Most long leaseholders of houses and flats have the statutory right to buy the freehold interest of their homes[3] (on a collective basis in the case of flat-owners), or extend their lease agreements. Exercising these rights means that the risk of the lease expiring is substantially delayed or removed.

Section 3 of this paper describes ongoing dissatisfaction with aspects of leasehold tenure. The National Leasehold Survey 2016, conducted by the Leasehold Advisory Service (LEASE) with Brady Solicitors, attracted 1,244 responses from leaseholders. The main survey findings included:

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1 The Leasehold Advisory Service (LEASE) has a helpful overview: Living in leasehold flats – a guide to how it works.

2 For more information on what happens when a long lease expires see: Security of tenure when the lease runs out, LEASE

3 Also referred to as enfranchisement.

- 57% of leaseholders admit they regret buying a leasehold property.
- Two-thirds of leaseholders don't feel they get a good service from their managing agent.
- Just 6% are very confident the managing agent could resolve issues.
- 68% of leaseholders have little or no confidence that their managing agent could resolve issues efficiently and effectively.
- 51% of leaseholders see a change in managing agent would improve matters and benefit the block.
- 1 in 5 leaseholders are unaware they could replace a poorly performing managing agent.
- 55% of leaseholders consider changing managing agents would be a difficult process.
- 48% of leaseholders believe a lack of knowledge is a real barrier to changing managing agents.
- 40% of leaseholders strongly disagree that service charge is value for money.
- 62% of leaseholders say the service hasn't improved in the last two years.
- Resident management company (RMC) directors are generally happier with their leasehold properties than 'ordinary' leaseholders due to a greater sense of control over the property's management.
- Two-thirds of RMC directors feel they have a good relationship with fellow directors and leaseholders, but identify a need for a strong, wide skill set beyond legal and company expertise.
- 55% of leaseholders know where to go for information, but 32% definitely do not.
- 52% of leaseholders are confident they know their rights and responsibilities.[4]

57% of leaseholders regret buying a leasehold property.

Commenting on the findings, the MD of Brady Solicitors, Clare Brady, said:

> The challenges of communal living emerge strongly throughout the nationwide survey. This is compounded where leaseholders – by their own admission – lack a clear understanding of their rights and obligations. This lack of leasehold knowledge, including understanding how to replace a poorly performing management company, underpins many of the reported problems. It also represents a vast opportunity for the UK's leasehold sector, including its policy-makers, to bring about future change.[5]

In the Housing White Paper, Fixing our broken housing market (February 2017), the Government said:

> We will consider further reforms through the consultation to improve consumer choice and fairness in leasehold, and whether

4 LEASE, National Leasehold Survey 2016 - report
5 Ibid.

> and how to reinvigorate Commonhold. We will also work with the Law Commission to identify opportunities to incorporate additional leasehold reforms as part of their 13th Programme of Law Reform, and will take account of the work of the All-Party Parliamentary Group on Leasehold and Commonhold.[6]

The July 2017 consultation paper, Tackling unfair practices in the leasehold market, includes, amongst other things, proposals to tackle the sale of new-build houses on a leasehold basis and to control ground rent levels in new lease agreements. This consultation exercise, which closes on 19 September 2017, is described as "the first steps" in achieving the commitment set out in the Housing White Paper. For the future, the Government has said:

> We will be looking ahead to further steps needed to ensure transparency and fairness, and considering the outcome of the Law Commission's consultation on its 13th programme of law reform over the coming months which included residential leasehold. Our intention is for a wide ranging project. This will look at:
>
> - improving commonhold,
> - how managing agents operate
> - leasehold terms and enfranchisement.[7]

The consultation paper specifically asks for views on the areas of leasehold reform that should be prioritised and why.[8]

Housing policy is a devolved matter. The legislation governing leasehold ownership currently applies in England and Wales but there are some differences in content and format requirements.[9]

The Government's proposals for reform, set out inTackling unfair practices in the leasehold market (July 2017) would apply only in England.

There are very few leasehold properties in Scotland. The *Property Factors (Scotland) Act 2011* created a statutory framework to protect homeowners who use factoring services (property managers) by providing minimum standards for their operation.

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6 Cm 9352, para 4.38
7 DCLG, Tackling unfair practices in the leasehold market, July 2017, para 7.1
8 Ibid.
9 See Leasehold Advisory Service: Wales- differences in notices and other documents [accessed on 9 August 2017]

2. The extent of leasehold ownership

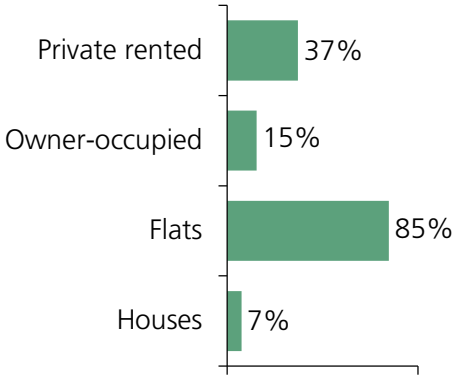
There are no official statistics on the number of residential leasehold properties. DCLG have made estimates based on survey data (section 1.1), and the Land Registry publishes data on sales of leasehold properties (section 1.2).

2.1 Estimating the stock of leasehold properties

DCLG have estimated the extent of leasehold in England by combining data from the English Housing Survey (EHS) with Land Registry records.[10] Their analysis only covers the private sector – social housing is not included.

They estimate that there were around **4 million private leasehold dwellings in England** in 2014-15, about 21% of the total private-sector dwelling stock. About 85% of flats were leasehold compared to 7% of houses. Leasehold was also more common in the private rented sector: 37% of private-rented homes were leasehold compared to 15% of owner-occupied homes. This is partly because flats are more common in the private rented sector.

Proportion of homes that are leasehold
2014/15 estimates



The table below shows the number of homes of homes estimated to be leasehold by type. The majority of leasehold homes are owner-occupied: 57% are, compared to 43% privately rented. 70% were flats and 30% were houses.

Leasehold dwellings in England by type
Millions, 2014/15 estimates

	Houses				
	Detached	Semi-detached / terraced	**All houses**	Flats	**All dwelling types**
Owner-occupied	0.16	0.77	**0.94**	1.32	**2.26**
Private rented	0.01	0.26	**0.26**	1.45	**1.72**
All private sector	**0.17**	**1.03**	**1.20**	**2.78**	**3.98**

Source: DCLG, *Estimating the number of leasehold dwellings in England, 2014-15*, p. 6

DCLG class these figures as 'Experimental Official Statistics'. This means that the methodology is still in development and has not been tested to the same quality standards that National Statistics are.

[10] DCLG, *Estimating the number of leasehold dwellings in England, 2014-15*, 6 April 2017

2.2 Trends in leasehold sales

While headline estimates are available for the stock of leasehold properties, more detailed trends are only available from data on leasehold sales. The Land Registry's Price Paid Data (PPD) file records all properties sold in England and Wales and includes details on the type of property, its location, and whether it was sold leasehold or freehold.

Looking at leasehold sales is not the same thing as looking at the stock of leasehold homes. A property only appears in the PPD if it has been sold, and a property sold multiple times will appear as multiple records in the PPD for a given year.

The following analysis uses the PPD file for 1995-2016.[11] For more details on the content of the PPD and how it has been used here, see 'What is the Price Paid Data?' below.

What type of properties are sold as leasehold?

27% of residential property transactions were leasehold in England and Wales in 2016 (around 263,000 transactions). However, the extent of leasehold sales varies widely depending on the type of property involved, as shown in the table below.

Leasehold transactions by property type
England & Wales, 2016

Property type	% of transactions leasehold
Flats	**98%**
New build	99%
Resale	98%
Houses	**7%**
New build	15%
Resale	7%
All property types	**27%**
New build	46%
Resale	24%

Source: HM Land Registry, *Price Paid Data 2016* [Accessed 7 July 2017]

Almost all sales of flats are leasehold: 98% are, compared to 7% of house sales. Leasehold sales are also more common for new build properties (46%) than resales of existing properties (27%). New build houses are also more likely than others to be sold leasehold: 15% are, compared to 7% of resales.

[11] HM Land Registry, *Price Paid Data 2016* and *Price Paid Data Single File* [Accessed 7 July 2017]. The PPD file is updated monthly as new sales transactions are registered.

Regional and constituency trends

The table below breaks down leasehold sales by region, nation and property type.

Leasehold transactions by region and nation

	Flats	Houses
North East	96%	8%
North West	99%	32%
Yorks & Humber	96%	7%
East Midlands	97%	2%
West Midlands	98%	5%
East of England	98%	2%
London	100%	3%
South East	99%	2%
South West	97%	3%
England	98%	8%
Wales	97%	4%

	New builds	Resales
North East	24%	17%
North West	78%	37%
Yorks & Humber	28%	16%
East Midlands	17%	9%
West Midlands	29%	15%
East of England	38%	19%
London	93%	53%
South East	39%	25%
South West	31%	20%
England	47%	25%
Wales	21%	11%

	New build houses	All transactions
North East	15%	18%
North West	69%	41%
Yorks & Humber	9%	17%
East Midlands	6%	10%
West Midlands	10%	17%
East of England	7%	21%
London	14%	60%
South East	2%	26%
South West	6%	21%
England	15%	27%
Wales	9%	12%

Source: HM Land Registry, *Price Paid Data 2016* [Accessed 7 July 2017]

Leasehold transactions are most common in London (60%), followed by the North West (41%). In London, this is likely to be driven by the high volume of flat sales – 59% of transactions in London were flats, compared to 21% nationally.

Sales of leasehold houses are more common in the North West: 32% are, compared to a national average of 8%. New build houses are more

likely to be sold leasehold across England (15%) but this is particularly true in the North West, where 69% of new build houses are sold leasehold.

In July, DCLG issued a consultation document, Tackling unfair practices in the leasehold market. The consultation comments on the geographic variation:

> Leasehold houses are more prevalent in the North of England. Developers argue that the sale of new build leasehold houses in some areas of England is an accepted custom and practice, and that selling a freehold house could create a potential competitive disadvantage. In some parts of northern England this has resulted in leasehold becoming the default tenure for consumers wanting to buy a new build house. It is particularly common practice in parts of Cheshire, Greater Manchester, Lancashire and Merseyside, but is not limited to these parts of the country.[12]

The maps and table overleaf show leasehold transactions by constituency. The first shows the proportion of all transactions that are leasehold, while the second shows house transactions only. There is no analysis of new build houses specifically, because the number of new build houses sold in a constituency annually may be too small to produce a reliable percentage.

Constituency-trends echo the region-level data above. Constituencies in central London had some of the highest rates of England and Wales, but this is only true when flats are included in the analysis. Leasehold house sales were most common in constituencies around Greater Manchester, Lancashire, Sheffield and Leeds.

Full constituency-level data is available to download alongside this briefing paper.

Box 1: What is the Price Paid Data?

The Price Paid Data (PPD) is a dataset that includes all residential properties sold for full market value and registered with the Land Registry. It does not include sales that were not for full market value, such as Right to Buy sales, gifts, or sales under a compulsory purchase order.[13]

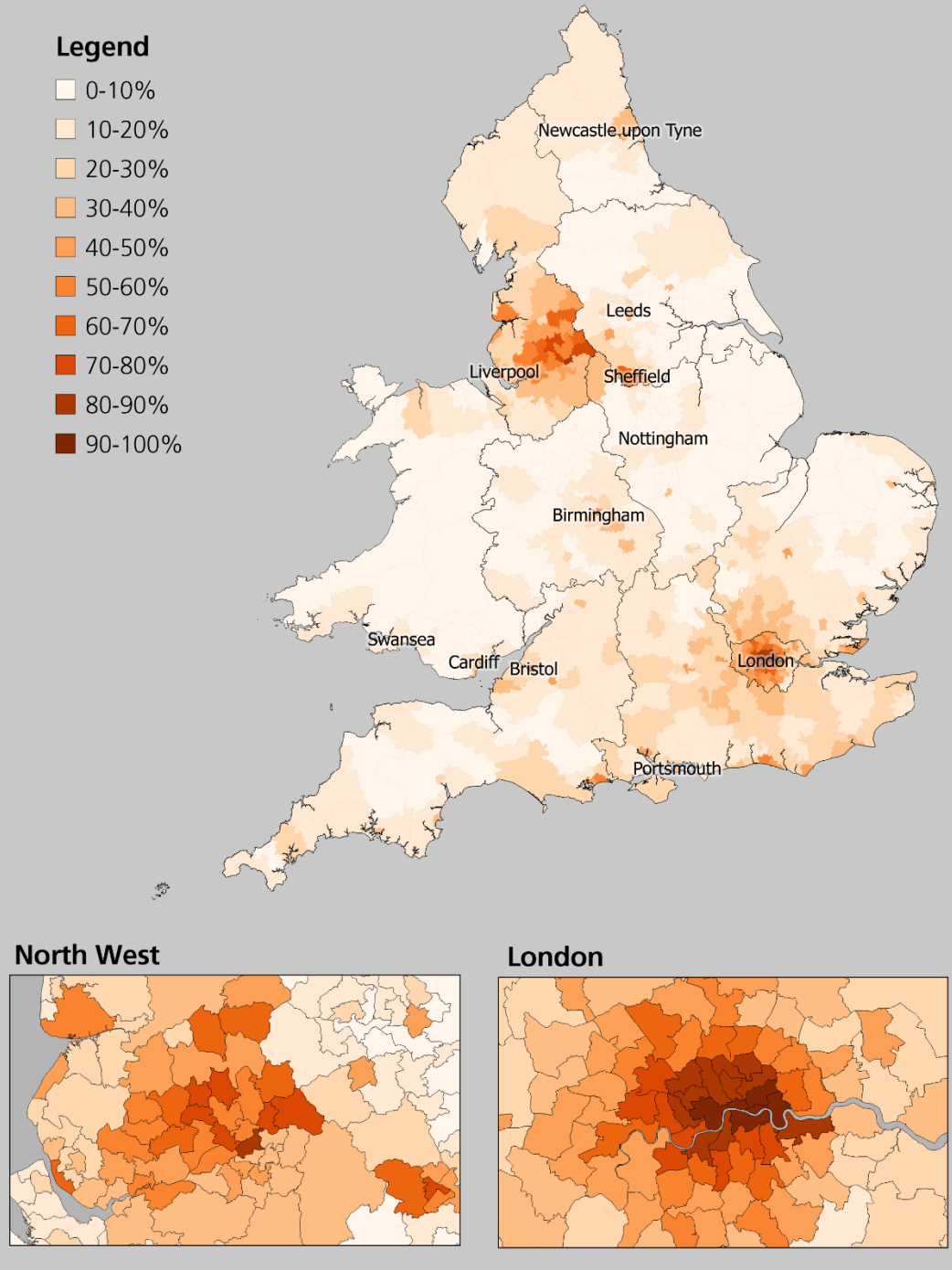
The analysis in this briefing paper covers transactions labelled as flats, detached, semi-detached or terraced. Transactions labelled 'other' are not included, as this category includes non-residential properties.

Also excluded are a small number of properties with no listed postcode, or a postcode that could not be matched to a specific constituency or region. Postcode matching was carried out using the ONS postcode directory, published by Doogal.

12 DCLG, Tackling unfair practices in the leasehold market: a consultation paper, p. 13
13 HM Land Registry, How to access HM Land Registry Price Paid Data, 14 June 2016

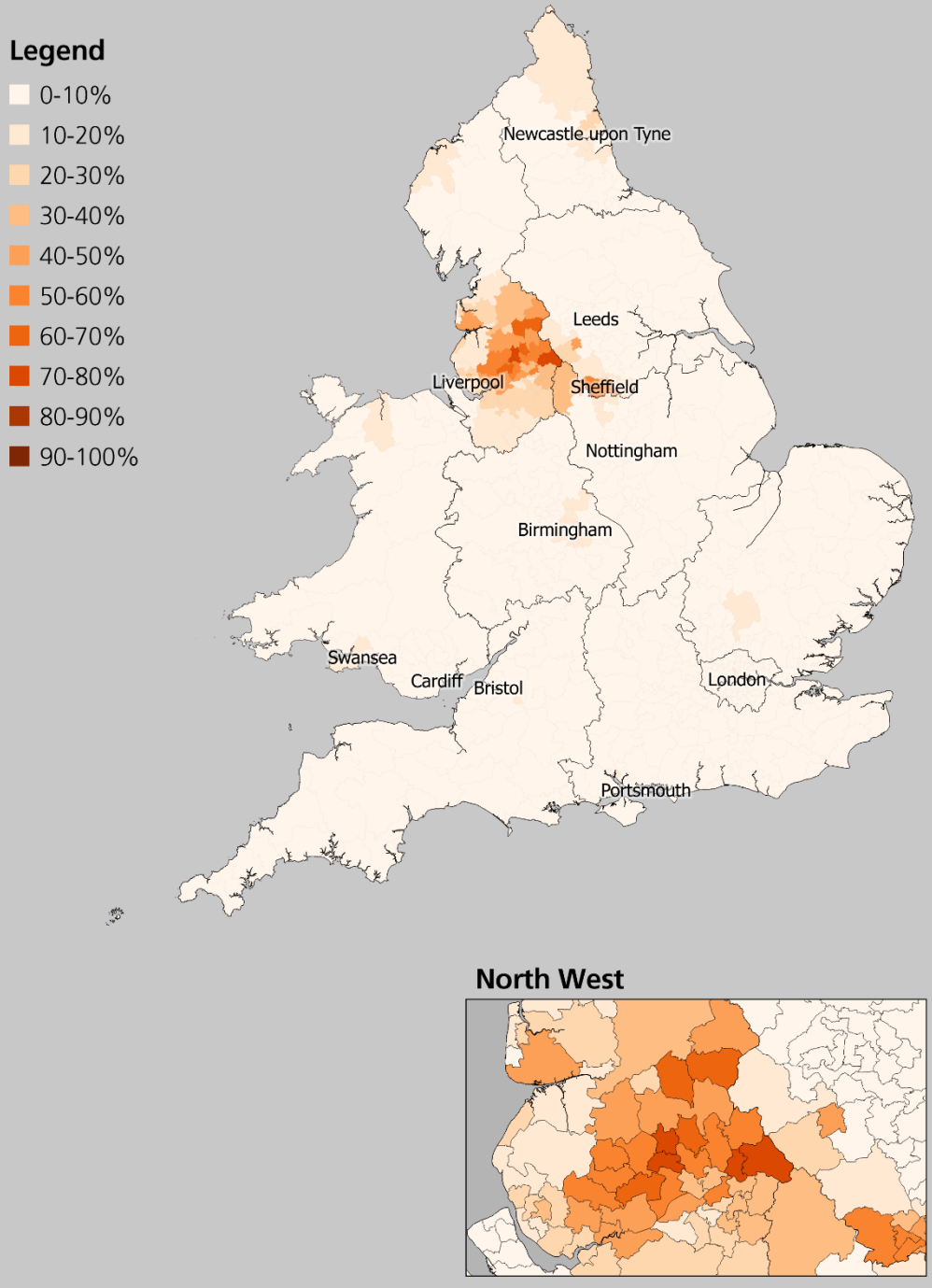
Leasehold sales in 2016

Percentage of all property sales that were leasehold, by constituency



Leasehold house sales in 2016

Percentage of all house sales (excluding flats) that were leasehold, by constituency



Constituencies with the highest proportion of leasehold sales
England & Wales, 2016

All properties

	Constituency	Region	Proportion
1	Poplar and Limehouse	London	97%
2	Cities of London and Westminster	London	95%
3	Bermondsey and Old Southwark	London	92%
4	Bethnal Green and Bow	London	91%
5	Vauxhall	London	88%
6	Islington South and Finsbury	London	88%
7	Westminster North	London	87%
8	Hackney South and Shoreditch	London	86%
9	Holborn and St Pancras	London	86%
10	Hampstead and Kilburn	London	84%
11	Hackney North and Stoke Newington	London	84%
12	Kensington	London	83%
13	Battersea	London	83%
14	Islington North	London	82%
15	Manchester Central	North West	82%
16	Greenwich and Woolwich	London	80%
17	Lewisham, Deptford	London	79%
18	Chelsea and Fulham	London	78%
19	Putney	London	78%
20	Hammersmith	London	77%

Houses only

	Constituency	Region	Proportion
1	Oldham West and Royton	North West	73%
2	Bolton South East	North West	73%
3	Bolton North East	North West	72%
4	Oldham East and Saddleworth	North West	71%
5	Bury North	North West	69%
6	Burnley	North West	68%
7	Hyndburn	North West	68%
8	Leigh	North West	65%
9	Bolton West	North West	60%
10	Rochdale	North West	60%
11	Makerfield	North West	58%
12	Wigan	North West	58%
13	Heywood and Middleton	North West	55%
14	Sheffield Central	Yorks & Humber	55%
15	Bury South	North West	53%
16	Sheffield, Hallam	Yorks & Humber	53%
17	Sheffield, Heeley	Yorks & Humber	52%
18	Manchester Central	North West	52%
19	St Helens North	North West	51%
20	Worsley and Eccles South	North West	51%

Source: HM Land Registry, *Price Paid Data 2016* [Accessed 7 July 2017]

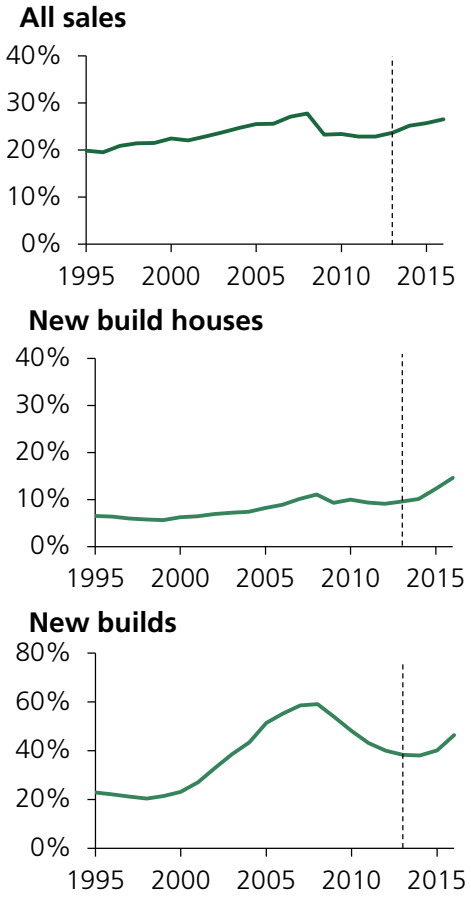
Trends over time

The Land Registry has collected data on property sales since 1995. The proportion of properties sold leasehold has increased slightly since then – from 20% in 1995 to 27% in 2016. The proportion of new build houses sold leasehold as also seen an uptick in recent years, rising from 7% in 1995 to 15% in 2016.

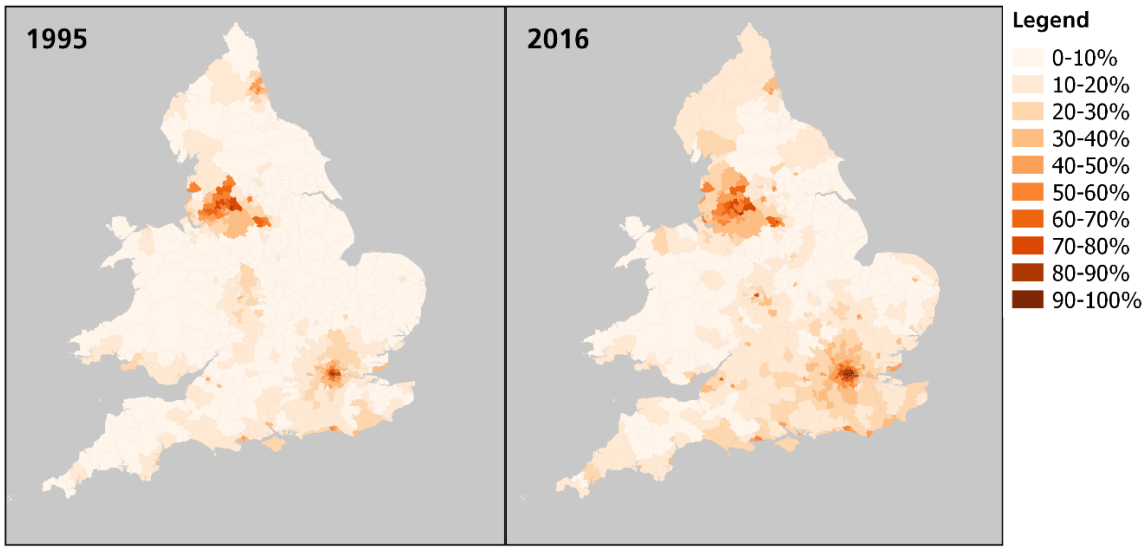
The proportion of properties sold leasehold saw a slight decline after the financial crisis in 2008. This trend is most pronounced in the sale of new build properties: the proportion in 2016 was 46%, still lower than the 2008 peak of 59%.

The maps below show how the geographical spread of leasehold has changed over time. The North West and London have been longstanding leasehold hotspots, but the practice has grown more common in the rest of the country since 1995 – particularly in parts of the South East close to London.

Proportion of sales leasehold



Leasehold sales by constituency



Source: HM Land Registry, *Price Paid Data single file* [Accessed 25 July 2017]
Data produced by HM Land Registry © Crown copyright 2017.

Notes: Since 2013, the coverage of the PPD has been expanded to cover certain other types of sale including repossessions, buy-to-lets and transfers to non-private individuals.

3. Issues with leasehold ownership

3.1 Background

The respective rights and obligations of long leaseholders and freeholders are set out in the lease agreement. Lease agreements are supplemented by a number of statutory provisions which have been introduced over the years. Some of the key provisions include:

- The *Leasehold Reform Act 1967* gave qualifying long leaseholders of houses the statutory right to buy the freehold of their homes.
- The *Landlord and Tenant Act 1985* provided that service charges must be 'reasonable' and that services/works must be carried out to a 'reasonable standard.'
- The *Landlord and Tenant Act 1987* placed a duty on freeholders of blocks of flats to offer a 'right of first refusal' to long leaseholders when they are seeking dispose of their interest.[14]
- The *Leasehold Reform, Housing and Urban Development Act 1993* gave qualifying long leaseholders in blocks of flats the collective right to buy the freehold of their blocks and the individual right to a lease extension.
- The *Commonhold and Leasehold Reform Act 2002* introduced a new form of ownership for blocks of flats and further strengthened long leaseholders' rights in respect of service and administration charges. Restrictions were introduced to limit the circumstances in which forfeiture action could be taken for failure to pay ground rent. The Act also introduced a 'no fault' Right to Manage.

These Acts have been subject to repeated amendment, most recently by the *Housing and Planning Act 2016*.[15]

Where freeholders or leaseholders are in breach of these and other statutory provisions, in most cases, enforcement takes place through an application to a First-Tier Property Tribunal (Property Chamber) in England, and to a Leasehold Valuation Tribunal (LVT) in Wales. Using the tribunal system was intended to provide long leaseholders with a cheaper and speedier means of resolving disputes without having to go through the courts.

Since 1 October 2014, all letting and managing agents in England have been required to be a member of a Government approved redress

[14] Certain types of disposal are exempt.

[15] The 2016 Act amended the 1985 Act to provide for the Secretary of State to make regulations to impose duties on a freeholder to provide the secretary of a residents' association with information about tenants, and to made provision for tribunals or courts to consider whether it is reasonable for a landlord to recover all or part of their costs via administration charges.

scheme.[16] Complaints made against members of a redress scheme are investigated and determined by an independent person. Local authorities can impose a fine of up to £5,000 for non-compliance, with a right of appeal to the First-Tier Tribunal.

There are also approved Codes of Practice to which agents operating in this sector (in England) are expected to adhere:

Service Charge Residential Management Code, 3rd Edition (2016)

ARHM revised Code of Practice for England (2016)

Despite legislative activity in this area, long leaseholders are still calling for further reform. Organisations such as the Leasehold Knowledge Partnership and the related Better Retirement Housing campaign[17] argue that the balance of power is still weighted in freeholders' favour, and have highlighted continuing issues associated with leasehold ownership.

2016 saw the establishment of an All Party Parliamentary Group on Leasehold and Commonhold which is chaired by Sir Peter Bottomley and Jim Fitzpatrick. The Leasehold Knowledge Partnership describes the aims of the group as:

- To reduce the opportunities for exploitation;
- To alleviate the distress and hardship of leaseholders, particularly the elderly;
- To do away with the high costs and legal gamesmanship that have distorted the original intention of the property tribunal as a low cost forum for redress.
- It will examine the incidence of lease forfeiture, and consider the case for its reform, as recommended by the Law Commission in 2006.
- It will examine why the values of retirement leasehold properties can have no relationship at all to the local property markets.
- It will unearth and publicise scandalous behaviour of professions involved in the leasehold sector.
- It will examine those matters where leaseholders pay for a service but are not deemed party to a contract and therefore have limited rights. On issues such as insurance the matter of commissions and the leaseholders rights under the terms of a policy will be reviewed
- To ensure that right to manage legislation acts as intended, although currently frustrated by freeholders' legal actions in the property tribunal and, lately, the Court of Appeal.[18]

The following sections outline some of the key concerns with leasehold ownership and suggested ways forward.

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16 *Redress Scheme for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014* [Regulations made under the *Enterprise and Regulatory Reform Act 2013*]

17 Previously Carlex, the Campaign Against Retirement Leasehold Exploitation.

18 LKP, 29 March 2016

3.2 Selling new-build houses on a long lease

The data in section 2.2 of this paper shows that new-build houses are more likely than others to be sold as leasehold. There is growing concern that developers are choosing to sell on this basis in order to create a future income stream from ground rent payments and the sale of the freehold interest to the long leaseholder. From the buyer's point of view, the price of a long leasehold house may be lower than one sold as freehold, but the Government's consultation paper, Tackling unfair practices in the leasehold market (July 2017), observes that "it is not clear that the 'leasehold discount' is always passed on to the consumer."[19]

Leasehold owners are liable to pay an annual ground rent (see below) and may, under the terms of the lease agreement, be required to seek the freeholder's consent before carrying out alterations. Administration charges are usually payable for seeking consents of this sort. The consultation paper notes "these costs can total thousands of pounds more than envisaged at the point of sale."[20] Disputes over 'unreasonable' administration charges can be referred to a First-Tier Tribunal (Property Chamber) in England[21] but leaseholders are often reluctant to go down this route. Section 3.13 of this paper discusses the tribunal system and calls for alternative means of securing dispute resolution.

Most owners of leasehold houses have the statutory right to buy the freehold interest (enfranchise) once they have owned the property for two years.[22] The Leasehold Advisory Service has information on its website in regard to eligibility and the process to follow. Valuation of the freehold interest is a contentious area.

Box 2: Freehold valuation

The valuation process is complicated and depends on several factors including the rateable value of the house at different dates, the ground rent, the number of years left on the lease and the current value of the house. Valuations should be carried out by qualified professionals such as chartered surveyors. Leaseholders may be required to obtain the rateable value of the house in 1965 (or the first day of the lease, if later) and in 1990. These rateable values will dictate whether the valuation should be carried out using the Original Valuation Basis or the Special Valuation Basis.

Marriage value[23] is payable on leases with fewer than 80 years left to run. Marriage value is split equally between the freeholder and leasehold.

Long leaseholders are also liable to pay the reasonable costs of the freeholder in engaging in the enfranchisement process.

If the parties cannot reach agreement over the price payable, the matter can be referred to a First-Tier Tribunal (LVT in Wales) for determination.

19 DCLG, Tackling unfair practices in the leasehold market, July 2017, para 3.5
20 Ibid., para 3.12
21 Leasehold Valuation Tribunal (LVT) in Wales.
22 *Leasehold Reform Act 1967* (as amended)
23 Marriage value is the increase in the value of the property following the completion of enfranchisement or a lease extension. This reflects the additional market value of a longer lease or the freehold.

Press reports have indicated that buyers of new-build homes are sometimes told that they will be able to buy the freehold interest for a certain amount once they have been owners for two years. However, developers often sell-on their freehold interest and the Government's July 2017 consultation paper says that "consumers can find that they are faced with significant legal and surveyor costs where they want to purchase the freehold."[24] There is no duty on a freeholder of a house to inform the leaseholder of a change in ownership, nor does the leaseholder have a 'right of first refusal' to buy the freehold interest at that point. However, qualifying long leaseholders' statutory right to enfranchise is still exercisable against the new freeholder, and disputes over the valuation can be referred to a First-Tier Tribunal (FFT) as outlined above.

The All Party Parliamentary Group (APPG) on Leasehold and Commonhold Reform published A preliminary report on improving key areas of leasehold and commonhold law in April 2017 which referred to the practice of freeholders offering to sell the freehold interest on an informal basis, i.e. outside the statutory process provided for by the 1967 Act. The APPG was told that freeholders sometimes use an informal approach "as a means of imposing onerous covenants".[25]

Potential reforms

Restricting developers' ability to sell houses on long leases

On 1 March 2017 the Prime Minister said:

> Other than in certain exceptional circumstances, I do not see why new homes should not be built and sold with the freehold interest at the point of sale.[26]

Tackling unfair practices in the leasehold market is seeking views on what steps the Government should take to limit the sale of new-build houses on a leasehold basis.

A ban on the sale of new build houses on a long lease is supported by the APPG "unless there is a legitimate reason why the land can only be owned under a leasehold."[27]

A right of first refusal

It has been suggested that long leaseholders of houses should be given a right of first refusal to ensure that freeholders offer the sale of the freehold interest to the leaseholder before selling to a third party. Freeholders may be able to avoid such a provision by entering into a contract with the third party before granting the lease to the home buyer, but it could still "give an option to those whose only option at

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24 DCLG, Tackling unfair practices in the leasehold market, July 2017, para 3.13
25 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017
26 HC Deb 1 March 2017 c295
27 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017

present is to exercise their right to enfranchise but only after they have owned their house for two years."[28]

Tackling unfair practices in the leasehold market suggests that transfers to third parties without the leaseholder's knowledge is not in consumers' best interests.[29]

Reducing Help to Buy Equity Loan support for leasehold houses

Tackling unfair practices in the leasehold market says that the Government proposes to:

> …remove as far as possible Help to Buy Equity Loan support on new build houses where these are sold as leasehold. Only where there are specific circumstances to justify the use of leasehold will Help to Buy Equity Loan support the sale.
>
> In the cases where leasehold houses can be justified, Help to Buy Equity Loan support would only be available if the ground rent terms are reasonable. We would aim to introduce this non–legislative policy change as soon as practicable.[30]

Removing the two year moratorium on the right to buy

The APPG on Leasehold and Commonhold Reform has recommended that existing leaseholders of houses should not have to wait two years before being able to buy the freehold of their homes.[31]

Limiting the costs of a formal purchase

The APPG has also recommended that the cost of enfranchisement and leasehold extensions should be moved to a 'formulaic model' that would not require mediation by tribunals.[32]

Removing incentives to impose onerous terms

The APPG has recommended that the Government should look at ways of reducing legal costs and removing incentives for landlords to impose onerous terms when selling a freehold interest on an informal basis.

A requirement for independent legal advice

The solicitors, Hart Brown, have said that developers can sometimes insist or encourage the use of a "pet solicitor" to handle the purchase of leasehold properties – this raises questions about the independence and standard of the advice given:

> Many of our clients have complained that they were not properly made aware that they were buying a leasehold house or of the potential costs of acquiring the freehold at a later date. An independent solicitor has no relationship with the developer and is not dependant on the developers' referrals for business.[33]

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28 Hart Brown Solicitors, Leasehold enfranchisement, 26 July 2017
29 DCLG, Tackling unfair practices in the leasehold market, July 2017, para 3.13
30 Ibid., paras 3.16-17
31 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017
32 Ibid.
33 Hart Brown Solicitors, Leasehold enfranchisement, 26 July 2017

3.3 Ground rents

Ground rent represents the consideration underpinning the contract (lease agreement) between a leaseholder and the freeholder. The lease will specify how much ground rent is payable, when it is due, and when it will be subject to review. Tackling unfair practices in the leasehold market comments on significant increases in ground rents in recent years. It seems that there is a trend of charging higher ground rents at the start of a lease and for shorter review periods. This means that long leaseholders can be faced with "onerous and unsustainable ground rents":

> This has included cases of freeholders charging initial ground rents of £295 per year on properties purchased for just under £200,000, which increase to £9,440 per year after 50 years. In these cases the estimated cost of purchasing the freehold using a statutory valuation method would be over £35,000. In such cases leaseholders can also face difficulties selling or re-mortgaging.[34]

The consultation paper refers to the attractiveness of ground rents as a revenue stream for major investment funds:

> Developers have highlighted that the returns from selling on ground rents can be up to 35 times the annual ground rent value. In the current market this can be considerably more than the amount normally charged to the purchaser of a new build house for the freehold interest at the point of sale.[35]

In April 2017, Taylor Wimpey reportedly apologised for selling leasehold properties containing provisions for a doubling of ground rents every 10 years, and set aside £130 million to settle ground rent disputes.[36] Commentators pointed out that this would not assist long leaseholders where the company has sold on its ground rent income streams to third-party investors. Taylor Wimpey's chief executive reportedly said that the aim was to reach agreement with all third-party freeholders "but that the group would give assistance to customers if a deal could not be reached."[37]

Potential reforms

Limiting ground rents in a new lease

Currently, there is no limit on the level of ground rent payable under a lease. Tackling unfair practices in the leasehold market says that the Government is minded to:

> …introduce measures limiting ground rents in new leases to start and remain at a 'peppercorn' (zero financial) level. Exceptions could apply to housing association and local authority tenants exercising the Right to Buy where most ground rents are set to £10 per year. We need to consider the impact of this and what a

34 DCLG, Tackling unfair practices in the leasehold market, July 2017, para 3.13
34 Ibid., para 4.7
35 Ibid., para 4.10
36 *Financial Times*, Taylor Wimpey sets aside £130m to cover ground rent disputes, 27 April 2017
37 Ibid.

> more 'reasonable' ground rent regime would look like if a case was made for this.[38]

Limiting ground rent increases in new lease agreements

Tackling unfair practices in the leasehold market makes reference to Nationwide's decision in May 2017 not to lend on leasehold properties with ground rents that double every 15 years or less. The Government is seeking views on what a reasonable ground rent would look like in terms of the maximum rate of increase and how often increases should be applied.

Ground rent levels are relevant to the calculating the premium payable for a lease extension or freehold interest. Attempts to limit ground rents would therefore have an impact on the cost of enfranchisement/lease extensions.

Exempting leaseholders from Ground 8 possession claims

As ground rents have risen, an unintended consequence is that where they exceed £1,000 per year in Greater London and £250 elsewhere, the lease agreements are classed as assured tenancies under the *Housing Act 1988*. In turn, this means that landlords can seek a court order for eviction where three months' ground rent is at least three months in arrears (where ground rent is payable annually) under Ground 8 of schedule 2 to the 1988 Act. Ground 8 is mandatory – this means that a judge cannot refuse to grant an order.

In Tackling unfair practices in the leasehold market the Government is seeking views on amendments to the 1988 Act to rectify this "unintended consequence."

3.4 Existing leaseholders of new-build houses

Moves to ban the sale of new-build houses on a leasehold basis, and to limit ground rents and increases in ground rents in new leases will not, it is acknowledged, assist existing leaseholders who have bought leasehold houses with onerous ground rent provisions.

In Tackling unfair practices in the leasehold market the Government says it is seeking views on steps that could be taken:

> The Government recognises the challenges faced by existing leaseholders with 'onerous' ground rents. We are very keen to hear views on what steps could be taken to improve the situation of these leaseholders, which could include steps to tackle unreasonable and onerous rises in the future and strengthen the rights of consumer redress from unfair trading practices.[39]

During a Westminster Hall debate on leasehold and commonhold reform on 20 December 2016, Sir Peter Bottomley asked whether there was scope for declaring onerous ground rent clauses to be "an unfair term" and have them "written out." The then Housing Minister, Gavin Barwell, said:

> There are a number of different ways in which the issue can be addressed. It is a difficult issue, because although the clear mood

38 DCLG, Tackling unfair practices in the leasehold market, July 2017, para 4.17
39 Ibid., para 4.19

> in the House is that the practice is unfair, it none the less interacts with the property rights of the freeholder, and those rights have some protection under the European convention on human rights. We need to think about the right way to address the problem. I will certainly reflect on the suggestion that my hon. Friend has made, and other suggestions have been made during the debate.[40]

As noted earlier, these leaseholders may have the right to buy the freehold interest under the *Leasehold Reform Act 1967*.

3.5 The Right to Manage (RTM)

Long leaseholders in blocks of flats buy the right to live in their property but the management of the block, including its maintenance and insurance, normally remains in the hands of the freeholder. The lease agreement usually makes provision for the costs of the freeholder or his/her agent in discharging these management functions to be met in full by the leaseholders; these payments are referred to as service charges.

The *Commonhold and Leasehold Reform Act 2002* introduced a 'no fault' RTM for long leaseholders in blocks of flats.[41] The aim was to enable long leaseholders in blocks to collectively take over the management of their blocks without having to establish a failure on behalf of the freeholder/managing agent. Long leaseholders in blocks already had the right to apply to a Tribunal for the appointment of a manager, but in order to be successful the leaseholder(s) had to demonstrate serious abuse by the landlord.

Of 1,244 long leaseholders surveyed by LEASE in 2016, 55% considered that changing managing agents would be a difficult process. Only 1 in 5 were aware that they could replace a poorly performing agent.

The aim of the RTM was to provide an alternative option to leasehold enfranchisement for leaseholders who were unhappy with the management of their blocks but who could not for some reason, e.g. cost, buy the freehold. No compensation is payable to the freeholder when the RTM is exercised.

The APPG's report, A preliminary report on improving key areas of leasehold and commonhold law (April 2017), states:

> It now appears to be accepted by government that the Right to Manage legislation is burdened with many deficiencies that add to the costs for the leaseholder.[42]

Problems with the RTM were raised by Oliver Colvile during the debate on leasehold reform on 20 December 2016:

> The Elim Court case has attracted national attention to right-to-manage law. Elim Court's RTM company, which was established for this purpose, made an application to acquire the right to manage a block of flats at Elim Terrace in Plymouth under part 2 of the Commonhold and Leasehold Reform Act 2002.
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> […]

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40 HC Deb 20 December 2016 c1354

41 Some exemptions apply, e.g. local authority long leaseholders cannot exercise the RTM under the 2002 Act.

42 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017

> Elim's landlord declined to participate in the RTM process and opposed it through the Leasehold Valuation Tribunal—now more commonly known as the first-tier tribunal—which accepted his arguments on a technicality. On appeal, the decision was upheld, and the case thrown out. My constituents in Elim Court have been battling for years for the right to manage their property. The legal system that was put in place in 2002, while welcome, is in desperate need of vast improvement.
>
> This really is the tip of the iceberg. Since its inception in 2002, the right to manage has proved popular with leaseholders who want to take control of badly managed blocks. However, it is an over-complicated scheme, riven with pitfalls and technicalities that are difficult to overcome without sound legal advice. I have been told that gaping holes have emerged in the 2002 legislation that need to be addressed urgently due to the increase in RTM applications and to landlords refusing to release their tight grasp on highly lucrative management arrangements, while finding every possible loophole to thwart applications by leaseholders and residents. That is an abhorrent way to treat anyone, let alone the retired and the elderly.
>
> A further issue that Elim Court and Regent Court have encountered is the high costs involved in tribunals and appeals, which have, indeed, become something of a cash cow for lawyers. The fact that RTM is so plagued by loopholes means that the no-fault basis on which leaseholders can obtain the right to manage is proving costly. Currently, Elim Court is awaiting a hearing at the Court of Appeal—as I explained earlier, the process has been highly expensive. If the residents were to walk away now, they would be set to lose between £25,000 and £30,000—a very large amount.[43]

During the same debate, Jim Fitzpatrick, one of the chairs of the APPG, cited the case of Canary Riverside in his constituency where a Tribunal appointed manager took charge of the block's management under section 24 of the *Landlord and Tenant Act 1987* with effect from October 2016. He said that the appointed manager was being "ground down" by "continuous litigation" brought by the landlord in an attempt to undermine the tribunal's decision. Mr Fitzpatrick declared section 24 to be "not fit for purpose."[44]

Potential reforms

The APPG suggests that a **review of the legislation** should be carried out and "consideration given to ending the ability of landlords to delay and add costs to the process."[45]

Premises with mixed residential and non-residential use, where the internal floor area of the non-residential parts exceeds 25% of the total internal floor area of the property, are excluded from the RTM. The APPG has questioned this exclusion as the commercial element is

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43 HC Deb 20 December 2016 c1347
44 Ibid., cc1329-30
45 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017

excluded from the RTM's role, saying "the 25% limit seems to serve no purpose."[46]

The APPG has also called for improvements to the legislation to ensure that it works for multi-site blocks and sites with a mixture of freehold and leasehold ownership.[47]

Oliver Colvile MP has called for "a more flexible, more transparent and less complicated system for RTM, insurance issues and service charges for leasehold properties."[48]

During the passage of the *Housing and Planning Bill 2015-16* through Parliament Baroness Gardener of Parkes sought to insert a new clause to change the qualifying threshold for the RTM. She said:

> I cannot understand why in order to get the right to manage, which is set out in statute, you require 50% of the leaseholders to agree, but having got the right to manage, you cannot do anything very significant to deal with any problems in a building unless you have 100%.
>
> […]
>
> It is therefore very important that we find a way of dealing with this, and one way would be to reduce the percentage required for it. I suggested a simple majority; I appreciate that that may be too simple but there must be somewhere between the simple majority and the impossible total. The Government must agree to look at that. I will not be satisfied unless they agree to look at it, because this issue is getting worse.[49]

Viscount Younger of Leckie, for the Government, rejected the new clause but committed to further discussion on the issue:

> …as a result of this debate and the debate in Committee, we now want to work closely with my noble friend Lady Gardner and all those interested in the sector to consider the complexities of these detailed issues. We need to balance the rights of all parties and consider how well the existing routes to push necessary repairs or vary leases work through the First-tier Tribunal and look at how all the aspects are working. I would like, with the Minister, to meet my noble friend Lady Gardner to discuss this issue, and I am sure that all noble Lords who have taken part in this debate would be most welcome to attend. I hope that, with my assurance to take these issues forward and look at the complexities, my noble friend will feel able to withdraw her amendment.[50]

3.6 Enfranchisement and lease extensions

As noted above, qualifying owners of leasehold houses have the right to buy the freehold interest under the *Leasehold Reform Act 1967*, while qualifying leaseholders in blocks of flats have a *collective* right to buy the freehold interest and an individual right to a lease extension under the *Leasehold Reform, Housing and Urban Development Act 1993.*

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46 Ibid.
47 Ibid.
48 HC Deb 20 December 2016 c1348
49 HL Deb 20 April 2016 cc646-7
50 HL Deb 20 April 2016 c653

The impact that rising ground rents can have on the cost of exercising these rights is explained in section 3.3. Aside from this, leaseholders have long expressed concerns over the complexity of the valuation process and price they are expected to pay. Disputes over valuation can be referred to a First-Tier Tribunal where the leaseholders invoke their statutory right to buy the freehold or extend the lease. As with the RTM, there are reports of obstructive freeholders who seek to block leaseholders in exercising their right to enfranchise/extend their lease agreements.

Potential reforms

Removing the two year moratorium on the right to buy

As noted above, the APPG on Leasehold and Commonhold Reform is seeking the removal of the two-year moratorium on the right to enfranchise.[51]

Limiting the costs of a formal purchase

The APPG has also recommended that the cost of enfranchisement and leasehold extensions should be moved to a 'formulaic model' that would not require mediation by tribunals.[52]

3.7 Service charges

The day-to-day management and maintenance of blocks of flats is usually the responsibility of the freeholder. This responsibility can be contracted out to an agent on the freeholder's behalf. The cost of the work is usually recoverable from long leaseholders, as a condition of their lease agreements, via a service charge.

Service charges are a highly contentious area for long leaseholders. There are complaints about excessive service charges and a lack of transparency over what services are being provided and how they are being charged. During the debate on 20 December 2016, Jim Fitzpatrick said:

> Previously, constituents of mine have been charged for lifts in blocks with no lifts, and for garden upkeep in places with no gardens.[53]

There has been legislative activity in this area. Demands for service charges must contain the landlord`s name and address. The demand must also include a summary of leaseholders' rights and obligations. The *Landlord and Tenant Act 1985* provides that service charges must be reasonable and that the services provided are carried out to a reasonable standard. Leaseholders can challenge the reasonableness of service charges and the standard of the work but are often reluctant to take legal action, citing cost as a significant barrier. Leaseholders can also request a summary of the service charge account and can inspect receipts and accounts in relation to the last accounting year, or where

Of 1,244 leaseholders surveyed by LEASE in 2016, 40% strongly disagreed that service charges represented value for money. 62% said that services provided had not improved in the last two years.

51 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017
52 Ibid.
53 HC Deb 20 December 2016 c1329

accounts are not kept by accounting years, the past 12 months preceding the request.[54]

Service charge contributions must be held on trust by the landlord for the leaseholders. There are also provisions which limit the landlord's ability to recover service charges that have not been demanded where the costs were incurred over 18 months ago.

Issues persist *despite* legislative activity aimed at strengthening leaseholders' rights. Jim Fitzpatrick has cited research by Which? into service charges:

> In 2012, the consumer organisation Which? estimated that £700 million was being overcharged in service charges each year. That was when everyone thought that there were between 2 million and 2.5 million leasehold homes. Given the size of the sector as we now know it to be, that suggests that £1.4 billion may be being overcharged each year. That cannot be right either.[55]

Long leaseholders may also face 'one-off' bills for major works to cover; for example, roof or lift replacement. This arose as a particular issue for leaseholders in the social rented sector as landlords worked towards achieving the Labour Government's target of bringing all social sector stock up to the decent home standard by 2010. The 1985 Act sets out mandatory consultation processes that must be followed by landlords who intend to recover the cost of major works from long leaseholders where the expected cost is likely to be above a certain threshold. Failure to follow the correct process can result in landlords being unable to recover the full cost of the works. There are some additional protections in place for social sector leaseholders in certain limited circumstances, these protections are explained in a separate Library briefing paper: Leaseholders in social housing: paying for major works (England).

Potential reforms

Contributions to the debate on 20 December 2016, and the APPG's preliminary report, did not include specific reference to changes in the law in relation to service charges. However, there were calls for **the introduction of overarching regulation**. Currently, property agents in England must be members of one of the Government approved redress schemes but the sector is mainly subject to self-regulation. Sir Peter Bottomley raised this issue on 20 December 2016:

> How can a self-regulation system that does not consider such court findings as warranting even an admonition retain the confidence of the general public? The Government have argued for years that there is no need for statutory regulation, but can anyone name a group that supports that position? Even the main managing agents trade body, the Association of Residential Managing Agents—ARMA—has been asking the Government to regulate the sector.
>
> Leasehold is the only part of the housing market where an unregulated person can hold huge amounts of leaseholder funds and yet has no obligation to act in the leaseholder's interests. Let

54 Sections 21 and 22 of the *Landlord and Tenant Act 1985*.
55 HC Deb 20 December 2016 c1330

> me remind the House of something: when the freeholder appoints a managing agent, who does the managing agent work for? It is the freeholder.
>
> I ask Ministers please to establish a legal position so that the leaseholder has an interest in everything that happens either with their money or in the block where they own the lease.[56]

Hart Brown solicitors has suggested that regulation of managing agents may address some of the concern regarding abuse of service charges, saying "Currently managing agents, who are often acting on the instruction of the landlord, but spending the leaseholders' money, are unregulated."[57]

Baroness Gardener of Parkes moved to insert a new clause into the *Housing and Planning Bill 2015-16* which would have made it a requirement to establish **'sinking' or 'reserve' funds** in respect of leasehold blocks. Where these funds exist, long leaseholders make a regular payment into the fund which is then used to cover the cost of major works, thus avoiding the impact of significant one-off bills.[58] Viscount Younger of Leckie responded for the Government:

> …while well-intentioned, the amendment is unnecessary. It would cause conflict and confusion with the existing requirements and responsibilities under the terms of the lease, and does not address a range of important issues covered by the existing legislation.
>
> […] The existing legal contract between the freeholder and leaseholder, which, as we all know, is called the lease, already provides for the collection of service charges for the upkeep and maintenance of a block. In a growing number of cases, provision is also made for an amount to be collected called a sinking fund. Importantly, where a lease does not already provide for a sinking fund, legislation makes it possible to seek a variation of the lease to do so.
>
> It is sensible, clear and workable for the person responsible for the upkeep and maintenance of the building to also be the person responsible for any sinking fund. To require the creation of a separately held and managed sinking fund administered by someone other than the person with legal responsibility for maintaining the block would create conflict and confusion with the existing lease, as would trying to dovetail it with the existing arrangements. For instance, if major work were required to the roof of the block, how would responsibility for the work be determined and how would any shortfall in the funds needed to carry out the work be dealt with? Who would be responsible for arranging the repairs? The current arrangements keep responsibilities and accountabilities clear, and do not fall foul of any legal obligations and responsibilities.
>
> Importantly, legislation enables the freeholder to be held to account on service charges, including any sinking fund. Leaseholders have the right to challenge the reasonableness of service charge amounts being sought, whether for day-to-day use or towards a sinking fund. Existing legislation governing service charges also provides for a wide range of important issues, including the protection for service charges by deeming them to

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56 HC Deb 20 December 2016 c1338
57 Hart Brown Solicitors, Leasehold enfranchisement, 26 July 2017
58 HL Deb 17 March 2016 c1989

> be held in a statutory trust, and that the money may be deposited only at a financial institution specified by the regulations. Under the amendment, it is unclear how the leaseholders would determine who held and administered the sinking fund, or how contributions would be determined and spent. The existing arrangements, in contrast, provide protection and a route to challenge the freeholder.
>
> I say again that I recognise the important role that sinking funds can play, and that where the lease does not already provide for a sinking fund it is possible for either leaseholders or the freeholder to seek a variation of the lease to do so. This is the most appropriate route for creating sinking funds, avoiding unnecessary confusion and ensuring that appropriate protections remain in place. I hope that with this explanation my noble friend will agree to withdraw her amendment.[59]

The amendment was withdrawn.

3.8 Building insurance

It is common for a long lease to provide for the landlord to organise building insurance, recovering the cost from the leaseholder(s), or for the lease to require the long leaseholder to insure with a company nominated or approved by the landlord. The *Commonhold and Leasehold Reform Act 2002* gave long leaseholders of houses the right to organise their own building insurance provided certain requirements are fulfilled.[60] Long leaseholders in blocks of flats must abide by any provision in the lease concerning building insurance, although they can request a summary of the insurance policy and challenge the cost of the insurance if they think it is unreasonable.

There are specific concerns about the commission a landlord or agent may earn through organising insurance with a particular company. This was raised during the debate on 20 December 2016, Oliver Colvile said:

> The ombudsman's decision highlights the fact that millions of leaseholders face the same position across the country. Some landlords also happen to own an insurance broker, as we heard earlier, creating loopholes and conflicts of interest across the board. The Financial Conduct Authority is fully aware that leasehold building insurance is a problem and has reported that high commissions—up to 40%—have been paid on insurance. In 2014, the Competition and Markets Authority investigated leasehold property management, and one of its specific recommendations was that the FCA should look into the matter.[61]

The CMA did not make specific recommendations on the charging of commission. However, in light of evidence of high charges and commission rates and a lack of transparency, the CMA encouraged the Financial Conduct Authority and the Government to consider regulation in this area.

Issues raised in relation to the inclusion of cover against terrorism in building insurance policies were debated in Westminster Hall on

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59 HL Deb 17 March 2016 c1993

60 For more information see Library briefing paper 1821: Long leaseholders: building insurance requirements

61 HC Deb 20 December 2016 c1348

22 October 2014. This is considered further in the Library briefing paper 1821: Long leaseholders: building insurance requirements.

3.9 Administration charges

A lease may make provision for leaseholders to pay for the landlord's costs when dealing with applications for approvals (e.g. permission to adapt a property) or for the provision of documents. These are known as administration charges. Long leaseholders can challenge unreasonable administration charges through the tribunal system.

High administration charges remain an issue. Justin Madders MP cited the following example during the debate on 20 December 2016:

> The same constituent recently obtained planning permission to extend her home, but was told that she needed to obtain consent from Homeground in order to proceed, for which she was charged a fee of £333. However, following payment of that amount, an additional £2,440 was requested for the same purpose. This amounts to nothing less than racketeering and it should be stamped out.[62]

Lord Young of Cookham sought to amend the *Housing and Planning Bill 2015-16* to prevent landlords from recovering costs associated with legal proceedings as administration charges:

> Amendment 84BA addresses an irregularity concerning the consideration of recovery of a landlord's costs from leaseholders as administrative charges. At the moment, a landlord can recover their costs for appearing before a tribunal or court as an administration charge where a covenant exists in the lease, without the leaseholder being able to ask the tribunal or court to consider the reasonableness of the costs, which they are able to do when the costs are recovered via the service charge. This is potentially unfair and can discourage leaseholders from exercising their rights to seek a determination that service charges or other payments are payable and reasonable, where they are aware that the landlord can recover his costs in this way through this loophole. The proposed amendment would enable the court or tribunal to consider on application whether it is reasonable for a landlord to recover all or part of the costs of appearing before it as an administration charge, where the lease allows this. At the moment, that cannot be done.
>
> This amendment would therefore be similar to the existing legislation which enables tribunals and courts, on application by a tenant or leaseholder, to limit a landlord's costs of appearing before a court or tribunal where they seek to recover them through service charges. This is not to say that a landlord should not be able to recover his costs, but rather that a tribunal or court should be able to consider whether it is reasonable so to do.[63]

Viscount Younger of Leckie undertook to consider the matter further.[64] An amendment was subsequently agreed such that, from 7 April 2017, tribunals or courts can consider, on application by the leaseholder,

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62 HC Deb 20 December 2016 c1343
63 HL Deb 17 March 2016 cc1968-9
64 HL Deb 17 March 2016 c1973

whether it is reasonable for a landlord to recover all or part of those costs.[65]

3.10 Forfeiture

Forfeiture of a lease is the ultimate sanction a landlord can take against a leaseholder who is in breach of the lease agreement (contract). In order to gain possession of the property the landlord must obtain a court order. This is initiated by the service of a notice under section 146 of the *Law of Property Act 1925*. Restrictions have been placed on the use of forfeiture for service charge arrears (e.g. the arrears must be agreed by the leaseholder), and for ground rent arrears (the leaseholder must have received a demand for payment in the prescribed form[66]). The 2002 Act also placed some limits on the use of forfeiture based on the level of outstanding arrears. As a general rule, the courts can grant relief from forfeiture.

The APPG's A preliminary report on improving key areas of leasehold and commonhold law, refers to "considerable injustice as a result of the use of forfeiture in the residential leasehold sector."

Potential reforms

The APPG recommends:

- The adoption of the Law Commission report on replacing residential forfeiture: Termination of tenancies for tenant default.[67]
- In bringing forward the Law Commission's recommendations, the Government should consider how the use of forced sale applies in commonhold regimes around the world and "consider if the Commission's wording might be adopted to any future review of commonhold in England."[68]

3.11 Recognition of tenants' associations

Gaining recognition rights for tenants' associations in leasehold housing has been a longstanding issue, despite the fact that qualifying tenants of a residential leasehold property have a legal right to form a recognised association. Amendments were made during the passage of the *Housing and Planning Bill 2015-16* through Parliament which will, when in force, require a landlord to supply to the secretary of a residents' association information to allow contact to be made with absent leaseholders for the purpose of increasing the association's membership and, therefore, its likelihood of achieving recognition under section 29(1) of the *Landlord and Tenant Act 1985*.[69]

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65 Under section 131 of the *Housing and Planning Act 2016* which inserted a new provision into the *Commonhold and Leasehold Reform Act 2002*.
66 Section 166 of the *Commonhold and Leasehold Reform Act 2002*
67 Cm 6946, October 2006
68 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017
69 Section 130 of the *Housing and Planning Act 2016* which has inserted a new section 29A into the *Landlord and Tenant Act 1985*.

The Government is currently consulting on the content of regulations that will be made under the new section 29A: Recognising residents' associations, and their power to request information about tenants. Consultation will close on 19 September 2017.

3.12 Leasehold retirement properties

There are some specific issues that have arisen in relation to leasehold retirement properties. Companies that own or manage these properties often include a clause in their lease agreements requiring owners to pay an 'exit' or 'transfer' fee when they wish to sell or rent out their homes. The Law Commission notes that payment of these fees is often triggered by an event (such as resale or sub-letting), and for this reason has referred to them collectively as "event fees." The fee, according to the Law Commission, can be up to 30% of the property's resale price. Owners have questioned whether this practice is legal and the matter has attracted a good deal of media attention. Background and additional information can be found in Library briefing paper 5994: Leasehold retirement homes: exit/event fees.

The Law Commission reported on Event Fees in Retirement Properties on 31 March 2017. The Commission identified significant problems associated with these fees:

- event fees can be hidden in complex leases
- leaseholders may be charged unexpectedly – even when their spouse or carer moves into the property
- event fees are often disclosed too late in the process for the consumer to take the fee into account
- that if consumers do spot event fees, they may fail to appreciate their financial consequences[70]

The Commission is not recommending the abolition of event fees, but has recommended regulation through a Code of Practice supported by an amendment to the *Consumer Rights Act 2015* to enable enforcement by consumers.

The APPG has questioned some of the Law Commission's findings, in particular, the idea that event fees may make retirement housing more affordable for older residents who are 'capital rich and cash poor' by deferring payments. The APPG is critical of the Commission's failure to consider counter evidence and the risk of a lack of transparency around event fees.[71] The APPG report concludes that "the APPG is concerned that the proposed event fee system may have disadvantages and produce serious continuing consumer disadvantage."[72] The report goes on to call for more work to be carried out on the need for wider regulation of this part of the housing market.[73]

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70 Law Commission, Event Fees in Retirement Properties, 31 March 2017
71 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017
72 Ibid.
73 Ibid.

3.13 Dispute resolution

Of 1,244 leaseholders surveyed by LEASE in 2016, 32% said they did not know where to go for information on their rights and obligations.

There are references throughout this paper to leaseholders' rights to challenge aspects of how their blocks are managed and the valuation of a lease extension/enfranchisement. Challenges primarily take place through the tribunal system. The use of the tribunal system was intended to give long leaseholders access to a speedier and cheaper means of seeking redress. In practice, leaseholders are reluctant to go down this route. During the Westminster Hall debate on 20 December 2016 Jim Fitzpatrick said:

> When the dispute resolution procedure was originally designed, was it not supposed to create a relatively informal arrangement whereby residents could go to a tribunal to argue their case? That has been completely distorted by some of these unscrupulous freeholder landlords bringing in high-powered barristers and then charging their fees to the residents, whether they win or lose.[74]

In the same debate, Sir Peter Bottomley referred to the inability of tribunals "to fine for repeat offences"[75] and described the experience of an elderly couple on Plantation Wharf in Battersea:

> One of the worst cases is that of Plantation Wharf in Battersea. Two elderly people applied to challenge management costs of about £9,000. The leasehold valuation tribunal—the lower property tribunal—agreed with them in large part and struck off about £7,000. There were then applications for costs. One of the leaseholders had read on the Government website that the cost of going to the leasehold valuation tribunal was £500 and therefore assumed that there was nothing in the cost application. By inattention, he ended up bouncing between various courts and owing over £70,000. A forfeiture order was granted, with even the mortgage lender not realising that its part of the asset would be forfeited as well.[76]

Justin Madders said:

> It is not enough to say that leasehold valuation tribunals are there to resolve these issues, because these companies are going out of their way to obstruct and delay the process. I do not know whether anybody here has taken the time to read one of the tribunals' decisions, but I suspect that very few people would feel comfortable going into one of them without a lawyer, and probably also a surveyor. Certainly the freeholders seem to do that, and from what I have seen they also put the cost of their representation back on to the homeowners as well, rubbing salt into an already very expensive wound.[77]

Section 3.9 of this paper explains the changes that came into force on 7 April 2017 which enable tribunals and courts to consider, on application by the leaseholder, whether it is reasonable for the landlord to recover all or part of their costs through administration charges.

74 HC Deb 20 December 2016 c1336
75 HC Deb 20 December 2016 c1338
76 HC Deb 20 December 2016 c1333
77 HC Deb 20 December 2016 c1345

The APPG is concerned that there is an imbalance in the cost regime and resources available to landlords and tenants. There is reference to the inability of leaseholders to claim their costs:

> The costs imbalance limits the proportion of leaseholders able or likely to defend their position. The knowledge of this limit to this risk of challenge encourages some landlords to overcharge.[78]

The APPG argues that leaseholders are less likely to defend their position as a case rises through the higher courts given the potential to incur higher costs while "landlords with multiple properties under their control have every incentive to defend a case on one site so as to protect their position on other sites".[79]

Potential reforms

The APPG has called for:

- Consideration of how the cost balance might be changed such that a landlord faces the same prospect of the leaseholder's costs as the leaseholder might face against the landlord were it not for the cost advantage given to the landlord via the terms of the lease.
- That the landlord should face the deterrent risk of some form of penalty for repeat offences.
- That a system be considered where a standard set of costs might be set on matters such as sublet fees.[80]

3.14 Simplification of the law

The legislation governing leasehold tenure has developed in something of an ad hoc way and has been subject to good deal of amendment. The APPG has called for the Law Commission to be tasked with simplifying and consolidating the existing legislation into a single Act. The APPG has also called for the development of standard lease agreements:

> …at present the sector is burdened with entirely nonstandard lease written by the landlord's lawyer for their clients' advantage. There would be considerable consumer benefit by moving to a standard model of lease with appendices where relevant to meet the specific needs of the site.[81]

78 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017
79 Ibid.
80 Ibid.
81 Ibid.

4. Commonhold tenure

4.1 Background

A new form of tenure, commonhold, was introduced by the *Commonhold and Leasehold Reform Act 2002*. One of the aims of this Act was to overcome the disadvantages of leasehold ownership. It was assumed that, once in place, commonhold would become the standard form of tenure for new-build blocks of flats.

The consultation paper which accompanied publication of the *Draft Commonhold and Leasehold Reform Bill* (August 2000) summarised the challenges that developing a scheme for owning and managing interdependent properties presents:

> In England and Wales, there are two ways to own land, freehold and leasehold. Each has its advantages and disadvantages in particular circumstances. Freehold comes closest to absolute ownership. Leasehold confers ownership for a temporary period, subject to terms and conditions contained in the contract, or lease.
>
> A covenant is a promise contained in a deed, such as a deed passing ownership of property from one person to another. There are two types of covenant: the positive covenant, which is a promise to do something, such as to pay rent or to keep the property in repair, and the restrictive covenant, which is a promise not to do something, such as cause a nuisance to neighbours. For historical reasons, positive covenants cannot apply to freehold land once the first buyer of the property has sold it on. However, both positive and restrictive covenants apply to leasehold property.
>
> The problems with covenants are accentuated in the case of blocks of flats, where each flat will often depend on its neighbour for support and shelter, and the very stability of the building depends on the proper maintenance and repair both of the individual flats and the common parts. This means that, where it is desired to set up a scheme to allow for ownership of interdependent properties and for the management of the common parts and facilities, the scheme must, today, be based on leasehold ownership. There is no satisfactory scheme at present that would allow for freehold ownership in such circumstances.
>
> As long term residential leasehold has become more and more widely discredited, pressure has grown for the Government to bring forward a scheme which would combine the security of freehold ownership with the management potential of positive covenants which could be made to apply to each owner of an interdependent property. That scheme is commonhold.[82]

[82] Cm 4843, para 1.2

The regulatory impact assessment (RIA) that accompanied the first *Commonhold and Leasehold Reform Bill*[83] described commonhold as:

> …the name given in this jurisdiction to a scheme widely used throughout the rest of the world with greater or lesser degrees of variation. It provides for multiple occupation of developments, such as blocks of flats, or mixed flats and shops, or business parks in which unit owners have an interest in their unit of occupation, whatever that may be, which is closely analogous to a freehold interest. A body corporate, the commonhold association, made up exclusively of unit holders, owns and manages the common parts of the development, which may be no more than hallways and stairs, but might run to parks, sports halls, lakes, etc.

Owners of units have an interest analogous to a freehold interest and a corporate body made up of unit owners owns and manages the common parts.

Commonhold tenure is viewed as offering several advantages over the leasehold system. It does not remove the obligation on residents to contribute to management/maintenance and major works, but it is argued to be a more transparent system. The September 2000 issue of Lovells' property newsletter identified the following perceived advantages of commonhold:

> Commonhold will address the problem of lessees being beholden to an absentee landlord who cannot be bothered to carry out building maintenance and management, or who is more interested in trying to make a profit at their expense.
>
> Commonhold will also remove the problem of leasehold property being a wasting asset. Commonholders will each have a perpetual interest, effectively akin to a freehold, in their individual unit.
>
> Standardised commonhold constitutional documents should be of general benefit.

However, the newsletter went on to point out that commonhold would not make it any easier to live alongside difficult neighbours who are noisy or who refuse to pay reasonable service charges:

> Large multi-occupied buildings of a certain age are expensive to maintain. Commonhold will not make any difference to this, but unit holders may feel happier about spending large amounts of money on building maintenance if they feel they are in control and no one is trying to rip them off.

The British Property Federation's (BPF) briefing note on commonhold (2000) also emphasised that it is not a panacea for problems associated with residential long leasehold:

> The demands, problems and requirements of community living and block management will be the same, regardless of the legal basis of which the property is owned.[84]

The *Commonhold and Leasehold Reform Act 2002* was an attempt to introduce a new tenure for multi-occupied blocks. The principle of commonhold had broad support across the political parties. The previous Government had twice consulted on draft Commonhold Bills,

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83 This Bill fell for lack of time before the 2001 General Election (HL Bill 11 of 2000-01)
84 11 February 2000

and the genesis of the provisions in the 2002 Act can be traced back to 1965.[85]

The 1997 Labour Government arrived in office with a manifesto commitment to introduce commonhold ownership; the 2002 Act honoured this commitment. During the debate on Second Reading in the Lords on the 2000-01 Bill, the Lord Chancellor, Lord Irvine of Lairg, said that he did not expect the commonhold provisions to be the subject of controversy "either in this House or in another place."[86]

4.2 Why has commonhold tenure failed to grow?

Part 1 of the Commonhold and Leasehold Reform Act 2002 made commonhold tenure possible in England and Wales but it has failed to take-off.

Although Part 1 of the Act has been in force since 2004, commonhold tenure has failed to take-off – there are very few blocks in commonhold ownership. It appears that there may be two main reasons for this:

- conversion from leasehold to commonhold requires unanimity from everyone with an interest in the block – this has provided difficult to achieve; and
- developers have not been persuaded to build new commonhold developments. Commentators argue that there are no incentives for them to do this and, in fact, leasehold offers opportunities as a source of future revenue through the purchase of lease extensions or selling off the freehold interest.

As the legislation progressed through Parliament there was a good deal of debate over whether there should be a *requirement* for all new blocks to be developed as commonhold – amendments along these lines were resisted.

The APPG has said that there are drafting deficiencies within the 2002 Act and has also identified problems arising from the fact that responsibility for commonhold tenure lay with the Ministry of Justice, while leasehold issues are within the remit of the Department for Communities and Local Government (DCLG):

> …difficulties have arisen because the Ministry of Justice has never been tasked with promoting commonhold as a tenure type nor has it had a budget to develop the legislation.
>
> …the Housing Department had not considered commonhold as part of its housing strategy.[87]

One of the APPG's 'asks' has already been achieved. On 20 July 2017 the Prime Minister announced that "Responsibility for commonhold law will transfer from the Ministry of Justice to the Department for Communities and Local Government" with immediate effect.[88]

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85 Cmnd. 2719. The consultation paper that accompanied the publication of the *Draft Commonhold and Leasehold Reform Bill* (Cm 4843) contains a brief history of efforts to amend the law of positive and restrictive covenants and introduce commonhold tenure at pages 79-8.

86 HL Deb 29 January 2001 c455

87 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017

88 Written Statement – HCWS88, 20 July 2017

Over the years there have been several calls for Governments to review Part 1 of the 2002 Act in order to address the issues preventing the development of commonhold units and the conversion of existing leasehold blocks to commonhold. Most recently, Dr Blackman-Woods attempted to amend the *Housing and Planning Bill 2015-16* by adding a new clause entitled 'conversion of leasehold to commonhold for interdependent properties.'[89] The aim of the clause was to end leasehold tenure by converting existing leasehold blocks to commonhold by 1 January 2020.

The Minister, Marcus Jones, responded for the Government:

> The Parliamentary Under-Secretary of State for Communities and Local Government (Mr Marcus Jones):
>
> New clause 13 seeks to replace long residential leasehold with commonhold. As hon. Members know, leasehold is a long-established way of owning property, supported by a framework of rights and protections that aims to deliver the appropriate balance between providing leaseholders with the rights and protections that they need and recognising the legitimate interest of landlords.
>
> Commonhold is subject to a different statutory framework of rights and protections. It has its benefits, but there are important differences between commonhold and leasehold. That is partly why commonhold is and was intended to be a voluntary alternative to long leasehold ownership—a choice. There are no plans to abolish residential leasehold.
>
> Abolishing leasehold and forcing leaseholders into commonhold may seem attractive to some, but would that be the right thing to do in all circumstances? The Government believe that it would not. Removing choice in this instance and, with it, the rights and protections currently afforded to leasehold homeowners and at the same time forcing existing leaseholders to become commonholders against their will would not be desired by all. Considerable care needs to be taken before embarking on legislation that would force existing leaseholders and landlords to transfer to the commonhold model, which would not in all cases be appropriate. Commonhold should remain a voluntary alternative to long leasehold ownership.
>
> On that basis, I hope that the hon. Lady will, as she says, withdraw the motion.[90]

The motion was withdrawn.

During the Westminster Hall debate on 20 December 2016 both Sir Peter Bottomley and Ruth Cadbury called on the Government to review commonhold and implement necessary changes. Both made reference to the fact that commonhold operates effectively around the world and should be made to work in England and Wales.[91]

89 PCB 10 December 2015 c684
90 Ibid.
91 HC Deb 20 December 2016 c1337 and c1351

4.3 An appetite for reform?

In 2014, Lord Faulks said there were no plans for a review of commonhold:

> **The Minister of State, Ministry of Justice (Lord Faulks) (Con):** My Lords, the Commonhold and Leasehold Reform Act 2002 introduced commonhold ownership and made numerous reforms to long leasehold law. Although the Government monitor the take-up of commonhold and continue to respond to concerns about the working of leasehold legislation, they have no current plans to carry out a formal review of the Act.[92]

The Minister's response to an attempt to amend the *Housing and Planning Bill 2015-16* (see section 4.2 above) made it clear that the Government had "no plans to abolish residential leasehold."[93]

However, just over one year later the Government published a Housing White Paper, Fixing our broken housing market (February 2017), in which a commitment was given to:

> …consider further reforms through the consultation to improve consumer choice and fairness in leasehold, **and whether and how to reinvigorate Commonhold**.[94]

The July 2017 consultation paper, Tackling unfair practices in the leasehold market, is described as "the first steps" in achieving the commitment set out in the Housing White Paper. For the future, the Government has said it will carry out a wide ranging project which will look at several issues including "improving commonhold."[95]

The APPG has welcomed the Government's commitment to improve commonhold but has pointed out that the 2002 Act's deficiencies have been evident for almost a decade. The APPG notes that "If there is a debate still to be had, it should be whether to reform the old legislation or to replace it."[96]

The APPG's report makes reference to some shift in opinion on the part of developers, but there is no sense of a sector ready to fully embrace commonhold on a voluntary basis:

- It is noted that the British Property Federation recorded a considerable shift of position in the 2014 debate and now accept that for commonhold to work there would need to be some form of sunset clause on new leasehold once the commonhold legislation shown to work.
- That the sector is cautious that, government having failed once to bring forward effective legislation in 2002, errors may be made again if the legislation was not put right properly.

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92 HL Deb 7 May 2014 c1471
93 PCB 10 December 2015 c684
94 Cm 9352, para 4.38
95 DCLG, Tackling unfair practices in the leasehold market, July 2017, para 7.1
96 APPG, A preliminary report on improving key areas of leasehold and commonhold law, April 2017

- The sector is concerned they might be asked to adopt this form of tenure without the relevant market support to ensure consumer acceptance.[97]

[97] Ibid.

5. Freehold houses: estate charges

In addition to its focus on certain leasehold practices, Tackling unfair practices in the leasehold market also asks for views on whether the Government should:

> …promote solutions to provide freeholders equivalent rights to leaseholders to challenge the reasonableness of service charges for the maintenance of communal areas and facilities on a private estate? If not, what management arrangements on private estates should not apply?[98]

It is relatively common for private estates with freehold houses[99] to include a provision in the deed of transfer which places a duty on the owners to contribute to the maintenance of the estate's communal areas and facilities. The deed of transfer should state:

- What the freeholder is expected to contribute towards.
- The proportion of costs they should pay.
- Dates on which payment is due.

Tackling unfair practices in the leasehold market describes the different ways in which this arrangement can be structured:

> The developer can set up a Residents' Management Company that owns the communal areas and facilities. The Residents' Management Company may upkeep the communal areas and facilities itself or employ a managing agent to act on its behalf. Alternatively, the developer can retain the ownership of the communal areas and facilities, and the responsibility for their maintenance. As in the case of a Residents' Management Company, the developer can carry out the maintenance directly or through a managing agent, who is accountable to the developer under the terms of the management contract. However, other approaches may be used to provide for the long-term management of shared areas and facilities.[100]

It is a bone of contention amongst freeholder owners that they have limited rights to challenge the level of charges and the standard of service provided. Rights which may be conferred in the deeds or in common law can be contrasted with the statutory rights leaseholders have to challenge the same charges and management standards. The Association of Residential Managing Agents (ARMA) has produced an advice note for freeholders in this position: Freehold houses on private estates (revised July 2014).

Tackling unfair practices in the leasehold market states that "the Government wants to promote appropriate rights for all freeholders living on private estates to challenge the reasonableness of service charges."[101]

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98 DCLG, Tackling unfair practices in the leasehold market, July 2017, para 6.5
99 The estates may form a mixture of freehold houses and leasehold flats.
100 DCLG, Tackling unfair practices in the leasehold market, July 2017, para 6.2
101 Ibid., para 6.5

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