Ministry of JUSTICE

HER MAJESTY'S COURTS SERVICE hmcs

COMMONHOLD
IMPROVING THE LEGISLATION
PROMOTING TAKE UP

Consultation Paper

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Foreword

[Instructions: some consultation papers/reports will require a foreword. These often set out the aims of the consultation in the 'voice' of the Secretary of State or Minister. You may wish to add an electronic version of his or her signature.]

Executive summary

Part 1: Preliminary

Overview

1.1 Commonhold was introduced in England and Wales in September 2004 as a general alternative to long leasehold ownership of flats and other premises that are not structurally self-contained. Since then very few commonholds have been created. The general alternative therefore exists more in theory than in practice. We want to find out why this has happened. Is it due to ignorance of commonhold; to innate resistance to change; to dislike of one or more of commonhold's features or some other reason? The purpose of this paper is to initiate a real debate on the use of commonhold. This will help us answer these questions and prescribe the appropriate remedies.

Scope

1.2 This paper discusses the law relating to commonhold land in England and Wales. It does not discuss changes to long leasehold law.

Aim

1.3 The purpose of the paper is to raise awareness of commonhold and to identify any changes that need to be made to the commonhold legislation to make it a genuine alternative to long leasehold ownership of flats and other inter-dependent premises.

Background

History

1.4 Commonhold was introduced by Part 1 of the Commonhold and Leasehold Reform Act 2002 as a voluntary alternative to long leasehold tenure. The intention was to promote housing choice and to provide a better way to own individual properties, such as flats, within larger buildings or estates. Commonhold is available for residential and commercial properties and can be used for new and existing developments. In legal terms, the key feature of commonhold is that it overcomes the restrictions in English law on the passing of the burden of a positive covenant from a freehold owner to his or her successor. As a result, it allows owners of flats and other similar premises to be freeholders rather than tenants on long leases. It is similar to the condominium and strata title systems used throughout the world.

1.5 Notwithstanding these advantages and despite the apparently parlous reputation of the long leasehold system, only a handful of commonholds have been created since the Act and the Commonhold Regulations 2004 came into force on 27 September 2004. This is has not gone unnoticed in Parliament. In November 2005 Baroness Gardner of Parkes asked a Parliamentary Question about the number of commonholds that had been registered and the number of them that included social housing. In reply Lord Evans of Temple Guiting said that as at 18 November 2005 there were 6 commonholds and that the Government was considering whether it was necessary to hold a formal review into the disappointing rate of take-up. On 14 June 2006 Baroness Ashton of Upholland said in a written ministerial statement that after careful consideration the Government had decided not to hold a formal review, but would continue to work on the development of the commonhold legislation and its promotion.

1.6 Baroness Gardner returned to the issue with another parliamentary question on 27 July 2007. In reply Lord Hunt of King's Heath said that there were 13 commonholds. He acknowledged that this was disappointing but added that the Government intended to consult with key parties interested in commonhold to see what the Government could do to improve take up.

1.7 Although a major commonhold development in Milton Keynes was announced in December 2005 since then the overall level and rate of take up remains disappointing and commonhold has yet to make a significant impact on the housing market or the property market generally. Clearly, the vast majority of developers, lenders and their professional advisers are either unaware of commonhold or have not found it attractive enough to adopt within their developments.

Commonhold Issues

1.8 It is unclear why people who are aware of commonhold have not used it. They may simply be unwilling to be pioneers. But they may also think that commonhold as presently structured does not deliver what they want. This paper accordingly considers the possible reasons for the low level of take up. In doing so, it explores three main themes. First, is commonhold sufficiently flexible? Secondly, is it sufficiently accessible? Thirdly, are there particular aspects of commonhold that are unattractive, in particular, to developers and lenders? In relation to each of these themes we examine concerns that have been expressed to us and, where appropriate, make proposals for change. We invite developers, lenders and other key stakeholders to tell us why they are not using commonhold.

1.9 New builds are one source of commonholds. The other is the conversion of existing developments in which the tenants want to cast off their leases and become freeholders. The commonhold legislation requires all the tenants and the freeholder to agree to the conversion. This high threshold was extensively debated during the parliamentary passage of the Commonhold and Leasehold Reform Act 2002. Many supporters of commonhold, including the Campaign for the Abolition of Residential Leasehold, wanted the threshold to be lower so that it would be easier for commonhold to replace the leasehold system. We acknowledge the continuing strength of feeling underlying the arguments of those who wish to make conversions easier and agree that the 100% threshold for conversion places a significant obstacle in their path. However, there are good reasons for the present rule. The most obvious problem with specifying any threshold below 100% of the long leaseholders and the freeholder is that some place must be found in the commonhold for the long leaseholders that do not wish to convert.

1.10 This is a particular problem because long residential leases are not permitted in residential commonhold units. This policy preserves the inherent simplicity of the commonhold management arrangements and prevents the importation of the problems of residential long leasehold tenure into commonhold. Although, this fundamental policy objective makes reducing the threshold for conversion difficult, we acknowledge that consideration should be given to whether the rules relating to conversion should be changed.

1.11 An alternative approach to achieving the replacement of long leasehold by commonhold would be the introduction of a 'sunset clause' into the commonhold legislation specifying a date after which multi-owner residential developments would be required to be commonhold rather than long leasehold. Provisions of this kind were discussed during the parliamentary passage of the 2002 Act but were not adopted. We still consider that compulsion is not the appropriate way to spread the use of

commonhold. We doubt it would be wise to insist on the use of commonhold when it is not yet a proven product in the market place. We also recall that commonhold was intended to increase choice rather than diminish it. Our policy remains that commonhold should be a voluntary alternative to long residential leasehold ownership, but we are prepared to consider views to the contrary.

1.12 The prohibition on long residential leases in residential commonhold units is also perceived by some to be an obstacle to the provision of shared ownership housing and some home purchase finance products. We believe that this is a misconception and that equally satisfactory shared ownership housing and home purchase finance products can be provided in other ways. We do not think that any change in the commonhold legislation is necessary for this purpose.

1.13 Our overall conclusion, having considered all the issues relating to new developments and conversions from existing developments, is that the small number of commonholds is not overly surprising. Commonhold is a new product and the magnitude of the change for developers and others who have been accustomed for many years to using leasehold structures should not be underestimated. We are, however, struck by the generally low level of awareness of commonhold among developers. This will need to be remedied if the commonhold is to become widespread in the foreseeable future.

1.14 We also consider that the fundamental structure of the legislation is sound. Nonetheless, we propose some changes. Some are relatively minor and probably amount to little more than clarification of the existing text. Others are more significant and will require development over a longer period.

1.15 Finally, we invite readers to let us know of any concerns they have about the commonhold legislation that we have not discussed and to suggest ways in which commonhold should be promoted.

Next Steps

1.16 Following the analysis of the responses to this consultation paper we will publish a document summarising the comments received and indicating the Government's response. In the areas where the consultation paper includes draft regulations and the proposals are endorsed on consultation, it is likely that the changes to the legislation can be made relatively quickly. In other areas the timing of any change will in part depend on the method by which the change can be implemented and whether any further consultation on the detail of any necessary legislation is needed.

Structure of this Paper

1.17 In Part 2 we describe the present position. We then outline the advantages of commonhold, with particular reference to the creation of sustainable communities. We also discuss the alleged limitations of the present legislation.

1.18 In Part 3 we examine the issues relating to the flexibility of the commonhold legislation. In some respects, the legislation may be over-restrictive and thereby reduce the attractiveness of commonhold to potential users. We provisionally propose some changes to make it more versatile. The changes discussed relate to the following issues: the allocation of common expenditure between unit-holders; the division of a commonhold into sub-commonholds; the creation of more than one commonhold on a single site; the resolution of disputes between unit-holders; the possible need for a commonhold ombudsman and/or a new commonhold jurisdiction for the Leasehold Valuation Tribunal; and the allocation of votes to joint unit-holders who are already members.

1.19 In Part 4 we examine the theme of accessibility. Our starting point is that commonhold ownership should be as accessible as leasehold and freehold ownership generally. The key issues here relate to the availability of shared ownership and home purchase finance products. The allegation is that the prohibition on long residential leases makes it impossible to provide shared ownership and certain home finance products in commonhold. We disagree. We explain how the same objectives can be delivered by means of a co-ownership trust. In case we are wrong in this conclusion, we also explain how the commonhold rules could be relaxed so that long residential leases could be created for these limited purposes.

1.20 As an extension of this and for the purpose of exploring whether more conversions might be encouraged, we discuss in Part 5 whether the prohibition on long residential leases might be abandoned or relaxed,

either generally or in relation to conversion alone, or strengthened. We would, however, stress that our strong preference is to prevent the use of long residential leases in commonhold and to retain the existing rules.

1.21 In Parts 6 and 7, we discuss some features of commonhold that we know are of particular concern to the key interest groups of developers and lenders. We discuss the rules relating to development rights, developer's votes and developer's directors. We also discuss the provisions in the legislation relating to the termination of commonhold. We know that some lenders still have reservations as to how these provisions will operate in practice.

1.22 In Part 8, we discuss issues relating to compulsory take up company law reform, double registration and compulsory purchase. We also invite readers to identify topics that we have not addressed but which need to be addressed if commonhold is to become a general alternative to long leasehold ownership. Finally, we describe how the changes we have discussed might be enacted and also invite suggestions as to how commonhold might best be promoted.

1.23 In Part 9, we list the questions that we have asked in the remainder of the paper.

1.24 Annex A contains the draft regulations prepared to give effect to some of the changes suggested and the related explanatory notes. Extracts from the draft regulations are included in the main body of the paper as appropriate. We would stress that the inclusion of a draft regulation does not mean that there is an intention to make such a regulation.

Impact Assessment

1.25 Annex B contains a partial Impact Assessment in relation to the changes provisionally recommended to the legislation. The reforms proposed for consideration in this paper are intended to make commonhold more flexible and accessible so that the benefits of this new system of property ownership can be realised on a significant scale. The impact assessment is therefore based on the impact assessment that was prepared for the making of the Commonhold Regulations 2004. These benefits are still unrealised and unproven because they have not been delivered on any significant scale. We particularly invite those with experience of commonhold to express their views on the impact of commonhold as against other forms of ownership.

1.26 Readers are invited to comment on the partial regulatory impact assessment at Annex B.

Question – Impact Assessment

1 Do you agree with the partial impact assessment? If not, please give details.

Code of Practice on Consultation

1.27 This consultation is aimed at everyone with an interest in the provision of modern legal structures to govern the ownership of flats and other premises, which share the use of structures or facilities with other properties. This includes developers, social housing providers, lenders, lawyers, surveyors, property managers, investors in property in the residential and commercial property markets as well as home and other property owners. We consider that it should also include people interested in the erection of sustainable communities and the preparation and maintenance of structures and facilities. We also invite comments from interested individuals, including legal academics and commentators. We would stress that the consultation is not limited to those with an interest in the residential property market. This consultation is intended to be part of a real dialogue with the property industry.

1.28 Copies of the consultation paper are being sent to the governmental, professional and representative bodies listed at Annex C. However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

1.29 Annex D contains the prescribed forms of dispute resolution procedure in the model commonhold community statement prescribed in the Commonhold Regulations 2004. This is relevant to the discussion of a new unit holder against the unit holder dispute in Part 3 of the paper.

Definitions and terms used

1.30 Annex E contains extracts from legislation relating to the termination of a commonhold. In the paper references to:

'the Act' refer to Part 1 of the Commonhold and Leasehold Reform Act 2002.

"the 1986 Act" refer to the Insolvency Act 1986.

'the Regulations' refer to the Commonhold Regulations 2004.

'local rules' refer to non-prescribed provisions in a commonhold community statement.

'succession order' refer to the order of the court under Section 1 of the Act in a winding up of a commonhold association that a successor association

be created. This new association takes over the functions of the old association.

'transitional period' refer to the period from the creation of a commonhold without unit-holders to the time that a third party becomes entitled to be registered as a unit-holder.

Further information about commonhold [to be added: details of the LEASE website; MoJ website (Guidance); Statute Law Database].

Part 2: The present position

Introduction

2.1 In this Part we describe the current level of take up of commonhold and its legislative framework. We also summarise its advantages and perceived limitations. In general terms, this Part of the paper explains why commonhold should be attractive to developers, lenders, property managers and property owners.

An overview of the legislative framework

2.2 As we have mentioned, commonhold is a new way of owning properties, such as flats, offices and shops, that share structures and facilities with other properties in different ownership. It may be used for new developments and for existing premises. It may be used for residential, commercial and mixed-use purposes.

2.3 The Act requires the extent and ownership of all commonholds to be recorded on the land register. The commonhold land is divided into separate registered titles: one for each unit and one for the common parts. A unit is expected to be a flat or some other property in single ownership. The common affairs of the commonhold are conducted through the medium of a commonhold association. This is a company limited by guarantee, registered at Companies House. Only the subscribers, who form the company, the developer and the unit-holders can be members of the company. Its memorandum and articles of association are registered at Companies House and Land Registry, but any amendments are not effective until registered at Land Registry.

2.4 The rights and duties of the unit-holders are set out in the commonhold community statement. It too must be registered at Land Registry and amendments are only effective when registered there.

2.5 The content of the commonhold community statement and of the memorandum and articles of association are largely prescribed by the Regulations.

Overview of take up

2.6 Although during the parliamentary passage of the Act many supporters of commonhold wanted it to replace long leasehold ownership of residential property, commonhold was introduced as a voluntary alternative to long leasehold. It was decided that the market would determine which system would predominate. At present, it is clear that the market as a whole is not persuaded that commonhold is a better system than leasehold or even its equal.

2.7 This is confirmed by the low level of take up. As at 1 September 2007, there were ( ) commonholds, comprising in total ( ) units. Of these units ( ) had been transferred to an individual unit holder and { } had been mortgaged to [ ] mortgagees. The largest of the commonholds comprises [ ] units and the smallest [ ] units. All appear to be residential developments. [ ] are park (or mobile) home estates. [ ] were registered with unit-holders suggesting that they are conversions from pre-existing leasehold developments. Of all these commonholds [ ] is in Wales and the remainder are in England. They are situated in [list counties]. It is striking that there are no commonholds in Greater London, which has the highest concentration of flats in the country.

2.8 This level of take up is disappointing and if commonhold continues to grow at this rate, it will be a very long time before commonhold becomes commonplace for properties of the kinds that are now sold on a long leasehold basis. But, it is important to recognise that some developers and lenders are using commonhold. Not only are there a few registered commonhold developments but there are prospects for larger, more complicated, developments coming on-stream in the not too distant future. On 16 December 2005, for example, proposals to use commonhold for a £500 million Millennium Community in Milton Keynes, including up to 2,000 homes, were announced on behalf of the developer, Crest Nicholson. In this case, we understand that the developer and its partners place a special premium on sustainability. We are aware of other discussions for the creation of commonholds in other locations but none of the parties have yet committed to its use.

2.9 The low level of take up suggests that commonhold is not considered to be sufficiently attractive by the majority of developers. This is problematic. If developers are not convinced that commonhold will be a better product for them to sell, commonhold will not succeed. We believe that commonhold has advantages and accordingly need to be sure that developers and their advisers have properly understood what commonhold has to offer.

The advantages of commonhold

2.10 Commonhold has several advantages over leasehold tenure. The first is that ownership is freehold ownership. There is no need for leases or landlords. Although tenants now enjoy statutory rights to lease extensions, to acquire the freehold and to take over the management of a property,

these rights still fall short of freehold ownership. They are all, in effect, attempts to fill the gap between leasehold and freehold. For the developer, who does not wish to retain a longer term involvement with the development, commonhold offers a clean break. There is no freehold reversion that has to be retained, transferred or sold to a third party. Secondly, the commonhold legislation provides a well-managed commonhold community with an almost guaranteed income stream from the unit-holders. The finances of the commonhold have therefore a sound basis, which will guarantee the sustainability of the community. Failure of a commonhold for want of cash flow should be vanishingly rare.

2.11 Another advantage is that commonhold is free of the significant volumes of legislation that have been enacted to address the imbalance of power that is perceived to exist between landlords and tenants. This will make management of the community easier. This is illustrated by the following example. In a commonhold, the directors set the communal budget known as the commonhold assessment. They must provide the unit-holders with an estimate of the money required and consider any representations made, but, having done so, can issue demands for payment that the unit-holders must meet. There is no provision for the payees to challenge the amount of the demand by reference for example, to its reasonableness or the number of estimates that have been obtained from suppliers. By contrast, in addition to any procedure specified in the lease, a leasehold service charge is subject to numerous statutory controls intended to ensure that landlords do not exploit tenants. These include a test of reasonableness and procedural steps regarding consultation and obtaining a prescribed number of estimates before significant expenditure can be incurred.

2.12 In addition, the freedom from statutory intervention and the ability to bind future owners of freeholds to obligations to pay money will enable the commonhold association to enter into long term management and service contracts. There are clearly risks in any such contract but the security and longevity of these contracts may be the key to the provision of sustainable common facilities, energy supplies and protecting environmentally sensitive environments at a reasonable cost. Providers of carbon neutral heating and power systems, for example, require certainty about the duration of their contracts to ensure they can recover their investment. These considerations seem likely to become increasingly important and may represent an important advantage for the commonhold community over the leasehold community.

2.13 Leasehold documentation is notoriously varied in form and quality. Even within a single development there may be inconsistencies between the leases of different properties. Each property has its own lease, which is individually negotiated and may contain its own errors or discrepancies as against other leases in the same development. Leases are also usually written in legalistic terms and are not infrequently defective in some way.

2.14 By contrast, the commonhold documentation is highly standardised and designed to be easy to use and understand. It will be sufficiently standard as between different commonholds to highlight differences created by local rules. This will reduce transaction costs. In commonhold, there is only one

document setting out all the rules of the community and the rights and duties of its members. This is the commonhold community statement. In a commonhold, people should be able to find out easily what the rules are and what to do if they are broken. This should make management easier and encourage better community relations. The standardised procedures for administering the finances of the commonhold and the resolution of disputes between the commonhold association and the unit-holders and amongst the unit-holders themselves will make management easier and encourage the settlement of disputes within the community.

2.15 The overall effect of the commonhold approach is that commonhold ownership is much more transparent and readily understandable than leasehold ownership. The legislation puts the community in control of the commonhold. There is no third party landlord. Management is delivered by and through the commonhold association, which is democratically controlled and has a secure financial base. This will allow the community to plan with confidence for its future.

Limitations of commonhold

2.16 The first perceived limitation of commonhold is that developers seem likely to make more money out of leasehold. Leasehold gives them the opportunity to sell an entitlement to receive ground rents to investors. This can amount to some thousands of pounds per unit and recent case law reinforces the value of this opportunity. Commonhold, which is freehold, provides no equivalent opportunity for a second phase income stream from the unit-holders to the developer and its successors. Commonhold, it might be said, can only be sold once. Leasehold appears to be able to be sold twice.

To illustrate the value of the sale of a ground rent, consider the cost of a block of one hundred flats, each subject to a ground rent of one hundred pounds. The annual income is £10,000 at a yield rate of 5% for a 99 year lease, which is we understand not untypical in the market, the value of each flat to the landlord would be £1,985 (5% for 99 year lease = 19.85; 19.85 x £10,000 = £198,500; £198,500 ÷ 100 = £1,985 per flat).

2.17 In the absence of a demonstrable premium for commonhold property, which the market is not yet in a position to provide, it might seem that this is an insurmountable difficulty that could only be cured by prohibiting ground rents or their sale. However, even setting aside the possibility that commonhold ownership and commonhold communities may be intrinsically better than leasehold ownership and leasehold communities, there are reasons why this difference should not be fatal.

2.18 Logically, the absence of an obligation to pay ground rent should mean that the unit holders will pay more for their unit than for the equivalent leasehold property subject to such an obligation, especially if on-going management costs of commonhold are lower than for the equivalent leasehold development. However, buyers of flats and houses are not usually considered to be very interested in the nature of the tenure they are buying. There may therefore be a need to educate them as to the differences.

2.19 If it is argued that buyers are insufficiently sophisticated to notice the difference between commonhold and leasehold, they will surely notice the difference between being obliged to pay ground rent and not. They may also have views on being subject to the rights of the landlord to enforce payment, perhaps with threat of legal proceedings (and their inevitable costs). Prospective buyers would surely find it more attractive to enter into a relationship with their fellow owners than with a third party landlord interested only in enforcing the payment of a ground rent. Once educated of the differences and their consequences, buyers may themselves start to ask for commonhold.

2.20 Of course, so long as developers have the option of selling the freehold reversion, the ability to sell a ground rent will have an attraction. One leading commentator has argued that legislation should be enacted to ensure that in all new developments the freehold should be vested in the tenants, thereby effectively embedding enfranchisement at the outset of the development. A change of this kind would remove the ability to sell ground rent incomes is outside the scope of this consultation.

2.21 Secondly, following on from this suggestion, some people will ask why it is worth creating commonhold if the tenants can have collective control of the freehold in their development and individual long leases of their flats (which they can extend or renew ad infinitum). The allegation is really that commonhold offers nothing different from leasehold. Of course, not all tenants control their own freehold but some do. For them, the end result, viewed from the perspective of their own development is broadly similar so far as the absence of a third party landlord is concerned. However, the law does not make any distinction between landlords controlled by tenants and independent landlords. All landlords are subject to the same legislative controls in relation to service charges and rights to enfranchise, extend leases and manage. The management cost of this legislation is an overhead that all tenants have to bear. There are therefore significant differences between leasehold developments controlled by tenants and commonhold developments.

2.22 Thirdly, we have explained that commonhold enables the commonhold association to raise the money it requires free of the restraints that apply to

leasehold service charges. Some people will consider that the absence of external constraints, such as an overriding requirement of reasonableness on the amount of the commonhold assessment, and the presence of only limited procedural protection in commonhold will open minorities of unit-holders to exploitation by the majority. We acknowledge that there are differences between leasehold and commonhold developments and that different views may reasonably be held as where the balance should be struck between the interests of the community and the individual. But we do not consider that the result in commonhold is unreasonable, because the commonhold association is controlled by its members, who are unit-holders.

2.23 Another difference in protection for the individual owner in leasehold is that, although far from universal, there is a reasonably wide ombudsman jurisdiction exercised by the Independent Housing Ombudsman and in relation to some disputes, a relatively cheap alternative to the court in the form of the Leasehold Valuation Tribunal. Although the Act makes provision for the creation of a commonhold ombudsman service and for jurisdiction to be conferred on a tribunal in relation to commonhold disputes, no such service or jurisdiction has been created.

2.24 Fifthly, commonhold seems to suffer from some apparently widely held misconceptions. These include beliefs that:

- Commonhold is only suitable for residential developments.
- Commonhold cannot be used to provide shared ownership.

2.25 The suggestion that commonhold can only be used for residential development is clearly wrong. A commonhold could be entirely commercial. A business park developer might, for example, wish to consider selling the units on a commonhold basis rather than a long leasehold basis.

2.26 One small exception relating to agricultural land apart, there is similarly no legislative barrier to mixed use developments. However, we accept that the present legislation does not necessarily provide an optimum solution to the needs of mixed-use developments in practice. Two areas of concern have been mentioned to us.

2.27 The first relates to the interpretation of the provisions in the Act about the allocation of common expenditure. It can be argued that under the Act each unit may only have one percentage allocated to it in respect of its contribution to the running expenses of the commonhold. This would mean that in a commonhold comprising a block of flats and a number of houses, different percentages could not be allocated to the units for the running costs of, for example, the gardens shared by all unit-holders on the one hand and the lifts used only by the unit-holders in the block on the other. Similarly, in a mixed use commonhold, the costs of maintaining a service road and loading bay serving ground floor shops could be difficult to split between residential unit-holders and commercial unit-holders. This rigidity would make achieving a fair distribution more difficult, which would be likely to make management more difficult and to encourage disputes. We

do not think that the criticisms of the wording of the Act are necessarily well-founded. Clearly, however, it would be sensible to set beyond doubt that different percentages can be allocated.

2.28 The second area of concern is related to the first. It is argued that even if expenditure can be grouped by means of allocating different percentages to different items of expenditure, creating and managing a larger development will still be cumbersome because the legislation only permits a unitary structure of one commonhold run by one commonhold association. It is not possible to have a hierarchical commonhold structure, akin, perhaps, to that used for groups of companies. The absence of a legal framework enabling this is therefore seen as a brake on the use of commonhold.

2.29 Such a framework would, however, not of itself allow the creation of an overarching commonhold with subsidiary commonholds on the same piece of land. It would not, for example, be possible to divide a tower block into three separate commonholds: one for the retail premises on the ground floor; one for the commercial premises above and one for the residential flats in the remainder. This is because the Act provides that commonhold must be 'grounded'. There are good reasons for this rule, but it may be another brake on commonhold usage.

2.30 The second misconception we mentioned is that shared ownership is not possible in commonhold. This is particularly pernicious because the provision of social housing is often a requirement of planning permission. The allegation arises from the prohibition in the Regulations on leases of residential commonhold units for more than seven years. As shared ownership leases are granted for terms of 99 years and upwards, the argument is that they clearly cannot be created in commonhold and therefore shared ownership is not possible. If shared ownership is required for planning permission but is not available in commonhold, commonhold is clearly not going to be accessible to most of the market and developers will not use it. However, we consider that shared ownership is not restricted to mechanisms that make use of long leases. We consider that shared ownership can be delivered through the medium of co-ownership without a lease.

2.31 The prohibition on long leases is also an issue in relation to home purchase finance products that rely on the use of a lease. Our attention has been drawn to the difficulties that this would cause for the use of some Sharia'a compliant home purchase finance products, but any device involving a sale and leaseback could clearly be affected. If this difficulty is insurmountable, it too would make commonhold less accessible than long leasehold ownership. However, we think that solutions based on co-ownership provide the answer.

2.32 An alternative, but we think less attractive, solution to the alleged problems relating to shared ownership and sale and leaseback home purchase financial products would be to remove the prohibition on long leases, either generally or specifically in relation to specified products. However, although this solution would probably also ease the process of conversion to commonhold, it would inevitably bring with it the problems of having long

leases in commonhold. We would not want to permit this unless there were on balance significant overriding advantages to be won.

2.33 Sixthly, there have also been other less specific criticisms of commonhold. Some developers have said that the present rules compel them to hand over control of the development to the owners of the units at too early a stage. The developers are concerned that the rights they can reserve in the commonhold community statement are not sufficiently wide to give them adequate control for long enough into the development period. Our view is that the rights can be widely drawn and that they can provide developers with ample control over the development.

2.34 We also know that many lenders are satisfied with the security that commonhold offers. As at [ ] the Council of Mortgage Lenders Handbook indicated that [ ] of the [ ] members were prepared in principle to lend on the security of a commonhold property. However, there are others who are still concerned that commonhold does not give them sufficient certainty. We think that this anxiety relates primarily to the working of the rules relating to the termination of commonhold, but are not convinced that it is well founded.

2.35 Finally, there are provisions in the legislation that on reflection do not appear as clearly expressed as they were thought to be when it was drafted. We mention various examples of this at different points in the paper. One of the advantages of the commonhold legislation is that the majority of the practical provisions are contained in regulations. They are therefore relatively easily amendable as the need arises.

Advantages and limitations: conclusion

2.36 On this analysis of the advantages and perceived limitations of commonhold, it seems to us that there are clear advantages in using commonhold rather than long leasehold. However, five years from the passing of the Act it seems that the market has barely begun to come to terms with this new product. There is therefore a need to raise its profile and create a better and more general understanding of commonhold. This should go someway to improving take up, but commonhold will not be used unless the detail of the scheme is right. We have identified some uncertainties that might usefully be clarified and some new features that might be developed. We nonetheless invite readers to tell us what other changes, if any, are necessary to the commonhold legislation to persuade them to use it.

Question – advantages and disadvantages of commonhold

2 Do you agree with the analysis of the advantages and disadvantages of commonhold? If not, please give details.

Part 3 - Making commonhold more flexible

Introduction

3.1 In this Part we consider how the commonhold legislation can be made more flexible. We examine the rules relating to the distribution of the common expenses of the commonhold and seek views on some provisional proposals that will remove any doubt as to the ability of the commonhold association to allocate different percentages of expenditure to different users. We also consider whether the legislation should permit more sophisticated organisational structures for commonholds and commonhold associations. The changes we provisionally propose will remove any doubt concerning the flexibility of the commonhold assessment. They will also allow the creation of commonholds within commonholds and commonholds upon commonholds. This will make commonhold more attractive for mixed use, larger and more complex developments.

3.2 However good the quality of the commonhold legislation, there are still bound to be disputes within the community. The legislation tries to make it as easy as possible to resolve those disputes in a proportionate and effective way, not least by the inclusion of three dispute resolution procedures. All involve the commonhold association. In this Part, we make provisional proposals for the introduction of a simpler dispute resolution procedure for disputes between unit-holders. This new procedure will not involve the commonhold association and will be an alternative to the existing procedure. We think that this will be attractive to smaller commonholds. In relation to dispute resolution more generally we also invite views on the need for a Commonhold Ombudsman and the creation of an additional jurisdiction for the Leasehold Valuation Tribunal at this stage of the development of commonhold.

Commonhold Assessment – allocation of percentages

3.3 First, we consider the rules relating to the distribution of the commonhold assessment between the units in the commonhold. The commonhold assessment and the reserve fund levies are the commonhold equivalents of the service charge payable by tenants in the leasehold system. More precisely, the commonhold assessment is the income raised from the unit-holders to meet the expenses of the commonhold association. The directors of the commonhold association are required by the commonhold community statement to make an annual estimate of the income required to be raised from the unit-holders to meet the expenses of the association. They also have power to make estimates from time to time of income required to be raised from unit-holders in addition to the annual estimate. Reserve fund levies are subject to similar provisions. These levies are raised to fund the repair and maintenance of the common parts or commonhold units. The commonhold community statement must specify the percentage of the income to be contributed by the owners of each unit. Although a nil percentage may be allocated to a unit, the total of these percentages must amount to 100%.

3.4 In a simple development of, say, ten residential flats of equal size, deriving equal benefit from the structure of the block and the services provided within it, it is obvious that an equal division of the commonhold assessment between the units would be appropriate. In this case, the commonhold community statement would record that each unit was responsible for 10% of the commonhold assessment. The appropriate apportionment is less obvious if one of those flats is significantly bigger than the others. The picture becomes more complicated still if the commonhold also includes a group of ten town houses, which are structurally separate from the flats. An equal distribution of a 5% per flat and town house may well not be fair.

3.5 The obvious answer, which is adopted in leasehold developments, is to allocate different proportions to each property in respect of different categories of common expenditure. However, a number of commentators have suggested that under the present wording of the Act (set out in the box below) only a single percentage can be allocated to each unit in a commonhold.

Box with s38 and s39 in it.

3.6 Section 38 of the Act provides that a commonhold community statement must specify the percentage of any estimate of the expenses of the commonhold association made, which is to be allocated to each unit. It also specifies that the percentages allocated must amount in aggregate to 100. By contrast, section 39 makes clear that there may be several percentages allocated to a unit in respect of the reserve fund levies payable by the unit-holders. The section also provides that the commonhold community statement must specify the percentage of any levy set and that the aggregate of the percentages for any levy must total 100.

3.7 Differences of view on such an important matter are at best unhelpful. In the absence of a court case on the point, the only way to resolve the possible ambiguity is to amend section 38 to make clear that several percentages may be allocated to each unit in respect of different expenditure within the commonhold assessment. Thus, in the example given, the amendment would have the effect that different percentages could be allocated for expenditure on the town houses only and for expenditure on the flats only and, perhaps, a third percentage for expenditure common to both.

3.8 Ensuring that different percentages can be allocated will also allow relative changes in cost between different items of expenditure to be taken into account more easily. This is because although percentages allocated at the outset may be fair, they can become unrealistic, and need to be recomputed as various component costs change at different rates. We provisionally propose that section 38 should be clarified so that there is no doubt that several percentages may be allocated to a unit in respect of the commonhold assessment.

3 Do you agree that section 38 should be amended to make clear that the CCS can allocate different percentages to a unit in relation to different items of expenditure within the commonhold assessment?

Local rules on conversion expenses

3.9 Pending the amendment of section 38, commonholds may wish to create local rules imposing obligations on unit-holders to make additional financial payments over and above the commonhold assessment and the reserve fund levies as a means of distributing the burden of specific costs more flexibly.

3.10 The creation of local rules to levy financial contributions has the disadvantage of providing a diversity of solutions between different commonholds. This will cut against the desired uniformity of commonhold documentation. Nonetheless, in the absence of any express restriction on the creation of local rules for this purpose, it seems to be a sensible interim solution and the only people who can be affected are those in commonholds that make the rules.

Planned under- and over-recovery of expenses

3.11 As we have mentioned, the Act provides that the percentages allocated to the commonhold units in the commonhold community statement in relation to the commonhold assessment and reserve fund levies must amount to 100%. We consider that this rule should be extended to the total of all the percentages allocated to a unit in respect of a particular head of expenditure comprised in the commonhold assessment. This will ensure that the whole of the estimates of income required to be raised to meet the expenses of the commonhold association, whether annual or additional, will be recoverable from the unit-holders. This avoids the problem that sometimes occurs in leasehold developments where the totals reserved in all the individual leases in a development when added together can be found to be greater or less than 100%. This is of course only discovered when a problem arises because each lease is private. In commonhold, by contrast, the commonhold community statement is open for inspection as a matter of public record at all times and the total of the percentages is open for all to see. Equivalent rules apply to reserve fund levies. The question we now wish to examine is whether the 100% limit is too restrictive.

3.12 The commonhold community statement requires the directors of the community association to make an annual estimate of the income required to be raised from the unit-holders to meet the expenses of the community association. The unit-holders are required to make payments to the community association in respect of the percentage of any estimate, which is allocated to their respective units. The commonhold community statement must also require the directors to serve notices on unit-holders specifying the payments required to be made by them and the date on which each payment is due. It has been suggested to us that these requirements are too restrictive because they do not permit the community association to demand more than the expenses required. This, it is

alleged, prevents the community association from encouraging early payment with the offer of a discount.

3.13 It seems to us that if the 'discount' is calculated by reference to the benefits of early receipt of the money by the community association and the corresponding savings in not having to chase recalcitrant unit holders for payment, the provisions in the Act are already flexible enough to accommodate this practice.

3.14 However, if we are wrong or the 'discount' is not related to those benefits, there seem to be two solutions to this inflexibility. First, commonholds could be free to depart from the 100% rule. The Act could be amended to remove this requirement. The total of the allocated percentages could instead be required to amount to some other given figure or no figure. In support of this proposal, it could be argued that the directors should be free to specify whatever total they wish because the only people affected are the commonholders and the relevant percentage would be apparent from the commonhold community statement. We are unconvinced by this as it would expose the unit-holders to demands that were unrelated to expected expenses. In the absence of statutory controls similar to those that apply to leasehold service charges, it seems to us more important that the directors should be under an obligation to relate income required to projected expenditure.

3.15 The second approach would be to make clear that in calculating the income to be raised from the unit-holders the commonhold association may make allowance for discounts for early payment.

3.16 Our provisional view is that the present wording is adequately flexible to allow sensible discounts to be built into the demands issued to unit-holders. However, if we are wrong is in this, we consider that the second approach of making express reference to the possibility of offering discounts is to be preferred.

3.17 We do not think that any change is required to enable the commonhold association to demand less than the total of the expected expenses of the association from the unit-holders because the Act requires the directors to specify the income that they require from the unit-holders. It does not require that amount to be equal to the expenses expected. Income from other sources can be taken into account by the directors in calculating the sums to be demanded from unit holders.

4.	Do you agree that the allocation of proportions of any head of expenditure of the commonhold assessment between units should have to amount to 100%?
5.	Do you agree that no additional provision is needed in the legislation to permit discounts on early payment?

Allocation of expenditure: percentage or fraction

3.18 It has also been suggested to us that the restriction to percentages is itself unduly restrictive because any fraction can be used to achieve the same result, possibly in a simpler manner. The advantage of percentages, however, is greater uniformity and, generally, ease of arithmetical computation. We would prefer to retain the present approach of requiring percentages to be specified rather than fractions, ratios or any other method.

6.	Do you agree that allocation of proportions of expenditure to units in the commonhold community statement should continue to be expressed in percentages only?

Relations between different commonholds

3.19 Clarifying the rules relating to the grouping of expenditure and the other changes provisionally proposed in relation to the commonhold assessment and the reserve fund levies will confirm that commonhold can be as flexible as leasehold in dealing with multiple cost centres. However, these changes will operate within the framework set by the rules that every commonhold must stand on its own land and that every commonhold can only have a single commonhold association.

3.20 If adopted, the changes we discuss in this section would allow separate commonholds to exist on one piece of land and different commonholds to exist within a hierarchy of commonholds. These changes would be more far-reaching and innovative than the relatively modest clarifications to the rules relating to the distribution of the commonhold assessment discussed above. They will also take longer to develop.

3.21 We have in mind the situation in which a tower block is to be divided into three communities, one on top of another: retail; commercial and residential. Of course, if instead of being within a single tower block, the retail, offices and residential communities each had their own building, they could under the present law have separate commonholds, but there could not be a single overarching commonhold to manage their mutual affairs.

3.22 Even though within a single commonhold voting rights can be distributed to reflect and protect differing interests, it is likely that the three sub-communities we have mentioned would, for one or more purposes, be to a degree self-contained and would have different needs and different

priorities. This may make it more difficult to find a suitable system of allocating voting rights and shares of expenditure.

3.23 The most obvious solution for larger and more complex developments in these cases is to permit the creation of a federation of commonholds within an overarching commonhold. In the example given, three separate sub-commonholds could then be created within the tower block, under an overarching commonhold comprising the whole of the block. This is not possible under the present law.

3.24 A less complete solution might be to create three separate commonholds within the tower block but require them to enter into contractual obligations amongst themselves.

3.25 The restriction to a single commonhold on a single piece of land undoubtedly promotes simplicity and clarity but it is also a restraint on the creation of more complex commonholds. Rigid adherence to the concept of a single commonhold on a single plot would mean that larger and more complex commonholds might not be able to divide their affairs in the most efficient way. This will make management more complicated. For this reason we examine, first, the rule that only one commonhold may exist on a single site ('the grounded rule'); secondly, the rule that only one commonhold association may exist in a commonhold; and thirdly, whether there should be any special provision made relating to positive obligations between commonholds.

The Grounded Rule

3.26 We consider the 'grounded rule' first. It provides that an application to register a commonhold may not be made wholly or partly in relation to land above ground level ('raised land') unless all the land between the ground and the raised land is the subject of the same application. An application may, however, be made wholly or partly in relation to raised land if all the land between the ground and the raised land forms part of the commonhold to which the raised land is to be added.

3.27 There are several reasons for having the grounded rule. First, the rule makes it more likely that a commonhold building will be independently viable physically, making it easier to manage. Secondly, it prevents the issues that arise in relation to the enforcement of positive covenants over freehold land occurring in relation to a commonhold. The problems of flying freeholds are, of course, the reason why flats and similar premises dependent upon, or sharing facilities with, other properties are generally developed on a leasehold basis. As a result of the grounded rule, a commonhold should never 'fly' over an adjoining property. Thirdly, without

the rule, there would be a danger that commonhold, leasehold and non-commonhold freehold units would be found in one building. This 'pepper-potting' would complicate management and might produce considerable problems on the ending of the commonhold.

3.28 These reasons still appear persuasive. They may contribute to making commonhold less flexible than its leasehold equivalent, but this limitation is outweighed by the advantages of community coherence and easier management.

3.29 The arguments against the retention of the grounded rule are, first, that other freeholds are not subject to this restriction. Against this, if the rule did not apply to commonholds, then 'flying' commonholds would have to rely on the same relatively cumbersome types of arrangements as other 'flying freeholds' to overcome the problems that result from the legal limitations on the passing of the burden of positive covenants on freehold land. These devices, such as estate rentcharges and obligations on the buyer of a property to enter into a deed of covenant, can be effective, but relying on them would hardly enhance commonhold as a secure modern way to own property. Also, unless their form was prescribed, they would undermine uniformity, which is a strength of commonhold, and increase the risk that commonholds would be created with unsatisfactory legal arrangements. This might then bring the whole of the commonhold concept into disrepute.

3.30 In our view, the advantages of the grounded rule outweigh its limitations. Nonetheless, some commentators have pointed out that the provisions in the Act setting out the grounded rule do not deliver the intended policy objectives. The rule is set out in Schedule 2 to the Act in the following terms.

Schedule 2 para 1

3.31 The provisions state that an application for registration of a commonhold can only be made in relation to the raised land if all the land between that land and the ground level is included in the application. The present rule does not therefore prevent the upper part of any building from being excluded from the commonhold. More importantly, the grounded rule does not appear to address the question of underground exclusions, such as foundations or cellars. The rule may say that so long as the building above ground level is commonhold, the parts of the building beneath ground level can be something else. We do not think that this was what was intended. Deep tunnels or mineral strata in different ownership from the surface are, however, unlikely to be relevant to the existence of a commonhold at ground level. Another point raised is that the rule only applies when the commonhold is created or land is added to a commonhold. The application of the rule in circumstances where land, including part of a building is

removed from a commonhold, is therefore not clear. Finally, there is also uncertainty about the meaning of 'ground level'.

3.32 Subject to our recommendations about multiple commonholds within a single development, we accordingly recommend that the grounded rule should be retained. Flying commonholds should not be permitted. However, although no problems have yet arisen and normal conveyancing practice will probably ensure that practical problems for the underground projections are avoided, we also recommend that the present provisions should be amended so that they clearly deliver the intended policy objectives. The new grounded rule should therefore ensure that the whole of a commonhold development does not over- or under-lap with any adjoining property. Also, although 'land' should be able to be added to or removed from a commonhold, it should not be possible to have an 'ungrounded' commonhold. Whether or not a commonhold is grounded should be a question of fact but essentially, the question would be whether it is structurally over or under-lapped by another building. The existence of immaterial projections, such as, for example, deep underground railway tunnels in cities or mineshafts that have no bearing on the structural integrity of the commonhold structure should not be taken into account.

7. Do you agree that the grounded rule should be retained and clarified?

One commonhold association per commonhold

3.33 On the assumption that there is a grounded rule of the kind we have proposed, we would also provisionally propose that it should be possible to create sub-commonholds within a grounded commonhold. We have not worked out in detail how this might be done. Our discussion is therefore restricted to consideration of general principles.

3.34 The nature of the division of the commonhold into sub-commonholds would be left to the community. We do not think that it would be helpful to impose rules as to how the sub-commonholds should relate to one another spatially. Nor do we think that we should legislate to the effect that if there is a sub-commonhold, the whole of the commonhold must be divided into sub-commonholds. These are matters that are better left to the designers of each individual commonhold. Nor do we consider that a sub-commonhold must comprise only one parcel of land. Geographically disparate retail units might, for example, be brought together in a single sub-commonhold.

3.35 Nonetheless, there are issues that need to be considered. If sub-commonholds were to be permitted, there would need to be detailed consideration as to how the common parts would be owned. Clearly, they could not be owned as freeholds twice over.

3.36 One possibility would be that the inferior associations would, in effect, only be management companies and would not own common parts. Consideration would also have to be given to the relationship of the commonhold assessments and other financial levies raised by the different communities. There would also be difficult termination issues to consider. Nonetheless, although difficult, the task is not impossible. In Queensland, the Body Corporate and Community Management Act 1997 provides for a layered arrangement of community title schemes. This model creates a community title scheme that operates within another larger community title scheme.

8.	Do you agree in principle that a scheme permitting the creation of sub-commonholds should be developed?

Positive obligations between commonholds

3.37 An alternative to permitting sub-commonholds would be to rely on some form of contractual agreement between different commonholds. This alternative could co-exist with legislation permitting sub-commonholds or instead of it. In our view, although relying exclusively on those agreements would be unattractive, co-existence might be acceptable because in some cases creating a corporate hierarchy may be excessively complicated for the practical issue in hand.

3.38 The basic proposal for contractual arrangements would be that commonhold associations could enter into specified agreements that would be binding on their successors in title. These agreements could include positive and restrictive obligations. The agreements would have to be registered at Land Registry.

3.39 If, however, this avenue was to be adopted, whether alone or as an alternative to a sub-commonhold scheme, it would have to be decided whether the agreements could be between any commonhold association or only those that were vertically situated in relation to one another. We think that a restriction to situations where one or more of the commonholds is grounded and the remainder are vertically situated above them would be an unnecessary complication, which would reduce the benefit of the reform.

3.40 A difficulty with giving certain contractual obligations special force is that they must be readily distinguishable from other obligations. For this reason and for uniformity, it will also help to have a prescribed form or format for these obligations. We accordingly propose that if it is decided to develop the concept of using obligations between independent commonholds as a means of creating binding obligations between commonhold associations

and as moderating the effect of the grounded rule, a prescribed form should be developed for the obligations that are to have permanent effect and this permanent effect should only flow from registration at Land Registry.

9.	Do you agree that a form of obligation for use between commonhold associations should be developed?

Resolving disputes

Overview

3.41 An advantage of commonhold over leasehold is the existence of three prescribed community dispute resolution procedures. These are set out in the model commonhold community statement and are intended to ensure that as many disputes as possible are resolved within the commonhold community itself. Disputants are, however, not required to use the procedure for the enforcement of obligations to pay money or in an emergency. For these disputes, the parties may proceed direct to court.

3.42 The three procedures apply respectively to disputes between the commonhold association and unit-holders and vice versa and between unit-holders directly. All the procedures place a strong emphasis on ensuring that every effort is made to resolve the disputes without litigation. The relevant provisions of the model commonhold community statement are set out at Annex [D].

3.43 In this section of the paper we are concerned only with the detail of the unit-holder against unit-holder procedure. Unit-holders in this context include tenants of unit-holders.

3.44 We consider that the existing procedure may be burdensome in some cases and provisionally propose giving commonholds a choice of unit-holder against unit-holder procedures so that each commonhold association can chose the unit-holder against unit-holder procedure that is best suited to its own circumstances.

Unit-holder against unit-holder disputes – position now

3.45 The dispute resolution procedure in the model commonhold community statement in relation to unit-holder against unit-holder disputes is intended to control the number of insubstantial disputes and to encourage, so far as possible, resolution of disputes without reference to a court. There is as yet little experience of the working of the current dispute resolution procedure.

3.46 The unit-holder against unit-holder procedure in the model commonhold community statement prescribed by the Regulations engages the commonhold association in the attempted resolution of the dispute. It requires the commonhold association to act as a 'gatekeeper' to the later stages of the procedure. This is to prevent unhelpful escalations of minor disputes. First, the procedure requires the aggrieved unit-holder to try to resolve the dispute by negotiation, mediation or some other form of non-litigious dispute resolution procedure. If this is unsuccessful then the aggrieved unit-holder is required to give the commonhold association notice of the dispute. The notice gives the commonhold association the opportunity to take up a unit-holder's complaint and take action against an alleged defaulter itself. If the association decides not to take up the complaint, it must also decide whether or not the aggrieved unit-holder can pursue the complaint directly. If the association considers that the complaint does not amount to a breach, or considers that it is vexatious, frivolous or trivial, it can prevent the unit-holder from taking any further direct action. It is therefore the association that decides whether the aggrieved unit-holder can continue to pursue the case against the alleged defaulter. If the association decides that a unit-holder should not be permitted to pursue a complaint (for example, where it believes the dispute is of a trivial nature), the unit-holder may dispute the decision of the association by making a complaint against it, using the unit-holder against commonhold association dispute resolution procedure.

3.47 In carrying out its role in relation to the procedure, the commonhold association is under the general duty to manage imposed by section 35 of the Act. This duty enjoins the association to use the dispute resolution procedures in the commonhold community statement to prevent, remedy or curtail a failure by a unit-holder to comply with the statement or the Act. But, the Act provides that the association need not take action against a defaulting unit-holder if inaction is in the best interests of establishing or maintaining harmonious relationships between all unit-holders. The association's discretion in this respect is subject to the proviso that inaction will not cause any unit-holder (other than the alleged defaulter) significant loss or disadvantage. The association is therefore required to gauge the effect of the dispute and any action to resolve it on the community generally and the parties.

3.48 We are not aware that the unit-holder against unit-holder procedure has caused practical problems, but concerns have been expressed that it may be burdensome for some commonhold associations to operate. The burden of consideration and intervention may be relatively readily absorbed in a large commonhold that retains professional managers, but even there the management overhead of assessing disputes and the fallout of a refusal to allow a case to proceed may be unattractive and expensive. There may also be problems for small commonholds, where directors of the association may not have the necessary skills and knowledge to deal with disputes. They may also be more likely to be personally involved or at least known to the parties. This may make it all the more difficult for a small association to act as an impartial gatekeeper further within the procedure.

Alternative unit-holder against unit-holder dispute resolution procedure

3.49 We therefore propose for consideration an alternative unit-holder against unit-holder dispute resolution procedure. This would give commonholds a choice of procedures. This can only make commonhold more flexible.

3.50 The new procedure removes the commonhold association's 'gatekeeper' role and operates in a similar way to the procedure for use by a unit-holder against the commonhold association (set out at paragraphs 4.11.2 to 4.11.9 of the model CCS in Annex D). We provisionally propose that the new procedure would provide as follows:

> **Procedure for enforcement by unit-holder or tenant against another unit-holder or tenant**
>
> **4.11.17** Subject to paragraph 4.11.18, if a person ("the complainant") (who is either a unit-holder or a tenant of a unit) seeks to enforce a right or duty contained in this CCS or a provision made by or by virtue of the Act against another person (the "defaulter") (who also is either a unit-holder or a tenant of a unit), the complainant must use the dispute resolution procedure set out in paragraphs 4.11.19 to 4.11.29.
>
> [**4.11.17A** The procedure must be used even if—
>
> (a) one party is a unit-holder and the other is a tenant;
>
> (b) both parties are unit-holders or tenants; or

(c) where one party is a tenant, the other is his landlord;

provided that the right or duty sought to be enforced is of the kind referred to in paragraph 4.11.17.]

4.11.18 However, in an emergency, or if the duty that the complainant seeks to enforce is a duty to pay money, the complainant may bring legal proceedings without first using that procedure.

4.11.19 The complainant must first consider resolving the matter by—

(a) negotiating directly with the defaulter; or

(b) using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.20 If the matter is not resolved in accordance with paragraph 4.11.19, and the complainant wishes to take further action, he must give a complaint notice to the alleged defaulter. Form 23 [Complaint notice against unit-holder or tenant] must be used.

4.11.21 The alleged defaulter may respond to the complaint notice by giving a notice (a "reply notice") to the complainant. Form 24 [Reply to complaint notice against unit-holder or tenant] must be used.

4.11.22 After 21 days (beginning with the day on which the complaint notice is given to the defaulter) have passed, or upon receipt of the defaulter's reply notice (if that is earlier), the complainant must, if he wishes to take further action to enforce the right or duty, reconsider whether the matter could be resolved by—

(a) negotiating directly with the alleged defaulter; or

(b) using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.23 If the matter is not resolved in accordance with paragraph 4.11.22, the complainant may bring legal proceedings.

3.51 This procedure is clearly much simpler than the present provisions, which should assist the commonhold association. However, there may be a concern that the removal of a gatekeeper will result in an increase the number of disputes reaching the court. We do not consider that this is likely. The difference is that instead of pursuing the commonhold association on the merits of its decision not to take action – or indeed for failing to take the best form of action – by initiating a new dispute against the commonhold association, the aggrieved unit-holder will have to take responsibility for any action against the alleged defaulter. The advantage of the new procedure is that it offers the commonhold association the opportunity to disengage from disputes and thereby reduces the administrative burden of taking action against unit-holders. The forms for the new procedure would be modelled on the existing forms used in the unit-holder against the commonhold association procedure.

10.	Do you agree that an alternative unit-holder against unit-holder dispute resolution procedure should be introduced?

Changing the procedure

3.52 If it is thought that the provision of an alternative procedure would be helpful, it will have to be decided whether the new or the old procedure should be the default model in the model commonhold community statement. We provisionally consider that the new – and simpler – procedure should be the default for new commonholds.

3.53 In any case, we consider that a commonhold association should be free to change to the other prescribed procedure at any time on the passing of an ordinary resolution.

3.54 In the event of a change by the commonhold association, we propose that the new procedure would only apply to disputes in relation to which the complaint notice was served after the amendment of the commonhold community statement was registered at Land Registry. We propose this date rather than the commencement of the dispute as it is more readily verifiable.

11.	Do you agree that the new procedure should be the default unit-holder against unit-holder dispute resolution procedure?
12.	Do you agree that the commonhold association should be able to change from one prescribed unit-holder against unit-holder dispute procedure to another by ordinary resolution?
13.	Do you agree that where the procedure is changed the new procedure should only apply to disputes where the complaint notice is served on the alleged defaulter after the registration of the change at Land Registry?

Should the commonhold association be informed?

3.55 Where the new procedure applies, the commonhold association will not necessarily be aware of a dispute. We think it would be helpful if the new procedure included an obligation on the aggrieved unit-holder to notify the commonhold association of the service of a complaint notice on the alleged defaulter. This would not impose a duty on the commonhold association to take action but it would ensure that the commonhold association was informed and could decide to take its own action if so desired.

14.	Do you agree that an aggrieved unit-holder using the new procedure should inform the commonhold association of the dispute?

Ensuring finality in unit-holder disputes

3.56 The present dispute resolution procedures do not prevent a unit-holder who has unsuccessfully pursued a complaint against the commonhold association for failing to take action against a unit-holder from commencing an action against the unit-holder. It has been suggested to us that the exhaustion of one procedure should prevent the use of another in relation to a single dispute. If adopted, this would mean that on the conclusion of court proceedings in which the commonhold association successfully defended the claim that it had improperly failed to act, the aggrieved unit-holder could not then begin a dispute and ultimately sue the alleged defaulter on the same facts.

3.57 A rule that presented this occurrence would clearly bring greater finality and prevent some secondary disputes. However, its creation would complicate each of the three procedures and could give rise to arguments about whether the same facts were actually in issue, which might itself create the same number of disputes that the rule sought to prevent. Our provisional conclusion is that it is not necessary to create a rule of this kind.

15.	Do you agree that it is not necessary to specify that the exhaustion of one dispute resolution procedure in relation to a dispute should not preclude the use of another?

Commonhold Ombudsman scheme

3.58 Section 42 of the Act gives the Lord Chancellor power to require commonhold associations to belong to an approved ombudsman scheme. The underlying aim of having an ombudsman scheme is to ensure that

commonhold disputes can be readily settled with the minimum of cost and disruption to the community and the individuals concerned.

3.59 Each of the dispute resolution procedures in the model commonhold community statement makes provision for the dispute to be referred to a commonhold ombudsman, if one has been appointed. At present no ombudsman scheme has been approved and therefore no ombudsman has been appointed and no commonhold association has been required to join such a scheme. Therefore, when the dispute resolution procedure has reached the stage at which a reference might be made to the ombudsman, the parties may instead take the matter to court if they wish.

3.60 We do not think that the absence of an ombudsman service has been a factor in the slow growth of commonhold. We are however aware of arguments that the absence of a less formal dispute resolution forum than the court as the place of resort after the dispute resolution procedure has been exhausted may be detrimental. We are told that tenants benefit greatly from the services of the independent housing ombudsman and that it would benefit commonholders to have access to the same or similar services.

Background

3.61 An approved ombudsman scheme is a scheme that is approved by the Lord Chancellor. To be approved, a scheme must meet the conditions specified in the Act. It must provide for the appointment of an ombudsman, or more than one, and the Lord Chancellor must approve those appointments in advance. It must enable both unit-holders and their tenants on the one hand and the commonhold association on the other to refer disputes to which they are parties to the ombudsman. The scheme is not, however, required to accommodate disputes only involving unit-holders or tenants. The scheme must require the ombudsman to investigate and determine a dispute referred to him. The ombudsman would therefore be unable to refuse to investigate and determine any individual case falling within the remit of the approved scheme.

3.62 Regulations may require that a commonhold association is to be a member of an approved ombudsman scheme. They require associations, which are members of the scheme, to co-operate with the ombudsman in his or her investigations and determinations. Commonhold associations (but not unit-holders or tenants) must comply with the ombudsman's decisions, including decisions that require the commonhold association to pay money.

3.63 The requirements specified in the Act are, however, only the basic standards that a scheme must satisfy before a commonhold association can be required to belong to an approved scheme. The content of the remainder of each scheme will be settled on a scheme by scheme basis.

16.	Do you consider that the creation of an approved commonhold ombudsman scheme should be a priority?

Approved ombudsman scheme - issues

3.64 Although there is no work proceeding at present on the creation or approval of a scheme, there are several issues on which we would welcome views at this stage.

3.65 First, the Act does not specify how an approved scheme is to be financed. We would welcome views as to how the cost of the service should be met. One possibility would be to provide for a levy on all the commonhold associations, which belong to the scheme. This would be funded by their unit-holders and would be administratively simple to collect. An alternative would be to establish a system of case fees so that the commonhold association and, perhaps, the other party to the dispute would pay for the service on a case by case basis.

3.66 Secondly, the Act does not indicate whether the ombudsman is to determine cases strictly in accordance with the law or in the light of wider considerations of reasonableness and fairness.

3.67 Thirdly, on a related point, the Act is also silent as to whether, and to what extent, the ombudsman is expected to promote best practice among the commonhold associations that are required to belong to an approved ombudsman scheme.

3.68 Fourthly, it is clear that an approved ombudsman scheme is intended to deal with disputes between owners of commonhold units and the commonhold association, and that both unit-holders and the commonhold association should be able to refer these disputes to the ombudsman. It also seems clear that the approved ombudsman scheme cannot bind a unit-holder to observe or perform the decision of an ombudsman. As unit-holders are not members of the scheme this seems reasonable.

17. Do you think that the cost of an approved ombudsman scheme should be met from levies on commonhold associations, who belong to the scheme, or on a case by case fee, or by some other means?

18. Do you think that the ombudsman's jurisdiction should be based on a strict assessment of legal rights or wider considerations of reasonableness and fairness? If so, should this be enshrined in legislation?

19. Do you think that the ombudsman should be able to issue binding guidance to members of the scheme?

20. Do you think that the ombudsman should be able to bind unit-holders to observe and perform his or her determinations, subject to necessary rights of appeal to the court?

A new jurisdiction for the Leasehold Valuation Tribunal

3.69 The standard dispute resolution procedures in the model community commonhold statement do not have to be used for disputes relating to the enforcement of a duty to pay money. These disputes will therefore only be considered by the ombudsman where the parties want him or her to do so. These disputes may instead be taken directly to court even though the parties remain free to use alternative dispute resolution procedures or negotiation to provide a solution.

3.70 A different approach might be to use section 66 of the Act to confer jurisdiction on a tribunal in relation to proceedings brought under the Act or in relation to commonhold land. The Leasehold Valuation Tribunal often determines disputes relating to residential leasehold service charges. It is generally considered less expensive than the court. Although the law to be applied would be very different in commonhold cases from leasehold cases, the underlying issues arising from community living would probably be much the same. The Tribunal might therefore be a good forum to determine money disputes relating to the commonhold assessment and other commonhold payments.

3.71 If a new jurisdiction were to be created for the Leasehold Valuation Tribunal, it might reduce the need for an ombudsman scheme, particularly if the jurisdiction extended beyond money disputes relating to the commonhold assessment and reserve fund levies.

21.	Do you consider that a new commonhold jurisdiction should be created for the Leasehold Valuation Tribunal
a)	In relation to money disputes and
b)	Generally
22.	Would such a jurisdiction diminish the need for a commonhold ombudsman?

Voting Rights

Overview

3.72 The commonhold community statement and the articles of association of the commonhold association together define the number of votes that a member may exercise. This is clearly an issue of critical importance to the running of the commonhold. If the members and the directors cannot work

out quickly and with certainty how many votes each member has, the running of the commonhold association or at least its general meetings will quickly descend into chaos.

3.73 The basic position under the model articles of association specified in the Regulations is that where there is a single unit-holder of a unit that person will exercise the votes allocated to that unit because he or she is the member in respect of that unit. Where there are joint unit-holders of a unit, the votes allocated to the unit will be exercised by the person designated as the member in accordance with the provisions of the Act. Where a unit-holder is already a member, when a unit is acquired, the position as to who will exercise the votes allocated to the unit is possibly not as clear as we would wish. We provisionally propose that the wording should be amended so that there is no lack of clarity.

Background

3.74 There are three categories of persons who may be members of a commonhold association: subscribers; developers and persons entitled to be registered as proprietor of a unit. The subscribers are the people who form the commonhold association. They will frequently be company agents who specialise in setting up companies. They are not expected to have any long term interest in the commonhold. The developer is the person who creates the commonhold. We discuss the issues relating specifically to developer's votes in Part 6.

Subscriber's votes

3.75 The subscribers have one vote each during the pre-commonhold and transitional periods. We do not expect the subscribers to have any active role in the commonhold and do not propose any change in relation to them.

Member's votes

3.76 A person becomes a member on being entered into the register of members by the commonhold association. A person becomes entitled to be entered into the register of members on becoming a unit-holder of a unit. A person is a unit-holder if he or she is entitled to be registered as the proprietor of a unit at Land Registry.

3.77 Where there are joint owners of a unit, only one of them may be the member of the commonhold association in respect of the unit. The Act therefore provides a procedure by which the member may be designated by the joint owners or, in the absence of designation, identified. The member exercises the votes allocated to the unit.

3.78 Some unit-holder members may have more votes than others. This might be because the individuals in question own several units and other people do not, or because more votes are allocated to one unit than another. The votes allocated to each unit are recorded in the commonhold community statement so that their allocation is a matter of record at all times.

3.79 The present rules relating to the allocation of votes are set out in articles 27 and 28 of the model articles of association. They provide:

Article 27 - *On a show of hands, every member who (being an individual) is present in person or (being a corporation) is present by an authorised representative not being himself a member entitled to vote, has one vote.*

Article 28 -

On a poll-

(a) during the pre-commonhold period or the transitional period, every member has one vote; and

(b) at any other time, every member has the number of votes that are allocated in the commonhold community statement to him in respect of the commonhold unit of which he is the member and, where a member is a member in respect of more than one unit, the sum of the votes allocated to him in respect of those units.

3.80 The overall effect of these provisions is that until the end of the transitional period, every member, whether a subscriber or developer, is entitled to exercise one vote on a poll. After the end of the transitional period, a member may exercise the sum total of the votes allocated from each unit in respect of which he or she is the member. Thus, in a commonhold of ten units, where each unit has one vote, the members might have the following votes after the transitional period has ended.

Unit 1	1 vote
Unit 2	1 vote
Unit 3	1 vote
Unit 4	1 vote
Unit 5	1 vote
Unit 6	1 vote
Unit 7	1 vote
Unit 8	1 vote
Unit 9	1 vote
Unit 10	1 vote

3.81 If each unit is owned individually by a separate person, each of them will have one vote. If, however units 1 to 9 (inclusive) are owned by the developer and unit 10 is owned by an individual, the individual will have one vote and the developer will have nine votes.

3.82 The allocation becomes more complicated if joint owners are introduced and even more so if one or more of those joint owners is already a unit-holder. If units 1 to 5 are owned by the developer, but unit 6 is owned by A, unit 7 by B, unit 8 by A and B (B is the member in respect of the unit), unit 9 by C and unit 10 by A and C (A is the member in respect of the unit), then the developer will have 5 votes, A will have 3 votes, B will have 2 votes and C will have no votes.

3.83 This follows from the wording of article 28 that each member has the votes ***in respect of the commonhold unit of which he is the member and, where a member is a member in respect of more than one unit, the sum of the votes allocated to him in respect of those units.*** However, it might be asked whether a member is strictly a member **in respect of** the unit. The developer was a member in the transitional period and did not become so again on being entered as a unit-holder. Similarly, in the example given, if A first acquired unit 6, he or she did not become a member again on the acquisition of unit 10. We do not think that these arguments are persuasive but it would be sensible to avoid any doubt and to make the legislation easier to understand.

3.84 We accordingly propose to amend the terms of the model article so that it more fully describes the votes allocated to a person. In general terms, we propose that the revised model article would state that on a poll:

"**Allocation of votes on a poll**

28.— (1) During the pre-commonhold period or the transitional period, on a poll, each member has one vote.

(2) After the transitional period has ended, on a poll—

(a) a member who is a unit-holder may exercise the number of votes recorded in relation to him in the members' register for the commonhold association; and

(b) no other member has a vote.". (2) If 2 or more members become joint unit-holders of a commonhold unit, they may also nominate one of themselves to exercise, on a poll, the votes allocated to the unit.

(3) The members referred to in sub-paragraph (2) who gave a nomination under that sub-paragraph may revoke that nomination and nominate another one of themselves to exercise, on a poll, those votes.

(4) A nomination or revocation under sub-paragraph (2) or (3) is to be by notice in writing, signed by all the members concerned and given to the commonhold association

(5) A reference in sub-paragraph (2), (3) or (4) to a member of the commonhold association includes a person who has been nominated under sub-paragraph (1)(d)(i) or (1)(d)(iv) to become a member.".

3.83 The effect of the new working would be to make clear that:

- On the transfer of the first unit by the developer, only a member who is a unit-holder is entitled to vote on a poll.
- On the transfer of the first unit by the developer, the developer will be the registered proprietor of all the units other than that transferred and will have the votes allocated to those units until they are transferred to a third party.
- Subject to the provisions for joint unit-holders, a unit-holder of more than one unit will be allocated the cumulative total votes allocated to every unit he or she owns.
- If two or more members are joint unit-holders of a unit, the whole of the votes allocated to the unit must be exercised by one of them. They may nominate one of themselves as the person entitled to the use of the votes allocated to the unit. If they do not, the first named

on the proprietorship register at Land Registry for the unit will be entitled to do so.

3.84 In preparing these proposals we considered whether provision should be made to enable joint owners, who are both already members and who acquire a further unit, to split the votes allocated to the new unit between them. Although, this flexibility might be attractive to such joint owners, we rejected the proposition because of the complications that might be caused to the commonhold association in keeping track of votes allocated in this way. We were also not attracted to the idea of making an additional default provision, for example, that the votes should be split in specified proportions as it would add a further layer of complication. We think it better that the votes of a unit remain indivisible and any arrangements between joint unit-holders as to their exercise should be private matters between themselves.

23. Do you agree with the revised text of article 28 (allocation of votes to members?)

Registration of votes

3.85 We intend that the commonhold association will record the number of votes to which each member in a register is entitled on an on-going basis. We therefore need to decide whether the register should be definitive of the allocation of votes at any time or whether this should be a question of fact to be decided on the evidence.

3.86 A conclusive register would clearly make the task of ascertaining votes allocated as simple as it could be. We think this may be helpful, especially in small commonholds. However, it will put a burden on those maintaining the register to ensure that they make changes promptly. Notwithstanding this burden, we provisionally propose that the register should be definitive. This should encourage interested members to make it their business to ensure that the register is updated.

3.87 If provision were to be made for split votes we consider that provision would have to made to ensure that the split would only be effective when it was notified in writing to the commonhold association and, if the register is to be definitive, entered on the register.

3.88 If our proposal is adopted the new articles would read:

"**Register of members**

3.—(1) The commonhold association must keep a register of members in accordance with this article.

(2) For each member, the commonhold association must record in the register—

(a) his name and address;

(b) his address for correspondence, if he has given the commonhold association notice of a separate correspondence address;

(c) the date on which he became a member;

(d) the unit or units of which he is a registered proprietor;

(e) for that unit or each of those units, the number of votes he is entitled to exercise on a poll; and

(e) after he ceases to be a member, the date on which he so ceased.

(3) A person who—

(a) is nominated in relation to a commonhold unit for the purposes of sub-paragraph 2(2) or 2(3); or

(b) if the members do not so nominate one of themselves within 7 days of becoming entitled to be registered as proprietors of the freehold estate in the unit, the member whose name appears first on the proprietorship register for the unit;

is entitled to exercise, on a poll, the votes allocated to the unit.".

24.	Do you agree that the register of members should be conclusive of the votes exercisable by a member?

Part 4: Making commonhold more accessible

Shared Ownership

Overview

4.1 In this Part we consider issues relating to the accessibility of commonhold ownership to prospective homeowners generally. We address first the provision of shared ownership housing and, secondly, the availability of certain home purchase finance products. The perceived obstacle in both these cases is the prohibition in the commonhold legislation of long leases of residential commonhold units. This prevents the use of certain established products, such as the shared ownership lease. These products are, however, only a means to an end. We therefore examine whether there are other ways in which the same objectives can be achieved.

4.2 We provisionally conclude that a co-ownership trust is at least as good a way, and may be a better way, of providing shared ownership than the traditional long leasehold method. However, in case we have overlooked any real problem with this approach, we also explain how we would create an exemption for shared ownership leases from the present rule prohibiting long leases if this proved necessary. We would, however, stress our preference for the co-ownership solution and invite those who disagree with our conclusion to provide examples of real problems that it would create.

Shared Ownership Housing - background

4.3 It is usual for planning permission for residential developments to include a requirement to provide a proportion of social or affordable housing. One of the most important products used by the social housing sector as a mechanism to provide affordable home ownership is shared ownership. Shared ownership, where a property is co-owned by the purchaser and a social housing provider, gives the benefits of ownership to people who cannot buy a property outright.

4.4 The most common form of shared ownership uses a long lease. The landlord and the tenant become the co-owners of the property bought. The landlord is usually a Registered Social Landlord (RSL), but could be another public sector landlord or a private sector landlord under the new provisions of the Housing Act 2004 (which came into force in February 2005). The size of the share initially purchased by the tenant will depend on the income and savings of the tenant. This initial share is often around 25%, although it could be as much as 75%.

4.5 The tenant has the right to buy further shares in tranches of say, 10% or 25%. This process is called staircasing. As the tenant staircases, he or she gains a greater share of the equity in the property. Tenants usually mortgage their leases to commercial lenders as security for loans taken out to provide the funds to pay these premiums.

4.6 The Regulations impose restrictions on the grant of a lease in a residential commonhold unit. A commonhold unit is residential for the purposes of the Act if provision is made in the commonhold community statement that it

must only be used for residential purposes or for residential and other purposes. Regulation 11(1)(b) states that a term of years absolute in a residential commonhold unit or part only of a residential commonhold unit must not be granted for a term longer than 7 years. Leases for terms of seven years or less may be granted. There is therefore no inhibition to the usual buy-to-let arrangements or indeed on the short term letting of property whilst it is not required by the owner: for example, whilst the owner is away on business. The Act provides that leases of non-residential units have effect subject to the terms of the commonhold community statement. The model commonhold community statement prescribed by the Regulations makes no such provision. Such provisions will therefore be in local rules if they exist at all.

4.7 As a result of the restriction on long leases of residential commonhold units, traditional shared ownership leases, which are based on the grant of a long lease (usually for a period of 99 or 125 years) are currently unavailable to developers and housing associations wishing to create or buy residential commonhold units.

4.8 A solution must therefore be found. We consider that there are three possible options for the provision of shared ownership in commonhold. One is the use of a co-ownership trust to replace the shared ownership lease. This does not require any change to the Act or the Regulations. The second is to create an exception to the lease restrictions in the Regulations and permit the grant of long leases of residential commonhold units for the purposes of shared ownership. The third option is to remove the special rules for leases of residential units. The second or the third could co-exist with the first.

The co-ownership trust

4.9 Co-ownership is not a new concept. It is already applied to all jointly owned land. In broad terms, the proposal to use co-ownership to deliver shared ownership in commonhold is simply to extend the arrangements commonly used for joint ownership for the special purpose of shared ownership. The effect will be that instead of dividing their ownership ‘vertically’ as landlord and tenant as at present, the housing provider and the shared ownership occupier will divide it ‘horizontally’ as beneficiaries under a co-ownership trust.

4.10 One possibility would be that the property would be registered at Land Registry in the names of the trustees, which could be the RSL and the purchaser. If so, the trustees would hold the property on trust for themselves as co-owners. Both the RSL and the purchaser would own separate equitable interests in the property as beneficiaries under the trust. They would technically be tenants in common in equity in the proportions of their contribution to the purchase price made from time to time, or as otherwise specified in the trust deed. Occupation payments under section 13 of the Trusts of Land and Appointment of Trustees Act 1996 and compensatory payments made to persons who give up rights of occupation would be excluded from the payments taken into account for calculating shares of the capital value. As a result of changes introduced by the Finance Act 2007, the same Stamp Duty Land Tax Concessions available in relation to shared ownership leases will apply to shares in property owned on co-ownership trusts. In respect of the purchaser's equitable interest, his or her lender could take a charge over it, which might be supplemented by a non-recourse mortgage over the legal estate. The lender might also enter into an arrangement with the RSL to take additional security over the RSL's income stream. As a result, a lender would be no more exposed in relation to a shared ownership purchase based on a co-ownership trust than it would be in the case of purchase based on a shared ownership lease.

4.11 The trust deed will detail the rights and obligations of the co-owners. It will replace the lease as the document describing the property obligations of the occupier. It will define the right of the occupant to occupy the property and exclude the RSL from doing so. The right to occupy will be subject to the payment of specified sums and other obligations. The trust deed will also include the arrangements as between the RSL and the occupier relating to membership of the commonhold association and the staircasing arrangements by which ownership passes from the RSL to the occupier. We would expect that common standards for this documentation would be promulgated by the Housing Corporation so that it would be very similar from one commonhold to the next.

4.12 The principal benefit of using the shared or co-ownership trust as a mechanism of providing shared ownership in commonhold is that it will enable developers to create commonholds that satisfy the terms of their planning permissions. It has the added advantages that it would do so in a way that would avoid perpetuating the problems of leasehold within commonhold and simplify the transaction for the RSL and the shared ownership buyer.

4.13 Another advantage of the shared ownership trust is that it has potential to be more flexible than a shared ownership lease. This could make it more attractive. With shared ownership leases, staircasing is usually limited to 10% or 25% tranches because it is administratively burdensome to amend the lease documentation each time a smaller percentage is purchased.

Theoretically, under the trust model, it would be possible to write the trust to allow buyers to increase their equity in smaller tranches, which would be less burdensome than amending the lease arrangements. A further benefit of the trust model is that it removes the landlord and tenant relationship.

4.14 We have described how the co-ownership model could work for RSLs. It would work equally for all other providers, whether in the public or private sectors. However, the special concessions and arrangements available to RSL providers of shared ownership leases in relation to Stamp Duty Land Tax and housing benefit in leasehold situations will only be available to RSL providers of shared ownership within commonhold. This is to ensure that a level playing field is created that gives a genuine choice to the market. We are working with the relevant government departments to identify what else, if anything, needs to be done to create this equality.

4.15 We would welcome views on the use of the co-ownership trust for the purpose of providing shared ownership in residential commonhold units. We are particularly interested in any real problems that potential users and their lenders might face in using the co-ownership approach rather than the traditional lease based model.

25.	Do you agree that shared ownership can be satisfactorily delivered in commonhold by means of co-ownership trusts?
26.	Are you aware of any legislative changes that will be necessary to ensure that users of a co-ownership trust to provide shared ownership are not unfairly disadvantaged as against the users of long leases to achieve the same end?

Permitting the grant of shared ownership leases

4.16 If the co-ownership model is not viable for some reason, then it may be necessary to allow commonholders an exception from the general prohibition on leases of more than seven years for shared ownership properties. For reasons that we will explain, this is a route we would only undertake with the greatest reluctance. However, in case it is necessary, we now explain how we would proceed. For this purpose, we have drafted specimen regulations to allow a narrow exception to the long lease restriction for shared ownership schemes.

4.17 We have already described the basic structure of the long lease form of shared ownership. It is familiar and widely used. It requires in practice the grant of a lease of some 99 or 125 years, but in any case longer than

seven, which is the maximum length generally permitted in residential commonhold units.

4.18 The provisions of the proposed regulation follow a form similar to that used in the Regulations for the compensatory leases for terms of up to 21 years for tenants, who lose their leases by statutory extinguishment on the creation of a commonhold.

4.19 The exception for shared ownership leases will build on established statutory definitions of shared ownership. It will allow shared ownership leases for terms not exceeding 125 years. Unlike the case of compensatory leases, which are permitted on the creation of a commonhold, there is no need to prevent the tenant from being required to make payments to the commonhold association in discharge of payments required by the commonhold community statement to be made by the unit-holder. This is because the shared ownership tenant will often be intended to be the 'owner' and to take responsibility for the communal costs.

4.20 If an exception for shared ownership long leases were to be created, we provisionally propose that the provisions of the Regulations relating to permitted leases of residential commonhold units should be amended as follows. We have omitted the provisions relating only to other types of leases permitted in residential commonhold units.

New regulation 11

1. For regulation 11, substitute:

"**Leasing of residential commonhold units**

11.—(1) In this regulation—

"leasehold estate" has the same meaning as "term of years absolute" in sections 17 and 21 of the Act;

"shared ownership lease" means a leasehold estate in the whole of a residential commonhold unit—

(a) that was granted on payment of a premium calculated by reference to a percentage of the value of the unit or the cost of providing it; or

(b) under which the tenant or his personal representatives will or may be entitled to a sum calculated by reference, direct or indirect, to the value of the unit.

(2) For sections 17(1) and 21(2)(a) of the Act, the prescribed conditions(**1**) for a leasehold estate are those set out in—

(a) in the case of a shared ownership lease, paragraph (3);

(3) The conditions for a shared ownership lease are the following:

(a) the lessor is—

(i) a registered social landlord;

(ii) a local housing authority; or

(iii) a person who has received a grant under section 27A of the Housing Act 1996(**2**);

(b) in the case that the lessor is a person referred to in subparagraph (a)(iii)—

(i) the property has been disposed of on shared ownership terms, within the meaning given by section 2(6) of the Housing Act 1996; and

(ii) the property was provided or acquired (wholly or in part) by means of a grant under section 27A of that Act;

(**1**) Subsection 17(1) of the Act prevents the creation of a term of years absolute in a residential commonhold unit, and s21(2)(a) in part of such a unit, unless the term satisfies prescribed conditions.

(**2**) 1996 c. 52. Section 27A was inserted by s 220 of the Housing Act 2004 (2004 c. 34).

(c) the term is no longer than 125 years;
(d) the lease does not contain an option or agreement—
(i) to renew it for a further term that, together with the original term, amounts to more than 125 years; or
(ii) to extend it beyond 125 years;
(e) the lease does not require the lessee to make payments to the commonhold association in discharge of payments required by the commonhold community statement to be made by the unit-holder.

(4) In paragraph (3)(a)—
"local housing authority" has the meaning given—
(a) in relation to England—by section 261(2) of the Housing Act 2004(**3**); and
(b) in relation to Wales—by section 261(4) of that Act;
"registered social landlord" means a landlord that is on the register maintained under section 1(1) of the Housing Act 1996(**4**).

27. Do you agree that if an exception for shared ownership leases of residential commonhold units has to be created it should be in the form of the proposed regulation 11?

28. Do you agree that an exception of this kind should only be created if it can be demonstrated that a co-ownership trust does not provide a satisfactory substitute?

Would a temporary exception be acceptable?

4.21 The creation of an exception for long leases might be resisted on the ground that it will perpetuate leases within commonhold. However, the exception might be created as a temporary measure for a period of, say, five or ten years. The period would have to be adequate to allow a new

(**3**) 2004 c. 34. The subsection is as follows:

"(2) In this Act "local housing authority" means, in relation to England—
(a) a unitary authority;
(b) a district council so far as it is not a unitary authority;
(c) a London borough council;
(d) the Common Council of the City of London (in its capacity as a local authority);
(e) the Sub-Treasurer of the Inner Temple or the Under-Treasurer of the Middle Temple (in his capacity as a local authority); and
(f) the Council of the Isles of Scilly.
(3) In subsection (2) "unitary authority" means—
(a) the council of a county so far as it is the council for an area for which there are no district councils;
(b) the council of any district comprised in an area for which there is no county council.".

(**4**) 1996 c. 52. Section 27A was inserted by s 220 of the Housing Act 2004 (2004 c. 34).

alternative method of providing the same opportunities as the shared ownership lease to develop. This possibility could be given legislative form by creating the exception for a limited period of years only. The problem is that leases created during the currency of the exception would still be likely to run for their full terms. We do not favour this option. A long term solution needs to be found.

29.	Do you agree that a time limited exception for shared ownership leases is undesirable?

Leaseholders' rights – enfranchisement and lease extensions

4.22 Even as a temporary measure, the creation of an exception for long leases of residential commonhold units will give rise to potentially difficult issues. Many of the rights of long leaseholders, including the individual rights to enfranchise and to lease extensions, and the ability to enfranchise collectively are not entirely suited for the commonhold environment. If long leases are to be permitted, even on a limited basis, then we consider that the leasehold rights that are inconsistent with commonhold should be excluded. We think that the following exclusions at least would be necessary. They modify the right to enfranchise and the right to a lease extension under the Leasehold Reform Act 1967, as well the right collectively to enfranchise under the Leasehold Reform, Housing and Urban Development Act 1993. The power to make these exclusions is contained in section 19(4) of the Act. It provides that regulations may exclude rules of law relating to leasehold estates. The requisite regulations might provide that:

Modification of Leasehold Reform Act 1967 leases of commonhold units

2. In the Leasehold Reform Act 1967(**5**), in Schedule 4A, after paragraph 4, insert:

"Certain leases of commonhold land

4A. A lease of the whole of a commonhold unit (within the meaning given by the Commonhold and Leasehold Reform Act 2002(**6**)), being a lease granted by—

(a) a registered social landlord;

(b) a body referred to in paragraph 2(2); or

(c) a person who has received a grant under section 27A of the Housing Act 1996;

is excluded from the operation of this Part whether or not the interest of the landlord belongs to a person or body referred to in paragraph (a), (b) or (c)..".

(**5**) 1967 c. 88.
(**6**) 2002 c. 15.

Modification of Leasehold Reform, Housing and Urban Development Act 1993 in relation to commonhold land

3. In the Leasehold Reform, Housing and Urban Development Act 1993(**7**), after section 4(5), insert:

"(6) This Chapter does not apply to premises that are commonhold land (within the meaning given by the Commonhold and Leasehold Reform Act 2002(**8**)).".

30.	Do you agree that the rights to enfranchisement under the Leasehold Reform Act 1967 and the Leasehold Reform Housing and Urban Development Act 1993 and the right to a lease extension under the 1967 Act should be excluded in relation to commonhold land?

Tenants' rights – service charge payments

4.23 The existence of long leases of residential commonhold units may also cause practical problems for the commonhold communities and their managers. These problems may arise from the interaction of the leasehold service charge legislation and the commonhold legislation. The concern is that a commonhold assessment and other payments to the commonhold association might be deemed to be a service charge for the purposes of landlord and tenant legislation. This is not certain but if it is correct the following problem might arise.

4.24 A unit-holder has let a unit. The unit-holder is liable to pay a commonhold assessment and may want to pass the cost of the assessment onto his or her tenant. The unit-holder is not protected by the service charge legislation and has no grounds to challenge the assessment. The tenant, however, as against the unit-holder, is protected and challenges the payment sought as excessive. If the court or the Leasehold Valuation Tribunal (as the case may be) upholds the objections made, the tenant need only pay a reduced sum. The shortfall is the responsibility of the unit-holder. The commonhold association will then have to sue the unit-holder for what may be a relatively small shortfall or exercise the diversion of rent remedy to recover the money due if the unit-holder does not pay.

4.25 We should mention at this stage that these service charge problems will apply to the short leases that are already permitted in residential commonhold units. This is, however, not likely to be a significant practical problem because most short leases are granted at a rack rent, without service charge provision. The real issues arise with longer leases. The question in these cases is whether it is acceptable for the situation described to arise.

(**7**) 1993 c. 28.
(**8**) 2002 c. 15.

4.26 Commonhold and leasehold are intended to be different. The fact that different situations can arise in both should not be surprising. In addition, a commonholder has clearly elected to join a commonhold and so can have no complaint that he or she may be less protected in law than a tenant under a long lease in a similar situation. A commonholder granting a long lease might be considered even less deserving of sympathy, but it must not be forgotten that the landlord in this case is a provider of affordable housing, who would not be so disadvantaged if providing the same product in a leasehold development.

4.27 One way to remove the difference might be specifically exclude the service charge legislation from leases within a commonhold. As mentioned, the Act provides power to modify rules of law about leasehold estates. There are, however, doubts as to whether rules about service charges are rules about leasehold estates. It they are not a new power to exclude would be required, if this policy were to be adopted. In addition, as a matter of policy, tenants might well argue that they are as entitled to protection against their landlords in commonhold as out of it. Suspending protections is therefore not a step that can be lightly undertaken, even if there is power to do so.

4.28 Another approach to removing the difference would be to apply the service charge legislation to commonhold payments. This would undermine the core financial stability that has been built into the commonhold legislation. We do not think that it would be acceptable, even limited to the situation of a co-ownership trust.

4.29 The final possibility is to accept that tenants may have rights against their landlords that unit-holders do not have against the commonhold association in so far as common expenditure is concerned. This seems to us to be the fairest and most practical solution to what may in practice be a relatively small problem.

31.	Do you agree that no special provision should be made for the payment of sums reimbursing the whole or part commonhold assessment to unit-holders by tenants under long shared ownership leases of residential commonhold units?

Tenants' Rights – Right to Manage

4.30 Under Part 2 of the Commonhold and Leasehold Reform Act 2002 the tenants of a building let on long leases have the right, irrespective of any fault on the part of the landlord, to take over the management of the property. If, tenants with this right were to be permitted in a commonhold, we consider that they could not be permitted to exercise it. Management of a commonhold can only be exercised by the commonhold association.

32. Do you agree that the right to manage should not apply in commonhold land?

33. Do you think that there are any other tenant's rights that should be excluded if long leases of residential commonhold unit are permitted.

House purchase

Overview – home purchase finance products

4.31 Closely related to the issue of the use of shared ownership leases is the question of the availability of long lease-based home purchase finance products. These may take the form of equity release or home reversion schemes but sale and leaseback arrangements, with and without formal security over the lease, can arise in many circumstances. An example that has been particularly drawn to our attention relates to the use of Sharia'a compliant home purchase finance products. We therefore address this topic in some detail, but it is an example of a wider problem.

4.32 These Sharia'a compliant products apparently generally use a lease of 25 years, although much longer terms also seem to be granted. The restriction on the grant of leases for longer than seven years is therefore a barrier to the use of these products for residential commonhold units.

4.33 We consider that there is a way of providing home purchase finance products through the use of a co-ownership trust rather than a long lease. But, in case we are mistaken, we propose for consideration draft

regulations that will create an exemption from the restriction on long leases for home purchase finance products reliant on the use of long leases.

Background - home purchase finance products

4.34 Sharia'a law is a religious law which is a code for living underpinning every aspect of daily life for Muslims across the world. We understand that Sharia'a law requires that a Muslim will neither benefit from interest on a transaction, nor pay interest, and that the risk of a venture must be borne jointly between the parties. Therefore, a conventional home purchase finance product with its ongoing calculation of interest is forbidden. Muslims living in non-Islamic states can therefore face difficulties in finding a suitable home buying product and some may have had to compromise their religious beliefs by taking out conventional mortgage products, involving the payment of interest.

4.35 There are, however, some lenders in England and Wales who offer Sharia'a compliant home finance products. There are three principal Sharia'a compliant products available:

- Murabaha;
- Ijara; and
- Ijara with diminishing Musharaka ("IDM").

Murabaha

4.36 Under Murabaha, the borrower enters into a contract with the lender, under which the lender buys the property from the seller at market value and then resells it to the purchaser at a higher price (including a profit element), with the resale price being paid by way of equal instalments. Those payments are secured by means of a mortgage. The borrower becomes the registered proprietor of the property. This type of arrangement can operate within commonhold as easily as outside it.

Ijara

4.37 Under the Ijara method, the lender buys the property from the seller (the borrower in the case of re-mortgaging) and then enters into an agreement with the borrower to sell the property to the borrower at the original purchase price at the end of a specified period (typically 25 years). The lender grants a lease of the property to the borrower for a term of years equal, at least, to the payback period, giving the borrower the right to occupy the property. The borrower makes fixed monthly payments to the provider, calculated so that part is rent (the profit element for the lender) and part is applied towards the purchase of the property. The monthly

payments are reassessed, usually at six-monthly intervals, and fixed for the subsequent six months. At the end of the agreed period, the lender transfers ownership of the property to the borrower.

4.38 There are strong similarities between the Ijara and shared ownership using a long lease. The lender, like the shared ownership provider, is the registered proprietor of the freehold. The borrower, like the shared ownership provider's tenant, has a lease, of which he is the registered proprietor, allowing him to or other occupy the property, and the benefit of an agreement that the lender will transfer the property in the future on payment of specified sums.

IDM

4.39 IDM is a particular type of Ijara where the legal estate is purchased by trustees and held on trust for the lender and the borrower as beneficial tenants in common. Under this model, the borrower provides part of the equity, for example, 20% of the purchase price, and the lender provides the remainder. The lender enters into an agreement to sell its share of the property to the borrower at the original purchase price at the end of a specified period. The trustees grant a lease to the borrower, who agrees to pay the agreed price in fixed instalments over a number of years, as with the Ijara arrangement. The beneficial interest is transferred to the borrower in instalments once the payment stages are completed. By the end of the rental period, the borrower has a 100% interest in the property at which time the lender transfers legal ownership of the property to the borrower.

4.40 In summary, under IDM, the trustees are the registered proprietors of the property. The borrower is the registered proprietor of the lease. The borrower's share in the equity increases as the instalments are paid. If the share increases to 100% of the beneficial ownership, the property is transferred to the borrower.

Sharia'a compliant home purchase finance products in commonhold

4.41 As we have seen, the Regulations impose restrictions on the grant of a lease in a residential commonhold unit. This does not affect the Murabaha products as they do not rely on the grant of a lease. However, these products are only suitable for those who have a significant amount of capital (for example, 20% of the purchase price). In addition, they are not available for those wishing to re-mortgage. By contrast, Ijara and IDM arrangements, which rely on the grant of a long lease are suitable for use by purchasers who do not have, or are not able to obtain, a significant capital sum. However, as a result of the prohibition on long leases, they are not available to those wishing to purchase a residential commonhold unit. It is therefore necessary to consider how they can be accommodated within the commonhold structure.

4.42 We anticipate that there will be a body of opinion that favours continuing with the products that are available at present. We recognise that this argument has some merits but the potential costs of introducing long leasehold into commonhold should not be underestimated. We believe that it is possible to use a co-ownership model to create suitable home purchase finance products without using a long lease. As in the case of the shared ownership arrangements we have described, rights of occupation can be granted under a trust deed instead of a long lease. However, we are not aware that any such products exist at present.

4.43 If they do not exist and cannot be created then some form of exception from the general rule against long leases of residential commonhold units will be required to permit Ijara and IDM products to be used for the purposes of financing the purchase of a residential commonhold unit. The only other options are to accept that these products cannot be offered in relation to commonhold or to remove the general rule against long leases itself. In relation to the former, we do not think it desirable that sectors of the community should be denied access to financial products merely because they are freeholders rather than leaseholders. We discuss the issues relating to the removal of the prohibition on long leases below.

4.44 The first point to note is that the same problems attach to leases used in home finance products as to shared ownership leases. Incorporating home finance product leases will therefore give rise to the same issues in relation to the interaction of leasehold and commonhold.

4.45 On the same basis that we have prepared draft regulations against the possibility that we may have to create an exception for shared ownership leases, even though that is not our preferred option, we have drafted a narrow exception to the long lease restriction for home finance product leases. It too is not our preferred option.

4.46 The wording of the possible exception that we have prepared is based on the Stamp Duty Land Tax concession framed with Sharia'a home purchase finance products in mind but not in terms restricted to them. It forms part of the proposed Regulation 11 that are referred to above:

Regulation 11

(2) For sections 17(1) and 21(2)(a) of the Act, the prescribed conditions for a leasehold estate are those set out in—

(a) …

(b) in the case of a lease under a property financing arrangement to which section 71A of the Finance Act 2003 applies, paragraph (5);..

Paragraph (5) would read as follows:

(5) The conditions for a lease under a property financing arrangement to which section 71A of the Finance Act 2003 applies are—

(a) that the term of the lease is no longer than 25 years; and

(b) that the lease is one referred to in section 71A(1)(c) of the Finance Act 2003.

4.47 The exception we propose is limited to leases of 25 years or less. However, there may be different views as to whether this is an adequate term. By contrast, the Stamp Duty Land Tax exception is open ended and the possible exception that we have discussed for shared ownership leases would permit leases of 125 years.

4.48 What then is an appropriate length? The compensation leases permitted on the creation of a commonhold by the Regulations may be up to 21 years in length. We note, however, that modern mortgage terms, which represent the equivalent product to Sharia compliant home purchase finance products, are not generally taken out for more than 25 years. It therefore seems to us that any permitted length of lease over 25 years for Sharia's compliant home finance products would require very strong justification. However, if 125 year leases are to be permitted for shared ownership purposes, we can see merits in applying the same limit for consistency. Similarly, if there are longer term arrangements commonly in use for equity release or other lease-back schemes then a longer term would be more justifiable.

34. Do you agree that home purchase finance products can be satisfactorily provided in commonhold by means of a co-ownership trust?

35. Do you agree that an exception for long lease based home purchase finance products should only be created if a co-ownership trust model does not provide a satisfactory alternative?

36. If it is necessary to create such an exception, do you agree with our proposed exception for long lease based home purchase finance products set out in draft regulation 11?

Part 5: Removing the prohibition on long leases

Overview

5.1 In Part 4 we discussed the problems created by the use of long leases in relation to the provision of shared ownership and home purchase finance products. However, there is a more general concern. It is that leasehold is a feudal relic that should ultimately be replaced by commonhold. From this perspective, it is regressive to permit in commonhold the thing that commonhold is intended to replace. Clearly, this argument is not so strong if commonhold is only a voluntary alternative to leasehold. On that basis, both systems are acceptable. More pragmatically if the proposals that we have made in relation to co-ownership trusts as a means of delivering affordable housing are not, for some reason, technically satisfactory, it could be argued that permitting two additional classes of long leases of residential commonhold units will reduce the benefit of the general prohibition to the point that it might no longer be worth maintaining.

5.2 A similar issue arises in relation to the conversion of developments from leasehold to commonhold. It is widely agreed that the requirement that everyone with a major interest in the land must agree to the creation of a commonhold will mean that there will be few conversions. This is a restriction on the growth of commonhold. However, for the threshold to be lowered, provision would have to be made for those who did not wish to convert.

5.3 In this Part, we consider whether the benefits of the prohibition on long leases outweigh the disadvantages. We would stress at the outset that our preference would be to retain the prohibition without any new exceptions.

Removing the prohibition on long leases – general

5.4 We have already described the problems that introducing exceptions for long leases of residential commonhold units will create. There are also wider policy reasons why long leases should not be permitted in these units. Long leases are said to come with endemic problems related to the quality of the documentation. Leases are also surrounded by a mass of legislation intended largely to re-balance the interests of landlord and tenant. Bringing these documents and this legislation into commonhold is

an avoidable complication. Commonhold documents are by contrast largely standardised and their content can be controlled by regulations and there is no landlord so that the community controls its own affairs.

5.5 Secondly, and more importantly, a long lease of a unit takes away the greatest immediate financial interest in the property from the freeholder and gives it to the tenant. This cuts against the central commonhold concept that the unit-holders should have an equality of interest. If some commonhold units are subject to a long lease, the unit-holders of those units are less likely to take a close interest in the running of the community. The introduction of long leases into residential commonhold could therefore result in the introduction of absentee unit-holder landlords. This could also be seen as unfair to the tenant, who has the real ownership of the unit but would have no say in the running of the commonhold.

5.6 These are good reasons to keep long leases out of commonhold, but do they justify a total ban on leases of residential commonhold units over seven years in length? The present attitude of the commonhold legislation to leases is not one of absolute hostility. Long leases of non-residential units are permitted in commonhold. The problems we have described may therefore occur where a long lease is created of a non-residential commonhold unit. We anticipate that this is not seen as an issue because long leases of commercial premises are less frequently encountered and do not have the same history of hostility between landlord and tenant as seems to apply in the residential arena. Even there, there are few restrictions in the Act and Regulations on leases of no more than 7 years and longer leases of up to 21 years are permitted, where leases are extinguished by the creation of a commonhold.

5.7 Undoubtedly, the retention of the prohibition will make the management of commonhold simpler. However, would the removal of the restriction on long leases of residential units inevitably lead to the grant of significant numbers of long leases? And, if it did, could the commonhold legislation itself provide a means of curing the defects of leases within commonhold and neutering the adverse effects that there might be on the management of the community? Regulations made under the Act may impose obligations on tenants and may enable a commonhold community statement impose obligations on tenants.

5.8 These points suggest to us that consideration should at least be given to the possibility of an alternative approach. Instead of creating exceptions for leases of different varieties, why not remove the restriction on long leases in residential commonholds and place those units on the same footing as other commonhold units? Namely, that the regulations may provide restrictions but do not have to do so. If no restrictions were then imposed, this would remove any barriers regarding the use of long leases to provide shared ownership and home purchase finance products in commonhold. This might also open the way to easier conversion. The disadvantage would be the arrival of long leases in commonhold in an unpredictable

number of cases. We consider that this is too high a price to pay for these benefits.

37.	Do you agree that the general prohibition on long leases of residential commonhold should be retained?

Removing the prohibition on long leases – conversion to commonhold

5.9 We know that re-opening the question of permitting long leases of residential units in commonhold will not be universally popular. A general removal of the restrictions on the creation of long leases would, however, benefit those who wanted to use shared ownership leases or lease based finance products. It would also benefit the commonholders who wanted, for whatever reason, to create a long lease of a residential unit. We are not aware that there is any great incentive for them to do so in practice, but the possibility would exist. There is, however, a much bigger group of leaseholders who may benefit from a total or partial relaxation of the prohibition.

5.10 The legislation provides that to create a commonhold the consent of the owners of all the major interests in the land must be obtained. We refer to this as the 100% rule. It is an obvious reason why conversion to commonhold from an existing leasehold or even an enfranchised freehold development is very unlikely. This means that commonhold is likely to be restricted to new development and denied to the constituency of existing long leaseholders. It is for debate whether this is desirable. Certainly, if a way could be found for tenants of blocks to enfranchise and proceed direct to commonhold the market realistically achievable for commonhold would be instantly expanded. This could provide real experience of the working of commonhold in significant numbers of sizeable communities. A successful established market in commonhold would then emerge and would raise the profile of commonhold and encourage developers to use it.

5.11 The scenario we have in mind is the possibility that, say, 75% of the tenants holding long leasehold leases in a residential development wish to enfranchise their leases and are interested in converting to commonhold for ease of future management. 25% are apathetic and do not respond to any communications. The 75% can acquire the freehold through a limited company but they cannot become commonholders, even though they control the company that owns the freehold.

5.12 How could the leases of the 25% be absorbed into a commonhold? One possibility would be forced conversion to commonhold. This may, however, give rise to concerns about interference with the free enjoyment of the tenants protection under the European Convention on Human Rights. Another would be to allow a company representing the 75% to be the unit-

holder of the units subject to the leases of the 25%. These tenants could be encouraged, but not forced, to enfranchise their individual leasehold interests to commonhold status at an appropriate price. In so far as they did not do so, in their rights as tenants would be preserved.

5.13 The company could exercise the votes allocated to the units and act in every way as a unit-holder. It may however be fairer and simpler to provide that the company cannot vote. This is because the division of opinion between the members of the commonhold association should mirror the division of opinion among the members of the company. The obligations of the commonholders collectively in respect of these units would have to be enforceable proportionately against the commonholders. This might argue for the members of the company to have unlimited liability in an absolute or qualified form to help ensure the income stream of the commonhold association.

5.14 If a decision was to be taken to reduce the threshold for conversion consideration should be given to a streamlined procedure for conversion from leasehold to commonhold, without laboriously going through the full freehold enfranchisement process.

5.15 The level of the reduction would have to be decided. It might perhaps be set at the same level as for collective enfranchisement under the Leasehold Reform Housing and Urban Development Act 1993. However, this might be thought to be too low for the preservation of the commonhold ethos.

5.16 Clearly, a concession on the existence of long leases on residential commonhold units to encourage conversion could be general or specific. A general concession might remove, the prohibition on the grant of long leases of residential commonhold units. A specific concession might be restricted to the preservation or re-creation, of the long leases of units where owners did not wish to convert. If no concessions are made in relation to shared ownership or home purchase finance product leases, then the case for a general concession is weakened. However, the creation of even a limited concession would equally weaken the case for opposing the use of long leases in other cases.

5.17 If such a relaxation were to be attempted, it would be for consideration whether it should be time limited. A time limit would encourage those interested to proceed more quickly. We doubt, however, that there would be advantage in such an approach because the effects of the relaxation should be acceptable or not. They will not become worse with the passage of time.

5.18 Any relaxation of the 100% rule will give rise to difficult issues and to a dilution of the nature of the commonhold community. The question is whether the benefits of extending commonhold to new users significantly

outweighs the possible damage to commonhold that the introduction of long leases leaves may cause.

38. Do you consider that the threshold for conversion from leasehold to commonhold should be lowered so that the consent of all long leaseholders is not required?

39. If so, do you consider that the long leases of leaseholders, who do not wish to convert, should be preserved in commonhold?

5.21 Finally for completeness, we should mention the possibility that, instead of being weakened. The prohibition of long leases should actually be strengthened. It would be possible, for example, to remove even the limited cases in which long leases of residential commonhold units are permitted and to restrict long leases of other units. We do not think that this is an attractive option as it would further restrict the power of the unit holders and diminish the attraction of commonhold as a type of freehold ownership.

40. Do you agree that the prohibition on long leases of commonhold units should not be strengthened?

Part 6: Developer's Issues

Overview

6.1 In the earlier parts of this paper we discussed general issues that we believe may be restricting the take up of commonhold and suggested various solutions for consideration. In this Part we focus on issues that are of particular relevance to developers. These are of particular importance because if developers are not happy with commonhold then commonholds are very unlikely to be created.

6.2 We examine three particular areas: developer's votes; developer's directors and development rights. The interaction of the rules on these topics define the degree of control that a developer will have over the development in the course of its construction and sale. We understand some developers have expressed concern that the commonhold legislation does not give them sufficient freedom in the ongoing development of an estate. We do not understand why this should be the case and invite developers to give us specific practical examples of their concerns.

6.3 Where a commonhold is registered without unit-holders, which is expected to be the case in new developments, the developer will be the person who makes the application for the registration of the commonhold at Land Registry of the commonhold land. Subject to selling out or bringing in other development partners, the developer will be the person who creates the commonhold and sells the units. If the original developer sells out, its successor will be the developer for the purposes of the commonhold legislation. If new partners are brought in, they and the original developer will collectively be the developer. Subject to the votes of the subscribers, the developer will control the commonhold association entirely pending the sale of a unit to a third party. Thereafter, the developer will be the unit-holder of as many units as have not been sold.

6.4 The Act provides that the commonhold community statement may confer rights intended to permit the developer to undertake development business and to facilitate the conduct of development business. These rights are referred to as development rights. All the developer has to do is to specify the desired rights in the commonhold community statement. Development business for these purposes include the building works, the marketing of the properties, the additional or removal of land and amending the commonhold community statement, even so as to redefine a unit.

Development rights may also include provisions relating to the appointment and removal of directors of the commonhold association.

6.5 In the case of a commonhold registered with unit-holders, there is no developer. This is expected to be the case for most conversions from leasehold tenure.

6.6 In leasehold developments we understand that the developer will often retain control of the management company by delaying the transfer of the shares or membership until the development is complete. The Act does not permit that solution in relation to commonhold. The transitional period ends on the first sale. We do not propose changing this but invite views on this policy.

Developer's Votes – Transitional period

6.7 The present rules provide that during the transitional period, each member has one vote (subject to slightly different provisions during the transitional period where there is more than one developer). This means that during this period the subscribers will have one vote each and the developer will also have one vote. We have assumed that developers will not be concerned at the possibility that subscribers may have a continuing vote as they will presumably ensure that the subscribers resign their membership when the developer acquires the commonhold association. However, where there are two or more developers, equality of voting strength may not always be appropriate.

6.8 To provide a little additional flexibility, we propose that where there are two or more developers, they will then be free to specify their relative voting strengths during the transitional period. At present article 14 of the Regulations prescribes the form of model articles of association and specifies when they may be amended. Article 14(4) describes the alterations that may be made for certain numbers, dates or times in the prescribed form. Article 28 of the prescribed form of articles as it would be amended if our proposals discussed in Part 3 of their paper are adopted will state:

28(i) During the pre-commonhold period or the transitional period, on a poll, each member has one vote.

To allow this to be amended to give the greater flexibility that we propose, article 14 of the Regulations, should be amended as follows:

Amendment of regulation 14 (Articles of association)

(1) Regulation 14 is amended as set out in this regulation.

(2) After regulation 14(4)(c), insert –

"(ca) any method of allocation of votes on a poll during the pre-commonhold period or the transitional period instead of that required by article 28(1) in the form in Schedule 2; and".

(3) After regulation 14(6), insert –

"(6A) An amendment of a commonhold association's articles of association authorised by any paragraphs (4) to (6) is to be made by special resolution.

"(6B) A provision of the articles of a commonhold association that has been amended as authorised by paragraphs (4) to (6) may be further amended, by special resolution, as authorised by those paragraphs.".

These changes to the default provision specified in the model articles of association will therefore be made by special resolution. The legislation will then provide that during the transitional period, if there is more than one developer that is a member, each of the developer members should have one vote, unless the articles of association say otherwise.

41.	Do you agree that where the developer comprises two or more persons they should be able to specify their respective votes during the transitional period?

Development Rights

6.9 At the end of the transitional period the developer will continue to be a member and will also be the registered proprietor of any units that have not been transferred to a third party. The ownership of these units will in many cases give the developer a significant degree of continuing control over the affairs of the commonhold community. We think that the amendments we have already proposed to the description of the voting rights of members will make this even clearer.

6.10 However, there may come a point at which the other members will be able to outvote the developer. This may not translate into practice very often as unit-holders may not vote, but the commonhold legislation still provides the opportunity for the developer to protect its interest in the development. This protection takes the form of developer's directors and development

rights. The right to appoint developer's directors is technically a development right, but we will examine it separately.

Development Rights: Developer's Directors

6.11 The Regulations specify that if the commonhold statement gives the developer the right to appoint and remove directors certain limits apply. These limits specify that if, such provision is made, the developer has the right to appoint up to two directors in the transitional period and, therefore, for so long as the developer owns up to one quarter of the units, up to a quarter of the directors of the commonhold association. These directors appointed by the developer are referred to as developer's directors. They are intended to give the developer a continuing influence at the centre of the business of the commonhold association.

6.12 Concerns have however been expressed to us that the developer may have to pay too high a price for the entitlement to appoint and remove developer's directors. This is because while the developer is so entitled, whether or not the developer has actually appointed any directors, the developer is not allowed to vote on resolutions fixing the number of directors, or appointing, removing or remunerating any director, who is not a developer's director. The criticism is in essence that in relation to these decisions a developer is given a choice between taking power to appoint developer's directors as a development right or relying on its general voting strength to influence the numbers of directors and their appointment and removal. An uninformed decision to appoint developer's directors may therefore have adverse consequences. For example, where an entitlement to appoint developer's directors is taken and only a small proportion of the commonhold units have been sold, this may leave control of these aspects of the commonhold association's affairs on which the developer's directors cannot vote in the hands of a small number of unit-holders. Developers may therefore see the provisions for the appointment and removal of developer's director's as a false friend. The counter-argument is that it would be unfair to the unit-holders to allow the developer to appoint developer's directors and still have power to influence the number, remuneration and identity of the other directors.

6.13 The argument for retaining the provisions relating to director's developers is that developers need extra comfort in using commonhold because it is new form of ownership and developer's directors will give an insurance against unforeseen eventualities. These directors may also provide a benefit to the wider community in that they may well be experienced in property management matters and bring experience to the board that would not otherwise be available.

6.14 There seem to be three options: retain the present provisions; retain the right to appoint developer's directors but remove the restriction on voting;

or, to remove the provisions so that there are no developer's directors. The first is subject to the objections described. The second seems to produce the closest result to the equivalent leasehold situation. The third would remove a possibly useful tool. Our provisional conclusion is that the restriction could be dispensed with on the basis that its removal would not put unit-holders in a worse position than they would be in under a leasehold arrangement.

42. Do you agree that the developer should be able to appoint developer's director but that they should not be subject to any restrictions as to the matters on which they can vote?

Developer's rights generally

6.15 During the construction of a development there may come a stage at which the construction and other works have not been completed but one or more of the properties within the development have been transferred to a purchaser. It is important in these cases that the sale does not impede the completion of the development and that the development does not render the property sold unusable. In leasehold developments the special provisions governing these situations are, if they are detailed at all, generally set out in the agreement for lease. We understand that they tend to provide the developer with a good deal of freedom. They may even provide for the management of the whole development to remain within the control of the developer until such time as the developer decides to hand control to the body of purchasers through the medium of their management company. This may be after the last unit is sold.

6.16 In our view, the requirement that developer's rights be specified in the commonhold community statement is no more onerous than the need to specify rights reserved to the developer in leasehold documentation. The legislation rightly leaves the definition of the development rights in relation to a specific development largely to the developer.

6.17 The development rights set out in the commonhold community statement are, however, subject to general requirements in the Regulations. The first is that the developer must not exercise the rights so as to interfere unreasonably with the enjoyment by a unit-holder of the freehold estate in his or her unit or the exercise of rights under the commonhold community statement. The second is that the developer must make good any damage to the common parts caused by development business as soon as reasonably practicable, taking into account that work that has still to be done to complete the development. The third is that land may not be removed under development rights from a unit that has been sold without the consent of the unit-holder. We do not consider that any of these general requirements are onerous. We would, however, invite developers

to tell us if we are mistaken and these safeguards do impose too heavy a restraint on the developer's freedom of action.

43.	Do you agree that the legislation gives the developer adequate flexibility to specify the rights necessary to protect its interests in the completion of the development?

Development rights: amending the commonhold documentation

6.18 Another concern expressed to us is that the documentation for the commonhold has to be settled at a very early stage of the development and that it will therefore be impossible to effect the inevitable practical adjustments that actually converting the development from paper to reality will bring. We do not think that this concern is well-founded. First, there is no requirement that the proposed commonhold should be registered as such before construction starts or indeed before construction has finished. It is for those involved in the development to decide when they wish to register the commonhold as such at Land Registry. This need not be simultaneous with the acquisition of the land. The best practical advice may well be to delay the registration of the commonhold until relatively late in the construction of the development. This need not delay any sale as the contractual documentation can specify that the land will be commonhold and the terms of the commonhold documents. Secondly, the development rights can themselves reserve a flexibility to amend documentation. The Act does not require that the reservations should be in detailed terms. Obviously, a sensible buyer will want to be satisfied about the nature of the property that he or she is buying. This may restrict the developer but no more so in the commonhold world than the leasehold one. We consider that the commonhold legislation confers adequate flexibility for the developer to amend the documents to meet changes in circumstance.

44.	Do you agree that the legislation gives the developer adequate flexibility to amend the commonhold documentation during the development process?

Development Rights – Practical Issues

6.19 Finally, having examined specific aspects of the legislation that impact directly on developers, we invite developers and others to inform us of any

other features of the legislation that would deter a developer from using commonhold. It would be very helpful if specific examples could be given.

Development Rights – Transitional Period

6.20 The Act specifies that the commonhold period begins on the sale of first unit by the developer. The transitional period then ends and the commonhold period is up and running. One way to give the developer greater control could be to put the timing of the end of the transitional period into the control of the developer. The developer might be given a free hand to determine the time of the shift in status or the legislation might provide that the transitional period is to end when a specified proportion of the units have been sold. This might itself be subject to qualifications, such as the passage of time, to prevent abuse. A longstop of say, twelve months from the sale of the first unit might be specified. We are not convinced that any change is necessary.

45. Do you agree that the transitional period should end on the sale of the first unit by the developer?

6.21 We should make clear in our view the sale of a part of a development to a person who, with the transferor, is to be the developer, would not trigger the end of the transitional period. It has been suggested to us that this is not clear from the interaction of Section 7(3) of the Act and Section 59. These provides as follows:

S7(3) Where after registration a person other than the applicant becomes entitled to be registered as the proprietor of the freehold estate in one or more, but not all, of the commonhold units-

(a) the commonhold association shall be entitled to be registered as the proprietor of the freehold estate in the common parts,

(b) the Registrar shall register the commonhold association in accordance with paragraph (a) (without an application being made),

(c) the rights and duties conferred and imposed by the commonhold community statement shall come into force, and

(d) any lease of the whole or part of the commonhold land shall be extinguished by virtue of this section.

Development rights: succession

S59 (1) If during a transitional period the developer transfers to another person the freehold estate in the whole of the commonhold, the successor in title shall be treated as the developer in relation to any matter arising after the transfer.
(2) If during a transitional period the developer transfers to another person the freehold estate in part of the commonhold, the successor in title shall be treated as the developer for the purpose of any matter which-

(a) arises after the transfer, and

(b) affects the estate transferred.

(3) If after a transitional period or in a case where there is no transitional period-

(a) the developer transfers to another person the freehold estate in the whole or part of the commonhold (other than by the transfer of the freehold estate in a single commonhold unit), and

(b) the transfer is expressed to be inclusive of development rights,

the successor in title shall be treated as the developer for the purpose of any matter which arises after the transfer and affects the estate transferred.

(4) Other than during a transitional period, a person shall not be treated as the developer in relation to commonhold land for any purpose unless he-

(a) is, or has been at a particular time, the registered proprietor of the freehold estate in more than one of the commonhold units, and

(b) is the registered proprietor of the freehold estate in at least one of the commonhold units.

46. Do you agree that the Act makes clear that the transitional period is not ended by a transfer under Section 59(2)?

Part 7 - Termination of commonhold

7.1 In this Part we consider the provisions in the Act relating to the termination of a commonhold. These provisions are not expected to be greatly used in practice, but are clearly of great importance to everyone interested in commonhold, particularly lenders. As we have stated about half of the members of the Council of Mortgage Lenders have indicated that they are in principle willing to lend on the security of a commonhold. This is clearly a significant proportion of the market and means that buyers should have a ready range of lenders willing to provide funds for a purchase. We also understand that this attitude of the retail lending market is matched on the commercial lenders who lend to developers. We are, however, aware that this still leaves a good number of lenders who are not yet convinced that commonhold will offer a good security for their investors. If there are any concerns about the working of the provisions, we want to address and remedy them, whether they are raised by lenders or others.

7.2 The termination provisions are among the most complicated in the Act. They are, however, significantly less complicated than the very lengthy involving provisions that formed part of the Bills prepared in the 1990s. The Act's termination provisions are built upon general insolvency law. We believe that they are generally satisfactory in policy and technical terms in relation to the areas that they cover. We are, however, aware that their relationship with some aspects of insolvency law is not as clear as it might be. The overriding purpose of this part of the consultation paper is to ensure that the insolvency provisions do not present a barrier to take up of commonhold. If further legislation is necessary to modify any significant part of the special insolvency rules relating to commonhold it is very likely that a further technical consultation will be necessary.

7.3 After providing some general background information, we will describe the two principal termination procedures for a commonhold. These are the procedures for a voluntary winding up and winding up by order of the court. We will then examine the implications of the procedures for the owners of commonhold property and consider if there are any ways in which the procedures should be improved. The text of the relevant legislation is set out at Annexes E and F.

Background - general

7.4 Commonhold developments differ from leasehold developments in the degree to which the commonhold association is intimately connected with the status of the land as commonhold. It seems to us that there is no commonhold association, there is no commonhold. Lenders are therefore rightly interested in what will happen to their security if the commonhold

association fails. By contrast, the dissolution of a corporate landlord or a management company in a leasehold development does not affect the leasehold status of any land. Of course, in practice, the failure of a leasehold landlord or management company may well present practical problems. In that respect, leasehold and commonhold are similar, although the greater financial autonomy of the commonhold association should generally make it more secure against financial problems than its leasehold equivalent.

7.5 Commonhold associations and leasehold management or landlord companies are also similar in that they are companies incorporated under the Companies Act. This means that unless the Act provides otherwise, the general law of companies and insolvency will apply.

Background - Voluntary winding up

7.6 Voluntary winding up is perhaps most likely to occur where the commonhold is being ended to enable a sale to a developer to proceed for the purposes of re-development. To commence a voluntary winding-up of a commonhold association, the directors must make a declaration of solvency in accordance with section 89 of the Insolvency Act 1986. A creditor cannot therefore initiate a voluntary liquidation in respect of a commonhold association.

7.7 The commonhold association must also prepare a termination statement in accordance with section 47 of the Act. The termination statement must specify the commonhold association's proposals for the transfer of the commonhold land and how the assets of the commonhold association are to be distributed. The statement must comply with any provision in the commonhold community statement requiring the termination statement to make arrangements about the rights of the unit-holders on the land ceasing to be commonhold.

7.8 The next step is that the commonhold association must pass a termination-statement resolution to approve the terms of the termination statement. This will be followed by a winding-up resolution in accordance with section 84 of the 1986 Act. The Act provides that the winding-up resolution is not valid unless it is preceded by both a declaration of solvency and a termination statement resolution. Both resolutions must be passed with the support of at least 80% of the members as a whole.

7.9 Once these requirements have been satisfied a liquidator is appointed under section 91 of the 1986 Act. The liquidator must notify the Chief Land Registrar of his or her appointment.

7.10 The procedure then differs slightly depending on whether the resolutions are passed with 80% or 100% of the members in support. If the resolutions are passed with 80% agreement the liquidator must apply to court within three months for an order. The order will determine both the terms and

conditions on which the termination application is made and the terms of the termination statement to accompany it.

7.11 A termination application is an application to the Chief Land Registrar for all the land in relation to which a particular commonhold association exercises functions to cease to be commonhold land. The liquidator must make the termination application to the Chief Land Registrar within three months of the date of the court order.

7.12 If the liquidator fails to make either application with three months, a unit-holder may do so. Once the termination application has been made, the commonhold association will be entitled to be registered as the proprietor of the freehold estate in each commonhold unit.

7.13 If the resolutions are passed with 100% agreement the liquidator must make the termination application within six months of the date that the winding-up resolution is made. He must also notify the Chief Land Registrar that he is content with the termination statement submitted with the termination application, or apply to the court under section 112 of the 1986 Act to determine its terms. In the latter case, the liquidator must send the Registrar a copy of the determination made by the court. Once again, if the liquidator fails to make the termination application, a unit-holder may do so. The commonhold association will then be entitled to be registered as the proprietor of the freehold estate in each commonhold unit.

7.14 The Registrar must then take appropriate action to give effect to the termination statement (section 49 of the Act). This will entail the cancellation of the commonhold entries on each affected title. The land will then cease to be registered as a freehold estate in commonhold land and will no longer be commonhold land. On this happening, the liquidator will be able to sell the land and distribute the assets in accordance with the termination statement. The dissolution of the commonhold association will follow in the usual way.

The effect of a voluntary winding up on commonhold property rights

7.15 In the case of a voluntary winding up, the end result is that the entries on the land register that mark the land as commonhold land will be removed. The Act is silent about the effect of the removal of these entries on the property rights that existed as between units and the common parts within the land that was formerly designated as commonhold land: for example, rights to pass and repass over and along roads and pathways within the commonhold. These rights in a commonhold would have been created by the commonhold community statement. We consider that the absence of express provision in the Act in relation to the effect of a voluntary winding up on commonhold property rights is not a problem, The whole of the land will be in the ownership of the commonhold association – no doubt for

onward transfer to a third party – so no question of separate rights for units over the common parts or each other would arise.

Lenders' Issues – voluntary winding up

7.16 A particular concern expressed to us by lenders about the voluntary winding up procedure is that they are not certain that their mortgages will survive the vesting of the units in the commonhold association. We accept that the Act does not specify that the change in ownership does not affect the existence of any charge over a unit and that this may leave some element of doubt. However, there remains no reason under general principles that a change in ownership should have any effect on the mortgage. We consider that the effect of section 49(3) of the Act is that the commonhold association is entitled to be registered as proprietor of the units subject to the charges and other encumbrances that may exist over it. We do not think that this concern of lenders, if we have understood it correctly, is justified.

7.17 On a voluntary winding up the termination statement must specify how the assets of the commonhold association will be distributed. Those assets will include the whole of the commonhold land. As discussed, we consider that the land will be subject to whatever mortgages exist over the units. These will be recorded on the land register. However, lenders have noted that the Act does not specify that the termination statement will have to include provision for payment off of the mortgages over the units. The payment of the debts secured by the mortgages on the units will remain the primary responsibility of the (former) unit-holders.

7.19 In practice, we anticipate that the self-interest of the purchaser will ensure that the mortgages are paid off as part of the conveyancing process. Otherwise a clear title will not be obtained.

7.20 We note too that the Act does not specify on whom the application for the order approving the conditions on which the termination application is to be made and the terms of the termination statement is to be served. No rules of court have been made in respect but it is reasonable to assume that all unit-holders and their mortgagees would have an interest in being allowed to make representations to the court. We consider that the liquidator should ensure that the members are aware of the terms of the application for the order. Lenders should ensure that members are obliged to keep them informed.

47. Do you agree that no new legislative provision is necessary to establish that registered charges over units are unaffected by the vesting of the units in the commonhold association during the voluntary winding up of a commonhold association?

48. Do you agree that the termination statement need not specify how the debts secured by the registered charges over the units are to be repaid?

49. Do you agree that it is not necessary to make any specific provision regarding the service by the liquidator of the proposed termination order application to the court on members of the commonhold association?

Background - Winding-up by the court with a succession order

7.24 As we have mentioned, a commonhold association is a company limited by guarantee. It is therefore subject to the general provisions of the Insolvency Act 1986, subject to such special provision as is made by the Act.

7.25 At the hearing of the winding-up petition under section 124 of the 1986 Act in respect of a commonhold association, an application may be made to the court for a succession order in relation to the insolvent commonhold association. An insolvent commonhold association is one in relation to which a winding-up petition has been presented under section 124. An application for a succession order may be made by the insolvent commonhold association itself, one or more members of the insolvent commonhold association, or a provisional liquidator for the insolvent commonhold association appointed under section 135 of the 1986 Act. The application must be accompanied by the certificate of incorporation of the successor commonhold association given in accordance with section 13 of the Companies Act 1985 and any altered certificates of incorporation issued under section 28 of that Act. The application must also include a certificate given by the directors of the successor commonhold association that its memorandum and articles of association comply with the Regulations, which prescribe their content and format.

7.26 The court is required to grant the application for a succession order unless the circumstances of the insolvent commonhold association make it inappropriate (section 51(4)). This is clearly a very important safeguard for the commonhold community, but the Act does not specify any further guidance to the court as to the exercise this discretion. If the succession order is deemed inappropriate, the commonhold association will be subject to normal winding-up procedure. The termination of the commonhold will then follow.

7.27 The succession order must make provision as to the treatment of any charge over all or part of the common parts (section 52(4)(a)). It may

require the Chief Land Registrar to take action of a specified kind and may enable the liquidator to require the Registrar to take action of a specified kind. The succession order may also make supplemental or incidental provision. The Act does not specify the nature of the action contemplated. The terms of the succession order are therefore very much in the gift of the court.

7.28 On the making of a succession order, the successor commonhold association is entitled to be registered as proprietor of the freehold estate in the common parts. The insolvent commonhold association will no longer be treated as the proprietor of this land.

Background - the effect of a succession order on commonhold property rights

7.29 In the case of a winding up by the court where a succession order is made, the common parts transfer to the successor association and the commonhold continues. The order does not affect the ownership of the units or any changes registered against them. No issues arise as to the rights between units and the common parts.

Lenders issues – winding up with a succession order

7.30 We are not aware that lender's have any particular concerns about the procedure leading to the making of a succession order or its consequences.

50. Do you consider that the provisions in the Act relating to the making of a succession order in the course of a winding up by the court are satisfactory?

Background - Winding-up by the court without a succession order

7.31 The procedure for the winding-up of a commonhold association without a succession order is dealt with in section 54 of the Act. The liquidator's duties specific to commonhold are set out under section 54(2) and (3). The liquidator must inform the Chief Land Registrar as soon as possible that a winding-up order has been made by the court without a succession order. Under section 54(2)(b) to (g), the liquidator must also notify the Registrar of the following:

- Any directions given under section 168 of the Insolvency Act 1986 (liquidator: supplementary powers);
- Any notice given to the court and the registrar of companies in accordance with section 172(8) of that Act (liquidator vacating office after final meeting);
- Any notice given to the Secretary of State under section 174(3) of that Act (completion of winding-up);
- Any application made to the registrar of companies under section 202(2) of that Act (insufficient assets: early dissolution);
- Any notice given to the registrar of companies under section 205(1)(b) of that Act (completion of winding-up); and
- Any other matter which in the liquidator's opinion is relevant to the Registrar.

7.32 The Chief Land Registrar will then know the situation of the commonhold association. The Registrar must make appropriate arrangements to ensure that the commonhold land ceases to be registered as commonhold land and take appropriate action to give effect to a determination made by the liquidator in the exercise of his or her functions. The liquidator's task is then to set about realising the assets of the commonhold association, including the common parts, and paying the sums due to creditors.

Background - the effect of a winding up by the court without a succession order on commonhold property rights

7.33 In the case of a winding up by the court without a succession order, the common parts will ultimately be owned by whoever takes a transfer from the commonhold association, acting by the liquidator. The units will remain in the ownership of the unit-holders. Although the Act is silent on the point, it seems to us that the necessary consequence of the ending of the commonhold status is that the land will now be divided into simple freehold titles with none of the rights or burdens that derived from the commonhold community statement. Rights that existed before the land became commonhold should not be affected. The contrary argument that the commonhold rights continue to exist would depend on an analysis that they derived an independent existence by virtue of their registration (in effect the registration of the commonhold community statement at Land Registry). The Act does not however state this and we do not think that the agreement is persuasive. We also assume that in the case of units that are not attached directly to the ground that they will existing as flying freeholds. This is unlikely to be attractive as a long term solution.

7.34 In relation to third party rights, such as mortgages over the units, which exist independently of the creation of the commonhold, there seems no

reason why the completion of a winding up by the court should affect their existence.

Lenders issues – winding up by the court without a succession order

7.35 Where a succession order is not made, the commonhold will come to an end. The key issue facing the unit holders and third parties, such as charges, will be the loss of the rights previously contained in the commonhold community statement. In some cases the next step following the termination will be for the unit-holders and the liquidator, acting together, to dispose of the whole of the former commonhold to a third party – perhaps for redevelopment. In others, the unit-holders may buy the common parts from the liquidator and found a new commonhold or create a leasehold development. The Act leaves the parties to decide what is the best solution in the circumstances.

7.36 We anticipate that the key issue for a lender in this situation is to know what may happen at the earliest possible stage so that it can take appropriate action to protect its interests. If a winding up petition under section 124 of the Insolvency Act 1986 is to be heard, the unit-holders and their lenders will generally want to ensure that an application is made to the court for a succession order under section 51 of the Act. They will therefore need notice of the hearing of the section 124 petition. The petition will of course be advertised in the London Gazette and all commercial lenders can be expected to take notice of this. Nonetheless, there is no express requirement on the petitioner or the court to serve notice of the petition on the members. It might indeed be very onerous to require them to do so in the case of a large commonhold. A general rule requiring notice to be served on all members would be too burdensome. Rather we think that the distribution of the notice should be a matter for individual commonhold associations and their members. They should be able to ensure that appropriate persons are informed so that they have the chance to get before the court to make the application for a succession order. We anticipate that lenders will be able to insert in their terms and conditions requirements on borrowers in relation to action to be taken by them on receipt of notification of the making of a winding up petition. They may also wish to ensure that the commonhold community statement on the articles of association of the commonhold association contain appropriate provisions to require notice to be given to members.

7.37 We anticipate that in practice the directors of the commonhold association will almost automatically apply for a succession order or at the least for the hearing of the petition to be adjourned so that consideration can be given to the possibility of making such an application. It may be the case that failing this, court may wish to adjourn the hearing of the winding up petition of its own motion to give time for an application to be made for a succession order. If there is any doubt about the existence of the power,

the court could be given specific power to adjourn a hearing of the section 124 petition so that notice of the petition can be given to members and, perhaps, to registered chargees. Alternatively the Act could be amended so that the court automatically considers the making of a succession order unless the petitioner can demonstrate that notice has been served on the members and that they and the commonhold association have indicated to the petitioner that they do not wish a succession order to be made. This may, however, put too heavy a burden on the petitioner. Our provisional view is that lenders and others have adequate opportunities to protect their interests and that no new provision is necessary.

51.	Do you agree that no additional legislative provision is necessary to provide notice of the making of a winding up application against a commonhold association to the members and their lenders?

7.38 On the assumption that the existing procedure is not to be changed, it may be helpful to provide the courts, whether by way of a rule or a practice direction or by some other means, with some guidance so that the opportunity to raise the matter of a succession order does not go by default.

7.39 The second area of concern for lenders and others about the making of a succession order will, we expect, be its effect on property rights created by the commonhold community statement. As we have explained, we do not think that these rights can survive the ending of the commonhold. One approach would be to accept this consequence as the appropriate and unavoidable result of the commonhold association and, by application, its members, failing to manage its affairs properly. An alternative way to address the issue would be to specify that those rights do not cease to exist on the ending of the commonhold, but are transformed by operation of law into easements. This would, however, separate the property rights in the commonhold community statement from the obligations that related to them. The preservation of the rights alone would therefore not produce a satisfactory solution because there would be no proper arrangements for the maintenance of the common parts. A third way would be to provide for conversion by operation of law to a leasehold development. We are not attracted to any of these approaches, which would lead to excessive complication.

52.	Do you agree that no new legislative provision should be made regarding the property rights of the unit-holders over the common parts on a winding up by the court without a possession order?

7.40 It seems to us that the current legislation provides a reasonable and practicable framework for dealing with a terminally insolvent commonhold association. We are strengthened in this conclusion by our view that in practice, in a leasehold insolvency situation, the mechanisms for providing the services essential to the running of the leasehold community would devolve on the liquidator of the landlord company, whose interest would be to get the best price for the landlord's interest. In the commonhold situation, the liquidator will have a similar objective. If the preservation of the community as a going concern is the best way to get the best price then we expect that a practical way will be found to make that happen, whether a leasehold or commonhold context. If the best solution is to wind up the community then the liquidator's task, whether dealing with leaseholders or former unit-holders, in getting their co-operation is likely to be similar.

7.41 This analysis is inevitably hypothetical because no commonholds have been terminated. Indeed, we think that the provisions of the legislation make it likely that any reasonably competent commonhold association should be able to avoid financial difficulties. This will make insolvency an unlikely eventuality.

53. Do you agree that the termination provisions on a winding up by the court without a succession order are satisfactory and will provide at least as good an outcome as would apply in the care of a similar leasehold development?

Other insolvency related issues

7.41 The Act does not specify that the two methods of termination that we have described are the only methods of bringing a commonhold association to an end. However, it does not make any provision in relation to other insolvency procedures. The Act does not therefore make any provision as to the effect on commonhold associations of:

- Administration
- Public Interest Winding up
- Company Voluntary Arrangements
- Disclaimer and
- Dissolution.

7.42 No practical problems have yet arisen in relation to these matters but if there is a theoretical risk that the commonhold legislation will not function properly as a result of the effect of an insolvency procedure or vice versa, we would want to consider whether express provision should be made. As the commonhold association is a company limited by guarantee incorporated under the Companies Acts, the general principle seems to us to be that the general insolvency rules should apply unless there is express provision or necessary implication to the contrary. A commonhold association could, therefore, go into administration.

7.43 Administration and other insolvency procedures may lead to one of several possible outcomes. We would want to consider whether any of those outcomes would be unworkable in a commonhold context. If not, it is for consideration whether there should be guidance provided to insolvency practitioners or even special rules put in place to stop certain situations arising. Issues that have been mentioned to us in this context include the possibilities that:

an administration might lead to a creditor's voluntary winding up, a public interest winding up or a dissolution;

a member's voluntary winding up may convert into a creditor's voluntary winding up before a termination application is made; and

a commonhold association might be struck off the register of companies and dissolved for not complying with filing requirements.

7.45 Each of these situations may lead to the situation that the commonhold association ceases to exist. At this point the land may no longer qualify as commonhold land for the purposes of section 1 of the Act.

7.46 Section 1 requires that to be commonhold land, the land must be specified in the memorandum and articles of association of a commonhold association as land in relation to which the association exercises its functions. It is not absolutely clear whether this only applies at the time of the application for registration or whether there is a continuing requirement. We think that this is a continuing requirement.

7.47 Insolvency is a technical area of law that gives rise to specific issues. We would welcome the comments of experts as to how the general law of insolvency will affect a commonhold association.

54. Do you consider that the absence of express provision in the Act in relation to other insolvency procedures will cause any practical problems? If so, how do you think that these problems could be best avoided or overcome?

Part 8 Promotion and other commonhold issues

Overview

8.1 In this Part we consider a collection of topics that have been raised with us, but have not been discussed earlier in this paper. They include the possibility of introducing a compulsory take up of commonhold; revising the prescribed form of memorandum and articles of association of the commonhold association in the wake of recent company law reform; compulsory purchase and double registration. We also invite views on the existence of problems that we have not mentioned. Finally, we consider how the reforms we have discussed might be implemented and invite suggestions as to how commonhold might best be promoted.

Compulsory take up of commonhold

8.2 Commonhold was introduced as a voluntary alternative to leasehold tenure to promote housing choice. During the passage of the Bill through Parliament it was argued by some supporters of commonhold that it should replace long leasehold tenure for residential property either immediately or after a period of years by means of a 'sunset' clause. The Government resisted these proposals because commonhold was an unproven form of property ownership and outlawing leasehold was inconsistent with promoting housing choice. Clearly, an element of compulsion would drive up take of commonhold, but the view was taken that choice of tenure ought to be a matter of choice for individuals rather than that dictated by Government.

8.3 Suggestions have also been made that the Government might use the planning system to compel the use of commonhold, by means of planning conditions or obligations. This would be a significant change in the planning system and, for the reasons given in relation to compulsion generally, we do not think that it is the way forward.

55. Do you agree that commonhold should remain a voluntary alternative to long leasehold ownership?

Company law reform

8.4 The provisions of the model memorandum and articles of association of the commonhold association were inspired by precedents widely used in company law under the Companies Act 1985 and its predecessors These precedents have been reviewed as part of the review of company law, which has now been enacted in the Companies Act 2006. This Act is expected to come into force sometime in 2008. We intend to bring the model documents up to date when the new Act comes into force. This will ensure that commonhold associations get the benefit of the same simpler and more modern procedures as companies limited by guarantee generally.

56. Do you agree in principle that the memorandum and articles of association of the commonhold association should be updated in line with the Companies Act 2006?

Double Registration

8.5 The memorandum and articles of association of a commonhold association must be registered at Companies House and Land Registry. The Act provides that an amendment will not take effect until it has been registered at Land Registry (registration at Companies House being required under the Companies Act). The purpose of the requirement in the Act is to make sure that interested persons can acquire all the information necessary about a commonhold at Land Registry. We wonder however whether this is necessary. Both registers are accessible to the public. The requirement of double registration places a burden on commonhold associations and reduces the authority of the company register.

57. Do you consider that the requirement of registration of the memorandum and articles of the commonhold association at Land Registry should be removed?

Compulsory Purchase

8.6 The Act provides that regulations may be made about the transfer of commonhold land to a compulsory purchaser. No regulations have yet

been made. There will be a separate consultation on proposed regulations in due course.

Other Provisions in the Act

8.7 The commonhold legislation is intended to be clearly written so that it is in the main, readily understandable without a detailed knowledge of English property law. There may, however, be some provisions that are not as clear as they might be to the lay reader. If there are such provisions, it may be possible to improve their wording without altering their substance.

58. Are you aware of any provisions in the commonhold legislation that are difficult to understand?

Invitation to comment on other concerns

8.8 Although we have discussed several areas in which changes might be necessary or desirable to the commonhold legislation and have invited suggestions for drafting improvements, we acknowledge the possibility that there may be other points of which we are unaware where the legislation is in some way inhibiting the rate of take up of commonhold. If there are such matters and they can be changed without damaging the commonhold concept, we may be able to remove them. We would be grateful if readers could draw them to our attention. Any changes proposed to the legislation as a result would be consulted on.

Please provide details of any improvements that you think should be made to the commonhold legislation, which we have not discussed in this consultation paper.

Changing the legislation

8.9 If, as a result of this consultation, it is decided to amend the Act or the Regulations, there are, three possible types of legislation that may be used:

- Primary;

- Secondary; or
- Regulatory Reform Order under Legislative and Regulatory Reform Act 2006.

8.10 The Act may be amended by primary legislation or by regulatory reform order. The Regulations may be amended by secondary legislation or by regulatory reform order.

8.11 A regulatory reform order is in fact a special form of secondary legislation. It can be used to remove or reduce any burden resulting from legislation.

8.12 A burden is a financial cost, an administrative inconvenience, an obstacle to efficiency, productivity and profitability, or a sanction that affects the carrying on of any lawful activity. There are limitations on the use of the power, including certain specified pre-conditions:

- The policy objective cannot be satisfactorily secured by non-legislative means;
- The effect of the order is proportionate to the policy objective;
- The provision strikes a fair balance between the public interest and the interests of the persons affected;
- The provision does not remove any necessary protection or prevent the exercise of a right or freedom a person might reasonably expect to exercise; and
- The provision is not of constitutional significance.

8.13 Whether any reforms of the commonhold legislation can be effected by means of a regulatory reform order will depend on the circumstances of the case. The advantage of being able to use such an order is that it is not necessary to secure parliamentary passage of the measure through Parliament. This means that it should be quicker than using primary legislation.

8.14 Other forms of secondary legislation can only be used if there is power in primary legislation to make the order, rules or regulation proposed. This too can only be decided on a case by case basis. This is the quickest method.

8.15 Primary legislation can be used to make any changes but there is only a limited amount of time available each year for all the Government's legislative proposals. Any commonhold primary legislation will have to compete with other government legislative proposals for space in the legislative programme announced annually in the Queen's speech. This

makes primary legislation the least certain of the legislative methods available so far as timing and therefore implementation is concerned.

8.16 Of the proposals we have discussed in this paper we would expect the following methods of implementation to be available.

Possible Reform	Type of Legislation
Commonhold assessment: Multiple cost centre percentages etc.	Primary or RRO[x]
Discount for early payment	Primary or RRO[x]
Grounded rule	Primary or RRO[x]
Overarching and sub-commonholds	Primary or RRO[x]
Positive obligations between commonholds	Primary or RRO[x]
Unit-holders dispute procedure	Secondary
Ombudsman scheme and jurisdiction for Leasehold Valuation Tribunal	Secondary
Voting rights	Secondary
Shared ownership and home purchase finance products leases	Secondary
Removing restrictions on leases	Part primary and part secondary
Excluding rules of law relating to leasehold estates	Secondary
Developer's votes	Secondary
Developer's directors	Secondary
Development rights	Secondary
Termination	Primary mainly
Compulsory take up	Primary
Company law documents	Secondary
Double registration	Primary or RRO[x]
Compulsory purchase	Secondary
Clarification of Act or Regulations	Primary, secondary or RRO[x]

8.17 This table does not indicate that a regulatory reform order would be available, but only that it may be a suitable method of legislation.

Promoting awareness of commonhold

8.18 At the outset of this paper we stated that one of the possible reasons that commonhold was not being widely adopted was that people might not be aware of it. We have published guidance on the commonhold regulations (September 2004) and guidance on the drafting of a commonhold community statement including specimen local rules (December 2004). We have funded the Leasehold Enfranchisement Advisory Service (LEASE) to provide advice on residential commonhold law and to publish a guidance booklet on commonhold. Land Registry has published a practice guide (June 2004). Several books have been written. There have been receptions, meetings and professional conferences, but still the word about commonhold seems restricted to the few rather being known to the many. Although we think the most important task facing us is to ensure that there are no defects in the legislation that will deter developers, lenders and others from using commonhold, we would welcome suggestions as to how awareness of commonhold would best be spread.

8.19 One suggestion frequently made is that the Government should offer incentives to developers to use commonhold. Reductions or exemptions in stamp duty land tax are a favourite topic in this context. We do not think fiscal concessions of this kind are consistent with commonhold being a voluntary alternative to leasehold.

8.20 We believe that commonhold will have to obtain a place in the market by virtue of its own merits. Our most important objective in relation to promotion is to ensure that the people who make the key decisions regarding the development of communities are aware of and understand the benefits of commonhold properly.

59. How do you think that the use of commonhold should be promoted?

Part 9: Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

1. Do you agree with the partial impact assessment? If not, please give details?

2. Do you agree with the analysis of the advantages and disadvantages of commonhold? If not, please give details?

3. Do you agree that section 38 should be amended to make clear that the CCS can allocate different percentages to a unit in relation to different items of expenditure within the commonhold assessment?

4. Do you agree that the allocation of proportions of any head of expenditure of the commonhold assessment between units should have to amount to 100%?

5. Do you agree that no additional provision is needed in the legislation to permit discounts on early payment?

6. Do you agree that allocation of proportions of expenditure in the commonhold community statement should continue to be expressed in percentages only?

7. Do you agree that the grounded rule should be retained and clarified?

8. Do you agree in principle that a scheme permitting the creation of sub commonholds should be developed?

9. Do you agree that a form of obligation for use between commonhold associations should be developed?

10. Do you agree that an alternative unit-hold against unit-holder dispute resolution procedure should be introduced?

11. Do you agree that the new procedure should be the default unit-holder against unit-holder dispute resolution procedure?

12. Do you agree that the commonhold association should be able to change from one prescribed unit-holder against unit-holder dispute procedure to another by ordinary resolution?

13. Do you agree that where the procedure is changed the new procedure should only apply to disputes where the complaint notice is served on the alleged defaulter after the registration of the change at Land Registry?

14. Do you agree that an aggrieved unit-holder using the new procedure should inform the commonhold association of the dispute?

15. Do you agree that it is not necessary to specify that the exhaustion of one dispute resolution procedure in relation to a dispute should not preclude the use of another?

16. Do you consider that the creation of an approved commonhold ombudsman scheme should now be a priority?

17. Do you think that the cost of an approved ombudsman scheme should be met from levies on commonhold associations, who belong to the scheme, or on a case by case fee, or by some other means.

18. Do you think that the ombudsman's jurisdiction should be based on a strict assessment of legal rights or wider considerations of reasonableness and fairness? If so, should this be enshrined in legislation?

19. Do you think that the ombudsman should be able to issue binding guidance to members of the scheme?

20. Do you think that the ombudsman should be able to bind unit-holders to observe and perform his or her determination subject to necessary rights of appeal to the court?

21. Do you consider that a new commonhold jurisdiction should be created for the leasehold Valuation Tribunal (a) in relation to money disputes and (b) generally?

22. Would such a jurisdiction diminish the need for a commonhold ombudsman?

23. Do you agree with the revised text of article 28 (allocation of votes to members)?

24. Do you agree that the register of members should be conclusive of the votes exercisable by a member?

25. Do you agree that shared ownership can be satisfactorily delivered in commonhold by means of co-ownership trusts?

26. Are you aware of any legislative changes that will be necessary to ensure that users of a co-ownership trust to provide shared ownership are not

unfairly disadvantaged as against the users of long leases to achieve the same end?

27. Do you agree that if an exception for shared ownership leases of residential commonhold units has to be created it should be in the form of the proposed regulation 11?

28. Do you agree that an exception of this kind should only be created if it can be demonstrated that a co-ownership trust does not provide a satisfactory substitute?

29. Do you agree that a time limited exception for shared ownership leases is undesirable?

30. Do you agree that the rights to enfranchisement under the Leasehold Reform Act 1967 and the Leasehold Reform Housing and Urban Development Act 1993 and the right to a lease extension under the 1967 Act should be excluded in relation to commonhold land?

31. Do you agree that no special provision should be made for the payment of sums reimbursing the whole or part commonhold assessment to unit-holders by tenants under long shared ownership leases of residential commonhold units?

32. Do you agree that the right to manage should not apply in commonhold land?

33. Do you think that there are any other tenant's rights that should be excluded if long leases of residential commonhold unit are permitted.

34. Do you agree that home purchase finance products can be satisfactorily provided in commonhold by means of a co-ownership trust?

35. Do you agree that an exception for long lease based home purchase finance products should only be created if a co-ownership trust model does not provide a satisfactory alternative?

36. If it is necessary to create such an exception, do you agree with our proposed exception for long lease based home purchase finance products set out in draft regulation 11?

37. Do you agree that the general prohibition on long leases of residential commonhold should be retained?

38. Do you consider that the threshold for conversion from leasehold to commonhold should be lowered so that the consent of all long leaseholders is not required?

39. If so, do you consider that the long leases of leaseholders, who do not wish to convert, should be preserved in commonhold?

40. Do you agree that the prohibition on long leases of commonhold units should not be strengthened?

41. Do you agree that where the developer comprises two or more persons they should be able to specify their respective votes during the transitional period?

42. Do you agree that the developer should be able to appoint developer's director but that they should not be subject to any restrictions as to the matters on which they can vote?

43. Do you agree that the legislation gives the developer adequate flexibility to specify the rights necessary to protect its interests in the completion of the development?

44. Do you agree that the legislation gives the developer adequate flexibility to amend the commonhold documentation during the development process?

45. Do you agree that the transitional period should end on the sale of the first unit by the developer?

46. Do you consider that the Act makes clear that the transitional period is intended by the transfer under Section 59(2)?

47. Do you agree that no new legislative provision is necessary to establish that registered charges over units are unaffected by the vesting of the units in the commonhold association during the voluntary winding up of a commonhold association?

48. Do you agree that the termination statement need not specify how the debts secured by the registered charges over the units are to be repaid?

49. Do you agree that it is not necessary to make any specific provision regarding the service by the liquidator of the proposed termination order application to the court on the members of the commonhold association?

50. Do you consider that the provisions in the Act relating to the making of a succession order in the course of a winding up by the court are satisfactory?

51. Do you agree that no additional legislative provision is necessary to provide notice of the making of a winding up application against a commonhold association to the members and their lenders?

52. Do you agree that no new legislative provision should be made regarding the property rights of the unit-holders over the common parts on a winding up?

53. Do you agree that the termination provisions on a winding up by the court without a succession order are satisfactory and will provide at least as good an outcome as would apply in the care of a similar leasehold development?

54. Do you consider that the absence of express provision in the Act in relation to other insolvency procedures will cause any practical problems? If so, how do you think that these problems could be best avoided or overcome?

55. Do you agree that commonhold should remain a voluntary alternative to long leasehold ownership?

56. Do you agree in principle that the memorandum and articles of association of the commonhold association should be updated in line with the companies Act 2006?

57. Do you consider that the requirement of registration of the memorandum and articles of the commonhold association at Land Registry should be removed?

58. Are you aware of any provisions in the commonhold legislation that are difficult to understand?

59. How do you think that the use of commonhold should be promoted?

Thank you for participating in this consultation exercise

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (eg. Member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

How to respond

Please send your response by [insert date] to:

[Insert name]
Department for Constitutional Affairs

[Insert division]
[Insert room number and floor]
Selborne House
54-60 Victoria Street
London
SW1E 6QW

Tel: 020 7210 8888
Fax: 020 7201 7777
Email: [Insert your name]@dca.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.dca.gov.uk/index.htm

Publication of response

A paper summarising the responses to this consultation will be published in [insert publication date, which as far as possible should be within three months of the closing date of the consultation] months time. The response paper will be available on-line at http://www.dca.gov.uk/index.htm

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all

circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at consultation@dca.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator
Department for Constitutional Affairs
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the How to respond section of this paper at page [insert number].

Annex A – Draft Regulations

DRAFT STATUTORY INSTRUMENTS

2006 No.

COMMONHOLD, ENGLAND AND WALES

The Commonhold (Amendment) Regulations 2006

Made - - - -	***
Laid before Parliament	***
Coming into force - -	***

The Lord Chancellor makes the following Regulations in exercise of the powers conferred by sections 17(1) and 19(4) of the Commonhold and Leasehold Reform Act 2002(**9**):

PART 1

PRELIMINARY

Citation

4. These Regulations may be cited as the Commonhold (Amendment) Regulations 2006.

Commencement

5. These Regulations come into force on [date TBA].

(**9**) 2002 c. 15.

PART 2

AMENDMENTS OF THE COMMONHOLD REGULATIONS 2004

Amendment

6. The Commonhold Regulations 2004(**10**) are amended as set out in this Part.

New regulation 11

7. For regulation 11, substitute:

"**Leasing of residential commonhold units**

11.—(1) In this regulation—

"leasehold estate" has the same meaning as "term of years absolute" in sections 17 and 21 of the Act;

"shared ownership lease" means a leasehold estate in the whole of a residential commonhold unit—

(a) that was granted on payment of a premium calculated by reference to a percentage of the value of the unit or the cost of providing it; or

(b) under which the tenant or his personal representatives will or may be entitled to a sum calculated by reference, direct or indirect, to the value of the unit.

(2) For sections 17(1) and 21(2)(a) of the Act, the prescribed conditions(**11**) for a leasehold estate are those set out in—

(a) in the case of a shared ownership lease, paragraph (3);

(b) in the case of a lease under a property financing arrangement to which section 71A of the Finance Act 2003 applies, paragraph (5);

(c) in the case of a leasehold estate (other than one referred to in sub-paragraph (a) or (b)) for a term of longer than 7 years, paragraph (6); and

(d) in the case of a leasehold estate (other than one referred to in sub-paragraph (a) or (b)) for a term of 7 years or less, paragraph (7).

(3) The conditions for a shared ownership lease are the following:

(a) the lessor is—

(i) a registered social landlord;

(ii) a local housing authority; or

(iii) a person who has received a grant under section 27A of the Housing Act 1996(**12**);

(b) in the case that the lessor is a person referred to in subparagraph (a)(iii)—

(i) the property has been disposed of on shared ownership terms, within the meaning given by section 2(6) of the Housing Act 1996; and

---

(**10**) SI 2004/1829.

(**11**) Subsection 17(1) of the Act prevents the creation of a term of years absolute in a residential commonhold unit, and s21(2)(a) in part of such a unit, unless the term satisfies prescribed conditions.

(**12**) 1996 c. 52. Section 27A was inserted by s 220 of the Housing Act 2004 (2004 c. 34).

(ii) the property was provided or acquired (wholly or in part) by means of a grant under section 27A of that Act;

(c) the term is no longer than 125 years;

(d) the lease does not contain an option or agreement—

(i) to renew it for a further term that, together with the original term, amounts to more than 125 years; or

(ii) to extend it beyond 125 years;

(e) the lease does not require the lessee to make payments to the commonhold association in discharge of payments required by the commonhold community statement to be made by the unit-holder.

(4) In paragraph (3)(a)—

"local housing authority" has the meaning given—

(a) in relation to England—by section 261(2) of the Housing Act 2004(**13**); and

(b) in relation to Wales—by section 261(4) of that Act;

"registered social landlord" means a landlord that is on the register maintained under section 1(1) of the Housing Act 1996(**14**).

(5) The conditions for a lease under a property financing arrangement to which section 71A of the Finance Act 2003 applies are—

(a) that the term of the lease is no longer than 25 years; and

(b) that the lease is one referred to in section 71A(1)(c) of the Finance Act 2003(**15**).

(6) The conditions for a leasehold estate (other than one to which paragraph (3) or (5) applies) for a term of longer than 7 years are the following:

(a) it is not granted for a premium;

(b) the lessee was the lessee of a leasehold estate ("the extinguished leasehold") that was extinguished by section 7(3)(d) or 9(3)(f) of the Act;

(c) the term is the shorter of—

(i) the unexpired term of the extinguished leasehold immediately before it was extinguished; and

(ii) 21 years;

(**13**) 2004 c. 34. The subsection is as follows:

"(2) In this Act "local housing authority" means, in relation to England—

(a) a unitary authority;

(b) a district council so far as it is not a unitary authority;

(c) a London borough council;

(d) the Common Council of the City of London (in its capacity as a local authority);

(e) the Sub-Treasurer of the Inner Temple or the Under-Treasurer of the Middle Temple (in his capacity as a local authority); and

(f) the Council of the Isles of Scilly.

(3) In subsection (2) "unitary authority" means—

(a) the council of a county so far as it is the council for an area for which there are no district councils;

(b) the council of any district comprised in an area for which there is no county council.".

(**14**) 1996 c. 52. Section 27A was inserted by s 220 of the Housing Act 2004 (2004 c. 34).

(**15**) 2003 c. 14. Section 71A was inserted by the Finance Act 2005, (c. 7) s 94 and Schedule 8 paragraph 2.

(d) the term commenced immediately after the extinguished leasehold was extinguished; [in other words, on registration of the commonhold (Act, s3(9)(f)).]

(e) the leasehold estate is, and the extinguished leasehold was, of the same premises;

(f) the lease does not contain an option or agreement—

(i) to renew it for a further term that, together with the original term, amounts to more than 21 years;

(ii) to renew the lease or extend it beyond 21 years; or

(iii) that may result in the grant of a term of years absolute that contains an option or agreement to extend that term;

(g) the leasehold estate is on the same terms (other than any terms that are spent or would be inconsistent with the Act or these Regulations) as the extinguished leasehold;

(h) the rent payable at the commencement of the term is the same as the rent payable under the extinguished leasehold at the date on which it was extinguished;

(i) the lease contains the same provisions for changes in rent, or rent review, as were in the lease for the extinguished leasehold at the date on which it was extinguished.

(7) The conditions for a leasehold estate (other than one to which paragraph (3) or (5) applies) for a term of 7 years or less are the following:

(a) it is not granted for a premium;

(b) the lease does not contain an option or agreement—

(i) for a further term that, together with the original term, will be longer than 7 years;

(ii) to renew the lease or extend it beyond 7 years; or

(iii) that may result in the grant of a term of years absolute that contains an option or agreement to extend that term;

unless the estate also satisfies the conditions in paragraph (6);

(c) the lease does not require the lessee to make payments to the commonhold association in discharge of payments required by the commonhold community statement to be made by the unit-holder.".

Amendment of regulation 14 (Articles of association)

8.—(1) Regulation 14 is amended as set out in this regulation.

(2) After regulation 14(4)(c), insert—

"(ca) any method of allocation of votes on a poll during the pre-commonhold period or the transitional period instead of that required by article 28(1) in the form in Schedule 2; and".

(3) After regulation 14(6), insert—

"(6A) An amendment of a commonhold association's articles of association authorised by any of paragraphs (4) to (6) is to be made by special resolution.

(6B) A provision of the articles of a commonhold association that has been amended as authorised by paragraphs (4) to (6) may be further amended, by special resolution, as authorised by those paragraphs.".

Commonhold community statements—alternative provisions for dispute resolution

9. After regulation 15(9), insert—

"(9A) In the commonhold community statement, the alternative provisions for dispute resolution set out in paragraph (9B) may be substituted for paragraphs 4.11.17 to 4.11.30 in Schedule 4.

(9B) The alternative provisions for dispute resolution are as follows—

"Procedure for enforcement by unit-holder or tenant against another unit-holder or tenant

4.11.17 Subject to paragraph 4.11.18, if a person ("the complainant") (who is either a unit-holder or a tenant of a unit) seeks to enforce a right or duty contained in this CCS or a provision made by or by virtue of the Act against another person (the "defaulter") (who also is either a unit-holder or a tenant of a unit), the complainant must use the dispute resolution procedure set out in paragraphs 4.11.19 to 4.11.29.

[**4.11.17A** The procedure must be used even if—

(a) one party is a unit-holder and the other is a tenant;

(b) both parties are unit-holders or tenants; or

(c) where one party is a tenant, the other is his landlord;

provided that the right or duty sought to be enforced is of the kind referred to in paragraph 4.11.17.]

4.11.18 However, in an emergency, or if the duty that the complainant seeks to enforce is a duty to pay money, the complainant may bring legal proceedings without first using that procedure.

4.11.19 The complainant must first consider resolving the matter by—

(a) negotiating directly with the defaulter; or

(b) using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.20 If the matter is not resolved in accordance with paragraph 4.11.19, and the complainant wishes to take further action, he must give a complaint notice to the alleged defaulter. Form 23 [Complaint notice against unit-holder or tenant] must be used.

4.11.21 The alleged defaulter may respond to the complaint notice by giving a notice (a "reply notice") to the complainant. Form 24 [Reply to complaint notice against unit-holder or tenant] must be used.

4.11.22 After 21 days (beginning with the day on which the complaint notice is given to the defaulter) have passed, or upon receipt of the defaulter's reply notice (if that is earlier), the complainant must, if he wishes to take further action to enforce the right or duty, reconsider whether the matter could be resolved by—

(a) negotiating directly with the alleged defaulter; or

(b) using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.23 If the matter is not resolved in accordance with paragraph 4.11.22, the complainant may bring legal proceedings.".".

Schedule 2 (Articles of association)

10.—(1) Schedule 2 is amended as set out in this regulation.

(2) For paragraph 3, substitute—

"**Register of members**

3.—(1) The commonhold association must keep a register of members in accordance with this article.

(2) For each member, the commonhold association must record in the register—

(a) his name and address;

(b) an address for correspondence, if he has given the commonhold association a notice of a separate correspondence address;

(c) the date on which he became a member;

(d) the unit or units of which he is a registered proprietor;

(e) after he ceases to be a member, the date on which he so ceased.

(3) The commonhold association may also record, in the register, for each member, the number of votes that he is entitled to exercise for each unit of which he is a registered proprietor.".

(3) For paragraph 28, substitute—

"**Allocation of votes on a poll**

28.—(1) During the pre-commonhold period or the transitional period, on a poll, each member has one vote.

(2) After the transitional period has ended, on a poll—

(a) subject to paragraph (3), a member who is a unit-holder may exercise as many votes as—

(i) the number of votes allocated in the commonhold community statement to the commonhold unit; or

(ii) the total number of votes allocated in that statement to all the commonhold units;

of which he is a registered proprietor; and

(b) no other member has a vote.

(3) If two or more members are jointly registered proprietors of a commonhold unit, on a poll the number of votes that each member is entitled to exercise is to be decided in accordance with paragraphs (4) to (8), even if a different number is recorded in the register of members.

(4) The members may specify, by notice in writing to the commonhold association signed by both or all of them, a particular number of the votes allocated to the unit that each of them is entitled to exercise.

(5) Such a notice may specify that one of the members is to exercise all the votes allocated to the unit.

(6) The members who have given a notice under paragraph (4) may withdraw the notice, and substitute a fresh notice, at any time.

(7) A notice given under paragraph (4) ceases to be effective if any member who was, at the time of the notice, a joint registered proprietor of the unit concerned (whether or not able to exercise any votes under the notice) has died or otherwise ceased, since the notice was given, to be a proprietor of the unit.

(8) If two or more members of the commonhold association are jointly registered proprietors of a commonhold unit and—

(a) those members—

(i) have not given the commonhold association a notice in accordance with paragraph (4) in relation to the unit; or

(ii) have given such a notice and withdrawn it without substituting a fresh notice; or

(b) such a notice given in relation to the unit has ceased to be effective under paragraph (7);

the number of votes that each of the members is entitled to exercise is the number of votes allocated to the unit divided by the number of members who are joint proprietors of the unit (or, if the result of that calculation is not a whole number, that result rounded down to the next lower whole number).

(9) In paragraphs (3) to (8), a reference to a registered proprietor of a commonhold unit includes a reference to a person who is entitled to be a registered proprietor of the unit.

Alternative version, for use if you decide to make recording voting rights compulsory

Schedule 2 (Articles of association)

11.—(1) Schedule 2 is amended as set out in this regulation.

(2) Renumber paragraph 2 as paragraph 2(1).

(3) At the end of that paragraph, insert—

"(2) If 2 or more members become joint unit-holders of a commonhold unit, they may also nominate one of themselves to exercise, on a poll, the votes allocated to the unit.

(3) The members referred to in sub-paragraph (2) who gave a nomination under that sub-paragraph may revoke that nomination and nominate another one of themselves to exercise, on a poll, those votes.

(4) A nomination or revocation under sub-paragraph (2) or (3) is to be by notice in writing, signed by all the members concerned and given to the commonhold association

(5) A reference in sub-paragraph (2), (3) or (4) to a member of the commonhold association includes a person who has been nominated under sub-paragraph (1)(d)(i) or (1)(d)(iv) to become a member.".

(4) For paragraph 3, substitute—

"**Register of members**

3.—(1) The commonhold association must keep a register of members in accordance with this article.

(2) For each member, the commonhold association must record in the register—

(a) his name and address;

(b) his address for correspondence, if he has given the commonhold association notice of a separate correspondence address;

(c) the date on which he became a member;

(d) the unit or units of which he is a registered proprietor;

(e) for that unit or each of those units, the number of votes he is entitled to exercise on a poll; and

(e) after he ceases to be a member, the date on which he so ceased.

(3) A person who—

(a) is nominated in relation to a commonhold unit for the purposes of sub-paragraph 2(2) or 2(3); or

(b) if the members do not so nominate one of themselves within 7 days of becoming entitled to be registered as proprietors of the freehold estate in the unit, the member whose name appears first on the proprietorship register for the unit;

is entitled to exercise, on a poll, the votes allocated to the unit.".

(5) For paragraph 28, substitute—

"**Allocation of votes on a poll**

28.—(1) During the pre-commonhold period or the transitional period, on a poll, each member has one vote.

(2) After the transitional period has ended, on a poll—

(a) a member who is a unit-holder may exercise the number of votes recorded in relation to him in the members' register for the commonhold association; and

(b) no other member has a vote.".

Amendment of Schedule 3 (Commonhold community statement)

12.—(1) Schedule 3 is amended as set out in this regulation.

(2) For paragraphs 4.8.2 and 4.8.3, substitute—

"**4.8.2** Parts 1 to 4 of this CCS cannot be amended unless—

(a) the provision being amended is a local rule; or

(b) the amendment substitutes one of the following sets of provisions for dispute resolution for the other—

(i) paragraphs 4.11.17 to 4.11.30 in the model commonhold community statement set out in Schedule 3 to the Commonhold Regulations 2004;

(ii) the alternative provisions for dispute resolution set out in regulation 15(9B) of those Regulations.

4.8.3 Unless this CCS provides otherwise, an amendment of a local rule, or an amendment referred to in paragraph 4.8.2(b), may be approved by ordinary resolution.".

(3) For paragraph 4.11.8, substitute—

"**4.11.8** If the matter is not resolved in accordance with paragraph 4.11.7, and the complainant wishes to take further action, he must, if the commonhold association is a member of an approved ombudsman scheme, refer the matter to the ombudsman.".

(4) For paragraph 4.11.13, substitute—

"**4.11.13** If the matter is not resolved in accordance with paragraph 4.11.12, and the commonhold association wishes to take further action, it must give a notice (a "default notice") to the alleged defaulter. Form 19 [Default notice] must be used.".

(5) For paragraphs 4.11.17 to 4.11.30, substitute—

"Procedure for enforcement by unit-holder or tenant against another unit-holder or tenant

4.11.17 Subject to paragraph 4.11.18, if a person ("the complainant") (who is either a unit-holder or a tenant of a unit) seeks to enforce a right or duty contained in this CCS or a provision made by or by virtue of the Act against another person (the "alleged defaulter") (who also is either a unit-holder or a tenant of a unit), the complainant must use the dispute resolution procedure set out in paragraphs 4.11.19 to 4.11.29.

[**4.11.17A** The procedure must be used even if—

(a) one of the complainant and the alleged defaulter is a unit-holder and the other is a tenant;

(b) both the complainant and the alleged defaulter are unit-holders or tenants; or

(c) where one of them is a tenant, the other is his landlord;

provided that the right or duty sought to be enforced is of the kind referred to in paragraph 4.11.17.]

4.11.18 However, in an emergency, or if the duty that the complainant seeks to enforce is a duty to pay money, the complainant may bring legal proceedings without first using that procedure.

4.11.19 The complainant must first consider resolving the matter by—

(a) negotiating directly with the alleged defaulter; or

(b) using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.20 If the matter is not resolved in accordance with paragraph 4.11.19, and the complainant wishes to take further action, he must give a notice (a "request for action") to the commonhold association. Form 21 [Request for action] must be used.

4.11.21 The commonhold association must consider the request for action and decide whether to—

(a) take action to enforce the right or duty against the alleged defaulter, and if it so decides, to take action as soon as reasonably practicable using the dispute resolution procedure set out in paragraphs 4.11.12 to 4.11.16; or

(b) in accordance with paragraph 4.11.22, take no action.

4.11.22 The commonhold association may decide to take no action if it reasonably thinks that inaction is in the best interests of establishing or maintaining harmonious relationships between all the unit-holders or tenants, and that it will not cause any unit-holder or tenant (other than the alleged defaulter) significant loss or significant disadvantage.

4.11.23 The commonhold association must inform the complainant of its decision as soon as practicable after making the decision. Form 22 [*title of form here*…] must be used.

4.11.24 If the complainant wishes to challenge the decision made by the commonhold association under paragraph 4.11.21 he may use the dispute resolution procedure set out in paragraphs 4.11.4 to 4.11.9. However, for that purpose, the period mentioned in paragraph 4.11.7 is taken to be 7 days.

4.11.25 If—

(a) the commonhold association does not give the complainant notice of its decision in accordance with paragraph 4.11.23 within 21 days, beginning with the day on which the request for action is given to it; or

(b) its decision is that no action be taken;

the complainant may enforce the right or duty against the alleged defaulter directly, but he must use the dispute resolution procedure set out in paragraphs 4.11.26 to 4.11.29.

4.11.26 If, in accordance with paragraph 4.11.25, the complainant is permitted to enforce the right or duty against the alleged defaulter directly, the complainant must, if he wishes to take such action, give a notice (a "complaint notice") to the alleged defaulter. Form 23 [Complaint notice against unit-holder or tenant] must be used.

4.11.27 The alleged defaulter may respond to the complaint notice by giving a notice (a "reply notice") to the complainant. Form 24 [Reply to complaint notice against unit-holder or tenant] must be used.

4.11.28 After 21 days (beginning with the day on which the complaint notice is given to the alleged defaulter) have passed, or upon receipt of the alleged defaulter's reply notice (if that is earlier), the complainant must, if he wishes to take further action to enforce the right or duty, reconsider whether the matter could be resolved by—

(a) negotiating directly with the alleged defaulter; or

(b) using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.29 If the matter is not resolved in accordance with paragraph 4.11.28, the complainant may bring legal proceedings against the alleged defaulter.".

Amendment of Schedule 4 (Forms)

13. In Schedule 4, for form 22, substitute—

"

".

PART 3

MODIFICATIONS OF ACTS

Modification of Leasehold Reform Act 1967 in relation to shared ownership leases of commonhold units

14. In the Leasehold Reform Act 1967(**16**), in Schedule 4A, after paragraph 4, insert:

"Certain leases of commonhold land

4A. A lease of the whole of a commonhold unit (within the meaning given by the Commonhold and Leasehold Reform Act 2002(**17**)), being a lease granted by—

(a) a registered social landlord;

(b) a body referred to in paragraph 2(2); or

(c) a person who has received a grant under section 27A of the Housing Act 1996;

is excluded from the operation of this Part whether or not the interest of the landlord belongs to a person or body referred to in paragraph (a), (b) or (c)..".

Modification of Leasehold Reform, Housing and Urban Development Act 1993 in relation to commonhold land

15. In the Leasehold Reform, Housing and Urban Development Act 1993(**18**), after section 4(5), insert:

"(6) This Chapter does not apply to premises that are commonhold land (within the meaning given by the Commonhold and Leasehold Reform Act 2002(**19**)).".

Signatory text

Name
Address — Parliamentary Under Secretary of State
Date — Department

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations amend the Commonhold Regulations 2004(**20**), and modify the Leasehold Reform Act 1967(**21**) and the Leasehold Reform, Housing and Urban Development Act 1993(**22**), to make provision for the grant of shared ownership leases over commonhold land.

Shared ownership leases allow a long term lease of a dwelling to be granted on payment of a premium of the order of 25% of the value of the dwelling, and the purchaser enters into a long-term lease (usually 99 or 125 years) of the property. During the term the purchaser is able to make further payments towards the purchase of the property.

(**16**) 1967 c. 88.
(**17**) 2002 c. 15.
(**18**) 1993 c. 28.
(**19**) 2002 c. 15.
(**20**) SI 2004/1829.
(**21**) 1967 c. 88.
(**22**) 1993 c. 28.

At present the Commonhold and Leasehold Reform Act 2002(**23**) and the Commonhold Regulations 2004 prohibits the grant of a lease over commonhold land for a longer term than 7 years. The relevant provision in those Regulations is regulation 11. These Regulations omit regulation 11 in its entirety and substitute a new regulation 11 that makes the same provision as the omitted regulation 11 in relation to leases for 7 years or less, but adds new provision relating to shared ownership leases.

The regulations also modify the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993 to remove any right of enfranchisement in relation to shared ownership leases over commonhold land.

(**23**) 2002 c. 15.

Annex B - Partial Impact Assessment

[Instructions: Partial Regulatory Impact Assessment for proposals likely to affect businesses, charities, voluntary sector or the public sector – see guidance on DCA intranet].

Annex C – Principal Stakeholders Consulted

Annex D

Statutory Instrument 2004 No. 1829

The Commonhold Regulations 2004 (extract on dispute resolution)

4.11 DISPUTE RESOLUTION

4.11.1 The dispute resolution procedure contained in the following paragraphs applies only to the enforcement of rights and duties that arise from this CCS or from a provision made by or by virtue of the Act. References to enforcing a right include enforcing the terms and conditions to which a right is subject.

Procedure for enforcement by unit-holder or tenant against the commonhold association

4.11.2 Subject to paragraph 4.11.3, a unit-holder or tenant must use the dispute resolution procedure contained in paragraphs 4.11.4 to 4.11.9 when seeking to enforce against the commonhold association a right or duty contained in this CCS or a provision made by or by virtue of the Act.

4.11.3 A unit-holder or tenant, when seeking to enforce against the commonhold association a duty to pay money or a right or duty in an emergency, may -

(a) use the dispute resolution procedure contained in paragraphs 4.11.4 to 4.11.9;

(b) if the commonhold association is a member of an approved ombudsman scheme, refer a dispute directly to the ombudsman; or

(c) bring legal proceedings.

4.11.4 When seeking to enforce a right or duty a unit-holder or tenant (the "complainant") must first consider resolving the matter by -

(a) negotiating directly with the commonhold association; or

(b) using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.5 If the matter is not resolved in accordance with paragraph 4.11.4, then the complainant must, if he wishes to take further action to enforce the right or duty, give a complaint notice to the commonhold association. Form 17 [Complaint notice against commonhold association] must be used.

4.11.6 The commonhold association may respond to the complaint notice by giving a reply notice to the complainant. Form 18 [Reply to complaint notice against commonhold association] must be used.

4.11.7 Upon receipt of the reply notice or when 21 days have passed, beginning with the date on which the complaint notice is given, (whichever is earlier) the complainant must, if he wishes to take further action to enforce the right or duty, first reconsider whether the matter could be resolved -

(a) by negotiating directly with the commonhold association; or

(b) by using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.8 If the matter is not resolved in accordance with paragraph 4.11.7 and the complainant wishes to take further action to enforce the right or duty, then he must, if the commonhold association is a member of an approved ombudsman scheme, refer the matter to the ombudsman.

4.11.9 If the commonhold association is a member of an approved ombudsman scheme, then legal proceedings may only be brought once the ombudsman has investigated and determined the matter and he has notified the parties of his decision. If the commonhold association is not a member of an approved ombudsman scheme, then legal proceedings may be brought upon completion of the dispute resolution procedure contained in paragraphs 4.11.4 to 4.11.7.

Procedure for enforcement by commonhold association against a unit-holder or tenant

4.11.10 Subject to paragraph 4.11.11, the commonhold association must use the dispute resolution procedure contained in paragraphs 4.11.12 to 4.11.16 when seeking to enforce against a unit-holder or tenant a right or duty contained in this CCS or a provision made by or by virtue of the Act.

4.11.11 The commonhold association, when seeking to enforce against a unit-

holder or tenant a duty to pay money or a right or duty in an emergency, may -

(a) use the dispute resolution procedure contained in paragraphs 4.11.12 to 4.11.16;

(b) if the commonhold association is a member of an approved ombudsman scheme, refer a dispute directly to the ombudsman; or

(c) bring legal proceedings.

4.11.12 When seeking to enforce a right or duty the commonhold association must first consider -

(a) resolving the matter by -

(i) negotiating directly with the unit-holder or tenant (the "alleged defaulter"); or

(ii) using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings; or

(b) taking no action if it reasonably thinks that inaction is in the best interests of establishing or maintaining harmonious relationships between all the unit-holders, and that it will not cause any unit-holder (other than the alleged defaulter) significant loss or significant disadvantage.

4.11.13 If the matter is not resolved in accordance with paragraph 4.11.12, then the commonhold association must, if it wishes to take further action to enforce the right or duty, give a default notice to the alleged defaulter. Form 19 [Default notice] must be used.

4.11.14 The alleged defaulter may respond to the default notice by giving a reply notice to the commonhold association. Form 20 [Reply to default notice] must be used.

4.11.15 Upon receipt of the reply notice or when 21 days have passed, beginning with the date on which the default notice is given, (whichever is earlier) the commonhold association must, if it wishes to take further action to enforce the right

or duty, first reconsider whether the matter could be resolved-

(a) by negotiating directly with the alleged defaulter; or

(b) by using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.16 If the matter is not resolved in accordance with paragraph 4.11.15, then the commonhold association may either, if it is a member of an approved ombudsman scheme, refer the matter to the ombudsman, or, if it is satisfied that the interests of the commonhold require it, bring legal proceedings.

Procedure for enforcement by unit-holder or tenant against another unit-holder or tenant

4.11.17 Subject to paragraph 4.11.18, a unit-holder or tenant must use the dispute resolution procedure contained in paragraphs 4.11.19 to 4.11.30 when seeking to enforce against another unit-holder or tenant a right or duty contained in this CCS or a provision made by or by virtue of the Act.

4.11.18 A unit-holder or tenant, when seeking to enforce against another unit-holder or tenant a duty to pay money or a right or duty in an emergency, may -

(a) use the dispute resolution procedure contained in paragraphs 4.11.19 to 4.11.30; or

(b) bring legal proceedings.

4.11.19 When seeking to enforce a right or duty a unit-holder or tenant (the "complainant") must first consider resolving the matter by -

(a) negotiating directly with the other unit-holder or tenant (the "alleged defaulter"); or

(b) using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.20 If the matter is not resolved in accordance with paragraph 4.11.19, then the complainant must, if he wishes to take further action to enforce the right or duty, give a notice to the commonhold association requesting that the commonhold association take action to enforce the right or duty against the alleged defaulter.

Form 21 [Request for action] must be used.

4.11.21 The commonhold association must consider the notice referred to in paragraph 4.11.20 and decide whether to -

(a) take action to enforce the right or duty against the alleged defaulter; and if it so decides, then to take action as soon as reasonably practicable using the dispute resolution procedure contained in paragraphs 4.11.12 to 4.11.16; or

(b) take no action in accordance with paragraph 4.11.22; and if it so decides, then to decide whether, in accordance with paragraph 4.11.23, to allow the complainant to enforce the right or duty against the alleged defaulter directly.

4.11.22 The commonhold association may decide to take no action in respect of the matters specified in the notice referred to in paragraph 4.11.20 if it reasonably thinks that inaction is in the best interests of establishing or maintaining harmonious relationships between all the unit-holders or tenants, and that it will not cause any unit-holder or tenant (other than the alleged defaulter) significant loss or significant disadvantage.

4.11.23 The commonhold association may refuse the complainant the right to take further action in relation to the matter specified in the notice referred to in paragraph 4.11.20, if the commonhold association reasonably thinks that the complaint -

(a) does not amount to a breach of a right enjoyed by, or a duty owed to, the complainant; or

(b) is vexatious, frivolous or trivial.

4.11.24 The commonhold association must, as soon as practicable after making a decision in accordance with paragraph 4.11.21, inform the complainant of outcome of its decision. Form 22 [Reply to request for action] must be used.

4.11.25 If the complainant wishes to challenge the decision made by the commonhold association under paragraph 4.11.21 he may use the dispute resolution procedure contained in paragraphs 4.11.4 to 4.11.9, save that for these purposes the time period mentioned in paragraph 4.11.7 is to be 7 days.

4.11.26 If the commonhold association fails to comply with paragraph 4.11.24 within 21 days, beginning with the date on which the notice referred to in paragraph 4.11.20 is given, the complainant may enforce the right or duty against the alleged

defaulter directly, and if he does so, he must use the dispute resolution procedure in paragraphs 4.11.27 to 4.11.30.

4.11.27 If, by virtue of the notice referred to in paragraph 4.11.24, the complainant has the right to enforce the right or duty against the alleged defaulter directly then the complainant must, if he wishes to take further action to enforce the right or duty, give a complaint notice to the alleged defaulter. Form 23 [Complaint notice against unit-holder or tenant] must be used.

4.11.28 The alleged defaulter may respond to the complaint notice by giving a reply notice to the complainant. Form 24 [Reply to complaint notice against unit-holder or tenant] must be used.

4.11.29 Upon receipt of the reply notice or when 21 days have passed, beginning with the date on which the complaint notice is given, (whichever is earlier) the complainant must, if he wishes to take further action to enforce the right or duty, reconsider whether the matter could be resolved -

(a) by negotiating directly with the alleged defaulter; or

(b) by using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings.

4.11.30 If the matter is not resolved in accordance with paragraph 4.11.29 the complainant may bring legal proceedings against the alleged defaulter in respect of the complaint specified in the notice given under paragraph 4.11.20.

Annex E – Sections 43 to 54 of the Act

43 Winding-up resolution
(1) A winding-up resolution in respect of a commonhold association shall be of no effect unless-

(a) the resolution is preceded by a declaration of solvency,

(b) the commonhold association passes a termination-statement resolution before it passes the winding-up resolution, and

(c) each resolution is passed with at least 80 per cent. of the members of the association voting in favour.

(2) In this Part-

"declaration of solvency" means a directors' statutory declaration made in accordance with section 89 of the Insolvency Act 1986 (c. 45),

"termination-statement resolution" means a resolution approving the terms of a termination statement (within the meaning of section 47), and

"winding-up resolution" means a resolution for voluntary winding-up within the meaning of section 84 of that Act.

44 100 per cent. agreement
(1) This section applies where a commonhold association-

(a) has passed a winding-up resolution and a termination-statement resolution with 100 per cent. of the members of the association voting in favour, and

(b) has appointed a liquidator under section 91 of the Insolvency Act 1986 (c. 45).

(2) The liquidator shall make a termination application within the period of six months beginning with the day on which the winding-up resolution is passed.
(3) If the liquidator fails to make a termination application within the period specified in subsection (2) a termination application may be made by-

(a) a unit-holder, or

(b) a person falling within a class prescribed for the purposes of this subsection.

45 80 per cent. agreement
(1) This section applies where a commonhold association-

(a) has passed a winding-up resolution and a termination-statement resolution with at least 80 per cent. of the members of the association voting in favour, and

(b) has appointed a liquidator under section 91 of the Insolvency Act 1986.

(2) The liquidator shall within the prescribed period apply to the court for an order determining-

(a) the terms and conditions on which a termination application may be made, and

(b) the terms of the termination statement to accompany a termination application.

(3) The liquidator shall make a termination application within the period of three months starting with the date on which an order under subsection (2) is made.
(4) If the liquidator fails to make an application under subsection (2) or (3) within the period specified in that subsection an application of the same kind may be made by-

(a) a unit-holder, or

(b) a person falling within a class prescribed for the purposes of this subsection.

46 Termination application
(1) A "termination application" is an application to the Registrar that all the land in relation to which a particular commonhold association exercises functions should cease to be commonhold land.
(2) A termination application must be accompanied by a termination statement.
(3) On receipt of a termination application the Registrar shall note it in the register.

47 Termination statement
(1) A termination statement must specify-

(a) the commonhold association's proposals for the transfer of the commonhold land following acquisition of the freehold estate in accordance with section 49(3), and

(b) how the assets of the commonhold association will be distributed.

(2) A commonhold community statement may make provision requiring any termination statement to make arrangements-

(a) of a specified kind, or

(b) determined in a specified manner,

about the rights of unit-holders in the event of all the land to which the statement relates ceasing to be commonhold land.
(3) A termination statement must comply with a provision made by the commonhold community statement in reliance on subsection (2).
(4) Subsection (3) may be disapplied by an order of the court-

(a) generally,

(b) in respect of specified matters, or

(c) for a specified purpose.

(5) An application for an order under subsection (4) may be made by any member of the commonhold association.

48 The liquidator
(1) This section applies where a termination application has been made in respect of particular commonhold land.
(2) The liquidator shall notify the Registrar of his appointment.
(3) In the case of a termination application made under section 44 the liquidator shall either-

(a) notify the Registrar that the liquidator is content with the termination statement submitted with the termination application, or

(b) apply to the court under section 112 of the Insolvency Act 1986 (c. 45) to determine the terms of the termination statement.

(4) The liquidator shall send to the Registrar a copy of a determination made by virtue of subsection (3)(b).
(5) Subsection (4) is in addition to any requirement under section 112(3) of the Insolvency Act 1986.
(6) A duty imposed on the liquidator by this section is to be performed as soon as possible.
(7) In this section a reference to the liquidator is a reference-

(a) to the person who is appointed as liquidator under section 91 of the Insolvency Act 1986, or

(b) in the case of a members' voluntary winding up which becomes a creditors' voluntary winding up by virtue of sections 95 and 96 of that Act, to the person acting as liquidator in accordance with section 100 of that Act.

49 Termination

(1) This section applies where a termination application is made under section 44 and-

(a) a liquidator notifies the Registrar under section 48(3)(a) that he is content with a termination statement, or

(b) a determination is made under section 112 of the Insolvency Act 1986 (c. 45) by virtue of section 48(3)(b).

(2) This section also applies where a termination application is made under section 45.

(3) The commonhold association shall by virtue of this subsection be entitled to be registered as the proprietor of the freehold estate in each commonhold unit.

(4) The Registrar shall take such action as appears to him to be appropriate for the purpose of giving effect to the termination statement.

Termination: winding-up by court **50 Introduction**

(1) Section 51 applies where a petition is presented under section 124 of the Insolvency Act 1986 for the winding up of a commonhold association by the court.

(2) For the purposes of this Part-

(a) an "insolvent commonhold association" is one in relation to which a winding-up petition has been presented under section 124 of the Insolvency Act 1986,

(b) a commonhold association is the "successor commonhold association" to an insolvent commonhold association if the land specified for the purpose of section 34(1)(a) is the same for both associations, and

(c) a "winding-up order" is an order under section 125 of the Insolvency Act 1986 for the winding up of a commonhold association.

51 Succession order

(1) At the hearing of the winding-up petition an application may be made to the court for an order under this section (a "succession order") in relation to the insolvent commonhold association.

(2) An application under subsection (1) may be made only by-

(a) the insolvent commonhold association,

(b) one or more members of the insolvent commonhold association, or

(c) a provisional liquidator for the insolvent commonhold association appointed under section 135 of the Insolvency Act 1986.

(3) An application under subsection (1) must be accompanied by-

(a) prescribed evidence of the formation of a successor commonhold association, and

(b) a certificate given by the directors of the successor commonhold association that its memorandum and articles of association comply with regulations under paragraph 2(1) of Schedule 3.

(4) The court shall grant an application under subsection (1) unless it thinks that the circumstances of the insolvent commonhold association make a succession order inappropriate.

52 Assets and liabilities

(1) Where a succession order is made in relation to an insolvent commonhold association this section applies on the making of a winding-up order in respect of the association.
(2) The successor commonhold association shall be entitled to be registered as the proprietor of the freehold estate in the common parts.
(3) The insolvent commonhold association shall for all purposes cease to be treated as the proprietor of the freehold estate in the common parts.
(4) The succession order-

(a) shall make provision as to the treatment of any charge over all or any part of the common parts;

(b) may require the Registrar to take action of a specified kind;

(c) may enable the liquidator to require the Registrar to take action of a specified kind;

(d) may make supplemental or incidental provision.

53 Transfer of responsibility

(1) Where a succession order is made in relation to an insolvent commonhold association this section applies on the making of a winding-up order in respect of the association.
(2) The successor commonhold association shall be treated as the commonhold association for the commonhold in respect of any matter which relates to a time after the making of the winding-up order.
(3) On the making of the winding-up order the court may make an order requiring the liquidator to make available to the successor commonhold association specified-

(a) records;

(b) copies of records;

(c) information.

(4) An order under subsection (3) may include terms as to-

(a) timing;

(b) payment.

54 Termination of commonhold

(1) This section applies where the court-

(a) makes a winding-up order in respect of a commonhold association, and

(b) has not made a succession order in respect of the commonhold association.

(2) The liquidator of a commonhold association shall as soon as possible notify the Registrar of-

(a) the fact that this section applies,

(b) any directions given under section 168 of the Insolvency Act 1986 (c. 45) (liquidator: supplementary powers),

(c) any notice given to the court and the registrar of companies in accordance with section 172(8) of that Act (liquidator vacating office after final meeting),

(d) any notice given to the Secretary of State under section 174(3) of that Act (completion of winding-up),

(e) any application made to the registrar of companies under section 202(2) of that Act (insufficient assets: early dissolution),

(f) any notice given to the registrar of companies under section 205(1)(b) of that Act (completion of winding-up), and

(g) any other matter which in the liquidator's opinion is relevant to the Registrar.

(3) Notification under subsection (2)(b) to (f) must be accompanied by a copy of the directions, notice or application concerned.

(4) The Registrar shall-

(a) make such arrangements as appear to him to be appropriate for ensuring that the freehold estate in land in respect of which a commonhold association exercises functions ceases to be registered as a freehold estate in commonhold land as soon as is reasonably practicable after he receives notification under subsection (2)(c) to (f), and

(b) take such action as appears to him to be appropriate for the purpose of giving effect to a determination made by the liquidator in the exercise of his functions.

Annex F – Provisions from the Insolvency Act 1986

89. Statutory declaration of solvency

(1) Where it is proposed to wind up a company voluntarily, the directors (or, in the case of a company having more than two directors, the majority of them) may at a directors' meeting make a statutory declaration to the effect that they have made a full inquiry into the company's affairs and that having done so, they have formed the opinion that the company will be able to pay its debts in full, together with interest at the official rate (as defined in section 251), within such period not exceeding 12 months from the commencement of the winding up, as may be specified in the declaration.

(2) Such a declaration by the directors has no effect for purposes of this Act unless-

(a) it is made within the 5 weeks immediately preceding the date of the passing of the resolution for winding up, or on that date but before the passing of the resolution, and,

(b) it embodies a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration.

(3) The declaration shall be delivered to the registrar of companies before the expiration of 15 days immediately following the date on which the resolution for winding up is passed.

(4) A director making a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full, together with the interest at the official rate, within the period specified is liable to a imprisonment or a fine, or both.

(5) If the company is wound up in pursuance of a resolution passed within 5 weeks after the making of the declaration, and its debts (together with interest at the official rate) are not paid or provided for in full within the period specified, it is to be presumed (unless the contrary is shown) that the director did not have reasonable grounds for his opinion.

(6) If the declaration required by subsection (3) to be delivered to the registrar is not so delivered within the time prescribed by that subsection, the company and every offices in default is liable to a fine and, for continued contravention, to a daily default fine.

47. Statement of affairs to be submitted

(1) Where an administrative receiver is appointed, he shall forthwith require some or all of the persons mentioned below to make out and submit to him a statement in the prescribed form as to the affairs of the company.

(2) A statement submitted under this section shall be verified by affidavit by the persons required to submit it and shall show;

(a) particulars of the company's assets, debts and liabilities;

(b) the names and addresses of its creditors;

(c) the securities held by them respectively;

(d) the dates when the securities were respectively given; and

(e) such further or other information as may be prescribed.

(3) The persons referred to in subsection (1) are;

(a) those who are or have been officers of the company;

(b) those who have taken part in the company's formation at any time within one year before the date of the appointment of the administrative receiver;

(c) those who are in the company's employment, or have been in its employment within that year, and are in the administrative receiver's opinion capable of giving the information required;

(d) those who are or have been within that year officers of or in the employment of a company which is, or within that year was, an officer of the company.

In this subsection "employment" includes employment under a contract for services.

(4) Where any persons are required under this section to submit a statement of affairs to the administrative receiver, they shall do so (subject to the next subsection) before the end of the period of 21 days beginning with the day after that on which the prescribed notice of the requirement is given to them by the administrative receiver.

(5) The administrative receiver, if he thinks fit, may;

(a) at any time release a person from an obligation imposed on him under subsection (1) or (2), or

(b) either when giving notice under subsection (4) or subsequently, extend the period so mentioned,

and where the administrative receiver has refused to exercise a power conferred by this subsection, the court, if it thinks fit, may exercise it.

(6) If a person without reasonable excuse fails to comply with any obligation imposed under this section, he is liable to a fine and, for continued contravention, to a daily fine.

84. Circumstances in which company may be wound up voluntarily

(1) A company may be wound up voluntarily-

(a) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring it to be wound up voluntarily;

(b) if the company resolves by special resolution that it be wound up voluntarily;

(c) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

(2) In this Act the expression "a resolution for voluntary winding up" means a resolution passed under of the paragraphs of subsection (1).

(3) A resolution passed under paragraph (a) of subsection (1), as well as a special resolution under paragraph (b) and an extraordinary resolution under paragraph (c), is subject to section 380 of the Companies Act (copy of resolution to be forwarded to registrar of companies within 15 day).

91. Appointment of liquidator

(1) In a members' voluntary winding up, the company in general meeting shall appoint one or more liquidators for the purpose of winding up the company's affairs and distributing its assets.

(2) On appointment of a liquidator all the powers of the directors cease, except so far as the company in general meeting or the liquidator sanctions their continuance

112. Reference of questions to court

(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.

(2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

(3) A copy of an order made by virtue of this section staying the proceedings in the winding up shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar of companies, who shall enter it in his records relating to the company.

124. Application for winding up

(1) Subject to the provisions of this section, an application to the court for the winding up of a company shall be by petition presented either by the company, or the directors, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories or by clerk of a magistrates' court in the exercise of the power conferred by section 87A of the Magistrates' Courts Act 1980 (enforcement of fines imposed on companies, or by all or any of those parties, together or separately.

(2) Except as mentioned below, a contributory is not entitled to present a winding-up petition unless either -

(a) the number of members is reduced below 2, or

(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him, or have been held by him, and registered in his name, for at least 6 months during the 18 months before the commencement of the winding up, or have devolved on him through the death of a former holder.

(3) A person who is liable under section 76 to contribute to a company's assets in the event of its being wound up may petition on either of the grounds set out in section 122(1)(f) and (g), and subsection (2) does not then apply; but unless the person is a contributory otherwise than under section 76, he may not in his character as contributory petition on any other ground.

This subsection is deemed included in Chapter VII or Part V of the Companies Act (redeemable shares; purchase by a company of its own shares) for the purposes of the Secretary of State's power to make regulations under section 179 of that Act.

(4) A winding-up petition may be presented by the Secretary of State -

(a) if the ground of the petition is that in section 122(1)(b) or (c), or

(b) in a case falling within section 124A below.

(5) Where a company is being wound up voluntarily in England and Wales, a winding-up petition may be presented by the official receiver attached to the court as well as by any other person authorised in that behalf under the other provisions of this section; but the court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories.

168. Supplementary powers (England and Wales)

(1) This section applies in the case of a company which is being wound up by the court in England and Wales.

(2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes; and it is his duty to summon meetings at such times as the creditors or contributories by resolution (either at the meeting appointing the liquidator or otherwise) may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories (as the case may be).

(3) The liquidator may apply to the court (in the prescribed manner) for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Act, the liquidator shall use his own discretion in the management of the assets and their distribution among the creditors.

(5) If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just.

172. Removal, etc. (winding up by the court)

(1) This section applies with respect to the removal from office and vacation of office of the liquidator of a company which is being wound up by the court, or of a provisional liquidator.

(2) Subject as follows, the liquidator may be removed from office only by an order of the court or by a general meeting of the company's creditors summoned specially for that purpose in accordance with the rules; and a provisional liquidator may be removed from office only by an order of the court.

(3) Where -

(a) the official receiver is liquidator otherwise than in succession under section 136(3) to a person who held office as a result of a nomination by a meeting of the company's creditors or contributories, or

(b) the liquidator was appointed by the court otherwise than under section 139(4)(a) or 140(1), or was appointed by the Secretary of State,

a general meeting of the company's creditors shall be summoned for the purpose of replacing him only if he thinks fit, or the court co directs, or the meeting is requested, in accordance with the rules, by not less than one-quarter, in value, of the creditors.

(4) If appointed by the Secretary of State, the liquidator may be removed from office by a direction of the Secretary of State.

(5) A liquidator or provisional liquidator, not being the official receiver, shall vacate office if he ceases to be a person who is qualified to act as an insolvency practitioner in relation to the company.

(6) A liquidator may, in the prescribed circumstances, resign his office by giving notice of his resignation to the court.

(7) Where an order is made under section 204 (early dissolution in Scotland) for the dissolution of the company, the liquidator shall vacate office when the dissolution of the company takes effect in accordance with that section.

(8) Where a final meeting has been held under section 146 (liquidator's report on completion of winding up), the liquidator whose report was considered at the meeting shall vacate office as soon as he has given notice to the court and the registrar of companies that the meeting has been held and of the decisions (if any) of the meeting.

174. Release (winding up by the court)

(1) This section applies with respect to the release of the liquidator of a company which is being wound up by the court, or of a provisional liquidator.

(2) Where the official receiver has ceased to be liquidator and a person becomes liquidator in his stead, the official receiver has his release with effect from the following time, that is to say -

(a) in a case where that person was nominated by a general meeting of creditors or contributories, or was appointed by the Secretary of State, the time at which the official receiver gives notice to the court that he has been replaced;

(b) in a case where that person is appointed by the court, such time as the court may determine.

(3) If the official receiver while he is liquidator gives notice to the Secretary of State that the winding up is for practical purposes complete, he has his release with effect from such time as the Secretary of State may determine.

(4) A person other than the official receiver who has ceased to be liquidator has his release with effect from the following time, that is to say -

(a) in the case of a person who has been removed from office by a general meeting of creditors that has not resolved against his release or who has died, the time at which notice is given to the court in accordance with the rules that that person has ceased to hold office;

(b) in the case of a person who has been removed from office by a general meeting of creditors that has resolved against his release, or by the court or the Secretary of State, or who has vacated office under section 172(5) or (7), such time as the Secretary of State may, on an application by that person, determine;

(c) in the case of a person who has resigned, such time as may be prescribed;

(d) in the case of a person who has vacated office under section 172(8) -

(i) if the final meeting referred to in that subsection has resolved against that person's release, such time as the Secretary of State may, on an application by that person, determine, and

(ii) if that meeting has not so resolved, the time at which that person vacated office.

(5) A person who has ceased to hold office as a provisional liquidator has his release with effect from such time as the court may, on an application by him, determine.

(6) Where the official receiver or a liquidator or provisional liquidator has his release under this section, he is, with effect from the time specified in the preceding provisions of this section, discharged from all liability both in respect of acts or omissions of his in the winding up and otherwise in relation to his conduct as liquidator or provisional liquidator.

But nothing in this section prevents the exercise, in relation to a person who has had release under this section, of the court's powers under section 212 (summary remedy against delinquent directors, liquidators, etc.).

(7) In the application of this section to a case where the order for winding up has been made by the court in Scotland, the references to a determination by the Secretary of State as to the time from which a person who has ceased to be liquidator has his release are to such a determination by the Accountant of Court.

202.Early dissolution (England and Wales)

(1) This section applies where an order for the winding up of a company has been made by the court in England and Wales.

(2) The official receiver, if -

(a) he is liquidator of the company, and

(b) it appears to him -

(i) that the realisable assets of the company are insufficient to cover the expenses of the winding up, and

(ii) that the affairs of the company do not require any further investigation,

may at any time apply to the registrar of companies for the early dissolution of the company.

(3) Before making that application, the official receiver shall give not less than 28 days' notice of his intention to do so to the company's creditors and contributories and, if there is an administrative receiver of the company, to that receiver.

(4) With the giving of that notice the official receiver ceases (subject to any directions under the next subsection) to be required to perform any duties imposed on him in relation to the company, its creditors or contributories by

virtue of any provision of this Act, apart from a duty to make an application under subsection (2) of this section.

(5) On the receipt of the official receiver's application under sub- section (2) the registrar shall forthwith register it, and, at the end of the period of 3 months beginning with the day of the registration of the application, the company shall be dissolved.

However, the Secretary of State may, on the application of the official receiver or any other person who appears to the Secretary of State to be interested, give directions under section 203 at any time before the end of that period.

205. Dissolution otherwise than under Sections 202-204

(1) This section applies where the registrar of companies receives -

(a) a notice served for the purposes of section 172(8) (final meeting of creditors and vacation of office by liquidator), or

(b) a notice from the official receiver that the winding up of a company by the court is complete.

(2) The registrar shall, on receipt of the notice, forthwith register it; and, subject as follows, at the end of the period of 3 months beginning with the day of the registration of the notice, the company shall be dissolved.

(3) The Secretary of State may, on the application of the official receiver or any other person who appears to the Secretary of State to be interested, give a direction deferring the date at which the dissolution of the company is to take effect for such period as the Secretary of State thinks fit.

(4) An appeal to the court lies from any decision of the Secretary of State on an application for a direction under subsection (3).

(5) Subsection (3) does not apply in a case where the winding-up order was made by the court in Scotland, but in such a case the court may, on an application by any person appearing to the court to have an interest, order that the date at which the dissolution of the company is to take effect shall be deferred for such period as the court thinks fit.

(6) It is the duty of the person -

(a) on whose application a direction is given under subsection (3);

(b) in whose favour an appeal with respect to an application for such a direction is determined; or

whose application an order is made under subsection (5),

within 7 days after the giving of the direction, the determination of the appeal or the making of the order, to deliver to the registrar for registration such a copy of the direction, determination or order as is prescribed.

(7) If a person without reasonable excuse fails to deliver a copy as required by subsection (6), he is liable to a fine and, for continued contravention, to a daily default fine.

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