CONSULTATION RESPONSE

"Reinvigorating commonhold: the alternative to leasehold ownership"

The following response is on behalf of the Property Litigation Association (PLA). The PLA is an industry association for solicitors with a substantial part of their practice in property litigation. The Association has around 1300 members comprising solicitors from throughout England and Wales (and elsewhere in the United Kingdom) specialising in all aspects of property litigation including commercial, residential and agricultural property law

Part II: Converting to Commonhold **Chapter 3: When should conversion be possible**	
Q.1	
3.31	Yes
Q.2	
3.41	Yes
Q3.	
3.54	Yes
Q.4	
3.104	(1) Yes (2) Yes) (3) Yes (4) No (5) Yes (6) We do not have sufficient evidence to address this
Q.5	
3.142	(1) Yes, if option 2, but prefer option 1. (2) Yes (3) Yes (4) N/A (5) We do not have sufficient evidence to address this (6) as a percentage of the final sale price, representing the percentage increase in value of the non-consenting leaseholder's property interest (from leasehold to commonhold) on conversion (7) This charge should be given priority over existing lenders
Q.6	
3.143	(1) Yes (2) No (3) Option 1 is preferred to avoid this issue
Q.7	
3.144	Yes. Given that the Tribunals have not had to determine such applications, it could be sensible to provide the requisite guidance regarding exercising such discretion.
Q.8	
3.152	Yes
Q.9	
3.172	We think lenders consent should be a requirement as lenders may have commercial reasons for not lending against commonhold which is not equivalent to freehold. With time more lenders may be willing to consent and can be encouraged to do so by the government as you suggest
Q.10	
3.183	Option 1 for the advantages you have set out, and to avoid the disadvantages of

	option 2 which you detail
3.184	None of which we are aware
Chapter 4: What is the procedure for converting to commonhold?	
Q.11	
4.18	Yes
Q.12	
4.43	Yes
4.44	Leaseholders should be required to do so collectively in the same way as collective enfranchisement as to do otherwise would create uncertainty for other leaseholders involved in the conversion.
Q.13	
4.49	Yes
4.50	Yes
Q.14	
4.59	Yes
Q.15	
4.61	Yes
4.62	We are not aware of any other changes
Part III: New Commonhold developments **Chapter 5: Mixed Use and multi-block developments**	
Q.16	
5.15	Yes
5.16	No
Q.17	
5.55	Yes
5.56	N/A
5.57	No
Q.18	
5.71	Yes for the reasons set out in the consultation
5.72	N/A
Q.19	
5.78	Collateral as the sectional committees are not a legal entity and to avoid the

	difficulties of enforcement and to provide a framework of oversight
Q.20	
5.81	(1) Yes (2) Yes. Given that the Tribunals have not had to determine such applications, it could be sensible to provide the requisite guidance regarding exercising with such discretion. (3) No as it allows for agreeable revocation or alterations to take place without the need of a Tribunal application. Otherwise all revocations and alterations would involve the costs and time of a Tribunal application.
Q.21	
5.88	Yes
5.89	Yes
5.90	Yes. Given that the Tribunals have not had to determine such applications, it could be sensible to provide the requisite guidance regarding exercising with such discretion.
Q.22	
5.94	Yes. We have no other proposals.
Q.23	
5.96	Yes
Q.24	
5.101	Yes
5.102	Yes
5.103	Yes
Chapter 6: Development rights	
Q.25	
6.65	We agree that statutory development rights should apply automatically, avoiding the need to reserve express rights in the CCS. This will provide clarity, simplicity and consistency, provided that the automatic statutory development rights are clearly defined and not too far-reaching.
6.66	We consider that it would be sensible for statutory development rights to include a right to add land, make consequential variations to commonhold contributions and voting rights and rights of access. It may also be necessary to include a right to vary (rather than just add to) the development, to reduce as well as increase the land within the commonhold development. This is on the understanding that such rights are likely to be demanded by developers of new commonhold developments in order to give them the flexibility they require, especially when creating new commonhold developments in stages. Such flexibility appears necessary in order to encourage developers to develop new commonholds. We recognise the potential for disputes between the Commonhold Association and developer in relation to (for example) the extension of commonhold contributions when a development is extended, but we agree that the possibility of such disputes is arguably no greater than between a landlord and its tenants with regard to the

	expansion of service charges.
Q.26	
6.67	We agree that a developer's right to appoint a director should exist only until 50% or more of the Units have been sold. This should be subject to constraints which prevent a developer from retaining Units in a development indefinitely in order to exert control over the Commonhold development to the detriment of the Unit owners. For example, the developer's director's right might be subject to a specific obligation not to exercise votes and rights in a way that would interfere unreasonably with unit owners' enjoyment of their units or their ability to exercise rights granted by the CCS.
6.68	Subject to the above, a developer should be able to exercise all voting rights associated with the units of which they are the registered owner.
Q.27	
6.69	See below
6.70	The current restriction on a developer's exercise of development rights, that they should not exercise rights in a way that would interfere unreasonably with unit owners' enjoyment of their units, is uncertain and so could lead to disputes. However, we appreciate that unreasonable interference is difficult to define other than by reference to specific examples and that restrictions are necessary. An obligation to not exercise development rights if the works for which the right was granted have been completed, will lead to developers requiring that the works are defined very widely at the outset (specifically, to include the addition of various additional parcels of land). Otherwise, developers will be dissatisfied by the scope of their right to add land at a later date. As to time constraints, developers would again want any constraints to be drawn widely. If an objective of reform is to make commonhold development available for large scale developments as well as small, then any time constraints on exercise of development rights will have to be measured in years (i.e. more than 36 months) rather than months.
Q.28	
6.71	We agree that legislation should include anti-avoidance provisions, to ensure a developer does not attempt to secure a greater degree of control by taking powers of attorney from purchasers or inserting terms into purchase contracts regarding the exercise of purchasers' voting rights. We consider that it may also be worthwhile to include an obligation on the part of the developer to dispose of any remaining units to the Commonhold Association in certain circumstances and after a prescribed period of time, to avoid the developer retaining units to exercise control over any part of the commonhold development other than pursuant to reserved development rights.
Q.29	
6.72	Broadly, we consider that the transitional period in the registration procedure for new commonhold developments introduces a degree of flexibility which should be advantageous to developers who might be considering the creation of new commonhold developments. This is conditional upon HM Land Registry being able to deal with the transitional period and the registration requirements effectively, and

	upon purchasers of Units understanding how the scheme should operate.
Chapter 7: The Commonhold Association	
Q.30	
7.67	As a representative body for property litigators, we do not have a firm view on whether any requirements of company law should be relaxed for commonhold associations. However, we understand that if the association is a non-trading entity, the requirements of company law relating to annual statements etc. are not particularly onerous.
Q.31	
7.68	We do not consider that there are particular difficulties in applying CVAs to commonhold associations. Company Voluntary Arrangements are in their nature very flexible, as the terms of the compromise between the Commonhold Association and its creditors can take whatever form is appropriate (so long as it does not unfairly prejudice any creditors).
7.69	For the same reason, we do not think that CVA procedure needs to be adapted to be more suitable to Commonholds. On the contrary, the regime is flexible as it is. What is more, creating a new bespoke form of CVA specific to Commonhold Associations might give rise to an unhelpful precedent for creating bespoke regimes for specific scenarios, when the wider regime can operate successfully as it is.
Q.32	
7.70	In principle, we consider that it would be helpful for the regime to provide for a commonhold administrator to be appointed over the affairs of a Commonhold Association if the CA falls into financial difficulties. This would be subject to the powers and responsibilities of the commonhold administrator being clearly defined, with its principal purpose to be the rescue of the CA. A clear distinction should be drawn, however, between the ordinary regime for petitioning for the winding-up of an insolvent company (which should not be diluted by new rules specific to commonholds) and any new and distinct regime for the appointment of a commonhold administrator. For example, revised legislation might require a creditor to apply for the appointment of a commonhold administrator before being permitted to petition for winding-up of a Commonhold Association (with the winding-up petition being filed no earlier than, say, 12 months after the appointment of the commonhold administrator). Alternatively, the companies court might be empowered to appoint *either* a liquidator or a commonhold administrator in the court's discretion, on the making of a winding-up petition in respect of a Commonhold Association.
7.71	It is unclear what "irretrievably insolvent" might mean in this case, or why it should only be in the power of the commonhold administrator to apply for the Commonhold Association to be wound up if, as a matter of fact, the association is "irretrievably insolvent" or has not been rescued by the commonhold administrator. We consider it would be more sensible for a moratorium to come into effect on the appointment of a commonhold administrator, for a period of (for example) 12 months, so that the Commonhold administrator has a period of time in which to rescue the company, failing which the commonhold administrator or another creditor of the Commonhold Association may petition for the association to be wound up.
Q.33	

7.72	We agree that there should be a presumption that on the winding-up of an insolvent Commonhold Association a successor association should usually be appointed.
7.73	There is clearly a risk of Commonhold Associations seeking to avoid their liabilities by appointing a liquidator (or allowing a liquidator to be appointed over the CA), before a successor association is appointed. This risk might be mitigated by authorising the court to refuse to allow a successor association to take over if the court considers that the insolvency was a deliberate attempt to avoid the CA's liabilities, but this would be very difficult to enforce in practice. However, the difficulties of directors seeking to avoid company liabilities by appointing an insolvency practitioner is not new or unique to commonholds, so this may be an acceptable risk that does not require further specific regulation.
7.74	For the reasons given above, we agree that the court should have a discretion as to whether to impose conditions for a successor association to be appointed.
7.75	If the question is one of conditions rather than of whether a court should (in its discretion) permit the appointment of a successor association at all, then: • The court might in certain circumstances require the payment of a deposit or other form of security in favour of a creditor of the commonhold association who is a creditor in respect of a liability that the previous CA had sought to avoid or failed to pay. • Generally, though, a successor Commonhold Association may find it difficult to obtain services from third parties if it is a successor to an insolvent Commonhold Association. Compulsory conditions on the appointment of a successor association may make it even more difficult for a successor association to successfully step into the shoes of an insolvent CA, which might mean that that property is no longer capable of being run as a viable commonhold.
Q.34	
7.76	In order to make commonholds more attractive to purchasers, we agree that a liquidator of a CA should not be able to demand further contributions from tue unit owners to reduce the level of indebtedness of the association.
7.77	As above, we agree.
Part V: The Commonhold Community **Chapter 8: The CCS**	
Q.35	
8.35	We agree that it should be possible for a CCS to impose restrictions on the short-term letting of units. Short-term lettings, empty residential properties and liability for the cost of shared areas can together be a major source of disputes between landlords and tenants and (by analogy) between unit owners and a Commonhold Association. It should therefore be in the power of the Commonhold Association by its members to impose such restrictions in their discretion.
8.36	We agree that such restrictions might include restrictions on lettings of 6 months or less (or even of less than 12 months), and should not apply to registered social landlords.
Q.36	
8.43	We agree that legislation should prevent the charging of event fees save for specific

	exceptions.
8.44	We understand that retirement living as an investment model relies heavily on particular kinds of event fees, and so we agree that those event fees might (subject to further legislation or regulation in that regard) be an exception to a general prohibition on charging event fees within commonhold developments. Care should be taken to ensure that the exception only applies to the retirement living element of a commonhold development if that development compromises more than one form of accommodation.
8.45	We have no suggestions in this regard
Q.37	
8.47	We do not have a view as to whether further restrictions should be placed on the inclusion of local rules in a CCS. In order to maintain flexibility in commonholds and encourage investment in them, we consider that CAs should have control over the rules that govern use of the Commonhold over which they are appointed.
Q.38	
8.68	We agree that different thresholds should apply to the amendment of different categories of local rule.
8.69	We consider that it would be reasonable to adopt a regime under which the equivalent of a Special Resolution has to be passed in order for specific categories of local rule to be amended by the CA. In this way, the votes of those who wish to engage in the process will be taken into account, with a relatively high threshold to meet. In order for the regime to be workable in practice, there would have to be a degree of standardisation. So, a higher threshold could be introduced which applies to certain categories of local rules (so some, but not all local rules). The CCS could, as the discretion of its authors and CA members, provide separately for *more* forms of local rule to have a higher threshold than that of an ordinary resolution. If a CCS is silent on a particular issue, the introduction of a new rule in that area should depend on meeting the higher Special Resolution threshold.
Q.39	
8.77	We agree that it should not be necessary to replicate the mandatory provisions of the CCS in the body of the CCS itself.
8.78	We agree that it would be reasonable to require the directors of the CA to provide an up to date copy of the mandatory provisions to all new unit owners and (no less than once a year) to provide updated copies to existing unit owners when the mandatory provisions change. This is on the assumption that the mandatory provisions will not be amended with particular frequency.
Q.40	
8.80	We agree that if commonhold developments can be separated into sections, specific rights and regulations for each different section should be capable of being documented in different schedule to the CCS.
Q.41	
8.83	We have no additional prescribed terms to propose for the draft CCS.

Chapter 9: Management and maintenance issues	
Q.42	
9.32	We agree that this simplified approach to appointment of directors of a CS at a general meeting and by co-opting by existing directors is a sensible proposal when compared to the existing "recommendation" procedure.
Q.43	
9.36	As a commonhold association would otherwise be at risk of striking off at Companies House, we agree that a member of the association should be able to apply to a court or tribunal for the appointment of a professional director to be paid by the association (with the fee being below a fixed threshold), in order to ensure commonhold associations are a credible and stable entity for controlling a commonhold development.
9.37	We agree that someone with an interest equivalent to a mortgage over a unit should have the same right as the unit owner.
9.38	In order to ensure applications are dealt with effectively and proportionately, we agree that the First Tier Tribunal should be empowered to deal with such applications.
Q.44	
9.51	Generally, we agree that there is a risk of a single investor or group of investors holding a majority of the units running a block (and/or the CA) in their own interests and to the detriment of other unit owners. However, this is not a risk associated with commonholds alone, and can arise in other situations, too, including within a company that has acquired a freehold on behalf of the tenants of a block under collective enfranchisement.
9.52	A "persistent failure to comply with the CCS" may, if properly defined, form the basis of an application to a court or tribunal to intervene. However, if the matter in question is a failure to comply with the CCS, then a "material breach" of the CCS rather than "persistent failure" should afford unit owners access to a similar intervention from a court or tribunal. We agree that the ability of the court or tribunal to appoint a director to ensure the CCS is complied with in certain respects (eg. carrying out of repair obligations) would protect the interests of minority unit owners and incentivise existing directors to meet their obligations under the CCS. We do not consider that it should be proportionate or necessary for the court or tribunal to continue to exercise supervision over the directors who were appointed, provided that minority unit owners are able to return to the court or tribunal for further remedies if necessary. If the mischief to be dealt with is the risk of minority unit holders being prejudiced by the conduct of the majority, then (whilst we understand it can have limited application in practice) a right equivalent to that of a minority shareholder who has been unfairly prejudiced might also assist the minority unit holders.
Q.45	
9.58	We have not received sufficient representations from our members to say whether proxy voting has been subject to abuse in other forms of leasehold-controlled

	companies.
9.59	We consider that a restriction on the number of proxy votes that an individual might hold (by reference to the total number of votes) might mitigate against, but not prevent altogether, the risk of abuse.
Q.46	
9.87	We agree that it would be practically convenient of the legislation deemed that the CA has an insurable interest in the parts of the building owned by the unit owners.
9.88	We agree with the proposed requirement for a CA to reinstate or rebuild the whole of a horizontally divided building in order to satisfy the indemnity principle, including parts owned by unit owners.
9.89	We are not aware of any
Q.47	
9.90	We agree that insurance information should be provided to all unit owners before they acquire a unit and whenever the terms change.
9.91	We agree with the proposal for an annual update and additional updates where reasonably required.
Q.48	
9.93	We do not have sufficient information about the insurance market to answer this question.
9.94	We agree that if it is generally available then details of minimum cover etc. for public liability insurance should be prescribed in regulations.
Q.49	
9.96	We agree that it would be prudent to include in the CCS a power to take out directors' and officers' insurance.
Q.50	
9.111	We agree with the extension of the repairing obligations in the CCS prescribed requirements to include "renewals" as well as "repairs"
9.112	We do not have sufficient representative views on this subject to be able to respond adequately to this question.
9.113	We agree that the CCS should be capable of including a higher state of repair than the prescribed minimum, at the discretion of the CA and its unit holders.
9.114	We agree that internal repairing obligations in relation to units in horizontally-divided buildings (eg. flats) should be governed by local rules, save (for the avoidance of doubt) for any internal repairs relating to structural parts.
9.115	We agree that repairing obligations in relation to units in vertically-divided buildings (eg. flats) should be governed by local rules.
Q.51	
9.128	We consider that a right of entry for (for example) insurance purposes or works to neighbouring land can be important to proper management of a commonhold (or leasehold) estate, so that a certain level of right of entry should be enshrined in

	prescribed rights in the CCS.
9.129	We do not think it should be necessary to make a distinction between different types of building, if a basic level right of entry is reserved to the CA.
9.130	See above
9.131	A basic right of entry should include at the least a right to enter in case of emergency to inspect and carry out structural works, or to carry out works to neighbouring property.
Q.52	
9.139	Subject to the words "incidental to" being construed narrowly, so that only a small category of works to common areas incidental to internal alterations may be permitted without an ordinary resolution, it is agreed.
9.140	We agree that such authority may be reasonably delegated to the CA's directors.
9.141	The proposed definition may be appropriate to form the basis of a rule about minor alterations to areas of the common parts, incidental to works to a unit. As well as the impact of a minor alteration on the structure etc. of the building, other criteria such as nuisance to other unit holders and the CA may be appropriate.
Q.53	
9.152	We have not received sufficient representative comments from our members to be able to respond to this question.
9.153	See above
Q.54	
9.154	We are concerned that the right of an Association to terminate pre-existing long-term contracts may dissuade third parties from contracting with CAs unless those third parties were assured of adequate compensation in return for the CA terminating the contract.
9.155	That risk may be mitigated if the types of contract which were made the subject of that right were long-term contracts which had been in effect for at least 12 months, so that the third party will have had the benefit of the contract for that minimum period of time.
9.156	We consider that 6 months may be too long a period of uncertainty for the 3rd party contractors, and this would be a disincentive for third parties entering into contracts with a CA. 3 months may be more appropriate.
Q.55	
9.157	We do not have sufficient representative comments from our members to be able to respond to this question.
Chapter 10: Financing the Commonhold	
Q.56	
10.35	We agree with this proposal. It introduces a further tier to commonhold decision making, but is probably justified because this is likely to be a controversial point for owners.

10.36	Yes, we agree with this proposal.
10.37	We agree. This is the most sensible default position.
10.38	N/A
Q.57	
10.41	Yes. However, we think that generally it is better to build in on-going flexibility to regulate commonhold affairs rather than being set out in local rules. Consequently, we want this restriction to exclude only cases which involve a significant hike in contributions and a significant uplift in facilities.
10.42	Yes. However, we think that generally it is better to build in on-going flexibility to regulate commonhold affairs rather than being set out in local rules. Consequently, we want this restriction to exclude only cases which involve a significant hike in contributions and a significant uplift in facilities.
10.43	We agree with this proposal.
10.44	Yes. This proposals promotes simplicity and certainty in the running of the commonhold. It would be worth specifying precisely what consequences might follow - whether any other forms of relief might be withheld from or made available to a disgruntled owner who is barred from challenging.
Q.58	
10.71	Yes. The reserve fund is a good idea and it needs to be made compulsory. If left non-compulsory, those running the association may never get round to it (due to the hassle factor in the planning, paperwork and banking), even though they recognise the sense of having such a fund.
10.72	Yes.
10.73	Agreed. The idea behind making the reserve fund compulsory is only to overcome the deterrent which comes from extra administrative tasks, which might discourage the smaller commonholds from getting round to it. It would not be practical to set a legal formula for contributions across all commonholds and each commonhold association should be left to set its own levels.
10.74	N/A
10.75	Yes. We support flexibility here.
10.76	Yes. We broadly support the owners being able to initiate votes on significant financial matters in this way.
10.77	Yes, we support the principle. However, we expect that the proposed rule about ‘claims relating to the specific purpose’ will be difficult to apply in many cases because of uncertainty in its scope unless the drafting is tightened up - but there are unlikely to be many cases where the rule is crucial (only where there is insolvency, and such a special reserve has been set up, and an eligible creditor appears).
10.78	Yes. It would be useful to be clear on precisely what the designated fund creditor gets on insolvency. If it is first call on the designated reserve fund, and without any abatement on insolvency, then this offers a security which gives a serious advantage over the other creditors who have no access to a designated reserve fund. That might create an incentive for any company supplying goods or services to insist on a designated reserve fund for the project. If that became a common tactic, it would lead to a significant disruption of the principle of equality in distribution to creditors on

	insolvency.
10.79	We agree with the proposal.
10.80	Yes, they should be permitted to 'borrow'. It is important not to cause cash flow problems for the commonhold when there are funds in hand that may have been unwisely earmarked. Safeguards are the difficult issue. To impose a requirement of approval by the owners in advance by resolution could make for delays which defeat the object of borrowing to assist a temporary cash flow problem. To allow after-the-event disavowal by the owners would defeat the principle that dealings should be secure. Perhaps the best option is simply to put it in the hands of the directors, and then leave their decision to be regulated by the normal legal rules about proper purposes when dealing with others' funds.
10.81	Yes.
Q.59	
10.96	Yes, for the reasons given in the consultation paper.
10.97	We recommend no limitations - maximum flexibility in these circumstances.
Q.60	
10.100	No. There are perfectly good reasons to have a power to alter the owners' aggregate contributions, as where unexpected repairs have to be carried out. But there is no compelling reason to have a general power to alter the owners' respective individual percentages. That would not be justified by the need for repairs, etc. It would arise simply because one or more owners think that others should pay more. It is a worrying invitation to play the politics of envy that could damage the running of the commonhold. An owner needs the absolute security of knowing that the others cannot unilaterally increase the proportion of his or her payment obligation. We discourage any attempt to allow rebalancing of the percentages, except in specific carve-outs. One of our members has personal experience of the contention caused by these percentages in a similar cooperative apartment scheme overseas: even though the percentages were, by law, fixed and unchangeable, owners regularly proposed that their least favourite neighbour should have to pay more on the basis that that owner was wealthier / had a larger floorspace / had upgraded the fixtures / used the faciltities more / had a nicer view / was closer to the road, etc. Under that regime, fortunately, they had to be rejected out of hand because of the fixed legal rule - but even that did not stop owners raising such proposals at association meetings. It would be unbearable if England adopted an approved system for indulging these wishes.
10.101	It is not clear what is being asked here. If question (1) is asking 'Do consultees think that the original allocation of percentages in the CCS should be capable of being challenged?" then our answer is No.
10.102	Yes, providing it is unalterable (except in the case of an owner buying a piece of the common property).
10.103	Floor space is satisfactory as a default even in these situations. Whatever rules exist for the percentages, the owners never gain equal benefit from their contributions. The link between percentages and anticipated benefits can only ever be rough and

	ready. Floor space is as good as any other criterion and has the advantage of being easily ascertainable. Furthermore, whatever method is used, any percentage contribution which is perceived to get disproportionately high or low in relation to the benefits, will be factored in to the market value of the unit.
Q.61	
10.118	Yes.
10.119	The proposals put forward in the Consultation Paper to mitigate these problems are appropriate.
10.120	No. Liability for contributions is a fact for participants in the commonhold and they are always frustrating whenever they occur. We appreciate that receiving a special contribution notice particularly when you first move in may be unattractive, but that is the reality of signing up to the commonhold. Notification before completion does not affect the issue. (And elsewhere the problem is counteracted by a practice of making inquiries with the commonhold management to ask what contributions have been set in train or are envisaged in the near future.)
10.121	Yes.
10.122	We do not have information on this.
10.123	The buyer and seller should have a right to go to court to compel the directors to do their duty by issuing the CUIC. But in the vast majority of cases this would be too little too late. The seller and buyer would not have the time or inclination. A damages action might be made available, although this is likely to be little solace to the disappointed buyer or seller. A criminal offence is unlikely to be appropriate here. There are models elsewhere that prevent dilatory officers from recovering any outstanding amounts. That would offer a possible solution to the commonhold association's neglect to provide the CUIC. But it may not translate very well into the commonhold environment - ultimately the money still has to come from somewhere, so all the owners as a whole would have to cover the loss in a future contribution, with the outcome that the owner of the unit in question loses a sale but is relieved from paying the full overdue contribution (and pays only the unit's percentage contribution to the future contribution which makes up the shortfall).
10.124	It should be conclusive in order to protect the buyer. There may be times when the buyer suspects an error, but in the interest of simplicity and certainty, these cases should not be the basis for creating exceptions that depend on the buyer's state of mind, because of the notorious practical difficulty of applying such tests.
10.125	In order to protect the buyer from an unplanned liability, there would have to be defences to correction of the CUIC based on estoppel-type circumstances - reliance by the buyer to his detriment on the CUIC. The causation issue would no doubt be a bone of contention between the buyer and the commonhold association.
	Chapter 11: Responding to emergencies
Q.62	
11.28	We do not know if lenders are likely to include a clause prohibiting securities over the common property without consent.

	If they do adopt that practice, then we expect that the practicalities of getting all the necessary consents in a sensible timeframe are likely to be insurmountable in a large commonhold scheme.
11.29	Because the absence of one individual lender's consent would affect the whole scheme, it would be justifiable to legislate (i) for the lender's deemed consent if no response within a certain timeframe after having been notified of the proposed charge, and (ii) that lender consent may only be withheld on reasonable grounds.
Q.63	
11.36	We agree with this proposal.
11.37	The requirement for Tribunal consent is a significant procedural hurdle. Bearing in mind that the proposed charge over common property will be given for value, and that the directors must act in the best interests of the commonhold, those principles should be sufficient to protect the interests of the owners and allowing practical flexibility. Rights in the common property might be given away by the proposed charge, but the commonhold association should receive in exchange some corresponding funds from the lender be applied towards the commonhold scheme.
Q.64	
11.40	Yes, this is a practical solution.
Chapter 12: The ban on residential leases – possible exceptions	
Q.65	
12.30	Ideally, it should be the Help To Buy scheme which flexes to adapt to the commonhold scheme, not vice versa. However, given the Law Commission's understanding of its parameters, there is not really any option but to adapt the commonhold scheme as the Law Commission indicates. The rule which adapts commonhold should be capable of being repealed by delegated powers so that it can be eliminated for the future when the Help to Buy ceases to be restricted to shared ownership lease structures.
Q.66	
12.44	Yes.
12.45	Yes. The Consultation Paper indicates that for new commonholds the provider will be the registered owner, and the shared owner will have the 'rights and responsibilities' of owner. The Consultation Paper goes on to look at how some specific examples of rights and responsibilities will be distributed between them. But it is clear that not all rights and responsibilities are divided up by the Consultation Paper - for example, the entitlement to the surplus when common property is sold or the commonhold terminated. It seems to be intended that the provider has all the rights and responsibilities of ownership, save those which are expressly transferred or delegated to the shared owner. If that is intended then it should be made explicit.
12.46	Yes.
12.47	Agreed.
Q.67	
12.49	No.

12.50	If there is to be compulsory conversion to commonhold, then it is an less intrusive to have a small compulsory adjustment in the relationship between a provider and a shared owner in the course of converting to commonhold. Particularly if the relationship between provider and shared owner is perceived as little more than a financing arrangement, then the provider's interest in certain limited voting rights should not be regarded as a fundamental objection.
12.51	Yes, that is the right approach if the shared owner is to be merely a leaseholder upon conversion.
Q.68	
12.58	We agree with the Law Commission's reasoning that the exception not needed.
Q.69	
12.67	We are not aware of other forms of leasehold that require accommodating within commonhold.
Q.70	
12.79	Yes.
Q.71	
12.84	Yes.
Q.72	
12.89	We do not have sufficient information to answer this question
Part VI: Enforcement and dispute resolution	
Chapter 13: Resolving disputes and the protection of minority interests within commonhold	
Q.73	
13.26	Yes. If this is expressed as a 'right' of the association, as the wording of the Consultation Paper appears to propose for the reformed law, then presumably it will have to require the owner who sues to make a similar notification to the association as under the current law. That will preserve a level of bureaucracy and it will also require a consideration of the legal effect (if any) where the owner fails to notify the association.
Q.74	
13.32	Yes.
Q.75	
13.52	Agreed.
13.53	Yes, we agree with the flexibility this brings.
Q.76	
13.56	Yes.
Q.77	
13.67	Yes. Much of the current procedure lends itself to a pre-action protocol, and embodying it in a pre-action protocol might have practical advantages (e.g. potentially easier to achieve regular amendment and updating of a PAP than issuing

	new Commonhold Regulations).
Q.78	
13.76	Yes.
Q.79	
13.82	The proposed indemnity should not be in the prescribed CCS. It would involve too much opportunity for abuse by a commonhold association using it in a heavy-handed manner.
Q.80	
13.90-91	We do not support the proposal to introduce a general power to alter the percentage contributions. But if that proposal goes ahead, we think that the right to challenge it should be confirmed.
Q.81	
13.95	Taking each in turn: (1) This factor does not look to the merits of the dispute, so we do not support the idea of having it enshrined in legislation. (2) We recommend that the tribunal should take account of the likely adverse impact on the owner who challenges. But we do not support having a particular set threshold. The problem with a set threshold is that it would have to apply across the vast range of commonhold owners: it would have to accommodate residential and commercial owners, it would have to accommodate millionaire owners and owners already struggling to make ends meet in an affordable unit. To accommodate this range would require a threshold that was so flexible as to be meaningless. The better approach is simply to have the degree of impact as a factor. (3) We are not convinced that 'the reason' for the decision is the best way of going about this. Instead we propose that the tribunal should take account of (i) any expressed objectives which the association used to support its resolution, and (ii) the positive impacts on the unit owners, including the owner who challenges, that are likely to result from the association's resolution.
13.96	Yes.
Q.82	
13.98	Yes.
Chapter 14: Enforcement	
Q.83	
14.31	Enhanced powers would appear to be appropriate re non financial breaches in order to determine disputes and minimise costs of ADR or court proceedings. However, it is difficult to identify what additional steps are appropriate in advance of launching legal proceedings in addition to the prescribed dispute resolution procedure described in chapter 13. The Law Commission will need to consider carefully possible options in terms of what those enhanced powers should be to ensure balancing the interests of both the Commonhold Association and the unit holder.
Q.84	

14.44	We agree with this proposal.
Q.85	
14.59 -60	We agree with this proposal. We can see why this proposal is made in order to avoid competing interests with lenders. In order for this to work, lenders will need to be satisfied that their interests are adequately protected otherwise there is a risk that they will not lend competitively on commonhold units.
Q.86	
14.61- 68	Firstly, we agree that a pre-action protocol will need to be applied and complied with by the Commonhold Association. Paragraph 40.58 makes sensible proposals as to the relevant steps to be contained in such a protocol. We also agree that prior to enforcing a charge to sell the unit it will be necessary to apply to the Court for an order for sale. In terms of the relevant thresholds, one option is for it to be based on a percentage of the value of the freehold unit by reference to market value. As to the other proposals, we agree with the proposal to appoint a receiver and those proposals relating to distribution. Finally, we do have some reservations about the suggestion that tenancies granted out of the unit should continue post-sale. This could cause difficulties if a buyer requires vacant possession and restrict marketability of the unit.
Part VII: Termination of a commonhold	
Chapter 15: Voluntary Termination of Commonholds	
Q.87	
15.88-89	We agree to the proposal as to the degree of support that should be required for a voluntary termination.
15.90-91	As to the proposal relating to relevant factors set out in paragraph 15.52, these appear sensible.
15.92	We also agree that applications for voluntary termination should be heard by the County Court.
Q.88	
15.93	We agree with these proposals.
15.94	We agree with these proposals.
15.95	We agree with these proposals.
Q.89	
15.96	We agree with these proposals.
15.97	We agree with these proposals.
Q.90	
15.101-102	We agree, that in respect of negative equity, any shortfall to the lender must be personally met by the unit owner and not be covered by neighbouring unit owners in the commonhold.

15.103-104	We agree, that in respect of negative equity, any shortfall to the lender must be personally met by the unit owner and not be covered by neighbouring unit owners in the commonhold.
Q.91	
15.117	We agree that it should not be a requirement for the CCS to specify the share but that it should be possible for those unit holders that wish to do so to state the share. We likewise agree that as per the general preference in the Consultation Paper for disputes within commonhold to be decided by a Tribunal, an application to disapply a provision in the CCS should be determined by the Tribunal. Given that the courts/tribunals have not had to determine such applications, it could be sensible to provide the requisite guidance regarding exercising with such discretion.
15.118-123	We agree with the remaining proposals provided.
Q.92	
15.126-127	We agree with the proposal.
Part VIII: Impact and application of reform	
Chapter 16: The impact and application of commonhold reform in England and Wales	
Q.93	
16.6	The Government is seeking to re-invigorate commonhold. These proposals are aimed at achieving this to increase the number of commonhold buildings. We consider this in turn will improve the position for those existing commonholds and seek to address the difficulties cited in paragraph 16.5.
Q.94	
16.9	Please refer to our earlier response to the Call for Evidence.
Q.95	
16.12 - 15	We do not have sufficient representative comments from our members to be able to respond to this question in detail save that in general terms considerable time is spent reviewing and considering the terms of the specific leases when dealing with such disputes.
Q.96	
16.18	Significant costs arise where there are inconsistencies between the terms of the various leases in the same building/development. We acknowledge that the proposals will reduce the scope for these particular costs to be incurred.
Q.97	
16.20 -22	We do not have sufficient representative information on this subject to be able to adequately respond to this question.
Q.98	
16.26	We do not have sufficient representative information on this subject to be able to adequately respond to this question.
Q.99	

16.29	We do not have sufficient representative information on this subject to be able to adequately respond to this question.
Q.100	
16.32	In our experience, costs incurred in tribunals are generally less expensive than cases heard before the court. It is difficult to say at this stage whether there is less scope for dispute under a commonhold regime than compared with leasehold.
Q.101	
16.34	We consider that this will increase the number of applications made to the Tribunal.
Q.102	
16.35	We do not have sufficient representative comments from our members to be able to respond to this question.
Q.103	
16.38	We do not have sufficient representative information on this subject to be able to adequately respond to this question.
Q.104	
16.41	We do not have sufficient representative information on this subject to be able to adequately respond to this question.
Q.105	
16.43	We do not have sufficient representative comments from our members on this subject to be able to adequately respond to this question
Q.106	
14.48-49	Currently, we consider that the uptake of commonhold has been limited due to the lack of understanding and potential difficulties in obtaining funding as well as the challenges with marketing commonhold as opposed to leasehold which is well recognised and understood.
Q.107	
16.51	We do not consider issues should be treated differently as between England and Wales.

Property Litigation Association

9 March 2019