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# The Past, Present and Future of Commonhold



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# The Past, Present and Future of Commonhold

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In the Queen’s Speech which took place in May 2021, the UK Government announced a commitment to “help more people to own their own home whilst enhancing the rights of those who rent.”<sup>1</sup> As a result of this focus, commonhold has come under the scope as an alternative to leasehold. This little thought-of method of ownership has seen extremely low numbers of take-up since its introduction in 2002, but now a Law Commission report wants to reform it and suggests a wide range of measures to do so. For this eBook, we asked three experts from the fields of property law and residential leasehold management for their opinions on the Government’s recommendations and what’s to come next for commonhold.

<sup>1</sup> Gov.uk, [“Queen’s Speech 2021”](#) (accessed 9 July 2021)

*DISCLAIMER: This ebook is intended for information only and does not constitute legal advice. If you have any questions related to issues in this ebook, we strongly advise contacting a legal professional.*

# The Past, Present and Future of Commonhold

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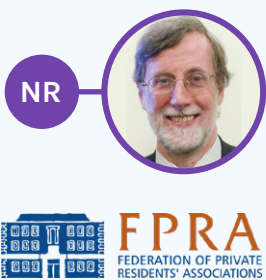
## Contributors



**Nigel Glen** has an extensive international career in downstream oil, financial software and investment banking. He founded a property management company in 2009 and joined the board of ARMA in 2015. In 2016 he was appointed as ARMA's CEO. Nigel represents ARMA in its interactions with Government Ministries, Parliament, relevant bodies, TV and press. He is a frequent contributor of articles and presentations on all aspects of leasehold.



**Roger Hardwick** is a Partner in the Enfranchisement and Residential Leasehold Department at Brethertons Solicitors. Roger has over 14 years' experience in residential leasehold law and is recognised as one of the UK's leading experts in this field. Roger has played a key role in the development of leasehold case law and legislation. Acting for both landlords and leaseholders, Roger understands the motivations of both parties and his in-depth knowledge of the relevant legislation and case law enables him to build a robust strategy to advance and protect his clients' best interests.



**Nick Roberts** practised as a solicitor for 20 years, then lectured in property law at Oxford Brookes University, and was an associate professor at the University of Reading. Most recently, he spent two years as a lawyer with the Law Commission. His PhD (Southampton, 2008) explored the differences between commonhold, and leasehold tenure, when the freehold is owned by a Residents' Management Company. He has written numerous articles on commonhold and landlord and tenant law. Since 1999 he has been Legal Adviser to the Federation of Private Residents' Association Ltd, answering members' queries and leading FPRA's responses to several consultations.

*The views expressed do not necessarily represent the view of the organisation that the speaker works for.*

## The history of commonhold

First proposed as an idea in 1987 by [The Aldridge Report](#), commonhold was introduced into English and Welsh law as an alternative to leasehold in 2004 via the [Commonhold and Leasehold Reform Act 2002](#). Its primary purpose was to enable the freehold ownership of flats, though it can also be applied in a commercial context, such as to individually-owned offices in an office block.

Under commonhold, each resident owns their own flat, or ‘freehold unit’ in a building, with all freeholders in the building being jointly responsible for the management of the shared parts, such as corridors, lifts, stairs and entry hallways.

Unit owners form a Commonhold Association (CA), a private limited company in which each unit owner automatically becomes a member. Each member gets a vote on how the building is run. The association decides rules for the building and how it is to be managed, commonly by appointing managing agents and contractors. In a document called the “commonhold community statement” (CCS), the rights and obligations of the association and unit owners are set out.

However, commonhold has not taken off in the UK. Fewer than 20 commonhold developments have been created since the legislation was introduced<sup>2</sup>, and the vast majority of flats in England and Wales continue to be owned on a leasehold basis.

<sup>2</sup> Law Commission, [“Commonhold”](#) (accessed 11 May 2021)



## Commonhold around the world

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### In Australia

Similar ideas to commonhold exist around the world and have enjoyed much greater levels of uptake, most notably in Australia via the strata title system. Strata title was introduced in New South Wales in the 1960s as a result of an explosion in post-war apartment buildings to address housing shortages. It was quickly accepted due to there being no workable alternative system for outright apartment ownership. The other Australian states eventually adopted their own strata schemes, and as of 2020, [9% of the Australian population](#) lived in strata apartments.

### In the United States

In the United States, commonhold residences are known as condominiums and have become one of the most popular ways to purchase apartments. Like in Australia, they arose from a need to address a housing shortage combined with high land costs. Prior to the introduction of condominiums, apartments could only be purchased in the United States through a cooperative structure. In this structure, a company owns the whole building, including its apartments and common areas. Individuals are granted the lease for their apartment and become stakeholders in the company.

Legislation for condominium ownership was first introduced in 1958 in Puerto Rico. By 1966, all 50 states had adopted their own legislation. Due to a preference for outright ownership and their affordability compared to other property types, condominiums are now commonly found across the United States, though cooperatives remain prevalent in areas with high costs of living, such as New York City.

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## Developments in the UK

Consultation by the Law Commission in 2016 identified commonhold as one of the areas of the law the public would like to see reformed as part of the Commission's Thirteenth Programme of Law Reform. The first stage of this project, a call for evidence from existing commonhold unit owners, those who manage commonholds, developers and other property professionals, was published in February 2018. The survey asked these groups for their experience of commonhold and what shortcomings in the law could be making it unattractive to homeowners and the property industry.

### Identified shortcomings of commonhold

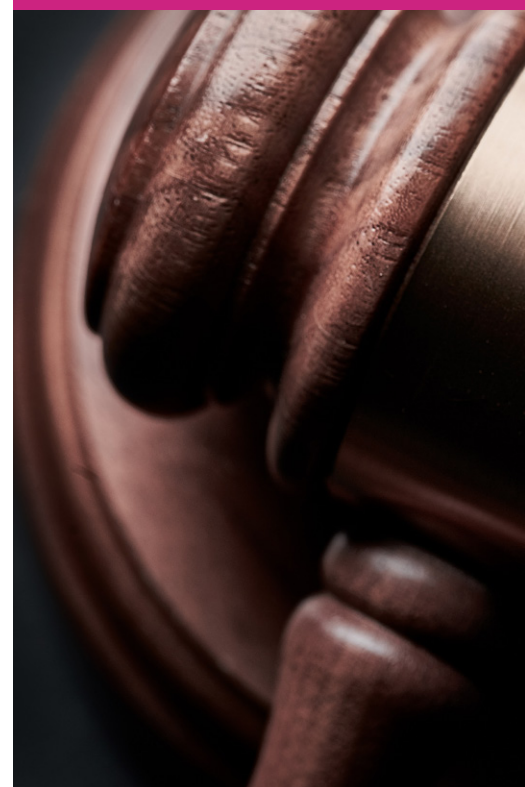
Stakeholders highlighted the difficulty in converting a property to commonhold because current law requires consent to be sought from everyone with a significant interest in the property, including all leaseholders, the freeholder and the lender, which would be difficult for larger developments. Homeowners identified a lack of control over commonhold costs and a lack of certainty and protection. Developers argued that commonhold was not sufficiently flexible to cater to larger and mixed-use developments. They also observed an inability to incorporate shared ownership leases within the commonhold system. Mortgage lenders said there was a lack of certainty over their security in the event that the commonhold was terminated and the commonhold association was to become insolvent.



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## Law Commission response

The Law Commission released a consultation paper with provisional reform proposals in response to these issues in December 2019. In July 2020, it published a report presenting the public's responses to these proposals plus 121 recommendations addressing areas such as conversion to commonhold, new commonhold developments, the commonhold community statement, management and finance, dispute resolution, and insolvency and termination.



## Commonhold Council

On 13 May 2021, in light of the report, the Government formed a Commonhold Council for the purpose of advising on the implementation of a reformed commonhold regime and bringing forward solutions to prepare homeowners and the market for the take up of commonhold.

## Proposed changes to commonhold

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The Law Commission's entire list of proposals is too vast to include here, but in a summary of the report, they have listed key recommendations for increasing uptake. These are:

### Conversion to commonhold

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The removal of the requirement for conversion to commonhold to require the unanimous agreement of leaseholders and others with particular interests in the building.

A simpler, more cost-effective procedure for converting to commonhold, which puts leaseholders in the driving seat and prevents tactical delays by those opposed to the conversion.

### New commonhold developments

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New commonholds should be able to be tailored to suit individual needs of developers by using "sections". Commonholds should have the option of being built in phases so better to respond to changing needs as the building progresses.

### Shared ownership

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Shared ownership leases and home purchase plans should be accommodated by commonhold to ensure as many people as possible can buy in a commonhold development.

### Financing

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There should be a robust regime for financing commonhold which provides owners with a greater say on setting the commonhold's costs and enhanced powers to take action against those who fail to pay their share.

### Repairs

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Every commonhold should maintain a fund towards future repairs, allowing the cost of major works to be budgeted for over the years, reducing the risk of large and unexpected bills. If emergencies arise, unit owners should be provided with easier ways of raising finance to undertake essential works.



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## Commonhold community statement (CCS)

The content and layout of the commonhold community statement, the rulebook for the commonhold, should be reformed to make it easier for owners to understand their rights and obligations within the building. It should be more difficult for the rules of the building to be changed, to protect the expectations of buyers.

When a change is made to the CCS that particularly affects one of the owners, he or she should be able to apply to the Tribunal under a new regime of protection for the minority. Where owners or the association fail to comply with the rulebook, recommendations should be resolved quickly and informally, through a bespoke dispute resolution process.

Lenders should be provided with greater certainty that their interests will be protected in the event of a commonhold association's insolvency, or the termination of a commonhold at the end of a building's useful life.



## The future of commonhold

*Do you think the Government's proposed changes to commonhold will help increase its uptake?*

NG

**Nigel Glen:**

I can't see any problems that leasehold has which could only be resolved through commonhold rather than leasehold reform, with the possible exceptions of what to do with end-of-life buildings and overall building improvements that service charges cannot currently cover. The Law Commission was specifically given the brief to improve commonhold. I like the Law Commission's reports, they're always very heavy, and they talk to real people and look in-depth at the issues they investigate.

Use of commonhold in Canada and Australia identified a problem with zombie apartments, in which commonhold owners living overseas did not pay their service charges, causing blocks to fall into disrepair. We told the Law Commission of this problem, and they added recommendations for handling forfeiture to their report. I'm not sure if the Commission's recommendations will increase uptake per se compared with other measures such as abolishing ground rent.



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RH

## Roger Hardwick:

I would be very surprised if the proposed changes did not result in some increase in the uptake of commonhold; however, I am less convinced that the changes will be sufficient, on their own, to “reinvigorate” commonhold to the extent required.

The biggest draw for residential flat owners is that commonhold is currently the only viable way in which a flat owner can own the freehold of their flat. In the absence of a commonhold structure, a freehold flat becomes what is known as a “flying freehold”, which is effectively unsaleable, as there are legal complications associated with managing communal areas and the contributions towards the maintenance of those areas, as well as buildings insurance. Where certain conditions are satisfied, leaseholders can collectively compel their freeholder to sell them the freehold of their block, usually through the vehicle of a company, in which they are a shareholder or member; however, they remain the leaseholder of their flat.

Although many of the proposals are sensible, only one is likely to have a significant impact on uptake: removing the requirement for unanimous consent for conversion to commonhold.

It seems unlikely that the proposals will have a significant role to play in encouraging developers to adopt commonhold; some may even hinder mass uptake. Lenders will need to be brought on board, and there may be areas of concern for them; in particular, the enforcement powers of Commonhold Associations (to apply for an order for sale, with the proceeds of sale being used to pay any arrears in priority to any mortgage) and the possibility of arrears attaching to the unit, including those incurred by previous owners.

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NR

## Nick Roberts:

I think that the Government's changes to Commonhold will increase its uptake because the Law Commission's proposals address some of the main objections to commonhold, such as the inability to structure the commonhold contributions by "schedules" of expenditure. But I suspect that the uptake will be lower than the Government hopes. Any uptake will need to be dependent upon the mortgage lenders coming on board and dropping some of their ill-conceived objections to commonhold. They give the impression that they want the improvements to their position that Commonhold may bring (e.g. less chance of seriously defective documentation) without being willing to make any concessions as a quid pro quo.

This means accepting that if commonhold is to be successful, commonhold associations need to remain solvent, which will involve the commonhold association always taking priority over mortgage lenders if there has to be an order for sale of a commonhold in the event that an owner falls substantially into arrears with their contributions.



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*What changes should be made to commonhold to make it work?*

NG

**Nigel Glen:**

There are two aspects of housing to consider: new stock and legacy stock. For new housing, leasehold is attractive to developers because of the continual profits they can make from charging ground rent. Abolishing ground rent will disincentivize this, though it could open the way up for shadier landlords to make money through more nefarious means like late fees.

For legacy housing, commonhold will require making current leaseholders want to take up commonhold. I can't see any problems that leasehold has which could only be resolved through commonhold rather than leasehold reform.



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RH

## Roger Hardwick:

One method of ensuring the speedy uptake of commonhold would be to make commonhold compulsory for all new developments comprising flats or any other units, which contribute towards the cost of maintaining shared facilities. A “softer” alternative would be to offer financial incentives to developers, e.g. in the form of tax relief.

When it comes to the Commonhold Association, the power for the members to reject a proposed budget could be problematic in practice. What are the directors to do if the members will not agree to any budget? The current proposal is to retain the previous year’s budget, but that may not work if different or exceptional expenditure is required.

It is also unclear what might happen if a unit holder successfully challenges the reasonableness of their contribution towards a shared cost in such a way that results in the aggregate of the proportions adding up to less than 100%.

Another concern is what might happen if the Commonhold Association becomes insolvent because there is no landlord able to ‘step in’. The Law Commission has attempted to deal with this by suggesting provisions for the appointment of a successor association. However, further thought should be given to the steps that might be taken to ensure that the unit holders in a commonhold arrangement are never put in a position where there is nobody to insure, maintain or manage their development.

One option may be a Government-backed insurance scheme to cover any irrecoverable expenditure; another may be a right or power for any interested party to apply to the First-tier Tribunal (FTT) to swiftly appoint a manager to take control of a development on an interim basis before a successor association is appointed (this could be done by a simple amendment to Part II of the Landlord and Tenant Act 1987).

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NR

## Nick Roberts:

I have an underlying fear that England and Wales “missed the boat” in not getting commonhold up and running in the 1980s. In a sense, commonhold (like strata title) best addresses a scenario that arises much less often now. When it was proposed in 1987, it was assumed that the typical flat development would comprise a predetermined number of units that were probably all the same, probably all in one building, and with few or no commercial units. It was also implicitly assumed that most, if not all, of the units would be owner-occupied. (It is sometimes forgotten that until the Housing Act 1988 introduced Assured Shorthold Tenancies, no one would buy a flat as an investment, except as a home for their retirement or as a property to keep whilst working abroad).

It was assumed that all owners would be willing to take responsibility for the management of their block (even if they delegated day-to-day matters to managing agents). None of these assumptions holds good today. I have noticed that it is becoming increasingly difficult to get leaseholders to become directors of Residential Management Companies (RMCs), especially post-Grenfell.

I do not think the proposals for complex commonholds will work in practice. Unit owners will certainly not wish to become directors of commonholds if they will also have to take ultimate responsibility for the decisions of section committees. The interests of commercial and residential occupiers are difficult to balance. It will be made more difficult by making inexperienced and probably reluctant amateurs ultimately responsible for the management of complex multi-use estates.

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*What's your outlook for commonhold in the long term and short term – the next five years and beyond?*

NG

**Nigel Glen:**

I struggle to imagine there will be a huge take-up of commonhold. If you're a leaseholder and you're unhappy with your current landlord or managing agent, you can enfranchise and gain the right to manage (RTM). If you have formed an RTM company or RMC, there is little reason to convert to commonhold as you are already in control of how the building operates. For some buildings and leaseholders, there will be financial value in extending the lease beyond 125 years, but this won't apply to all—some residents may only want to live in their building for a few years before moving on.

Some argue that commonhold will result in lower service charges, but our data from 240,000 flats does not support this. It shows that the difference in service charge between a third-party landlord and an RMC or RTM is almost exactly the same.

The ownership structure of a building, whether it's commonhold, leasehold or an RMC, is unlikely to affect how a building ages and thus service charge levels.





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RH

## Roger Hardwick:

In five years' time, I would expect new legislation on commonhold to have been introduced, but only recently. It will be too early to tell whether the changes to commonhold will be a success at that stage.

If the proposals are implemented in their current form, I would expect commonhold to take on more quickly than it did following the Commonhold and Leasehold Reform Act 2002, but the uptake would still be gradual. I would be surprised if more than 10% of residential properties were within a commonhold scheme in 10 years' time.

NR

## Nick Roberts:

I suspect that the take-up will be very slow and may slow further if early experience shows up some of the problems inherent in commonhold. I suspect that if pressure is put upon developers to use commonhold even for larger developments, they will adopt it on the basis that (a) each single building is its own commonhold; and (b) multiple uses within the same building are avoided, or at least kept to a minimum. "Estate-wide" charges will then be levied via an estate rent charge. By then, there will be legislation in force to ensure that rent charges can be reviewed for reasonableness, so the overall outcome will be reasonably satisfactory. The current commonhold proposals—or even the Commonhold and Leasehold Reform Act 2002—would allow for this. It is a shame that the Law Commission proposals do not recognise that this is a more practicable way forward than having commonhold associations with an unwieldy and complex internal management structure.

The proposals make the assumption that multi-tiered strata title schemes are the norm for complex developments in Australia. Whilst the legal structures are available, in practice, developers instead use a Building Management Statement (or Strata Management Statement) to entrench commercial interests. Lawyers specialising in the field boast that they can set up schemes that preserve valuable, saleable managing rights.

It's beginning to sound a lot like leasehold...

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## How will an increase in the usage of commonhold affect leaseholders?

RH

### Roger Hardwick:

If, or as, the number of commonhold developments increases to the point where it is a viable form of alternative structure, accepted by most lenders and buyers, it could result in leasehold property being viewed less favourably.

A commonhold unit holder will not pay ground rent (although, very soon, ground rent will not be payable in new leases) and will not have to worry about a diminishing term. Even a 999-year lease will be viewed less favourably than a freehold flat. The result may be a reduction in the value and saleability of leasehold properties. However, that is unlikely to happen overnight.

NR

### Nick Roberts:

In theory, if the use of commonhold took off substantially, then it would be likely to make leasehold less attractive to purchasers. That would, in turn, increase the pressure to facilitate conversion from leasehold to commonhold when there isn't unanimity. I think the latest proposals for conversion are exceedingly complex, so their take-up will be very low. In saying this, I can't suggest any way in which they could be simplified whilst still maintaining fairness to all concerned.

It is also possible that the experience of early commonholds will show that they are not all that they are cracked up to be, and purchasers will see more advantage in leasehold, provided that there is a genuine, leaseholder-controlled management company.

Too many ill-informed advocates of commonhold are arguing for mutually contradictory aims: a simple scheme which will also cover complex developments; standardised documentation, but also flexibility; associations which will remain solvent, without the possibility of owners ever being forced to sell up. The list could go on.

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## *How will an increase in the usage of commonhold affect managing agents?*

NG

**Nigel Glen:**

I think it will lead to managing agents having more business because it will cause a shift from professional landlords managing blocks to former leaseholders who may require more help. Professional landlords will have greater knowledge of the law than non-professionals. We think it should be mandatory for directors of management boards to have a few hours' basic education in the area so they can understand the structure of what they are managing.

In leasehold, ARMA has seen its membership grow from managing 700,000 units to 1.5 million, proving there is an appetite for management agencies. Running commonhold and leasehold on either side of each other could be complicated for managing agents because it will require two different administration systems.

If commonhold is to be run as intended, each block of an estate should have a say in how it is run, meaning each should have a separate management board. There should also be separate boards for the common areas plus other features such as car parks. This provides a lot for a managing agent to deal with. The alternative solution, forming a Residents Management Company to manage the entire estate, would make commonhold too similar to leasehold.

With greater take-up of commonhold, managing agents will inevitably be drawn into court cases to establish case law and what the boundaries between leasehold and commonhold are.

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## Conclusion

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From speaking with our experts, it's clear that commonhold has a long way to go before it reaches mass acceptance. Although the proposals offered by the Law Commission do go some way towards finding solutions for the issues that have slowed commonhold uptake, the panel agreed that more thought would be required on how to attract and keep leaseholders, developers and lenders on board.

The Government's stated commitment towards helping more people to own their own homes suggests that they will continue to work on this project and listen to the voices of the industry. Whether this will lead eventually to commonhold becoming more viable is questionable, and it seems that for now at least, leasehold will remain the main method of flat ownership in the United Kingdom. The next step for commonhold is for the Commonhold Council to advise the Government on how to implement commonhold, though it is not certain when we will see results from this.



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