Department for Communities and Local Government
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BY EMAIL ONLY

Dear Sirs

Protecting consumers in the letting and managing agent market - Call for Evidence

LEASE supports the Government's vision to grow home ownership and increase transparency and fairness for leaseholders. Through our work we also encourage best practice and improvements in the management of residential leasehold property.

We welcome the opportunity to respond to the questions posed in this call for evidence. As the leading source of independent leasehold advice to leaseholders in England and Wales, providing that advice across both the public and private sectors, we are well placed to comment; and keen to help DCLG and consumers to achieve better outcomes for leaseholders as regards the management of their properties.

We hope that these comments prove helpful.

1. The Case for Change

Q1.1 Do you agree with analysis of the problems in the market set out in this chapter? What regulatory measures could better empower leaseholders to manage the quality and cost of the services they receive?
Yes, the chapter has already highlighted the results of the research we undertook in 2016. We would add that queries about management rose, as a proportion of the enquiries we addressed annually, from 6% to 13% in the period 2013-17. Hence, as has been the case for a considerable period, the lack of confidence in leasehold management needs to be addressed.

Leaving aside the need for regulation, led by an independent Regulator, we have two suggestions which could be applied collectively or individually:

1. The compulsory requirement for managing agents to undertake engagement with their leaseholders would make great strides in helping leaseholders manage the quality and cost of the services they receive. We worked with the Tenant Participation Advisory Service to produce a 'Leasehold Engagement Guide' and feel that so many of its fundamental steps would assist leaseholders, and those who manage their properties too.

2. A compulsory report on the state of repair of a building, with a compulsory update every three years and covering the projected maintenance, repair and replacement costs for the building over a 30 year time span. It should be undertaken initially by the developer and renewed thereafter by whoever is the relevant landlord.

Q1.2 Is a new regulatory approach required for property management agents? If not, why not?

Yes, we respect that self-regulation has been tried. However, change is needed and quickly. LEASE has supported regulation throughout our existence. Indeed, in 2002, and in response to the then Government's consultation 'Improving the standard of residential leasehold management', we said:

"From research, elsewhere (France and Australia) it is clear that a licensing system is fully achievable, acceptable by the industry and effective in regulation of standards. It is clear that this is the ideal, which should be pursued."

Q1.3 Aside from regulation, are there any alternative means the Government should consider for driving up standards and professionalism in the sector?

A single Code of Practice that consolidates the RICS, ARHM and ARCO Codes of Practice. The landscape of good practices needs to be simplified for leaseholders.

Q1.4 What should be the scope and objectives of any regulation? In particular:

i. Which agents and individuals working within managing agents should be covered? Should individuals, companies and officers be treated differently?

ii. What types of services should be included? And should any types of companies or services be excluded?

iii. Should any other classes of people or property professionals be covered by any regulator?

Before addressing the specific questions about the scope and objectives of any regulation, we think it important that we address the key functions of the Regulator that we see as the way forward. We see the regulator as having two key functions:

1. Deciding whether an individual or organisation is eligible to become, or to continue to operate in residential leasehold management; and

2. Consideration of the investigation of complaints about licenced individual and organisations and enforcement action, if deemed necessary.

It should undertake these functions whilst at all times observing five principles (as set out by the Better Regulation Task Force in December 1997 and revised in October 2000):

1. Proportionality: Intervening only when necessary and appropriate to the risk posed, with costs being identified and minimised.

2. Accountability: Justifying decisions and subject to public scrutiny.

3. Consistency: Rules and standards must be joined up and implemented fairly.

4. Transparency: Being open and keeping regulations simple and user friendly.

5. Targeted: Focused on the issue and minimising any side-effects.

Turing to the particular questions posed, we believe:

i. Regulation should be under the supervision of a Regulator with the key functions identified above. To that end, licensing should be as follows:

   a. Corporate licence for the business , with the managing director (or whomever has day to day responsibility for the property management business) holding an advanced qualification (see 2.2 below); and

   b. Licensing for individual property managers.

ii. We would expect the arrangement of these services to be included:

   a. collecting or holding service charges or other amounts levied by, or due to, the freeholder

   b. exercising delegated powers and duties of a freeholder, including

      (i) making payments to third parties on behalf of the freeholder,

      (ii) negotiating or entering into contracts on behalf of the freeholder, or

      (iii) supervising employees or contractors hired or engaged by the freeholder

c. Repairs
d. Maintenance
e. Improvement
f. Insurance
g. any other aspect of the management of residential premises.

iii. We would exempt from compulsory licensing leaseholders who manage their own premises where it consist of four or fewer flats. However, whilst we are inclined to suggata that a building with five or more flats should only be managed by a licenced manager, we are concerned that there will not be economies of scale and so leaseholders suffer from full cost recovery.

3. Entry Requirements

Q2.1 Is there a need for minimum entry requirements for managing agents, similarly to the commitment to introduce such requirements for letting agents? If so, what should these requirements include – a fit and proper person test and/ or qualifications or training? Are there any risks, for example that this might stifle innovation?

Yes. We suggest these minimum entry requirements for licensing :

a. All individuals must satisfy an English language proficiency requirement.

b. A 'fit and proper' person test, to ensure an applicant has no relevant convictions against them and/or that they have not been disciplined by a professional body in a manner that should disqualify them from being licenced; and

c. Training completed by the applicant as part of the application that is suitable for licensing purposes.

Q2.2 If qualifications or training are required, what should they cover? What qualifications or courses already exist and are they necessary and sufficient?

Qualifications or training should cover the following:

1. Fundamentals of Leasehold Law
2. Leasehold Management Law
3. Professional Ethics
4. Leasehold Management Contract
5. Law of Agency
6. Negotiations and Alternative Dispute Resolution
7. RMC Meetings and Communications
8. Building Design and Construction
9. Controls, Maintenance, and Energy Conservation
10. Insurance and Risk Management
11. Security, Environmental Protection, and Hazardous Materials
12. Introduction to Accounting and Financial Statements
13. Budgeting: The Operational Budget
14. Budgeting: The Sinking/Reserve Fund

15. Purchasing

The IRPM, ARMA and NLG have most of these subjects in their published course range. Given additional capacity, LEASE could fill gaps in provision.

Q2.3 Should any qualifications and training requirements differ depending on role and service offered? (E.g. different requirements for company officers or differing requirements for repairs compared to contract negotiations?)

Yes, a person who has day to day corporate responsibility for a property management business should have undertaken the following training successfully:

1. The Leasehold Management Industry
2. Mandatory Requirements (as at para 2.2)
3. Licensee Standards
4. Technology and The Leasehold Management Business
5. Business Strategy
6. Introduction to Accounting and Financial Statements
7. Financial Statements and the Accountant's Report
8. Budgeting and Payroll Accounting
9. Taxation
10. Communication
11. Risk Management and business

Q2.4 What are the core elements that should be covered in setting appropriate standards for letting agents and for property managing agents?

We limit our comments to the core elements for property managing agents:

1. Customer care and a focus on the consumer
2. Diversity
3. The condition of premises and asset management
4. Service charges
5. Procurement

Q2.5 Do Codes of Practice have a role in any future regulatory approach?

Yes, in the absence of a single Code or something akin to a professional standards manual. But where there is repetition in terms of subject, the highest standards should be used.

Q2.6 Could Codes of Practice (or any other reforms) have a role in addressing service charge abuses? Could and should they be used to tackle conflicts of interest which might arise, perhaps from connected companies?

Potentially, yes, they could be the basis for 'Key Lines of Enquiry' that a regulator could use in assessing the conduct of a managing agent.

They could be used to assist property managers to avoid conflicts of interest through publishing helpful scenarios. This would aid property managers to understand where there is or isn't a conflict of interest; assess their current or future actions when providing management services; and to take appropriate steps to ensure they are in compliance with best practice and the law.

Scenarios could be developed by ARMA, RICS, ARHM and ARCO. The Institute of Chartered Accountants in England and Wales has done this to assist parties in understanding the Bribery Act 2010 (see https://www.icaew.com/-/media/corporate/files/technical/ethics/10410-international-accounting-auditing-and-ethics-update-v1.ashx?la=en

Q2.7 How should a future system build on the existing codes? What elements of existing codes would be useful to retain? Are there elements that could go further?

The Codes should be consolidated, with any repetition being edited such that only the highest of standards form part of the consolidated Code. This would assist in the establishing the initial, and enforceable, standards for the Regulator to base intervention following complaint.

4. Approaches to enforcement and regulation

Q3.1. Which of the following options do you believe would have the greatest impact in driving up standards and increasing consumer confidence in the sector:

a. Requiring all letting agents and managing agents to be members of a relevant professional body. This would require professional bodies or organisations to be approved by Government, possibly operating to one Code of Conduct.

b. As above, but with oversight from a regulatory body, established or approved by Government.

c. Government establishing or approving a new regulatory body, which agents are required to sign up to, with membership of a professional body optional?

We suggest that Option C is the best of choice. Being a member of a professional body ought to be compulsory, for example solicitors are members of the Law Society) and regulated by the Solicitors Regulatory Authority.

Q3.2 What implementation issues would need to be considered e.g. cost, corporate governance requirements, and timescales for introduction?

We suggest that Government should also consider:

1. Likely timeline for implementation.

2. Funding regulation properly (and not being primarily concerned with its cost)

3. The need to avoid overlap with the jurisdiction of First-tier Tribunal(Property Chamber)

4. Where does regulation sit in the current context of three redress providers?

5. What is the role for trade bodies as regards their members and regulation?

Q3.3 Are there other regulatory models that the Government should be exploring? Please give details.

There are a number of regulatory models. However, we understand that the most commonly used are:

1. Self-regulation (e.g. through voluntary codes of practice, ARMA-Q is an example)

2. Risk based regulation (e.g. through developing a 'risk picture' with regulated organisations, the Civil Aviation Authority is an example); and

3. Command and Control regulation (e.g. behaviour is stipulated, standards are fixed, unacceptable actions are defined and outlawed and penalties for noncompliance are set out)

The Government has had the opportunity to see the outcome of self-regulation in property management and the evidence cited in Chapter 1 suggests that it has failed. A 'Command and control' regulator would appear to be what is hinted at in the current call for evidence; this leaves 'performance based regulation for consideration.

Q3.4 What powers would any new regulatory body require to enforce its standards?

We take the view that the powers will need to at least include:

1. Immediate cancellation/suspension of licence (in cases or extreme risk to consumers)
2. Cancellation/suspension of licence, and the imposition of stringent conditions for licence to be retained (in cases of high risk to consumers); and
3. Imposition of lower intensity conditions for licence to be retained (in cases where the risk to consumers is low to medium)

We would envisage that the Regulator would be able to issue warning notices, in low to medium risk scenarios for consumers. These would provide a period for a particular breach (statutory standards or existing Code of Practice) to be remedied. A breach may be deliberate or may be the consequence of inadequate exercise of reasonable judgment by a licensee in carrying out their duties and responsibilities.

Finally, we would wish to see the Regulator inspecting all new property management companies within 12 months of their licensing.

Q3.5 How could the requirement to be a member of an approved or regulatory body be effectively enforced? Should enforcement responsibility sit with any new regulatory body? What would be an appropriate penalty for noncompliance?
The Regulator would have available for inspection online a list of licensees (individual and corporate). It would also be an offence to provide 'relevant services' and legislation should make provision that the Regulator can prosecute were a party is providing relevant services but is unlicenced.

Q3.6 Should the Government establish a new regulatory body to cover all the issues within leasehold and private rented management, lettings and, potentially, estate agency? Or should separate bodies be established? **Please explain your answer.**
The Government should establish a new regulatory body to cover all the issues within leasehold and private rented management, lettings and, potentially, estate agency for two reasons: 1. A single regulatory body can be very efficient, as the regulation of all residential property sales, lettings and management services is managed under a single framework rather than being shared across a range of bodies; and 2. Gaps in coverage and the risk of weak enforcement due to two or more bodies sharing regulation, with none providing much oversight over the other. A single regulatory body means consumers and the property industry would know precisely which body is in charge of regulation.

5. Rights to switch agents and challenge charges

Q4.1 What changes could be made to ensure that consumers are protected from unfair fees and charges, including major works?
Empower the First-tier Tribunal (Property Chamber) (the tribunal) to refer misconduct, including as regards fees, to the Regulator.

Q4.2 How can we support consumers to challenge unfair fees and ensure that they have a route to redress?
The removal of the threat of costs awards, a barrier to those seeking redress in the tribunal, and empowering the tribunal to refer misconduct as regards fees to the Regulator.

Q4.3 How can we make it easier for leaseholders to access their right to manage? What further measures are required to make it easier for consumers to choose or switch agent? Should we introduce a power of veto for

leaseholders over a landlord's choice of managing agent?

From 1st November to 31st October in 2015-16 and 2016-17 LEASE has seen around 1,100 enquiries regarding the Right to Manage (RTM). This consistent level of problems raised by leaseholders has highlighted two particularly pressing issues that need to be addressed:

1. RTM procedure – At the Second Reading, of the then Leasehold Reform Bill in January 2002, the Government described the intended RTM and its procedures as -

   "…intended to provide an effective long-term solution to management problems *that will be easy to exercise*." (emphasis added)

   However, in practice the procedure to exercise RTM is detailed, and as they are generally exercised by lay people errors occur. Hence, to meet its true intent, the procedure needs to be made less detailed and/or the First-tier Tribunal (Property Chamber) granted the ability to dispense with errors in favour of leaseholders. An example of just how errors can confound the exercise of rights can be seen in the 'Elim Court' case - https://www.lease-advice.org/news-item/right-manage-claims-no-longer-defeated-minor-mistakes-procedure/

2. RTM and estates with more than one block – Currently, faced with an estate comprising many buildings then even if it has one freeholder and is managed as one entity, to embark upon RTM will involve the creation of a single RTM Company for each building, serving invitation notices on the tenant of each building and ultimately serving a claim notice on the landlord and any relevant third party in respect of each building. Care must be taken to ensure that each building qualifies and that a sufficient number of qualifying tenants are members of the RTM Company before each claim notice is served.

   This is a cumbersome time-consuming exercise, and if a technical error is made (see 1 above) can have fatal consequences for an application. Procedure aside, it should simply be possible for a single RTM Company to manage an estate consisting of more than one block of flats. More than one RTM company creates challenges over the day-to-day administration of the estate, if nothing else because of the burden of multiple companies and their formal decision making procedures. Cases such as 'Triplerose' (https://www.lease-advice.org/article/important-court-of-appeal-judgment-regarding-right-to-manage-and-multi-building-estates/) should now be consigned to history and the legislation amended accordingly.

We also would agree with the suggestion of a power of veto for leaseholders over the landlord's choice of managing agent. Currently, where a recognised tenants association has served notice as per section 30B of the Landlord and Tenant Act 1985 its rights are as follows:

(a) If no managing agents are employed at the time of request the landlord must, before appointing any agents, serve notice on the tenants' association giving

details of the proposed appointees and the duties of the landlord which it is proposed to instruct the managing agents to carry out. The notice must also invite observations from the tenants' association upon those matters within a specified period of at least one month from the date of service of the landlord's notice and state the name and address of the person to whom such observations are to be sent; or

(b) If managing agents are already employed at the date of request the landlord must, within one month of the date of service of the request, serve a written notice upon the tenants' association specifying the duties of the landlord which the managing agents have been instructed to carry out. The notice must also invite observations, within a reasonable period, on the performance of the managing agents and on whether or not it is considered that they should continue to perform the relevant duties. The name and address of the person to whom the observations should be sent must be contained in the notice.

In both cases the landlord is required to “have regard” to all observations made. Our experience, in the context of section 20 consultation requirements, is that this duty is simply wooly and vague. It offers confusion for those looking to act properly, but an opportunity for evasion for those looking to be evasive. It follows, that proper engagement with leaseholders should mean the ability to veto a proposed agent. If nothing else, for the simple reason that leaseholders are ultimately paying for the agent’s services.

We would also suggest some additional points as regards RTM:

(a) The Right of First Refusal should provide that leaseholders can opt, as a matter of right and not by technical qualifications as regards numbers of flats etc., for the Right to Manage; and

(b) The removal of the threat of costs awards, a barrier to those seeking redress in the tribunal.

(c) Switching agent: include in the consolidated Code time-limits for the handover of management information from the outgoing agent/freeholder to the incoming one. We would see delay in this handover as serious consumer detriment and the basis of intervention by the Regulator.

Q4.4 Could and should a regulator act as a consumer champion? What powers might they need to support this?

The Regulator should focus on licensing and the enforcement of standards. This means it will need the following powers:

1. Powers to establish education standards for entry into the industry
2. Set the licensing requirements for entry into the industry
3. Set business standards
4. Carry out effective investigations of complaints

5. Inform consumers about the services that it regulates and the property industry

The role of consumer champion could be undertaken by LEASE. We have made a strategic change from serving the whole sector to being solely 'leaseholder focused'; and with our knowledge of the law, leaseholders experiences and the sector it makes us well placed to engage with the Regulator, Government and stakeholders in the sector to ensure that the Regulator, amongst other things, develops appropriate plans and actions them for the benefit of leaseholders.

Q4.5 Should regulatory bodies have a role in providing information to consumers about the qualifications or performance of property agents? If so how could information be of the greatest benefit for consumers? What information should be provided? Should it be public?

Yes, an annual report should be published with the Regulator reporting on a range of subjects, and KPIs, including:

1. Number of licensees

2. Enquiries and complaints raised about licensees and what appropriate action the Regulator took to protect consumers; and

3. Work done during the year to engage with consumers and licensees.

Q4.6 Are there other issues relating to the regulation of letting and managing agents that we should consider? Please explain.

The call for evidence suggests that the whole of a service charge comprises the managing agent's fee. This is rarely the case, and whilst fees can be inappropriately high, there are typically other service costs aggregated into the service charges. Managing agents should be able to explain clearly the items what costs are represented in the service charge.

As part of their functions, the Regulator should provide regular and plain English, reports on standards and those that have failed to meet them.

Yours faithfully

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