

Consultation Response

UK Government

Material information in
property listings

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the UK Government's consultation: Home buying and selling reform. We have the following comments to put forward for consideration.

Consultation Questions and Responses¹

Question 5 - What do you think are the most significant issues that prevent estate agents from providing material information in property listings?

It is important to highlight that solicitors in Scotland can carry out estate agency services, i.e. there are solicitor estate agents and non-solicitor estate agents. Solicitors in Scotland are regulated by the Law Society of Scotland.

Scotland has a distinct legal system, separate from England and Wales, which is a unique mixed system blending both civil law and common law traditions.

We are not aware of issues that prevent estate agents from providing material information in property listings in Scotland. This may be because when a property is marketed in Scotland, the seller must produce a Home Report. The Home Report comprises three parts: a Single Survey (which includes a valuation figure), Energy Performance Certificate and Property Questionnaire. The information provided by the Home Report is prescribed and is listed in Schedules 1 and 2 to the Housing (Scotland) Act (Prescribed Documents) Regulations 2008. It includes information regarding (amongst others) council tax band, EPC rating and the type of heating in the property, and the property type (e.g. flat, semi-detached house etc). Most Home Reports also include a mortgage valuation report in a format acceptable to most UK lenders. The tenure of the property is typically covered in that mortgage valuation report. The seller will complete the Property Questionnaire.

¹ Please note that questions 1 to 4 are administrative.

The Home Report is a useful tool in Scotland, as important information is provided when the property is marketed for sale. The buyer has visibility as to the condition of the property to assist them in making a decision to offer, and how that offer should be framed.

Home Reports work well in practice, and we would recommend a similar approach is taken across the rest of the UK.

In addition, our understanding is that, when a flatted property is being marketed, most estate agents (solicitor and non-solicitor) in Scotland obtain an EWS1 Report for that property at an early stage and provide it to potential buyers, along with the Home Report. We understand that an EWS1 Report usually covers the *whole* building in other parts of the UK, however, due to the way in which title is held, in Scotland each flatted property requires their own individual report.

Question 6 - In addition to providing guidance, what other steps do you think government should take to support estate agents to meet their legal responsibilities with regard to material information?

For example, this may include mandatory qualifications or training, or providing standardised forms to support information gathering.

Any guidance or other steps should take into account the existing Scottish home buying and selling system and avoid any unintended adverse impact on that. Scottish solicitor estate agents are already regulated by the Law Society of Scotland.

Please also see our response to Question 5 above.

Question 7 - What action would you like to see from other organisations or property professionals, and consumers, to support estate agents with their legal responsibilities regarding material information?

Please see our responses to Question 5 above and Question 20 below.

Question 8 - What information categories do you think should be included in guidance as things that would likely be considered material information?

The list below shows categories that we think may be considered material information, based on previous guidance and engagement with industry stakeholders:

- price
- council tax and domestic rates
- tenure, including time remaining on lease (if applicable)
- ground rent or service charges (if applicable)
- electricity supply
- water supply
- sewerage
- heating type
- broadband
- mobile signal and coverage
- property type (for example, terraced, detached)
- number and types of room
- parking
- accessibility and adaptations
- rights and easements
- flood risk
- property construction (for example, standard, thatched roof, prefabricated)
- issues with property (for example, damp, subsidence, asbestos, Japanese knotweed)
- building safety defects, including fire and structural risk modifications
- restrictions (for example, listed property, conservation area, restrictions on usage)
- coastal erosion
- planning permission
- coalfield or mining area
- any other category

Please see our responses to Question 5 above and Question 10 below.

Much of the information listed above in this question is contained within the Home Report. Other categories of information listed above are dealt with as part of the conveyancing process.

Some categories of information listed above are *not* covered by the Home Report and are *usually not* covered by the conveyancing process, namely: flood risk, coastal erosion and mobile signal and coverage. We can see the advantage of those categories of information being classed as material information and for that

information to be provided up front but, importantly, only if the data regarding those categories of information is accurate and up to date. If that data is not accurate and up to date, providing that information to prospective buyers could have unintended consequences, adversely impacting either the buyer or seller.

Any proposals for estate agents to provide material information should be considered with the Home Report in mind to avoid duplication and additional costs to parties and agents. Since most buyers will require mortgage funding, what should be included in material information, from a lender's perspective, for loan and valuation purposes, is also relevant and so should be considered.

It is not clear what is meant by "any other category" and so we would seek clarity on this point.

The Home Report in Scotland, via the Property Questionnaire section completed by the seller, provides details of whether the seller has, *during their time in the property*, carried out any structural alterations, additions of extensions and if so whether they have obtained all necessary consents for that work. We think it would be beneficial to expand this to also provide details of whether any alterations, additions or extensions have been carried out to the property in the previous 20 years, in so far as the seller is aware of those, and if so, whether they have all necessary paperwork for that work. This is because the lack of consents for alterations, additions and extensions can cause delays to a sale transaction.

Question 9 - Are there any information categories you want to highlight as data you would not consider material information? If so, why would you not consider it material information?

Please see our response to Question 10.

Question 10 - Are there any information categories that you think should be considered material information, but which could be challenging to display in property listings in a way that is easily understood by consumers?

How do you think any information categories of this sort should be treated?

There is a danger in providing too much information at an early stage, particularly information that would usually be provided at the conveyancing stage of a sale/purchase transaction, when legal advice is required and available. For example, information about title conditions (i.e. title covenants), servitudes (i.e. easements), information about coalfields and mining areas, if relevant.

Expectations of buyers may be better managed and the needs of clients may be better met if their solicitor/conveyancer is able to bring any relevant information to their client's attention and advise on the legal implications at the same time, as opposed to the buyer being provided with detailed information that may be difficult to decipher without support from their solicitor/conveyancer.

If more detailed information than is currently provided in the Home Report is to be provided upfront, consideration should be given as to how this would affect the expectations of clients and solicitors at this earlier stage and the costs associated with this. Certain title information is already provided via the Property Questionnaire in the Home Report. For example, a seller must confirm if they have the right to walk over their neighbours' property and, so far as they are aware, if (i) their neighbours have a right to walk over the seller's property or (ii) there is a public right of way over the seller's property. If more detailed **title information** were to be provided at the upfront stage, as opposed to during the conveyancing process, this is likely to increase costs. Title information is available in Scotland via ScotLIS, at minimal cost, and therefore, subject to our comments below regarding complexity, it may be more appropriate to signpost individuals to this as a resource instead of including title information at additional costs to parties.

Further, if more detailed title information is to be provided at an earlier stage, who will be responsible for obtaining that and explaining its significance to a potential buyer? Title information can be complex – for example, some properties in Scotland are not registered in the Land Register of Scotland and so title to them can comprise several title deeds, often without a plan. We therefore query how useful it is for consumers to be given such title information at a point in time when they may not yet have instructed a solicitor. In our view, providing such title information at an early stage is likely to increase the risk of (non-solicitor) estate agents inadvertently giving legal advice which they are not qualified to give, making it vital that prospective buyers are warned about the need for independent legal advice. If a potential buyer's solicitor will require to carry out significantly

more due diligence at the outset than is currently required, this is likely to result in increased costs to the potential buyer.

Question 11 - Do you think it is reasonable for any information that could be considered material to not be included in full detail in property listings, instead with further details being provided at a later stage in the process, for example when a customer views a property?

Please see our response to Questions 5 and 10 above.

In Scotland, where a property is to be sold on the open market, the estate agent (which could be a solicitor or non-solicitor estate agent) arranges for the Home Report to be carried out and instructs the surveyor on the seller's behalf. The seller will complete the Property Questionnaire. Once all parts are available, the property is placed on the open market and the Home Report can be made available to potential buyers. The Home Report is ordinarily sent to the buyer before they view the property and so a similar approach across the rest of the UK may prevent a potential buyer from taking steps to travel a long distance to view a property as they will have information within the Home Report to assist their decision making.

Similarly, our understanding is that when a flatted property is being marketed, most estate agents (solicitor and non-solicitor) in Scotland obtain an EWS1 Report for that property at an early stage and provide it to potential buyers along with the Home Report. We understand that an EWS1 Report usually covers the *whole* building in other parts of the UK, however, due to the way in which title is held, in Scotland each flatted property requires its own individual EWS1 Report.

Question 12 - If so, what are the differences between information you think should be included in property listings vs that which should be provided at a later stage?

Can you give examples of each?

Please see our responses to Questions 8, and 10 to 12 inclusive.

As mentioned above, our view is that the information contained in the Home Report is useful to allow buyers to make an informed decision on whether to offer, and how to frame that offer.

If additional information is to be provided, consideration should be given as to how this will impact upon costs for consumers.

Question 13 - What should be the requirement on estate agents regarding material information that could require technical expertise to obtain or interpret?

As explained in our response to Question 11, in Scotland the estate agent (which could be a solicitor or non-solicitor estate agent) arranges for the Home Report to be carried out and instructs the surveyor on the seller's behalf. The Home Report contains a Single Survey and most Home Reports also contain a mortgage valuation report, both of which are acceptable to most lenders. Scotland therefore does not have the same challenges regarding material information about the condition of the property as are outlined in the consultation.

As previously mentioned, solicitors in Scotland can carry out estate agency services, i.e. there are solicitor estate agents and non-solicitor estate agents in Scotland. If there were to be a requirement that title information (such as rights benefitting and burdening the property) be included in the material information which an estate agent must provide upfront, a non-solicitor estate agent would not have the legal expertise to identify the correct title information to include or to interpret it. A non-solicitor estate agent would therefore be reliant on a solicitor/conveyancer providing that information and on them doing so in a format which was easily understandable by potential buyers. This would result in a seller incurring legal costs at a much earlier stage and, importantly, before the seller knows whether there is interest in buying their property.

Question 14 - What should guidance state about estate agents working with surveyors and conveyancers to obtain or interpret technical information?

Any guidance should take into account the well-established position in Scotland, in particular the fact that in Scotland there are solicitor estate agents and non-solicitor estate agents and that information is provided via the Home Report, which includes the Single Survey and usually also contains a mortgage valuation report.

The benefit of the Single Survey is that the estate agent, seller and buyer and the seller's and buyer's respective solicitors can ask the surveyor questions about the terms of the Single Survey at an early stage.

Please also see our response to Question 13 above.

Question 15 - What should guidance say about estate agents working with other property professionals such as managing agents, mortgage advisers, lenders etcetera?

As previously mentioned, solicitors in Scotland can carry out estate agency services, i.e. there are solicitor estate agents and non-solicitor estate agents in Scotland. Any guidance should take this into account. We believe that solicitor estate agents should continue to be regulated by the Law Society of Scotland and that the dual regulation of solicitor estate agents should be avoided because, in our opinion, dual registration would increase complexity and risk.

Estate agents who are **not** legally qualified should make this clear to potential buyers and to other property professionals. We think it is also important for estate agents to avoid conflicts of interest and, where relevant, to disclose the fact that they will receive a commission or other similar financial benefit.

Question 16 - How could guidance on material information ensure data gathered by estate agents, and supplied by sellers, is as accurate as possible?

To ensure the data gathered is accurate, reliable, accurate and up to date sources of data would be required, and the guidance would have to mandate that the relevant data be obtained from approved (trusted) sources. Government can assist by ensuring that the data provided by Government agencies is accessible, accurate and up to date. Providing that data in a digital format will bring efficiencies and speed. It is essential that Government agencies across all UK jurisdictions are adequately resourced to provide such data within appropriate timescales. We note that measures to improve the accuracy and accessibility of data south of the border include HM Land Registry's Local Land Charge programme and the local authority property data pilots. Scotland has its own system of searches and search providers, and we are not aware of concerns regarding the accuracy and accessibility of the information produced by them.

Sometimes, buyers moving from England to Scotland are surprised to find that planning application information in a Property Enquiry Certificate (**PEC**) is more limited (in terms of geographic extent) than the information provided in England. In Scotland, a PEC can be obtained from the local council or from specialist search providers and typically encompasses: planning and building control information, whether there is any publicly adopted road(s) immediately adjacent to the property, whether the local council has served any statutory notices, whether the property is on the contaminated land register and, whether the property is connected to the mains water and sewerage.

Searches in Scotland are instructed by the seller (not the buyer), and we understand that searches are typically produced much more quickly in Scotland than in England. For example, a PEC can be obtained within 3-4 days from private searchers.

Question 17 - What else could government do to ensure information gathered by estate agents is as reliable as possible?

Please see our response to Question 16 above.

Question 18 - What could other organisations and sellers do to ensure information gathered by estate agents is as reliable as possible?

We are not clear what is meant by “other organisations” and seek clarity on this point. Please see our comments regarding Government agencies at Question 16 above.

It is likely that there will be at least some reliance on seller declarations, as certain information about a property is likely to be known only to the seller and it is difficult to understand how that information could be independently verified. In Scotland, the seller discloses information about the property by completing the Property Questionnaire section of the Home Report

If there is a concern as to the integrity of the seller providing the information, consideration should be given as to what remedies may be open to a buyer if that information proves to be false. For example, in Clause 31 of the [Scottish Standard Clauses](#) (the Scottish Standard Clauses are a standardised offer to buy a residential property), the seller confirms that the information in the Property Questionnaire section of the Home Report is true and correct to the best of the seller’s knowledge and belief and that the information provided in the Property Questionnaire remains the same as at the date of the buyer’s offer as at the date of issue of the Property Questionnaire. Any breach of those contractual confirmations would be enforceable, as a matter of contract law.

Question 19 - How can we most effectively support consumers to understand their rights and responsibilities regarding material information?

A statutory creation such as the Home Report may allow for material information to be collated in a standard format, which will support consumers to understand their rights and responsibilities.

Guidance on homebuying and selling would also assist. For example, we have published information for the public on the buying and selling process here - [Buying and selling a property | Law Society of Scotland](#), which sets out what clients can expect from a Scottish qualified solicitor.

Question 20 - Which of these audiences do you think should be provided with guidance on material information alongside estate agents – buyers, sellers, conveyancers, surveyors, etcetera.

If there is an expectation on other professionals to assist estate agents with ingathering material information, this is likely to increase consumer costs. Again, a provision such as the Home Report would allow for material information to be collated in an easily understandable, standard format which all interested parties can access.

Guidance for both sellers and buyers about what they must do and what documents they must have in preparation for selling/buying would help to smooth the selling/buying process. For example, in Scotland missing documents such as Sasine title deeds, septic tank SEPA consents, and planning/building control documents can delay, and in the worst-case scenario lead to the collapse of, a sale transaction.

Please also see our response to Question 19.

Question 21 - What information regarding enforcement do you think should be contained in the material information guidance?

For example, this may include information about the different organisations estate agents are accountable to, including details on their specific roles.

We suggest that this should include information about the different organisations which estate agents are accountable to, including details of their specific roles. It would also be sensible for any such guidance to include details about the penalties that can be incurred if an estate agent is in breach of their obligations and about how an estate agent can appeal against any enforcement action.

Any information regarding enforcement should take account of the fact that solicitors in Scotland can carry out estate agency services (i.e. there are solicitor estate agents and non-solicitor estate agents) and that solicitors in Scotland are regulated by the Law Society of Scotland.

Question 22 - What steps beyond those highlighted in your response to question 6 do you think government should take to support the implementation of material information guidance?

We would suggest that there is engagement with relevant stakeholders at an early stage to ensure that the market supports any changes.

Question 23 - What steps beyond those highlighted in question 7 do you think other organisations should take to support the implementation of material information guidance?

We would suggest that there is engagement with relevant stakeholders at an early stage to ensure that the market supports any changes.

Question 24 - Are there changes industry or individual businesses will have to make to support the effective implementation of guidance on material information which you wish to highlight?

Without knowing what the guidance will be, we are unable to comment on what changes will be necessary to support the implementation.

Question 25 - Do you think that material information guidance should be rolled out gradually during an implementation period?

Without knowing what the guidance will be, we are unable to comment on how it should be rolled out.

Question 26 - Is there anything else, beyond the issues highlighted in the questions above, that you think needs to be included in guidance to support estate agents with their responsibilities regarding material information?

As above, any guidance should take into account other processes and provisions already in place which already achieve the desired outcome. For example, the requirement of a Home Report when marketing a property in Scotland.

Any guidance should also take into account the fact that solicitors in Scotland can carry out estate agency services (i.e. there are solicitor estate agents and non-solicitor estate agents) and that solicitors in Scotland are regulated by the Law Society of Scotland. We believe that solicitor estate agents should continue to be regulated by the Law Society of Scotland and that the dual regulation of solicitor estate agents should be avoided because, in our opinion, dual registration would increase complexity and risk.



For further information, please contact:

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