



Law Society
of Scotland

Consultation Response

Property Factors (Scotland) Act 2011 - Draft revised
Code of Conduct for registered property factors

15 January 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Property and Land Law Reform Sub-committee welcomes the opportunity to consider and respond to the Scottish Government's *Property Factors (Scotland) Act 2011 - Draft revised Code of Conduct for registered property factors consultation*.¹ The Sub-committee has the following comments to put forward for consideration.

General comments

We note the requirement on Scottish Ministers to prepare and publish a Code of Conduct from 'time to time'.² We do not seek to make comment on the principles and contents of the revised Code of Conduct. The Code of Conduct is likely to have limited impact upon our membership who are already subject to regulation by professional rules and where appropriate, by the current Code of Conduct for Residential Property Factors. It is noted that the proposed changes are likely to provide additional information and protection to consumers.

Definition of 'property factor'

We do have wider concerns about the statutory framework which provides for provision of a Code of Conduct. In particular, the definition of 'property factor' gives rise to question as to whether consumers are, in all circumstances, afforded the extent of protection envisaged by the Code.

¹ <https://consult.gov.scot/housing-regeneration-and-welfare/code-of-conduct-for-registered-property-factors/>

² Property Factors (Scotland) Act 2011, Section 14.

The current definition of 'property factor' is contained within Section 2 of the 2011 Act which states:

(1) *In this Act, "property factor" means—*

- (a) *a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes,*
- (b) *a local authority or housing association which manages the common parts of land used to any extent for residential purposes and owned—*
 - (i) *by two or more other persons, or*
 - (ii) *by the local authority or housing association and one or more other person,*
- (c) *a person who, in the course of that person's business, manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties (but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land), and*
- (d) *a local authority or housing association which manages or maintains land which is available for use by—*
 - (i) *the owners of any two or more adjoining or neighbouring residential properties, or*
 - (ii) *the local authority or housing association and the owners of any one or more such properties, but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land.*

This gives rise to concerns about the possibility of certain individuals or bodies, which carry out work that would generally be considered to be that of a property factor, not falling within the statutory definition. The definition assumes that common land is owned by at least two people or is available for use by two adjoining or neighbouring owners (where there are effective rights in the title to recover costs). This may not be the case as we discuss below. The effect of this is that work may be carried out in certain areas by an individual or body who does not in law meet the statutory test.

This issue is particularly concerning in the context of the difficulties faced in connection with common property. This matter was considered by the Land Tribunal in the case of *PMP Plus Ltd v Keeper of the Registers of Scotland*.³ The Tribunal made it clear that the law could not create rights in common areas if identifying those areas depended on a future uncertain event. This has the impact that any wording to this effect within either a disposition or title sheet is meaningless and no rights are created.

Areas of property which are not, in law, common property will be excluded under the definition contained within section 2. This may impact both property factors and consumers – for example factors may not be able to recover costs for work actually carried out, and the accountability of property factors to consumers will be limited by them falling out with the parameters of the Code. This could put consumers at risk. Given

³ *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2.

the difficulties surrounding identification of areas of common property, consumers may believe that their factor is subject to the requirements of the Code of Conduct, when in reality, their factor may not.

We therefore suggest that a legislative change is required to the definition of 'property factor'. It would appear that the difficulties which could be faced in respect of common property could be resolved by amending the definitions contained within section 2 to insert, after the word "owned", the words "or purported to be owned".

In addition, the test of property factor is triggered in section 2(1)(c) and 2(1)(d) by the existence of a title condition requiring a contribution to be made towards the costs of maintenance. We also suggest that in section 2(1)(c) and 2(1)(d) the test is widened to apply where as a matter of fact, owners or purported owners are being charged and are paying for services, whether or not there is actually a legal obligation to do so.

Effect of provisions regarding charges for complaint-handling

We note that the terms of the revised Code will continue to require solicitors to update title sheets and Deeds of Conditions, where necessary, if a property factor seeks to charge homeowners for handling complaints.

This provision may impact upon consumers who, where a charge applies, may be put-off making complaints about their factor in the knowledge that they will be charged for doing so. This causes concern to us in terms of access to consumer rights.

For further information, please contact:

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