

Consultation Response

Proposed New-Build Homes (Buyer Protection) (Scotland) Bill

June 2019



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.

Our Property Law Committee and Property and Land Law Reform sub-committee welcome the opportunity to consider and respond to Graham Simpson MSP's consultation: *Proposed New-Build Homes (Buyer Protection) (Scotland) Bill*¹. We have the following comments to put forward for consideration.

General comments

We understand that some consumers may experience issues following the purchase of a new build property. We consider that it is important to understand the issues in question before considering potential remedial action. As such, it would be helpful to have evidence to demonstrate if there are particular issues with new build properties (as, arguably, the risks to a purchaser in a property purchase are not restricted to new build properties); the extent of these issues; and the nature of these issues in practice so that the appropriate remedies and measures can be considered. We believe that this information is required in order to most usefully comment on the proposals, in particular any proposal to have statutory standardised missives for use by builders.

Any action which is taken to provide greater consumer protection needs to carefully balance competing interests and recognise and address real problems, while protecting the principle of freedom of contract. It is important that steps taken are proportionate to the issues in question.

There is currently no statutory framework in place to regulate builders and provide redress to consumers who face post-purchase issues with new build housing, although voluntary schemes are available. The current system of consumer post-purchase protection is split between NHBC and other warranty schemes, and the Consumer Code for Home Builders and Consumer Code for New Homes. The protections

¹ <https://www.parliament.scot/S5MembersBills/GrahamSimpsonMSPconsultationdocument.pdf>

provided by these schemes can be limited in practice and may be costly to enforce. It is important that consumers know what these schemes offer and understand their limitations. Many small builders are not subject to these schemes.

We note that there are currently proposals in England to introduce a single ombudsman to simplify the complaints process. If this proposal is taken forward, then, depending on what is proposed by way of remedies, there is the potential for Scottish consumers purchasing from a national house builder to have a lower level of protection than a consumer purchasing a similar property in England unless a similar function is introduced here.

Consultation questions

1. Which of the following best expresses your view of establishing statutory standardised clauses for builders' missives?

We generally support the move towards standardised missives across all residential property transactions. Over the last 10 years, solicitors across Scotland have used and adopted standard missives for private secondary market house sales. Standardisation can help consumers by reducing costs and ensuring contracts are concluded quickly as, in most cases, negotiations over contract terms are reduced.

There are two sets of Standard Clauses currently available for use in residential property transactions - Scottish Standard Clauses (used for secondary market house sales) and Scottish New Build Standard Clauses (used for new build sales). The Clauses were put together by a group of solicitors working for both buyers and sellers with a view to aligning practice and assisting parties by having a consistent approach. Although the Standard Clauses can be found on our website, we have no formal role or remit to approve them or to make any amendments.

Although it is not currently mandatory to use the Standard Clauses as part of missives for a property purchase, members report that the use of the Scottish Standard Clauses is relatively wide. For new homes, we have supported a dedicated new home standard missive (the Scottish New Build Standard Clauses). While adoption of it appears to have been slower, we are aware through our members that a number of housebuilders have started to adopt it, including one of Scotland largest housebuilders (which sells over 700 homes annually).

We understand that, in practice, builders often instruct their solicitors to issue a standard offer (which may or may not be based on the Scottish New Build Standard Clauses) and there may be little scope for negotiation between parties. While the contractual relationship between the parties may be imbalanced, this contractual relationship is influenced by a number of factors including covenant strengths, bargaining strengths and demand for product (and the supply of the same).

Making standard clauses mandatory would require legislation. Imposition of contractual terms needs to be carefully balanced with the principle of freedom of contract. We respect party autonomy to the extent that individuals understand the terms, and the implications of the terms, to which they are being asked to agree.

It is hoped legal advice from a solicitor would enable consumers to understand the implications of any proposed contract. We would encourage consumers to seek early advice from a solicitor when considering purchasing a new build property. It is important that consumers understand the scope of the advice they require and factor in the costs of obtaining such advice to their house purchase costs. Some consumers may choose to proceed with the purchase of residential property on the basis of limited advice or diligence being carried out. In practice, it is common for a builder to suggest that buyers use a particular firm of solicitors, familiar with the developer's standard missive, in order to streamline the process and keep buyer costs to a minimum.

Issues experienced by consumers are often practical in nature and relate to the delivery of the product. Matters relating to the condition and construction of a property, for example, are unlikely to be matters for a solicitor but for other professionals who can provide specialist advice at separate and additional costs to the consumer. Consumers therefore require to balance the costs of obtaining appropriate advice and the risks of proceeding without advice or with only obtaining advice on a limited basis. They also need to understand the role of relevant professionals have in advising on different matters.

While statutory terms may hasten a move to standard missives, there are a number of practical steps that would need to be considered:

- Scope of missives
- Market practice

Scope of missives

A new home can take many forms. For example, it may be a newly built property or it could be a conversion of an existing property; it could be a flat, a detached or semi-detached home, or a townhouse. Equally, along with a home, a customer may purchase car parking and/or common areas – both external such as landscaping and internal such as common staircases in blocks of flats.

Depending on the development, which may range in size from a single plot to a village of 1,000 homes or more, a standard missive will need to be broad enough to cover all reasonable possible situations.

This may mean that any clauses will be general and uncontroversial – for example, standard terms around completion – and that a standard missive is unnecessary because these types of clauses are not already subject to any negotiation between customer and home builder. Or, to cover different situations, the clauses may need exemptions which could then make the scheme itself more voluntary in practice than intended.

Market practice

The second aspect is market practice. It is important to recognise that contracts and practices change. Will there be a mechanism to ensure the clauses are updated regularly? For example, the Scottish Standard Clauses are currently reviewed annually. Without such a mechanism, either the clauses chosen may require to be non-controversial, in which case, it is likely that the market will be using them anyway, or the clauses will become out of date and could lose credibility or effect.

Given the practical issues with standard clauses, and the market move to increased standardisation, we are supportive of any attempt to further this trend provided that the practical issues identified can be addressed as part of any scheme.

2. Which of the following best expresses your view of providing a statutory route for home buyers to obtain redress for major failings on new-build property?

We understand that consumers can experience a wide range of 'failings' on new build property including the following:

1. A failure to hand over the property timeously

This can cause issues with consumers arranging the sale of their existing property, transfer of funds and arrangements for removals. This is often caused by a 'late' completion of the property meaning that the local authority inspection and warranty inspection (if there is one) takes place very close to settlement of the transaction. This can cause issues where the property does not pass one or both of these inspections. The late handover of property can cause pressure on both the builder and the consumer who will each have likely made arrangements that are dependent on a target date being achieved. It can be difficult for a purchaser to refuse to accept a less than perfect product when they have sold their existing property contemporaneously and have made arrangements for removals. It is often the case that the form of builder's missive does not allow completion to be delayed where there are defects (which are often called 'snagging' but may comprise serious wants of repair and condition). We make further comment on this at question 5 below.

2. A defect with the finished product

We understand that defects can range from 'snagging' issues (and these, of themselves can range from minor cosmetic damage through to incomplete works) to significant structural defects. Significant structural defects may only become apparent some years after the property was built and possibly after the property has been sold on by the first purchaser (possibly more than once).

We consider that it may be difficult for statutory standard clauses to provide protection for consumers for significant structural issues for a number of reasons including:

1. the range of issues that can be experienced around quality of the product delivered. The standard clauses would have to be flexible enough to cover all possible scenarios;
2. the standard of a build that a consumer might choose to accept and what it is reasonable for a consumer to expect to receive when taking delivery of their product may differ. Consumers will also experience differences in their opportunity to involve other professionals, such as surveyors, during the build programme and before handover as this can depend on various factors including the stage of the build when the consumer offers, the willingness of the developer to allow access and the consumer's willingness and ability to pay. It is usually the case that the purchaser is unable to negotiate having their own professional on site during the build (even if the purchaser is prepared to cover the additional cost of this) and the consumer instead relies largely on the builder building a quality product and a warranty scheme. If such a professional has been involved on the part of the purchaser, or should reasonably have been involved (for example where there were obvious concerns over the build or the quality of similar finished products), would that qualify the statutory protection in any way?
3. their time limitation – it may be that the defect is not discovered or apparent until after the statutory protection has expired;
4. missives are a contract between the seller (usually a developer for a new build property) and the first purchaser, and therefore do not extend to any subsequent owners of a property;
5. if protection relies on the developer being liable, it must be understood that it is possible (and common) that the developer would have no assets at the time of the claim or no longer exists. It is common practice for builders to set up special purpose vehicles for each particular development which have no assets or may be dissolved on completion of the development. Any protection would have to take account of this common business practice;
6. enforcement of the standard missives and statutory protections may incur additional costs on the part of the consumer and take time.

We consider that further research requires to be undertaken in order to identify specific features of the problems arising before statutory standard clauses are considered. This would allow the solution to be tailored appropriately. It is important that any steps taken to resolve the issue are proportionate and have an evidence base. We consider that other stakeholders, for example Homes for Scotland as the trade body for a number of major builders in Scotland, may have some useful knowledge about the extent and nature of the issues and therefore should be consulted. We consider it unlikely that standard clauses are the most appropriate method to secure consumer protection in relation to defects in the construction of a new build property as the only method of enforcement would be by court action, which is likely to be costly, time-consuming and have an uncertain outcome.

We recommend that other options be considered as suitable ways of providing consumer redress for structural defects including:

- ‘no-fault’ insurance which pays out if there is an issue with a property,
- a guarantee fund maintained by builders which pays out if there is an issue with a property, or
- an ombudsman who deals with complaints relating to a product which is not fit for purpose.

3. What do you think would be the main practical advantages and disadvantages of the proposed Bill?

We believe the main practical advantage of the proposed Bill will be if it creates a single piece of legislation dealing with customer redress for defects in their new build properties. Consumers should be able to find and understand the laws and regulations that protect them. We would welcome consolidation of consumer protection in respect of these matters into a single piece of legislation, which will help consumers to ascertain and understand their rights. We believe that it will be a disadvantage for the consumer if this consolidation does not take place and, instead, this becomes another piece of legislation that requires to be considered – including which piece of legislation takes precedence – when assessing remedies.

Equally, the suggestion that a single body may address consumer protections for new homes will make it easier for consumer to find redress by allowing a single point of contact to address all issues.

We consider that the main practical disadvantages of the proposed Bill will be:

1. the need to keep any standard clauses or warranty scheme aligned with market practice. For example, changes in design and specification may lead to new issues that may not be reflected by the legislation. The rise of electronic vehicles, home charging and smart house technologies may see changes that will need to be reflected by any statutory provision. We can imagine, for example, that broadband speeds and Wi-Fi-availability throughout homes will become an increasing issue as housebuilders extend smart home technology to every room;
2. the need to ensure that the standard clauses or warranty scheme is proportionate to the defect in question given the range of problems that might be experienced;
3. the need to ensure that any warranty or remedy transmits appropriately to others with relevant interests in the property in question including purchasers from the original purchaser and lenders. Consideration should be given as to whether any others should have a right of redress, for example tenants;
4. the need to ensure that the remedies available for defects in new build properties are compared and assessed (and balanced) with the available consumer redress on buying ‘second hand’ or established properties which also may have defects; and
5. the need for consumers to seek any remedy through the courts and the issues of cost, time and uncertainty that entails.

4. What length of time do you think is most appropriate for a builder's warranty for a new-build home?

We believe 10 years from handover is an appropriate length of time reflecting standard insurance and warranty terms from contractors and others. In addition, a 10 year period is generally considered in the market to be sufficient length of time for any latent or inherent defects to be discovered.

5. Which of the following best describes your view of having standard missives that provide a right for buyers to carry out a full survey of the property within a specified period, and a right to pull out of the purchase if severe or very serious defects are discovered?

We are in favour in principle of any scheme that helps consumers ensure they receive a decent home with minimal defects. As referred to in our answer to question 2, it is often the case that the form of builder's missive does not allow completion to be delayed where there are defects. This means that purchasers may be contractually obliged to accept a property with a range of defects on the understanding that these will be remedied by the builder shortly after completion. It is our understanding that in most cases, that is done to the purchaser's satisfaction, but we are aware of cases where the builder simply does not carry out the work. The warranty schemes do not cover all work that a purchaser might expect to be remedied and the limitations of these schemes need to be understood. Even where all defects are remedied this can be a stressful, costly and time-consuming matter for purchasers to deal with.

Standard conveyancing fees are generally estimated on the basis that the conveyancing process will be straightforward without undue negotiation of the contract, that there will be no issues with title or consents or the handover, that a standard warranty package will be provided and that the product delivered at completion will be fit for purpose. Any legal advice sought in relation to defects or issues encountered post completion with the housebuilder or warranty provider, which can be a specialist area to advise on, will be chargeable and is, therefore, likely to be in addition to standard conveyancing fees and outlays.

We would flag the following:

1. Such a scheme may create practical difficulties in the housebuilding process and may lead to delays in delivering new homes.

In order for a survey system to be effective, the survey would require to be conducted as close to completion as practical and perhaps after the local authority has inspected the property. If so, given that local authority (and warranty provider) inspections may take place very close to completion, this would likely lead to a delay in completion and handover to the consumer in order to allow for the survey to be arranged, conducted, a report prepared and the results reviewed.

This could mean at least a few days delay in handover from the point the home is ready. This delay will need to be factored into any build programme and will have an impact on cash flow projections and turnover forecasts.

The impact on the consumers' own arrangements for removals, sale of their existing property and arranging funding for their purchase must be also considered. As a large number of consumers borrow to fund their purchase, the lender's position will also have to be factored in including the lender's approval of the survey report before release of funds;

2. Another factor that will need to be considered is whether the scheme should also have a third party adjudication process so that, if survey findings are disputed, there is a quick and easy process to resolve the dispute and either allow the home to be sold or the customer to walk away. This process will also affect likely timings and, as such, will be expected to form part of the financial projections of any housebuilder;
3. The scope of the survey and the ability of the consumer to rely on its findings would need to be understood. Latent and inherent defects will generally not be apparent from a survey carried out after completion. It is unlikely that such a survey will be intrusive in any way and may be restricted to the internal fabric of the property and not consider structural, hidden or inaccessible areas such as the roof or under floors;
4. Finally, the costs of such surveys will be an additional cost for the consumer as well as the additional legal work incurred in reviewing the report, reporting to the lender and dealing with any issues arising. Costs may also arise from the need to renew property searches, charges searches and Advance Notices in the Land Register in the event of delays.

6. If you have bought a new-build home in the past, please tell me about your experience, taking care not to name individuals/companies or the location of the property/development.

Not applicable.

7. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

(a) Government and the public sector

At a national level, we would expect an initial increase in costs to ensure any standard missives are updated and to help establish any new body overseeing consumer complaints.

(b) Businesses – including housebuilders

Excluding any impact on turnover and profits that may arise from a consumer successfully terminating a contract (bearing in mind that there may be a view that a housebuilder should not 'profit' from a home that may have substantial issues until those issues are fixed), we anticipate the impact will be neutral. Currently housebuilders often have to deal with both a warranty and a consumer code claim. This duplication increases the time and costs of responding to a consumer complaint. If the housebuilder deals with one body, they can reduce the time and costs of responding to a complaint.

(c) Individuals – including new-build house buyers

The current system of warranty and consumer code system is time consuming and involves some duplication, but it does not, of itself, have a significant cost. A single system will help reduce time but will largely be cost neutral to the consumer. However, the introduction of a right to terminate may increase costs as the consumer would need to instruct and pay for a surveyor. There will be increased legal costs in considering the report and dealing with any issues arising as well as costs arising in relation to delays resulting from any issues flagged by the survey and/or termination of the contract, for example rearranging removals, paying for temporary accommodation if the purchaser has nowhere else to go, paying for storage costs and outlays. In the event that the consumer requires to raise court proceedings to seek redress, there is likely to be increased costs for the consumer with no guarantees of a successful outcome

8. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, maternity and pregnancy, marriage and civil partnership, race, religion and belief, sex, sexual orientation?

We do not anticipate any particular impact given the proposals should benefit all current consumers equally.

9. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

We have no comment on this question.

10. Do you have any other comments or suggestions on the proposal?

We have suggested previously that other options to enhance consumer protection should be considered including no-fault insurance, a guarantee fund maintained by builders or an ombudsman. These methods may be more suitable ways of addressing the issue of structural defects.

We also note that Scottish Government are actively involved in the delivery of new build homes, including via the Help to Buy scheme. They may have a role to play in relation to the quality of new build homes.

In England, the report *Better Redress for Home Buyers*², by the All-party Parliamentary Group for Excellence in the Built Environment has recommended the creation of a single Property Ombudsman to be the sole point of conduct for all warranty and consumer code complaints. Given the Scottish market is dominated by national housebuilders (the two largest housebuilders in Scotland are Persimmon and Barratt), any proposal should consider how a Scottish system will work with the English system and the effect any dual proposals may have on consumers.

If a Property Ombudsman is created in England, will national housebuilders offer the same service to Scottish consumers? If so, how will Scottish housebuilders compete, as they may not be eligible to use the scheme if they are based in Scotland? Such issues have arisen with the five-star builder scheme operated by NHBC, a scheme which promotes good aftercare service which was, until this year, only open for housebuilders in England & Wales, but who were able to use the scheme in Scotland to promote their developments.

It is important to recognise the differences between housebuilders and any proposal should consider the impact on national and on Scottish housebuilders to ensure that there are no disproportionate impacts and ensure consistent consumer protection.

For further information, please contact:

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

AlisonMcNab@lawscot.org.uk

Gillian Alexander

Professional Practice Team

Law Society of Scotland

DD: 0131 476 8108

GillianAlexander@lawscot.org.uk

² <http://cic.org.uk/admin/resources/appg-ebnew-homes-ombudsman-report-2018.pdf>