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Consultation Response

Redress for Purchasers of New Build Homes and the New Homes Ombudsman

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Introduction

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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, Administrative Justice and Consumer Law sub-committees welcome the opportunity to consider and respond to the Ministry of Housing, Communities & Local Government's consultation: *Redress for Purchasers of New Build Homes and the New Homes Ombudsman*¹. We have the following comments to put forward for consideration.

General comments

We have previously responded to the UK Government's consultation on *Strengthening consumer redress in the housing market*² and to a consultation from Graham Simpson MSP on a Proposed New-Build Homes (Buyer Protection) (Scotland) Bill³.

We note that this is a high-level consultation and the detail of any redress and/or Ombudsman scheme are not clear from the consultation. It is not therefore clear what the final scheme will look like. As much is likely to depend on the intended purposes and detail of any scheme, it is difficult to assess the full impacts of the proposed scheme at this stage.

We consider that it is important to understand the issues experienced by purchasers of new build property before considering mechanisms for redress. It would be helpful to have evidence to demonstrate if there are particular issues with new build properties as compared to other properties; the extent of these issues; and the nature of these issues in practice so that the appropriate schemes can be considered.

¹ <https://www.gov.uk/government/consultations/redress-for-purchasers-of-new-build-homes-and-the-new-homes-ombudsman>

² <https://www.lawscot.org.uk/media/360024/18-04-09-misc-consumer-redress-in-housing-market.pdf>

³ <https://www.lawscot.org.uk/media/363058/19-06-27-pllr-and-plc-consultation-proposed-new-build-homes-buyer-protection-s-bill-final.pdf>

Consultation questions

Q4. Who should be required to belong to a New Homes Ombudsman?

We consider it would be appropriate for developers who build and sell homes on the open sales market and developers who convert and sell properties to belong to an Ombudsman.

Developers for new entrants into the house building market sometimes subcontract construction to building contractors who are members of a warranty scheme, often due to the financial hurdles faced by new developers. We think it would be preferable for the new entrant developers (who sell homes rather than sell and build new homes) to be included within the ambit of the New Homes Ombudsman.

In the event that developers who build and/or sell homes on the open market are included within the scope of an Ombudsman, it is important that those who are purchasing a new home in a mixed-use scheme (i.e. a scheme involving both residential and commercial properties) are also covered by any New Homes Ombudsman.

We do consider that the New Homes Ombudsman should apply to new homes comprising a conversion. However, this will create some uncertainties around the boundary between a conversion of a building, and the upgrading of a building.

We suggest that consideration be given to whether a *de minimus* level should apply for developments, and, if so, what the level should be. The impact of any changes on the self-build and 'amateur' developer markets, such as the conversion of a single flat or home, may impose a disproportionate cost and administrative burden.

Q5. Should a New Homes Ombudsman only cover complaints in relation to a purchaser's new build home where redress cannot be sought elsewhere? (For instance, it would not cover a complaint in relation to the sales process for a new build home bought through an estate agent as redress is sought through the redress scheme an estate agent belongs to)

We consider that it is not clear from the consultation document what is proposed in terms of the scope and powers of an Ombudsman. For example, how will such a scheme fit with existing warranty schemes such as NHBC?

Generally, we consider it appropriate that where an alternative redress scheme is available, for example via existing complaint mechanisms for estate agents, solicitors and surveyors, that alternative scheme should apply to the exclusion of the New Homes Ombudsman. As set out in our response to the

consultation on Strengthening Consumer Redress in the Housing Market⁴, we note the potential for increased costs and administrative burdens on our members and others if they were required to comply with overlapping regulatory frameworks.

We anticipate that a number of cases in which consumers seek redress are likely to involve claims that relate to various parts of the sales process, i.e. a particular unit may generate issues in relation to both the sale/marketing process and the construction phase of the property. We recognise that this is complex as there is an inherent tension in providing consumers with a single point of contact for any issues relating to new homes, while avoiding dual regulation, and in ensuring that the Ombudsman or regulator taking responsibility for each component is the most appropriate Ombudsman or regulator for that matter.

We consider that it is important for there to be clear boundaries in the function of the New Homes Ombudsman. This will help to ensure that the roles of other Ombudsman or regulators are not degraded by the risk of inconsistencies or uncertainty arising from a choice as to which Ombudsman or regulator would deal with a particular issue. It is important that there are clear routes for consumers to seek redress and certainty as to any redress schemes or mechanisms which require to be exhausted before an alternative may be taken. An additional layer of redress scheme could be confusing for consumers. It is important therefore that there is clear signposting for consumers to ensure that issues can be directed appropriately.

Finally, while contractual remedies may be available to a new home purchaser, such remedies may be difficult and/or expensive for consumers to enforce. We therefore do not consider it appropriate for consumers' complaints to be excluded from the scope of a New Build Ombudsman on the basis that contractual remedies are available.

Q6. Is there anyone else who should be able to seek redress through a New Homes Ombudsman? If so, who?

Yes. We suggest that the following should be able to seek redress through a New Homes Ombudsman – any secured heritable creditor; any spouse etc with rights to occupy; a tenant; and any proprietor of open space or any owner of a unit in a development who contributes or could be required to contribute to the maintenance of areas of open space.

In addition, we suggest that any purchaser of a new home within a certain period, perhaps 10 years (or whatever period is deemed appropriate), should also benefit from the Ombudsman. The rationale behind this is that if the New Homes Ombudsman is to give protection in the event of a major structural defect, then such defect may not emerge until several years after the date of entry. In such circumstances, the house may have been sold to another purchaser, who would not have a contractual right of redress (even if

⁴ <https://www.lawscot.org.uk/media/360024/18-04-09-misc-consumer-redress-in-housing-market.pdf>

available to the first purchaser) against the builder. We suggest that the New Homes Ombudsman should benefit not just the first purchaser, but also a subsequent purchaser for issues arising within a fixed period.

We suggest that it would also be appropriate for new purchasers of a property to be informed by the seller where a complaint has been made to the Ombudsman.

Q7. Should anyone or anything be excluded from a New Homes Ombudsman's remit? If so, who or what should be excluded?

Yes. Given that the focus of the New Homes Ombudsman is the protection of consumers, we would expect that purchasers of new homes who are purchasing as part of a relevant business should not directly benefit from the New Homes Ombudsman.

In accordance with our answer to question 5 and subject to the exclusions we set out, we think that matters which are regulated by another Ombudsman or regulator should be excluded.

Q8. How can the Government best ensure that organisations are aware of the requirement to belong to a New Homes Ombudsman?

We consider that advertisements would be an effective means of raising awareness. Liaising with the industry organisations would also be appropriate, for example UK Finance [CML], Homes for Scotland, Home Builders Federation, and also the Law Society of Scotland, the Law Society of England and Wales and the Law Society of Northern Ireland.

The requirements under the Consumer Code for New Homes⁵ in relation to making the code available could be mirrored to ensure information is available to consumers.

Q9a. Should there only be a single New Homes Ombudsman?

There may be merit having a single Ombudsman to ensure consistency in standards.

We note that 95% of new builds homes are currently covered by the Consumer Code for New Homes and they are making efforts to provide a single unified Code to apply to all new homes.

⁵ <https://www.consumercodefornewhomes.com/about-the-code/4591768504>, see section 3.2.

Q9b. If not, why not?

Not applicable.

Q10a. How long after the initial complaint should a purchaser of a new build home be able to access a New Homes Ombudsman?

We consider that there requires to be flexibility in relation to timing depending on the facts and circumstances of the particular case. The purpose of any period would be to provide for a guaranteed minimum period for the developer to provide an explanation and to propose a remedy. It is appropriate that a developer or builder is given a reasonable period of time to respond to a complaint. Circumstances may arise where a developer has responded to an initial complaint and intends to take action to rectify an issue however there is a delay in sourcing the required product and/or contractor to undertake the work.

On the other hand, in circumstances where a developer fails to respond to a complaint from a purchaser, we consider that it is appropriate that the purchaser be able to refer the matter to the Ombudsman immediately.

Any decision taken in relation to timing is likely to influence the workload of the Ombudsman and therefore consideration will require to be given to the appropriate resource requirements.

Q10b Are there any other circumstances that a purchaser of new build home should be able to access a New Homes Ombudsman?

As referred to above, we consider that it is useful to understand the nature and extent of the mischief that the redress scheme is aimed at, in particular, whether issues are pre- and/or post-completion matters.

We consider that there may be merit in an Ombudsman having a role in pre-completion matters such as those relating to handover or delays. This could help to resolve issues at an early stage and thereby help to keep post-completion issues to a minimum. Any pre-completion scheme would need to take account of the fact that there are likely to be contractual provisions and remedies, and account will need to be taken of any statutory standard missives introduced⁶. How will the scheme interact with these? It would be undesirable if this added to delays already being experienced so it would be important that a clear timetable was established and met in pre-completion cases.

⁶ As considered in a recent consultation from Graham Simpson MSP on a Proposed New-Build Homes (Buyer Protection) (Scotland) Bill.

It would generally be appropriate for a developer or builder to be given a reasonable period of time to respond to a complaint. Exceptions to this could include: (i) failure by the developer or builder to respond; (ii) insolvency of the developer or builder; or (iii) cases with a particular urgency.

Q11. Are there any other specific standards to the new build sector that a New Homes Ombudsman should meet?

We do not suggest any other specific standards. However, we note the importance of clarity in relation to the powers of an Ombudsman and the matters upon which they are taking a decision. Depending on the role and remit, the Ombudsman may require a level of technical expertise to effect suitable remedies or to require parties to the scheme to fix issues. An Ombudsman would require an understanding of other redress schemes and warranty providers.

Q12. Should a New Homes Ombudsman be delivered by a public sector body?

We note that were the Ombudsman to be delivered by a private sector body, and particularly if there are multiple Ombudsman services, there is the potential for an Ombudsman to be subject to commercial pressures. Having multiple services could be confusing for consumers and has the potential to lead to varying levels of protection.

Q13. How should a New Homes Ombudsman be chosen for approval by Government if it is to be delivered by a private sector body?

We consider that this is a policy decision for government. We consider it important that there is full geographic coverage if there were to be one national Ombudsman.

Q14a. Should approval of a New Homes Ombudsman be withdrawn or removed if they fail to deliver effective service standards?

Yes.

Q14b. If so, what should count as shortcomings in service standards to merit disapproval, how can this be verified and by whom?

We suggest that there should be key performance indicators for service standards. These standards should be subject to public consultation.

Q15. Are there any alternative sanctions, other than withdrawal of approval, that could be used to ensure a New Homes Ombudsman or other housing redress scheme continue to deliver an effective service?

One sanction would be to restrict the intake by that Ombudsman of new work streams, pending the resolution of the shortcomings in service standards. However, we are unclear as to how that might operate in practice or whether that would, effectively, disadvantage consumers further. We note that other options would be:

- to have a scheme of civil penalties – in the event that the scheme is financed by developers or builders, this would mean that they would ultimately bear the cost of an effective service which is unlikely to be considered fair and may, ultimately, be passed on to the consumer through increased prices; or
- to introduce criminal liability – this would appear to be unnecessary and disproportionate to secure delivery of an effective Ombudsman service.

Q16. Should access to a New Homes Ombudsman be free for purchasers of new build homes to access?

We are strongly in favour of legal redress being available to all, and so any costs to a consumer in seeking redress via the New Home Ombudsman should not be a barrier to accessing legal remedies. It will be necessary for there to be clarity around the remit of the Ombudsman and the scope of matters which will be covered. Consumers should be made aware of this.

There is a risk that the New Home Ombudsman is used inappropriately, which would make the Ombudsman harder to resource. We therefore suggest that there be some kind of safeguard for vexatious complaints. It may be the case that any fee could be refunded where the complaint or claim is successful.

Consideration will require to be given as to whether the charging of a fee may inhibit access to justice. If there is an initial charge to a consumer, then we would recommend providing for a rapid process for an initial assessment of whether or not each case is likely to have merit.

Q17. What would be the most appropriate way for a New Homes Ombudsman to charge property developers?

We would favour a mixture of the options listed, including a combination of price per unit and pay per complaint. However, this depends to some extent on the nature of the remedies available. For example, if the Ombudsman could become involved in adjudicating in a complex construction dispute, then the costs of managing that dispute could be harder to absorb or predict on a price per unit calculation.

Providing for a price per complaint system, has benefits and disadvantages. This may help to ensure that those developers or builders who are not carrying out work or acting to a particular standard are responsible for covering the costs, or some of the costs, of complaints arising from their work. However, such a system may disadvantage developers or builders where complaints are raised against them but not upheld.

Q18. Would any of these models have an adverse impact on smaller housebuilders?

Not sure. This is principally an economic question.

The impact on smaller house builders will depend upon the detail of the New Homes Ombudsman scheme and the model used for charging. In the event that a model of price per unit charging only is used, this would result in blanket payment by developers or builders regardless of the standards of homes built or appropriate resolution of any issues arising, but would relate directly to the extent of development.

Often smaller builders are also new entrants into the housebuilding sector. Accordingly, the sensitivities are likely to include:

- the lack of a proven track record for new entrants, and so any weighting to reflect a lack of a claims record, in the absence of a good or bad claims record, would adversely affect new entrant small builders;
- smaller builders may be particularly sensitive to cash flow pressures, and so the costs of the Ombudsman scheme may have a disproportionate effect on small builders; and
- small builders are also likely to be sensitive to the interaction between the Ombudsman scheme and any underlying home warranty scheme or architect's certification. For example, small builders will sometimes start out by subcontracting work to contractors that are registered with a warranty provider, to be able to afford to provide a home warranty.

Q19a. Should smaller housebuilders pay a smaller fee than larger housebuilders?

Not sure. This depends on the model used for charging, and we refer to our comments at Questions 4 and 18.

Q19b. If so, how should this be achieved/calculated?

We have no comment on this question.

Q20. Are there different sanctions in addition to those available in other sectors of the housing market that a New Homes Ombudsman should have access to?

We consider that the issue of sanctions requires to be considered in light of a clear understanding of the nature, role and remit of the Ombudsman. Once these have been identified, full consideration should be given to the possible sanctions and to sanctions available under existing schemes. This would allow sanctions to be reviewed with a view to considering whether consolidation and/or any difference in approach is required. As we refer to above, it is important that there is clarity for consumers which may support the need for reducing duplication.

The full nature of these sanctions requires to be considered. For example, at present, warranty schemes are largely voluntary and therefore any suspension from a scheme would not impact upon the developer or builder's ability to continue to undertake building but may affect the saleability of properties. We foresee that there may be difficulties or unintended consequences if developers or builders were to be stopped from building in the event of a suspension.

Q21. Are there any other powers or sanctions a New Homes Ombudsman should have?

We consider that this will depend on the role and remit of the Ombudsman.

For complex situations, where the identification of the defect or the required remedy may be complicated and time consuming, it would be useful for the Ombudsman to be able to require a reference to an expert to determine the defect and the appropriate solution. This may require access to technical expertise.

It is not clear from the consultation as to whether it is intended that the Ombudsman will oversee warranty providers. If the Ombudsman is to take on that role, we suggest that they should have the power to order a warranty provider to remedy the matter where it is within the warranty provider's power to do so.

Q22. If a New Homes Ombudsman offers awards, what should the maximum amount be?

We consider that this depends on the remit of the Ombudsman scheme and the available remedies. For example, we suggest consideration be given to the remedy available where a developer has gone out of business and the consumer is not covered by a warranty or other available remedy.

Q23. What information should be published by a New Homes Ombudsman to empower consumers?

We think that it would be useful for the New Homes Ombudsman to publish the number of complaints received and of those, the number which are upheld.

Q24. What is the best way to publish complaints data so that it incentivises developers to improve their service?

We have no comment on this question.

Q25. What data from a New Homes Ombudsman would be useful for consumers when they are making a decision about purchasing a new home?

We have no comment on this question.

Q26. Should a New Homes Ombudsman remit be UK-wide?

Yes. We consider that for the sake of consistency and efficiency of resources, there would be merit in a single Ombudsman operating across the UK. However, it will be important to consider how rules will be implemented in Scotland and other devolved administrations in light of different laws and building standards. A single body is likely to have a strong English focus given the number of homes it will deal with in that market and it is important that it does not overpower the need for a system and support which appropriately deals with matters arising in the context of Scotland and the devolved administrations.

In the event that the remit is restricted to one jurisdiction only, there is the potential for consumers purchasing from a national house builder to have a lower level of protection than a consumer purchasing a similar property in the jurisdiction covered by the Ombudsman unless a similar measure is introduced.

Q27. Are there distinct practices in the different countries of the United Kingdom that require consideration for how a New Homes Ombudsman should operate if it were to be UK-wide?

Yes. The different practices in Scotland which would require consideration include:

- missives;
- the different building control regime;
- the absence of a leasehold as a tenure for selling new homes; and

- the different ways in which common parts are owned and managed.

Q28. What should be included in a Code of Practice for developers of new build homes?

We consider that the majority of the options listed could be effective. However, two of these suggested features merit further comment.

In relation to standard contracts, we generally support the move towards standardised missives across residential property transactions in Scotland. Standardisation can help consumers by reducing costs and ensuring contracts are concluded quickly as, in most cases, negotiations over contract terms are reduced.

The 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 that 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.

In practical terms, it may be difficult to design a standard contract that is sufficiently wide in scope to cover all reasonable possible situations while providing additional protection to consumers. There would require to be a mechanism to update standard contract terms regularly to ensure that the terms remain aligned with market practice.

We consider that it may be difficult for standard contracts to provide protection for consumers for significant structural issues in a new home for a number of reasons including:

1. the wide range of issues that can be experienced around quality of the product delivered is difficult to cover in a standard contract;
2. the contract may be time limited. In Scotland, missives are usually limited to two-years;
3. the need to ensure that any warranty or remedy transmits appropriately to others with relevant interests in the home including subsequent purchasers;
4. the standard of build that a consumer might choose to accept and what it is reasonable for a consumer to expect when taking delivery of their product may differ. Consumers will experience differences in their opportunity to involve other professionals, such as surveyors, during the build programme and before handover;
5. if protection relies on a developer being liable, it is possible (and common) that the developer would have no assets at the time of a claim or no longer exists;

6. enforcement of the standard contract may incur additional costs on the part of the consumer, take time and court proceedings will have an uncertain outcome.

Pre-completion surveys may not provide an effective remedy for consumers. There is the potential for such surveys to create practical difficulties in the housebuilding process and may lead to delays in delivering new homes. These potential difficulties include:

1. 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, a further survey is likely to 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. A delay would need to be factored into any build programme and will 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. A lender's position will also have to be considered in relevant cases, including the lender's approval of the survey report before release of funds;

2. Consideration will require to be given as to whether there should be a third-party adjudication process so that if survey findings are disputed, there is a quick and easy process to resolve the dispute;
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 are unlikely to be apparent from a survey carried out after completion;
4. The costs of 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 if applicable and dealing with any issues arising. In Scotland, 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.

Q29a. Should a Code of Practice for developers of new build homes be underpinned by statute?

No.

Q29b. If not, why not?

So far, the code has been a code, rather than a set of rules. If the code becomes a creature of statute, then it may become too rigid. In the event that the code is enshrined in statute, it may become out of date and legislation would be required to make alterations.

Additionally, it is important that the mechanisms for redress and details of the required standards for developers are accessible for consumers. It is important that the law is clear and can be understood.

Q30a. How should failure to belong to a New Homes Ombudsman be enforced?

We consider that enforceability depends on a number of factors, in particular whether the scheme is compulsory or voluntary and the nature and remit of the New Homes Ombudsman.

Q30b. Who should enforce this?

We have no comment on this question. See our answer to question 30a.

Q31. What should the penalty for non-compliance be?

We have no substantive comment on this question. See our answer to question 30a. Consideration may be given to the appropriateness of director disqualification as a penalty for non-compliance.

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