



Law Society
of Scotland

Consultation Response

RICS and TPO's Draft Overarching Code of Practice: Regulation of Property Agents

September 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 welcomes the opportunity to consider and respond to RICS and the Property Ombudsman's consultation: *Draft Overarching Code of Practice for Property Agents*¹.

The Committee does not seek to respond to all of the questions detailed in the consultation but has the following comments to put forward for consideration.

General comments

As a generality we agree that there should be consistency of approach across the sector to ensure that the consumer is afforded adequate protection and standards are maintained.

Letting agency work² is a devolved matter in Scotland and, those carrying out this work, including Scottish Solicitors, are subject to the Letting Agent Regulations, therefore our comments relate to estate agency as a reserved activity only. We also assume that there would be a further consultation process should UK Government seek to introduce legislation in this area.

While we will provide general comments on the code below, our overarching view is that we do not believe that such a code is required for Scottish solicitors acting as property agents because aspects of the code are already embedded in our Standards of Conduct and Standards of Service. Therefore, we would not be in favour of a regulatory system which imposed duties on solicitor property agents in addition to the current duties incumbent on solicitors in Scotland.

¹ <https://consultations.intstandards.org/consult.ti/ropa/consultationHome>

² Letting Agent Registration (Scotland) Regulations 2016

We note that the overarching code has been set out in two sections: 'Dealing with Consumers' and 'Managing Businesses and Staff'. We think that it is helpful to separate out these sections in terms of clarity of what consumers should expect and what is expected of those acting as property agents.

Comments on the Code

We note that the consultation uses 'must' in all circumstances as opposed to 'should' with a view to raising standards as recommended by the Best Report³ and agree that to ensure compliance and consistency this is important. It will also bring this in line with the mandatory Standards of Conduct with which Scottish Solicitors must comply⁴.

We note that the code states that agents must seek to avoid conflicts of interest, and where this is unavoidable, declare all conflicts of interest and ensure these are managed properly. The code then goes on to say, at 2c, that where there is a significant risk of a conflict of interest arising, agents must immediately disclose this in writing to all relevant parties. We are concerned that as currently drafted, it might be seen to suggest that parties could continue to act if there was in fact a conflict of interest and assume that this is not the intention. This would be detrimental to client and consumer interests. Solicitors must not act where there is a conflict of interest under any circumstances⁵ and therefore clarity is sought on what is meant by conflicts being "managed properly".

Part 6c sets out that Agents '*must present all fees and charges (including any associated tax) clearly, accurately and transparently to consumers before they become liable for the same. Consumers must know the full extent of their financial liability before they are committed to using an agent's service*'. Solicitors are required to provide clients, when tendering for business, or at the earliest practical opportunity upon receiving instructions to undertake any work on behalf of a client, certain information regarding costs⁶ and therefore we would wish to avoid any duplication in this regard.

As is acknowledged within the code itself, there will be times when a consumer is not a client of the agent, for example when acting as an estate agent, the seller is the client but the agent will require to interact with a potential purchaser as a consumer. It is therefore important to clarify the expectations on an agent when

³ <https://www.gov.uk/government/publications/regulation-of-property-agents-working-group-report>

⁴ Law Society of Scotland Practice Rules 2011 - <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/>

⁵ Rule B1.7 of the Practice Rules 2011 - <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/rules/b1-7-conflict-of-interest/>

⁶ Rule B4 of the Practice Rules 2011 - <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b4/rules/b4-client-communication/>

having to deal with competing duties to clients and consumers, in particular at part 9. This may cause difficulty for solicitor estate agents who are bound by client confidentiality.

With reference to part 11d, while we appreciate that the intention is to protect consumers, we would have concern that agents may be disadvantaged should a consumer seek to unreasonably withhold payment for services rendered. We also note that where objections are received, money must not be deducted until such time as parties resolve the objections. Clarity is sought on whether this would involve a complaint made to the Scottish Legal Complaints Commission (as set out below) which could remain unresolved for approximately two years. It would be unreasonable to expect solicitors to wait this length of time to be paid for services rendered. If a complaint is upheld, the solicitor can be directed to refund or reduce fees.

We note that property managers have been excluded from the obligations set out at 6c and 11d and agree with this approach for the reasons set out. We recognise the importance and need for some flexibility in incurring costs in advance, but there should be a common-sense approach taken as there is a limit to the level of costs that managers should commit to, without client instructions.

With reference to part 13, we note that the agents must be fit and proper persons. Clarity is sought on what is meant by fit and proper and what tests and/or exemptions will be applied. We would also suggest that agents should not be required to carry out any CPD in addition to the requirements set down by their existing regulator or professional body.

Regulation of Scottish Solicitors

As the professional body for Scottish solicitors we have a statutory duty to work in the public interest, a responsibility we are committed to maintaining through a stringent, proactive and effective regulatory regime which places the protection of the consumer at the centre.

The current main regulatory framework for Scottish solicitors is provided under the provisions of the Solicitors (Scotland) Act 1980, and related regulation. Although, under the provisions of the 1980 Act, there are only a small number of legal 'activities' which are reserved to solicitors holding a current practicing certificate, the solicitor is regulated to the extent of all work undertaken in the course of their business; this includes advising and representing clients on property related matters. The statutory regulatory regime is underpinned by strict professional service and conduct rules which are aimed at ensuring a robust level of consumer protection.

Scottish solicitors are expected to work to standards which reflect the legal, moral and professional obligations they owe to clients. The standards are divided into standards of service and standards of conduct. Standards of service set out the quality that clients should expect from solicitors, for example being competent, delivering on commitments and ensuring communications can be easily understood by clients. Standards of conduct cover the behaviour of solicitors, for example setting out that solicitors must

act with integrity, maintain client confidentiality and should not act where there is a conflict of interest. Where complaints contain elements of both service and conduct each element is investigated separately. In the most serious cases solicitors can be and have been struck off the roll of solicitors.

However, we are concerned that the code as it stands does not set out what approach would be taken to those, such as solicitors, who are already heavily regulated to the extent of any related advice work they may undertake in the course of their business or how any new proposed regulatory regime will recognise existing regulation so as to avoid duplication, contradictory, overlapping or inconsistent provisions. We have previously experienced and highlighted similar issues in regard to other sectors where regulation has been introduced which has overlapped with the regulation of Scottish solicitors. For example, in relation to the regulation of letting agents, issues were identified relatively early and, through engagement with ourselves the resultant regulations make specific provision for when existing professional requirements will be recognised as superseding the regulations. We suggest that RICS, the Property Ombudsman, UK Government and others may find it helpful and informative at an early stage to refer to these regulations to understand the approach taken where the individual is a solicitor and already subject to stringent oversight.

Should UK Government pursue same they may also find it helpful to look towards the regulatory structure of those providing immigration and asylum advice and services. The Immigration and Asylum Act 1999 sets out who falls under the regulation of the Immigration Services Commissioner and who does not. Part V, section 84 excludes those who are already regulated - those authorised to provide immigration advice or immigration services by a 'designated qualifying regulator'. This means solicitors do not face double regulation because they come under a designated qualifying regulator - the Law Society of Scotland. This means they do not therefore fall under the regulation of the Office of the Immigrations Services Commissioner. This is a workable/efficient means of setting up a system of regulation that excludes those regulated elsewhere.

Overall, our view is that the difficulties that the code seeks to tackle are unlikely to be difficulties that exist with advisers who are subject to their own regulatory regimes (such as Scottish solicitors). Therefore, any regulation imposed should be 'light touch' or admit 'passporting' where the agent is already subject to regulation. In this way any new regulation would have a greater chance of achieving its objective of driving up standards while at the same time not imposing unnecessary duplication or further regulation on those advisers who are already regulated and are not those causing the difficulties referred to.

In certain areas of Scotland, the vast majority of properties are sold and marketed by solicitor estate agents. It is appreciated that buyers and sellers may have a different experience of buying and selling depending on whether a solicitor estate agent or an estate agent is instructed. In particular, solicitor estate agents will be subject to the Practice Rules as detailed above, which means that they will not be able to take certain actions in the course of a transaction which could be taken by estate agents. These requirements are generally intended to ensure fairness in the purchase of property from a solicitor estate agent.

If solicitors no longer carry out estate agency work due to additional regulatory requirements, this is likely not only to have a significant impact on legal businesses in Scotland, but also to restrict consumer choice and protection.

There is a robust statutory route of redress in place for consumers who may wish to raise a complaint against a solicitor estate agent. The Scottish Legal Complaints Commission (SLCC) is the gateway for all complaints against Scottish solicitors. This scheme is open to complaints against solicitor estate agents as their estate agency work is part of their business. If an individual is not satisfied with a solicitor or a solicitor's firm, they are required to raise their concerns with the firm in the first instance via a nominated client relations manager. If the problem is not resolved with the client relations manager, a formal complaint may be submitted by the complainer to the SLCC. The SLCC determines if a complaint relates to the service provided or the conduct of a solicitor. Complaints relating to service are investigated by the SLCC and we investigate complaints relating to conduct which may ultimately result in the solicitor facing disciplinary action before the Scottish Solicitors' Discipline Tribunal

We agree that it is important that there is an open and accessible complaint scheme for consumers using estate agent services however, we also wish to ensure that solicitors who undertake this work can avoid any unnecessary duplication and would be concerned that there is a potential for a conflict of interest to arise if solicitors are subject to two different regulatory regimes or complaint redress routes where there may be the potential for opposing outcomes.

We would welcome the opportunity to engage with RICS and TPO in a collaborative approach to ensure that solicitors estate agents, who are already robustly regulated, are not unintentionally and unnecessarily adversely impacted by the proposed Code of Practice.



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