



Law Society
of Scotland

Building Safety Bill

Law Society of Scotland – briefing for Second
Reading

January 2022



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.

We have previously responded to the UK Government's consultations on *Strengthening consumer redress in the housing market*¹ and *Redress of Purchasers of New Build Homes and the New Homes Ombudsman*², and to a consultation from Graham Simpson MSP on a Proposed *New-Build Homes (Buyer Protection) (Scotland) Bill*³.

In September 2020, we provided written evidence to the Parliament's Housing, Communities and Local Government Committee⁴ on the Draft Building Safety Bill⁵. We now welcome the opportunity to consider and provide comment on the Building Safety Bill⁶ ahead of Second Reading Stage in the House of Lords on 2 February 2022.

General remarks

The Bill has limited extent and application in relation to Scotland, as set out in clause 141 of the Bill. This includes clauses 120 to 127 and Schedule 9 which concern a new homes ombudsman scheme.

When the draft Bill was consulted upon, the provisions concerning the establishment of a new homes ombudsman scheme extended and applied to Scotland. The scope of these provisions was limited to England when the Bill was introduced to Parliament. The Explanatory Notes at the time that the Bill was introduced highlight that the subject matter of the Bill relating to the creation of the New Homes

¹ <https://www.lawscot.org.uk/media/360024/18-04-09-misc-consumer-redress-in-housing-market.pdf>

² <https://www.lawscot.org.uk/media/363412/19-08-22-pllr-plc-cons-adj-consultation-redress-for-purchasers-of-new-build-homes-and-new-homes-ombudsman.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>

⁴ <https://committees.parliament.uk/writtenevidence/11905/html/>

⁵ <https://www.gov.uk/government/publications/draft-building-safety-bill>

⁶ <https://bills.parliament.uk/bills/3021>

Ombudsman scheme is housing, which is a devolved matter within the competence of the Scottish Parliament as it is not a reserved matter under Schedule 5 of the Scotland Act 1998.

Amendments were laid by the UK Government on 13 January to amend the provisions concerning a new homes ombudsman scheme, including extending the scope of the provisions to include Scotland and Wales. The amendments were passed at Report Stage in the House of Commons on 19 January 2022. We therefore now provide comments on the provisions in the Bill concerning a new homes ombudsman scheme.

We highlight the importance of respecting the devolution settlement. Under section 28(7) of the Scotland Act 1998, the UK Parliament has the power to make laws for Scotland. The exercise of this power is subject to “the Legislative Consent” or “Sewel” convention, being that the UK Parliament will not normally legislate on a devolved matter without the consent of the Scottish Parliament as set out in section 28(8) of the Scotland Act 1998. The Scottish Government lodged a Legislative Consent Memorandum at the Scottish Parliament on 26 January 2022⁷ concerning clauses 120-126 and schedule 9 of the Bill and setting out an intention to lodge a Legislative Consent Motion in the Scottish Parliament.

We have previously highlighted that we consider that it is important to understand the issues experienced by purchasers of new build property before considering the detail of 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.

Comments on the Bill

Clause 120

Clause 120 is an enabling provision which requires the Secretary of State to make arrangements for there to be a scheme to be known as the “new homes ombudsman scheme” which meets certain conditions set out in the Bill, in particular those set out in clause 121. The provisions allow for flexibility as to how the scheme will operate with clause 120(2) providing “examples of arrangements”, including arrangements with another person to establish and maintain the scheme, arrangements under which the scheme is established and maintained by, or on behalf of, the Secretary of State or the maintenance of the scheme by a person other than the person who established it.

The subsequent clauses and Schedule 9 provide a high-level framework for a redress system, with the detail to follow in the scheme itself and in any associated regulations. While we appreciate that this provides flexibility, it is difficult to assess the full impacts of the proposed scheme at this stage.

⁷ <https://www.parliament.scot/-/media/files/legislation/bills/lcms/building-safety-bill/legislative-consent-memorandum.pdf>

We note that the Explanatory Notes to the Bill state: “The purpose of the New Homes Ombudsman scheme is to enable relevant owners of new build homes across Great Britain to make complaints against scheme members (developers) and to have such complaints investigated and determined by an individual who will act as an independent ombudsman.”⁸ We recognise the potential benefits in consolidating routes of redress for consumers by having a single Ombudsman, alongside existing legal remedies including contractual and delictual rights, as well as other measures which may continue, for example warranty provision. We expect that the creation of a legislative-based Ombudsman will help to ensure consistency in standards, particularly by virtue of a code of practice, and may make it easier for consumers to access redress.

Clause 120(3) concerns financing of the scheme. We note that the Explanatory Notes state: “the intention is for the new homes ombudsman scheme to cover its own costs and to finance itself through fees charged to developers.”⁹ We consider that it is important that these measures do not become a barrier for new developer entrants into the housing market and therefore suggest that costs be considered carefully. We comment further on this below.

Clause 120(4) requires the Secretary of State to consult Scottish Ministers before making arrangements under clause 120(1) for a new homes ombudsman scheme. We welcome this requirement which must be carried out in such a way as to respect the devolution settlement. We note that the Bill does not provide for consultation with stakeholders or the public at large. We suggest that a requirement for consultation beyond Ministers be provided on the face of the Bill. This will provide an opportunity for scrutiny and critical comment from stakeholders on the arrangements of the scheme.

Clauses 121 & 122

Under clause 121(1), the scheme is to “enable qualifying complainants to have complaints against members of the scheme investigated and determined by an independent individual”. “Qualifying complainant” is defined as being “a person who, at the time the complaint is made, is a relevant owner of a home which, at that time, is a new build home.”

In turn, “relevant owner” is defined in clause 122(2) as being an individual, with a relevant interest in land that includes the home, and meets the occupation condition, which requires the person to occupy the home or be the landlord under a lease granted to another individual that includes the home for their occupation (clause 122(3) and (4)).

This definition is therefore limited to individuals, who own the home and who occupy the home either themselves or where occupation is satisfied by virtue of a tenant under a lease. We have previously suggested that consideration be given as to whether the definition of “relevant owner” should be expanded so that some other parties have a right of recourse to the ombudsman. For example, to include

⁸ HL Bill 98 Explanatory Notes, paragraph 940

⁹ HL Bill 98 Explanatory Notes, paragraph 936

spouses/civil partners who occupy the new build property, but who do not hold a title interest, or a beneficiary under a trust, where for example, a trustee is purchasing a property for a disabled individual.

Turning to the requirement that a relevant owner “has a relevant interest in land that includes the home”, “relevant interest in land” is defined in clause 122(6). This is defined as being “in relation to land in Scotland, the interest of an owner of land.” As defined, this means that redress to the new homes ombudsman would only require to be available after the purchase of the new home had completed. This means that the new homes ombudsman will not be required to deal with issues arising before the completion of the sale and purchase of the new home, for example, matters such as poor communication, retention of deposits or reservation fees, delays or issues during construction.

All this said, we note that clause 121(4) provides that the scheme “may also include provision for persons other than qualifying complainants to have complaints against members of the scheme investigated and determined under the scheme”. While this could be used to address the issues narrated above as to the definition of “relevant owner”, we consider it preferable for the definition of consumers who will be able to access the scheme to be as clear and complete as possible on the face of the Bill. If clause 121(4) was applied to allow *any* third parties to raise complaints under the new homes ombudsman scheme this could open floodgates to complaints from parties with no direct link to the developer and with no direct link to the issue being raised with the ombudsman – we therefore suggest that the scope requires careful consideration.

Clause 122(5) defines ‘new build home’. We consider that clause 122(5)(a)(ii) requires greater clarity - can conversion be interpreted as meaning substantial alteration, or if it is intended that conversion is related to both the use and the form (i.e. that the property has been used for a non-residential purpose before)? This interacts with the meaning of developer under clause 122(7).

We consider that the two-year period from first acquisition of a relevant interest in land which includes the home (set out in clause 122(5)(c)) will mean that the scheme will be fairly limited in its scope, for example, principally dealing with snagging issues. We refer to our comments above in relation to the need to fully understand the issues experienced by purchasers of new build property.

Clause 122(7) sets out the definition of ‘developer’. We have previously suggested that consideration be given to whether a *de minimus* level should apply for developments as the impact on certain operators may impose a disproportionate cost and administrative burden, for example, self-build and amateur developers. It appears that self-builders fall out-with scope of the regime unless they seek to grant, or dispose of, a relevant interest in land (122(7)(a)), for example, by selling the property. We note the power under clause 122(7)(b) for a “national authority”, including the Scottish Ministers in relation to homes in Scotland, to set additional descriptions of “developer” by way of regulations, following consultation with the other national authorities.

Clause 123

We have no comments.

Clause 124

Clause 124 is an enabling provision which gives a power to the Secretary of State to make regulations requiring developers to join and remain members of the scheme (clause 124(1)). Subsection (2) requires the Secretary of State to consult Scottish Ministers before making regulations under subsection (1).

The clause provides that regulations may make provision for the imposition of civil sanctions for breaches of a requirement imposed by regulations under the clause (124(1)(d)). We welcome the requirement that regulations under this clause are subject to the affirmative procedure (under clause 140(6)(a)). Members of the scheme must have a clear understanding of what actions will amount to a civil penalty in order that they may guide their conduct appropriately. Any penalties should be proportionate and seek to balance the rights of the individual in relation to the regulatory needs of the state.

We welcome the requirement that provisions relating to sanctions must include provision for appeals (clause 124(5)). However, we consider that it would be appropriate for powers relating to appeals to be detailed on the face of the Bill.

Clause 125

Clause 125 provides that the person who maintains the scheme must keep a register of members of the scheme and the register must be made “available for inspection by members of the public at all reasonable times”. We consider that the register should be available without payment of a fee.

Clause 126

Clause 126 is also an enabling provision which provides that the Secretary of State “may issue or approve a code of practice about the standards of conduct and standards of quality of work expected of members of the new homes ombudsman scheme.” We consider that there may be merit in having a single code of practice for members of the new home ombudsman scheme to ensure consistency and question whether the clause should *require* the Secretary of State to issue or approve a code, rather than only permitting the Secretary of State to do so.

While subsection (4) requires the Secretary of State to consult Scottish Ministers (and Welsh Ministers) before taking steps in relation to the code, we note that the Bill does not provide for consultation on any code of practice with stakeholders or the public at large. We suggest that a requirement for consultation beyond Ministers be provided on the face of the Bill. This will provide an opportunity for scrutiny and critical comment from stakeholders, which may help to improve the code.

Schedule 9

Requirements in relation to membership of the scheme are set out in Schedule 9, paragraphs 2 and 3. We note that paragraph 3 provides that:



“The scheme may provide for different categories of member and the provision mentioned in paragraph 2 (including provision about fees) may differ as between such categories.”

We welcome this provision which would enable the scheme to cater for different categories of membership and provide for associated fees. If this is indeed provided for by the scheme, this may help to ensure that the costs and administrative burdens of membership of the scheme are not such that there is an adverse impact upon the market or certain types of businesses, for example, SMEs.

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