QUESTIONS

ABOUT YOU

(Note: Information entered in this "About You" section may be published with your response (unless it is "not for publication"), except where indicated in bold.)

1. Are you responding as:
   - ☑ an individual – in which case answer Q2A
   - ☐ on behalf of an organisation? – in which case answer Q2B

2A. Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose "Member of the public".)
   - ☐ Politician (MSP/MP/peer/MEP/Councillor)
   - ☑ Professional with experience in a relevant subject
   - ☐ Academic with expertise in a relevant subject
   - ☐ Member of the public

Optional: You may wish to explain briefly what expertise or experience you have that is relevant to the subject-matter of the consultation:

DIRECTOR OF SCOTTISH NATIONAL HOUSEBUILDING.

2B. Please select the category that best describes your organisation:
   - ☐ Public sector body (Scottish/UK Government or agency, local authority, NDPB)
   - ☐ Commercial organisation (company, business)
   - ☐ Representative organisation (trade union, professional association)
   - ☐ Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)
   - ☐ Other (e.g. clubs, local groups, groups of individuals, etc.)

Optional: You may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).
3. Please choose one of the following:

☑️ I am content for this response to be published and attributed to me or my organisation
☐ I would like this response to be published anonymously
☐ I would like this response to be considered, but not published ("not for publication")

If you have requested anonymity or asked for your response not to be published, please give a reason. (Note: your reason will not be published.)

☐ ☐ ☐

4. Please provide your name or the name of your organisation. (Note: The name will not be published if you have asked for the response to be anonymous or "not for publication").

Name: Jim Baxter

5. Please provide a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number. (Note: We will not publish these contact details.)

Contact details:

☐ ☐ ☐

6. Data protection declaration

☑️ I confirm that I have read and understood the privacy notice attached to this consultation which explains how my personal data will be used.
YOUR VIEWS ON THE PROPOSAL

Note: All answers to the questions in this section may be published (unless your response is "not for publication").

Aim and approach

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

   - [ ] Fully supportive
   - [x] Partially supportive
   - [ ] Neutral (neither support nor oppose)
   - [ ] Partially opposed
   - [ ] Fully opposed
   - [ ] Unsure

   Please explain the reasons for your response.

   WHILE ACCEPTING THE NEED FOR CONSUMER PROTECTION, I AM WARY OF NEGATING FREEDOM IN DECISIONS TO THE EXTENT THAT THEY IMPEDE PERSONAL RESPONSIBILITY.

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?

   - [ ] Fully supportive
   - [x] Partially supportive
   - [ ] Neutral (neither support nor oppose)
   - [ ] Partially opposed
   - [ ] Fully opposed
   - [ ] Unsure

   Please explain the reasons for your response.

   FOR BONA FIDE HOUSEBUYERS THERE ALREADY EXISTS SUFFICIENT MEANS TO SECURE FAIRNESS BOTH BUILDER AND PURCHASER. AS USUAL WE ARE LEGISLATING FOR THE UNCONSCIOUS.

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

   - MAIN ADVANTAGE: LEVEL BUYING FIELD.
   - MAIN disadvantage: ADDING AN AVENUE FOR THE "ENTITLED" PURCHASER TO HAVE THEIR CASE HEARD.
4. What length of time do you think is most appropriate for a builder's warranty for a new-build home?

- [ ] 5 years
- [x] 2 years
- [ ] 1 year
- [ ] 6 months
- [ ] Other (please specify)
- [ ] Unsure

Please explain the reasons for your response.

Two years should be sufficient time for people living in a house to notice defects, for building to settle, and for builders to put things right.

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?

- [x] Fully supportive
- [ ] Partially supportive
- [ ] Neutral (neither agree nor disagree)
- [ ] Partially opposed
- [ ] Fully opposed
- [ ] Unsure

Please explain the reasons for your response.

Local authorities and land registry records' inspectors do not always carry out regular inspections during the build. A full survey would prove if the build was good or not. It would also lead a buyer against further future claims.

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.

Never had any particular issues.
Financial implications

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

☐ Significant increase in cost
☒ Some increase in cost
☐ Broadly cost-neutral
☐ Some reduction in cost
☐ Significant reduction in cost
☐ Unsure

(b) Businesses – including housebuilders

☐ Significant increase in cost
☐ Some increase in cost
☒ Broadly cost-neutral
☐ Some reduction in cost
☐ Significant reduction in cost
☐ Unsure

(c) Individuals – including new-build house buyers

☐ Significant increase in cost
☐ Some increase in cost
☒ Broadly cost-neutral
☐ Some reduction in cost
☐ Significant reduction in cost
☐ Unsure

Please explain the reasons for your response.

☑ ADMIN
☐ SOME PEOPLE WILL CHARGE MORE INITIAL.
☑ SURVEY COST - AND MANY WILL BE TOO STRUCTURED TO CRY FOR THIS.

Equalities

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?
Positive
☐ Slightly positive
☐ Neutral (neither positive nor negative)
☐ Slightly negative
☐ Negative
☐ Unsure

Please explain the reasons for your response.

I CANNOT SEE ANY IMPACT

Sustainability

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?

☐ Yes
☐ No
☐ Unsure

Please explain the reasons for your response.

IT MAY, FACTORIALLY, SLOW DOWN THE BUILD TO SELL HOUSES BUT ONLY BY A FEW OF DAYS.

General

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

Purchasing a home

Purchasing a home is a major financial commitment and a major landmark in many people’s lives. It is generally the most expensive thing anyone will buy.

When a person buys a new-build home they should be confident that the property will remain structurally safe. However, as with any purchase, new-build homes are not without flaws. Some buildings can suffer major structural defects that a new-build home-buyer should not expect. Unlike other purchases that we make during our lives however, there is limited consumer protection for new-build home-buyers.

In brief, when someone sets out to purchase a new-build home, there are a number of steps:

1. Speak to a mortgage advisor about financing a new-build property.
2. Find the property by visiting new-build developers. This can include viewing a show home if one is available.
3. Reserve the property. A reservation fee is usually payable to secure the property, and, in most cases, this is non-refundable if the buyer changes his/her mind. The reservation fee will usually be deducted from the sale price.
4. Conclude missives. For new-build property these are known as builder’s missives and are drawn up by the builder. These are generally concluded within a number of weeks of reserving the property. Builders’ missives vary from builder to builder and are considered by some to be weighted in favour of the builder.\(^2\)
5. Pay deposit.
6. Completion of purchase and entry date. The date of entry is not defined in the missives.\(^3\)

Missives

For purchasing existing homes, the buyer’s solicitor typically prepares the offer and sends it to the seller’s solicitor. This correspondence of letters and acceptance of the offer is what constitutes, and becomes known as, the missives. Concluding missives is a legally binding contract between the buyer and seller.

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\(^3\) Ibid, 3.

\(^1\) Consumer Code — must be refundable albeit with deduction for costs incurred.

\(^@\) Depends on strength and dedication of the purchaser’s solicitors.
Builders' missives

Builders' missives, for new-build purchases, are drafted by the builder and not the buyer.

Builders' missives are the part of the new-build purchase process that this consultation is dealing with specifically.

My concern is that there is no statutory provision to ensure that current builders’ missives contain clauses that protect the new-build home buyer if there is a major or structural defect with the property. There are voluntary options that property builders can opt to use, but these are not used consistently across the sector.

Building regulations

For many years both as a local councillor and as an MSP I have been contacted by constituents who have been left in a difficult situation due to problems with new-build property. Most of these cases involved purchases of a new-build home that was covered by a warranty scheme.

One case I am dealing with has been ongoing for over seven years. This is a ridiculous situation and shows why the law needs to change.

I was shocked to discover that the current building verification process is not as robust as you might imagine. Through my work on the Local Government and Communities Committee we undertook a review of building regulations. I refer to the findings of this review later in this document.

Changing this system would be a significant overhaul and I am not proposing to change this system with this proposal.

The focus of my proposal is to strengthen the current system of builders’ missives and redress by ensuring all builders' missives contain the same protection for consumers.

Current law and practice

The main piece of legislation relating to consumer protection is the Consumer Rights Act 2015. This UK legislation came into force in 2015 and replaced three earlier Acts related to consumer protection. The Act was intended to simplify and strengthen consumer protection in the UK. As welcome as these changes were, the Act does not

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cover the purchase of new-build homes, resulting in a gap in protection for those who purchase them.

**Gaps in legislation**

There are various voluntary consumer protection schemes available, including the Consumer Code for Homebuyers, warranty schemes and, as already alluded to, voluntary new-build standard missives.

This variety of services and options can often be confusing for consumers. These options are only voluntary and so therefore do not always offer the robust protection that buyers of new-build homes need.

**Standard Missives**

When purchasing a new-build home, the builder and not the buyer prepares the wording of the missives. Builders’ missives can vary from builder to builder.

Builders therefore draft builders’ missives with the clauses and protections they choose. Homebuyers have little ability to amend these if the contract fails to provide sufficient consumer protection.

To address this, a working party of solicitors drafted a set of standard clauses (the Scottish New Build Clauses, Edition 1, 2015). These standard clauses are intended to replace many styles of builders’ missives. In practice, these are typically used by smaller developers, with larger developers still opting to use their own clauses.

By having standardised missives, we would ensure that everyone is treated fairly, and we could also ensure that all buyers of new-build homes had the same protection.

**Warranty schemes**

New build homes are likely to come with some form of warranty. There are various schemes available. Builders under warranty schemes represent over 90% of the new-build homes in the UK. Such warranty schemes include the National Housing Building Council (NHBC) Buildmark, Premier Guarantee and LABC Warranty.

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© In most cases, where purchasers’ solicitors draw missives, these and amendments concern boundaries, extras, incentives, dates of entry and are usually not compatible to the builders.
The NHBC Buildmark scheme is one example of an insurance policy for new-build home buyers who purchase a home built by one of its approved builders. It only applies to registered NHBC home builders.

New-build home-buyers can check whether their builder is registered with NHBC by checking the NHBC register online.

NHBC will only get involved during years 0-2 if the builder is insolvent or refuses to take any action. Following that, in years 3-10, the scheme offers protection for things including foundations, walls, staircases and drainage. It does not cover:

- Damage to the roof covering (including any underlays, fixings, mortar and weatherproofing details) unless the damage results in water getting into your home.
- Cracking, spalling (a chip, fragment or flake of masonry coming off the main structure), or mortar erosion that does not weaken the structural stability of your home or mean that it is no longer weathertight.
- Water entering, or dampness or condensation in, an underground garage, where its structural stability is not affected.

**Consumer Code for Homebuilders**

The Consumer Code for Homebuilders was developed by the homebuilding industry and applies to home builders under the insurance protection of one of the supporting home warranty bodies (NHBC, Premier Guarantee, and LABC Warranty). However, it carries no statutory weight whatsoever.

The code applies to all new private home-buyer reservations. It contains 19 requirements and principles, which home builders must meet in their marketing and selling of homes and their after-sales customer service, including:

- Effective customer service training
- Clear and truthful advertising and marketing materials
- Sufficient pre-purchase information to help you make an informed decision about your purchase
- Contact details for the Home Builder and other relevant bodies
- Home Warranty information
- Contract information including termination rights
- Timing of construction, completion and handover
- After-sales service
- Complaints process

Home buyers can seek assistance under the Code for dispute resolution should they feel that their builder has breached the Code.
Supporting evidence

**UK Parliamentary and Government consideration of redress for homebuyers**

The Westminster All-Party Parliamentary Group (APPG) for Excellence in the Built Environment is advocating that the Ministry of Housing, Communities and Local Government commissions a review of warranties to ensure they are fit for purpose.⁹

Although housing is devolved, this decision by the APPG reflects my own opinion that the current system is not functioning properly. The evidence received during this review was similar to the evidence heard by the Local Government and Communities Committee during its review of building regulations, and also resonates with my own caseload of complaints from constituents.

The APPG also found that house builders “were too frequently handing over poor-quality homes because they could get away with doing so.”¹⁰ In my opinion, if we cannot test the structure and material of a new-build home as part of the building verification process, then ensuring that the builder must meet its contractual obligations, and that these obligations are strengthened, is a more appropriate way to deal with the problem of building defects.

One of the ten recommendations the APPG put forward was for housebuilding sales contracts to be standardised.¹¹ Within the Scottish context of missives, this is what I am proposing to do with my proposed Bill.

In 2018, the UK Government consulted on 'Strengthening Consumer Redress in the Housing Market'. The results of this consultation mirror in part the purpose of this proposed Bill; “more needs to be done to strengthen consumer redress in relation to new-build homes”.¹² The consultation has suggested various changes to consumer redress, including but not limited to:

1. Introduction of a New Homes Ombudsman
2. Housing Complaints Resolutions Service
3. Code of Practice on complaint handling across all tenures

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¹⁰ Ibid.

¹¹ Ibid.

If the Scottish Government wishes, they could adopt these same changes when they come into practice elsewhere in the UK. If not, these improvements to the system will apply in England and Wales only.

If the Scottish Government adopts these suggestions, they would complement the measures in my proposed Bill.

**Scottish Parliament Local Government and Communities Committee**

In 2017 the Scottish Parliament's Local Government and Communities Committee published the report *Building Regulations and Fire Safety in Scotland*. This report “focused on complaints from a number of individuals relating to private house builders”.

In its report, the Committee noted that the current building verification process in place might allow for defects to go unchecked when new-build developments are being constructed.

**Building verification**

The report highlighted that building verification is not an exact science. In their evidence to the Committee, Local Authority Building Standards Scotland (LABSS) stated that “as a verifier need only make ‘reasonable enquiry’ before acceptance of a certificate, there can be circumstances where a site inspection may not be needed. .... In some cases, by the time building standards officers carry out their inspection, they may not get to see all of the elements of the build.”

Clearly the verification process is not perfect, with verifiers relying on the builder to confirm they have done the job properly.

LABSS also stated “in the event that following the issue of a completion certificate a property was found to be defective, any form of redress would be a civil matter between the purchaser and the builder.”

Ross MacKay from the Law Society of Scotland suggested a form of sinking fund for the “fairly rare cases of serious structural defects that are not picked up by builders or insurers and slip through the net. If there was some sort of fund there to deal with these