

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

Introduction

A proposal for a Bill to establish standard missives for the sale of new-build homes, including redress for purchasers in respect of defects in construction. The consultation runs from 5 April 2019 to 27 June 2019. All those wishing to respond to the consultation are strongly encouraged to enter their responses electronically through this survey. This makes collation of responses much simpler and quicker. However, the option also exists of sending in a separate response (in hard copy or by other electronic means such as e-mail), and details of how to do so are included in the member's consultation document. Questions marked with an asterisk (*) require an answer. All responses must include a name and contact details. Names will only be published if you give us permission, and contact details are never published – but we may use them to contact you if there is a query about your response. If you do not include a name and/or contact details, we may have to disregard your response. Please note that you must complete the survey in order for your response to be accepted. If you don't wish to complete the survey in a single session, you can choose "Save and Continue later" at any point. Whilst you have the option to skip particular questions, you must continue to the end of the survey and press "Submit" to have your response fully recorded. Please ensure you have read the consultation document before responding to any of the questions that follow. In particular, you should read the information contained in the document about how your response will be handled. The consultation document is available here: [Consultation document](#) [Privacy Notice](#)

I confirm that I have read and understood the Privacy Notice attached to this consultation which explains how my personal data will be used

About you

Please choose whether you are responding as an individual or on behalf of an organisation. Note: If you choose "individual" and consent to have the response published, it will appear under your own name. If you choose "on behalf of an organisation" and consent to have the response published, it will be published under the organisation's name.

an organisation

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".)

Professional with experience in a relevant subject

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

Ross Taylor, lead solicitor at Taylor Law, specialises in dispute resolution in the construction sector. He is also a Mediator, accredited by Core Solutions Group, and a Notary Public. He is a member of the Chartered Institute of Arbitrators and previously sat on the committee of its Scottish branch; a member of the Law Society of Scotland, previously sitting on its Regulatory Committee. Ross specialises in dispute resolution and avoidance within the Construction sector. He holds a Master of Laws in Construction Law, as well as a Bachelor of Laws with Honours and a Diploma in Legal Practice.

Please select the category which best describes your organisation

No Response

Please choose one of the following:

I am content for this response to be published and attributed to me or my organisation

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". Otherwise this is the name that will be published with your response).

Taylor Law

Please provide details of 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. We will not publish these details.

Aim and Approach

Q1. Which of the following best expresses your view of establishing statutory standardised clauses for builders' missives?

Fully supportive

Please explain the reasons for your response.

In 2015, a set of Standard Clauses were produced with the assistance of the Law Society of Scotland. These can be incorporated into Missives. They make specific provisions relative to new build properties. There are two problems: The first is that the conditions are not mandatory. They can be adopted, adopted under revision or ignored. I have been involved in subsequent disputes about the quality of the new build property, founded upon Missives which make no reference to the Standard Clauses. Secondly, I suggest that the clauses do not give enough protection. For instance, within the Standard Clauses, "completion" is determined with reference to the local authority completion certificate and/or the home warranty scheme provider's completion certificate. Neither may prevent defects in build quality, or inadequacies in specification. Indeed, broadly, both certificates focus on vouching that the property has been completed in accordance with the building warrant and Building Regulations. Indeed, at the time of "completion" it may appear that the new-build property is compliant, such that a certificate can be issued. Defects may materialise later. Tying completion to the issue of the certificate only, means that there is no breach of the missives by having done so, if such defects do later materialise. Also under the Standard Clauses, the property requires to have been constructed in a good and workmanlike manner. Failure to achieve that standard would be a breach of the missives., giving rise to compensation. Otherwise and provided the Building Warrant and home warranty scheme provider's standards have been met (remember largely structural), there is no more protection. Therefore, defects in design may not of themselves breach the missives. Returning to the analogy of goods purchases: I may have a car, with four wheels, a steering wheel, brake, accelerator and so on, but it may be a four door family saloon with a dodgy sound system, when what I wanted was a high end sports car with the latest technology. All too often, I have acted for clients who have purchased new build properties which have obvious problems, but which fall into a lacuna. Thankfully, this lacuna has come to the attention of the Scottish Parliament. The New Build Homes (Buyer Protection) (Scotland) Bill, proposed by Graham Simpson MSP, seeks to "establish standard missives for the sale of new-build homes, including redress for purchasers in respect of defects in

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construction". A stated aim of Homes for Scotland (which represents stakeholders in the House Building sector)) is to improve the quality of living in Scotland. A step towards achieving that may be to ensure that the clauses of the standard missives are compulsory, are carefully framed and fill the lacuna. It is not enough that they simply rehash obligations to comply with building regulations and warranty provisions. Whatever the particular design, specification and workmanship standards that are marketed to the purchaser may be, the missives need to contain provisions to ensure that those standards are delivered and that shortfalls in— which exist at completion or materialise over a stated period of time thereafter – are remedied or compensated. At present, compensation is likely to be based in loss of value. However, in a buoyant market, there is often no such loss, so that the purchaser just has to put up with the defect. Compensation ought not to focus on loss of value, but on cost of repair, and must of course be proportionate. This may be the only way to allow the purchaser to put right the defect and gain the enjoyment from his or her new home that he or she was expecting.

Q2. 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

Please explain the reasons for your response

Mr Simpson proposes that the Bill will include "a clear statutory route for redress". I agree that it should. I venture that one already exists. The Construction industry has long been familiar with Adjudication to sort out disputes within it. Since 1996 the process has had statutory backing. It is a fast-track process, in which parties make submissions to an Adjudicator. The Adjudicator usually has a technical background). He may arrive at a decision by using his own skills and experience. Adjudication is intended to be completed within four to six weeks. The Adjudicator's decision is binding, unless and until a Court or Arbitrator decides differently. In most cases that doesn't happen, because the parties accept the Adjudicator's decision. At present, the residential occupier does not have a statutory right to Adjudication. The Courts in England have suggested that he or she should. I agree. All that is needed is a one line amendment to the existing legislation, which presently applies to the industry.

Q3. What do you think would be the main practical advantages and disadvantages of the proposed Bill?

Advantage: Proper rights of redress for new-build home owners
Disadvantage: Added costs to the homebuilder sector

Q4. What length of time do you think is most appropriate for a builder's warranty for a new-build home?

5 years

Please explain the reasons for your response.

Tracks prescriptive period for contractual claims

Q5. 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?

Partially supportive

Q5. 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?

Please explain the reasons for your response

It is not enough that standard missives simply rehash obligations to comply with building regulations and warranty provisions. Whatever the particular design, specification and workmanship standards that are marketed to the purchaser may be, the missives need to contain provisions to ensure that those standards are delivered and that shortfalls in— which exist at completion or materialise over a stated period of time thereafter – are remedied or compensated. At present, compensation is likely to be based in loss of value. However, in a buoyant market, there is often no such loss, so that the purchaser just has to put up with the defect. Compensation ought not to focus on loss of value, but on cost of repair, and must of course be proportionate.

Q6. 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.

N/A. However acted for clients who have bought new-builds with defects. It has been a minefield for them to seek redress

Financial Implications

Q7. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

	Significant increase in cost	Some increase in cost	Broadly cost-neutral	Some reduction in cost	Significant reduction in cost	Unsure
Government and the public sector			X			
Businesses (including housebuilders)		X				
Individuals (including new-build house buyers)					X	

Please explain the reasons for your response.

Owners should have a more streamlined route to redress and should be more certain about what those rights are, thus saving cost. Home builders' costs may increase because they may require to fix defects or pay insurance against the same, when they may not have had to in the past.

Equalities

Q8. 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 or belief, sex, sexual orientation?

Positive

Sustainability

Q9. 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

Please explain the reasons for your response.

Overall the proposed scheme should be cost neutral. It should not involve government expenditure beyond implementation.

General

Q10. Do you have any other comments or suggestions on the proposal?

There is another issue within residential property development that I encourage Parliament to consider within the Bill. Too often (and even once is too often) my clients have learned that the sad news that the home they have been living in for years has been ruined by an incompetent builder's works and there is likely to be no real recourse. They are left in a property that can only be described as a building site, with no money left to remedy the builder's mistakes or even to get the property back to the state it was previously in. All too often, clients will seek to have their home extended, improved or developed. The local builder will set out with the best of intentions, following drawings it, or an architect has prepared. However, as the build goes on the builder will face challenges, discrepancies in design will materialise, or the builder will not have a sufficiently skilled labour force. The builder may in good faith have under-priced the work in the first instance, keen to win it in a competitive market, and so run out of the funds and materials to complete the job. The result is that tensions between the home-owner and builder develop. The builder leaves the site, or is thrown off it, before the job is complete, leaving a litany of poor workmanship and structural or other material defects, such that the home owner cannot even obtain a completion certificate from the local authority.

The difficulty is compounded because pursuit of the builder for compensation is futile. It is a company with little or no assets, or a sole trader in a poor financial state.

Again, a simple solution to the "rogue builder" could be incorporated into the Bill. The Bill could law that any builder which undertakes works under contract to a residential occupier (whether or not it sub-contracts that work) must have insurance upon which the homeowner can call, for the remediation of defective works, in the event of the builder's insolvency.