

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

Response to

Consultation by

Graham Simpson MSP, Member for Central Scotland Region

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(Note: Information entered in this “About You” section may be published with your response (unless it is “not for publication”), except where indicated in bold.)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

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).

Brodies LLP is a large commercial law firm with around 100 lawyers working solely on real estate matters. We act on behalf of a number of house builders, some operating throughout the UK and others operating in Scotland only in the acquisition and disposal of land for residential development and the sale of the new homes.

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I would like this response to be considered, but not published (“not for publication”)

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 (Note: The name will not be published if you have asked for the response to be anonymous or “not for publication”.)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: Brodies LLP

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

Please explain the reasons for your response.

It is very difficult to say whether statutory standardised clauses should be introduced without more detail on what those clauses might say.

We support a system which streamlines the sale of new homes for buyers and builders and contains protection for both parties if they do not comply with their obligations. However, lessons should be learned from the lack of uptake of the current Scottish New Build Standard Clauses. The one size fits all approach to contracts rarely works; the Scottish Standard Clauses for residential properties are widely used across Scotland but are rarely issued without some amendments and additions being made to take account of the individual property and instructions of the seller.

Flexibility is needed to take account of the many different types of new build properties and the different ways of buying them through different types of funding arrangements. Some of the larger builders also wish to align their sales processes north and south of the border. Imposing compulsory clauses on them will make this more difficult.

We would therefore suggest that the introduction of compulsory standardised clauses be avoided and that style clauses setting out the protections be supplied instead. The styles should not be prescriptive, only illustrative. However, the tenor of the clauses should not be departed from by builders in their own style of contract.

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
- Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

Please explain the reasons for your response.

Firstly, before looking to introduce a new statutory route, the gap the new route is intended to fill should be clarified. What protection for new home buyers is currently missing? Is there a common theme in the evidence to date which has to be addressed?

Secondly, it will have to be made clear what is meant by “major failings”. This could refer to a number of things, for example, major structural problems, unreasonable delays in completion or addressing of minor snagging issues, poor quality finishings in homes?

Thirdly, how would any statutory redress for major failings sit alongside the warranty schemes such as NHBC and Premier? Would the statutory redress be in addition to these schemes or only step in to fill any gaps where the schemes do not apply or have not been made available?

Fourthly, it will have to be made clear whether the new statutory redress is in addition to the Consumer Code for Home Builders and the Consumer Code for New Homes. In an ideal world, these Codes would be merged and amended to take in any new statutory redress and then fall under the responsibility of a new Ombudsman for New Homes. We understand that efforts are ongoing to merge the consumer codes into one. Joining and contributing to these efforts could bear more fruit and bring quicker more effective results across the UK. This would mean that builders, lenders and buyers would be furnished with equal rights across the UK.

Fifthly, whatever route is chosen, strict timescales would have to be put in place for complaints to be made and handled. No one will benefit from a long drawn out process. Builders must know when their responsibilities end, buyers must know when they can complain and all must be assured that any complaints system will be efficient and effective.

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

The practical advantages would be to plug any gaps found in the protection offered to home buyers at the moment.

Depending on what protections and how the chosen protections were put in place, the disadvantages could be the confusion caused by adding another layer of protection on top of what is already there. For example, if the Consumer Code for House Builders and the Consumer Code for New Homes are added to, buyers may be unclear as to which they should rely on. Also, should they be looking to the warranty scheme provided by warranty providers or should they be going down the new statutory route?

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

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

Please explain the reasons for your response.

The length of time given would depend on the types of issues that builders could be called on to address.

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?

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

Please explain the reasons for your response.

Buyers should be given the right to withdraw from the purchase of their new homes if severe or serious defects are identified before the purchase is due to complete. However, we are not sure that the right to carry out a full survey before taking entry will be the way to uncover such defects.

Most major structural defects will not become apparent until the property has been lived in for some time and exposed to different weather conditions; a survey before the property is occupied may not uncover defects which materialise at a later date.

If the survey takes place when the construction is complete and it is to be a full structural survey, it could be invasive and cause damage to the property which will have to be repaired. Any full survey would therefore either have to be done by non-invasive methods such as thermal imaging or be carried out at a stage of construction before the finishings and decoration were completed at the property.

Full surveys will be expensive both in terms of the actual cost and the delay to completion of the purchase – will it be expected that the builders bear the cost of the survey? If yes, the builders may look to recover those costs in the pricing of their properties. If the surveys are an option for buyers and they are expected to pay for them, lenders may not be willing to bear the cost and so buyers will have to fund the surveys themselves. If such surveys become part of the new home buying process, lenders may insist on them for every home and as a result add to the cost of building and selling the homes which ultimately will be passed to the buyers.

An alternative may be for buyers to be entitled to a full survey if and when defects start to materialise and only when those defects fall within the defined categories not covered by any other warranty in place for their home, for example, NHBC cover. Any such survey would be independent and stipulate what needs to be done for the property to be repaired. If defects caused by the builders' actions are uncovered, the builder would be responsible for underwriting the costs incurred by the buyer in having the defects remedied.

If surveys are to take place at any time, we would suggest that they should be limited to checking certain items rather than giving the surveyor a carte blanche and exposing buyers and builders to higher costs.

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.

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.

If builders had to incorporate standard clauses in their missives, legal, administration and training costs would be incurred for them to change their procedures and educate their employees. There will also be a financial impact for builders if they are expected to bear the cost of any survey before occupation is taken. Larger builders may be in a position to absorb these costs but smaller builders may find that they have to pass the cost on to the buyers.

If individuals are expected to pay the cost of any survey, that cost will either be added to their mortgage or will have to come from their own funds. Full surveys will be expensive and prohibitive for some buyers.

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.

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.

General

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

Brodies

June 2019