

Legislative Consent Memorandum

Building Safety Bill

Background

1. This memorandum has been lodged by Shona Robison MSP, Cabinet Secretary for Social Justice, Housing and Local Government, under Rule 9.B.3.1(c) of the Parliament's standing orders. The Building Safety Bill was introduced in the House of Commons on 5 July 2021. The Bill, explanatory notes and other supporting documents can be found at: <https://www.gov.uk/government/collections/building-safety-bill>

Content of the UK Building Safety Bill

2. The UK Building Safety Bill makes fundamental changes to the Building and Fire Safety regime in England. The Bill includes a new regime and regulator for high rise residential buildings in England. The proposed regime in England is based on a pre-emptive building standards system for buildings in scope, which adopts the approach taken by the Building Standards system in Scotland for all buildings. The Bill also introduces a new construction products regulator and introduces new disciplinary and competency processes for architects.

3. Part five of the Bill includes provisions for a New Homes Ombudsman scheme. The aim of which is to drive up standards in housebuilding and to independently resolve disputes between developers and purchasers where there is an issue concerning the quality of a new-build home.

Reasons for seeking a Legislative Consent Motion

4. The quality of new build homes is an issue of public concern. Currently, people who buy a new build home have no completely independent way of challenging developers' service or poor workmanship.

5. The Scottish Government is therefore supportive of the principles behind the New Homes Ombudsman scheme. We recognise that systems need to be strengthened so that consumers can purchase new-build homes with confidence, knowing that any problems relating to quality will be resolved effectively and efficiently.

6. Upon introduction, the provisions relating to the New Homes Ombudsman extended to England only. However the intention of the UK Government is that the scheme should also extend to the devolved administrations. On 12 January 2022 the UK Government introduced amendments that will extend the provisions of the scheme to Scotland, and Wales. A LCM is required to extend the provisions of the scheme to Scotland, as the legislation will cover areas within the legislative competence of the Scottish Parliament, namely housing. The alternative would be for

legislation for a separate Scottish scheme in the Scottish Parliament. However, the Scottish Government does not recommend this for a number of reasons.

7. Firstly, interactions with the consumer protection reservation may make it difficult for a Scottish Bill to exactly replicate the functions of the UK scheme, and there may be matters which cannot be included in a Bill in the Scottish Parliament. In addition, there are likely to be a range of practical challenges associated with setting up a separate system, including for example ensuring that all of the right connections are made with the UK system. The preference of the house building industry is to have a UK-wide scheme to avoid such issues.

8. Further, legislating to create a Scottish scheme could result in a 'gap' in protections for purchasers of new build homes in Scotland. The UK Bill is already underway and, subject to its progression in the UK Parliament, the scheme it provides for is likely to be in place within the next couple of years. This will almost certainly be before a Scottish system could be enacted if it were to be pursued at this point.

9. Additionally, there is likely to be an impact on the existing voluntary codes of practice, which set non-legally binding standards for new-build homes, when the scheme under the Building Safety Bill comes into effect. This would mean that purchasers of new-build homes in Scotland could be subject to different, or more limited, protection, at the same time that purchasers in other parts of the UK have the benefit of the statutory scheme.

10. Finally, it is important to note that joining the UK Government scheme at this point would not preclude the Scottish Government from setting up a separate Scottish system at a later stage. The Scottish Government could therefore choose to leave the UK Government scheme and pursue legislation in the Scottish Parliament to set up a separate Scottish scheme. This could be done at a point in time in the future that would not result in a potential 'gap' in protection for consumers in Scotland and would have the added benefit of enabling lessons to be learned from the operation and set-up of the UK Government scheme.

New Homes Ombudsman provisions

11. Part five of the Bill (clauses 120-126) and schedule 9 contain provisions relating to the New Homes Ombudsman. As outlined above these provisions are largely within the legislative competence of Scotland.

12. **Clause 1, subsection 6:** Clause 1 provides an overview of the Bill; subsection 6 provides an overview of part 5 of the Bill, in which the New Homes Ombudsman provisions are contained.

13. **Clause 120:** Clause 120 requires the Secretary of State to arrange for there to be a redress scheme, to be known as the 'New Homes Ombudsman scheme'.

14. The clause provides flexibility as to how the scheme will be established and delivered. The Secretary of State can either select a third party to establish the scheme and run/maintain it, or the scheme could be an 'in-house' arrangement

whereby the Secretary of State establishes the scheme and runs/maintains the scheme directly or establishes the scheme and appoints another person to run/maintain it once the Secretary of State has established it.

15. The provision also allows the Secretary of State to make arrangements for transfer, to allow the scheme to be run/maintained by a different person to the person who established it. This might become necessary if for example the external scheme provider which established the scheme could no longer fulfil its contract.

16. In line with the flexibility around how the scheme is established and maintained, the clause also provides for flexibility in terms of funding. It allows the Secretary of State to provide financial assistance to the new homes ombudsman scheme, including through non-repayable forms (grants) as well as repayable forms of assistance (such as loans and guarantees). Alternatively, if the scheme is procured and is not self-financing there is also provision to allow the Secretary of State to pay for the service. However, the intention in all circumstances is for the scheme to cover its own costs and to finance itself through fees charged to developers.

17. The clause places a requirement on the Secretary of State to consult Scottish, (and Welsh) Ministers before arrangements for the scheme are made.

18. **Clause 121:** This clause sets out the purpose of the scheme which is to enable 'relevant owners' of new build homes to make complaints against developers and to have such complaints investigated and determined by an individual who will act as an independent ombudsman.

19. The clause also sets out the requirement that the scheme must be available to all developers to join and that the scheme must meet the conditions set out in this clause and in Schedule 9.

20. However, the clause does not restrict the scheme to receiving complaints from 'qualifying complainants' only. It may also include provision for other people or organisations to have complaints investigated.

21. To avoid duplication the scheme will not be required to investigate a similar complaint being dealt with under another redress scheme. The scheme will also not be required to investigate complaints that are subject to legal proceedings. The same applies to complaints already resolved by other redress schemes or the courts.

22. **Clause 122:** This clause defines the key concepts including who is a 'relevant owner' what is a 'new build home' and what is a 'relevant interest in land' in Scotland, England and Wales.

23. The clause also allows Scottish Ministers (and the Secretary of State and Welsh Ministers) to set out, in regulations, an additional descriptor of developer. The purpose of this is to provide flexibility in the future to ensure that all of the intended members of the scheme are captured by the definition of developer. Before this power is exercised, the Secretary of State or counterparts in Scotland and Wales will be required to consult each other.

24. **Clause 123:** This clause sets out detail in relation to regulations made under clause 122.

25. **Clause 124:** This clause creates a power for the Secretary of State to make regulations which will require developers of new build homes, who are within scope, to join the scheme and remain members of the scheme for a specified period. The clause places a requirement on the Secretary of State to consult Scottish, (and Welsh) Ministers before the regulations are made.

26. The clause also provides that the Secretary of State may in regulations set out certain publicity requirements for members of the scheme, requiring developers to provide information about the scheme which may include requiring developers of new build homes to obtain a certificate to prove or advertise their membership.

27. Finally in such regulations the Secretary of State will set out the framework for enforcement including: enforcement body, types of sanctions for failing to comply, and the right to appeal the sanctions.

28. **Clause 125:** This clause places a requirement on the person who maintains the scheme to keep and publish a register of the schemes' members. This will mean that consumers will be able to see if a developer that they are considering purchasing a new build home from is a member of the new homes ombudsman scheme.

29. **Clause 126:** This clause allows the Secretary of State to give approval to an existing code of practice that covers the standards of quality and conduct which should be met by members of the scheme. It also allows for the Secretary of State to issue a code. This clause does not require a code to be issued or approved.

30. The clause sets out that if a code is issued or approved then it must be published by the Secretary of State. If the code of practice needs adjustment or replacement in the future, there is provision to allow this to happen. The Secretary of State can revise or replace it, or approve its revision/replacement, and again such revised or replaced code must be published and any revision or replacement will be consulted on with Scottish and Welsh Ministers.

31. In accordance with Schedule 9, where there is a code of practice which has been issued or approved then the scheme may accept complaints about non-compliance with such a code. In considering a complaint under the scheme, however, whatever the issue, the scheme must have regard to any code of practice that has been issued or approved.

32. Certain provisions in part 6 of the Bill, that make general provisions about the operation of the Bill, also apply to Scotland.

Schedule 9: The new homes ombudsman scheme

33. Schedule 9: This schedule sets the requirements of the scheme by outlining the provisions that it must include, and the forms of redress it can specify.

34. The scheme requirements must include matters such as: the appointment of the new homes ombudsman, how to become a member, which may include the payment of member fees and the provision of information, a requirement for members of the scheme to have internal procedures for the handling and resolution of complaints (and a requirement to publish those procedures) and the scheme may include different requirements for different categories of member).

35. The scheme must also set out in what circumstances and how complaints can be made, and how they will be handled by the scheme. The scheme may investigate complaints relating to non-compliance with a code of practice and must require the new homes ombudsman to have regard to the code of practice approved or issued under clause 126 to determine complaints, if there is one.

36. The scheme must make provision for the new homes ombudsman to require members of the scheme to resolve well-founded complaints through one or more of the forms of redress listed in the schedule. To enforce the determinations of the new homes ombudsman, the scheme may include provision for the expulsion of a member of the scheme provided that in such instance it must also set out the circumstances in which an expelled member may rejoin the scheme. The scheme must allow for the new homes ombudsman to make recommendations, where widespread standards of quality of work or poor developer conduct are identified, to improve standards.

37. The scheme must also set out how complaints can be made against the new homes ombudsman scheme itself, how the scheme provides information to the Secretary of State, Scottish and Welsh Ministers and how the new homes ombudsman scheme reports its activity.

38. Where jurisdiction falls to more than one redress scheme, the scheme may include provision about working jointly with other redress schemes, including the making of joint determinations with other persons under another redress scheme.

39. The Scottish Government is in principle content with the current proposals in the Bill that relate to areas of legislative competence of the Scottish Parliament. The proposals have been made following extensive engagement at official and Ministerial level.

Consultation

40. In June 2019, the UK Government undertook a consultation as part of its preparations for the Building Safety Bill 'Redress for Purchasers of New Build Homes and the New Homes Ombudsman' (2019)¹. It published a summary of the

¹[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812038/Redress for Purchasers of New Build Homes and the New Homes Ombudsman .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812038/Redress_for_Purchasers_of_New_Build_Homes_and_the_New_Homes_Ombudsman_.pdf)

responses to the consultation and set out the UK Government's response in February 2020².

41. The consultation sought views on the geographical scope of the proposed New Homes Ombudsman scheme. The vast majority of respondents (91%) stated that they thought the scheme should be UK wide. The most common reason for this was that respondents considered that the quality of new build homes should be high no matter where people live in the UK and that there should be a single place to seek redress to avoid confusion and ensure consistency and efficiency across the UK. Responses also highlighted the differing laws and practices across the devolved nations which the scheme would need to take account of if it were to be UK-wide.

42. Scottish Government's engagement with stakeholders mirrors the finding in relation to a UK-wide scheme, and indicates that the house building industry in Scotland has a strong preference for a UK-wide scheme.

Financial Implications

43. There will be minimal financial implications for Scottish Government in these proposals. The UK Government intends to cover the cost of the initial set up of the scheme, which it estimates to be in the region of £200-400,000. It has confirmed in the impact assessment for the Bill that once the scheme is up and running it will be industry funded.³

44. If the Scottish Parliament does not give consent then there is likely to be similar financial cost to set up a separate Scottish scheme.

Conclusion

45. It is the view of the Scottish Government that, in this particular instance and for the reasons set out, allowing the UK Parliament to legislate to extend provisions relating to the New Homes Ombudsman scheme to Scotland will be the most timely and efficient way to ensure that purchasers of new build homes in Scotland are protected and their rights strengthened.

46. Allowing the UK Government to legislate in an area of largely devolved competence, in order to extend the schemes' provisions to Scotland, is a pragmatic decision that will result in better protection for purchasers of new build homes in Scotland but importantly leaves open the possibility of creating a separate Scottish system at a later date.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/867567/New_Homes_Ombudsman_Consultation_Response.pdf

3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901877/Draft_Building_Safety_Bill_Impact_Assessment_web.pdf

47. The provisions require consultation with Scottish Ministers ahead of the arrangements for the scheme being made. This consultation requirement is underpinned by a cross-Government working group which provides a vehicle for timely engagement, discussion and consultation on the main aspects of the scheme to ensure that interests of the devolved administrations are taken account of.

Draft Legislative Consent Motion

48. The draft motion, which will be lodged by the Cabinet Secretary for Social Justice, Housing and Local Government, is:

“The Parliament agrees that the relevant provisions of the UK Building Safety Bill, introduced in the House of Commons on 12 January 2022, relating to housing, so far as these matters fall within the legislative competence of the Scottish Parliament and alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.”

Scottish Government
January 2022

This Legislative Consent Memorandum relates to the Building Safety Bill (UK legislation) and was lodged with the Scottish Parliament on 26 January 2022

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