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27 June 2019

By email to: [graham.simpson.msp@parliament.scot](mailto:graham.simpson.msp@parliament.scot)

Dear Mr Simpson

**Re: Proposed New-Build Homes (Buyer Protection) (Scotland) Bill**

Please find enclosed our response to your consultation on the Proposed New-Build Homes (Buyer Protection) (Scotland) Bill.

By way of background, the Consumer Code for Home Builders (“the Code”) was established in April 2010 and covers the whole of the UK. It currently covers 95% of the new build market, which equates to approximately 16,000 builders and sets mandatory Requirements that all home builders registered with the supporting home warranty bodies (NHBC and MD Insurance Services trading as Premier Guarantee and LABC Warranty and Checkmate<sup>1</sup>), must meet in their marketing and selling of new Homes and their after-sales customer service.

It has since been adopted by the Homes and Communities Agency, the Scottish Government and the Welsh Assembly as a criteria for compliance with their respective Help to Buy schemes.

**1. Executive Summary**

- 1.1 We are supportive of your desire to improve consumer protection within the housing sector, but we do not believe that it should be in isolation to what is happening in the rest of the UK and neither do we believe a single housing Ombudsman is the only solution in addressing the issues the consultation has raised. We propose further solutions for you to consider in our response.
- 1.2 An Ombudsman, for example, will not deal with issues of build quality and customer service which have concerned consumers but would simply address the problems that arise. A more fundamental approach to improving the quality of all new homes is therefore essential, and that is what the Consumer Code for Home Builders (“the Code”) is working to achieve.

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<sup>1</sup> With effect from 1 June 2019.

- 1.3 Furthermore, we believe there needs to be consistency across the UK. Our Code operates across England, and all the devolved nations to offer new build customers the same level of protection anywhere in the UK. This is extremely important as a consistent approach not only eases understanding for the consumer, it ensures warranty and mortgage lender buy in across the UK.
- 1.4 In proposing any changes to new build customer redress this point must not be lost. We must promote a system that enables consistency in participation given that many home builders, and indeed home buyers, may operate across borders. For us this is a key strength of an industry-led approach and we have involved Homes for Scotland, the representative body for home builders in Scotland, in the work to strengthen existing arrangements and maximise coverage across the UK.
- 1.5 We are currently working with the Homes for Scotland, the Home Builders Federation (“HBF”) and others in the home warranty and home building sector to find an industry-led solution that could more easily be implemented to address concerns in the new home build sector.
- 1.6 Our thoughts on the issues and proposed solutions are set out in detail in the paper but by way of summary, we are currently:
- Working towards a single common Code;
  - Working towards an agreed set of warranty standards which conform to best practice;
  - Improving the independence of the existing governance structure;
  - Improvement of the existing Independent Dispute Resolution Scheme(s) by way of providing free access to consumers and extending it to cover any gaps identified between the home builder and the home warranty cover in relation to dealing with quality issues;
  - Considering the implementation of an Ombudsman redress scheme;
  - Addressing issues of significant non-compliance through our independent Disciplinary and Sanctions Panel.

## **2. Introduction**

- 2.1 The Consumer Code for Home Builders (“the Code”) was established in April 2010 following extensive consultation with the Office of Fair Trading, the Department for Communities and Local Government and the devolved administrations.
- 2.2 The Code covers the whole of the UK and has since been adopted by the Homes and Communities Agency, the Scottish Government and the Welsh Assembly as a criteria for compliance with their respective Help to Buy schemes.
- 2.3 As your consultation sets out, the Code sets mandatory Requirements that all home builders registered with the supporting home warranty bodies (NHBC and MD

Insurance Services trading as Premier Guarantee and LABC Warranty and Checkmate), must meet in their marketing and selling of new Homes and their after-sales customer service. Full details of the Code's requirements can be seen here: <http://www.consumercode.co.uk/wp-content/uploads/2019/05/Consumer-Code-Requirements-with-Builder-Guidance-Fourth-Edition-June-2019-large-print.pdf>

- 2.4 It currently covers 95% of the new build market, which equates to approximately 16,000 builders.
- 2.5 Whilst we are supportive of your desire to improve consumer protection within the housing sector, we do not believe that standardised clauses and/or a housing Ombudsman alone, will provide the solution given the complexities involved in the construction and sale of new homes and the very different issues within the broader housing sector relating to second-hand homes, the rental market and social housing sectors, by way of example.
- 2.6 As evidenced by the industry's annual customer satisfaction survey: [https://www.hbf.co.uk/documents/8389/CSS\\_HBF\\_Brochure\\_2019\\_with\\_table.pdf](https://www.hbf.co.uk/documents/8389/CSS_HBF_Brochure_2019_with_table.pdf), most home buyers are satisfied with the purchase and the buying of their new homes does not give cause for concern. In fact, this year saw the first Scottish-only builder (A&J Stephen) to receive a five star rating.
- 2.7 However, on those occasions where there are matters that need to be addressed, an Ombudsman will not be able to deal with any intrinsic systemic and operational issues within a specific home builder company that do concern those consumers, but will simply address the problems that arise. A Consumer Code can work with builders to ensure quality is further raised across the board.
- 2.8 We are keen to work with the industry, and other stakeholders within the sector, to meet the challenges raised in relation to the new build market and our submission outlines and builds upon the work that is already being progressed in this area.

### **3. Background**

- 3.1 The Code came into force on 1 April 2010; this was as a result of the Barker Review of 2005 and a further review by the Office of Fair Trading in 2008. Subsequent work was done by a group of warranty bodies and the Home Builders Federation. The UK's main home warranty bodies NHBC and MD Insurance Services (trading as Premier Guarantee and LABC Warranty) and Checkmate are covered by the scheme and account for around 95% of the new homes market.
- 3.2 Since its launch, the Code has led to a step-change in how builders deal with customers through the sales process and is now in its fourth edition. It has been reviewed three times with wide consultation across the industry; consumer groups and Government, most recently in 2016 whereby the review was overseen by a former

Director General of Fair Trading. Each time, the Code has been updated and improved to provide greater protection for consumers.

- 3.3 At the outset, the Code developed a set of criteria for other warranty bodies to join the Scheme. These were devised on advice from Clifford Chance and consulted on widely across the industry. These set out best-practice standards in the new home warranty market and allowed for other home warranty providers to join the Code. However, some home warranty providers were unable to meet these standards and therefore unable to join the scheme.
- 3.4 As a result of some mortgage lenders requiring home warranty bodies to be part of a Code scheme, other warranty providers took the decision to form their own new home Code schemes. Many of which are to be based on the mandatory Requirements set out under our Code. In turn, those home warranty providers sought approval for their schemes from the Chartered Trading Standards Institute.
- 3.5 We accept that this has led to confusion for the consumer and is far from ideal. Further, whilst on the face of it the Codes themselves do not vary greatly, the protection afforded by the warranties that underpin them vary considerably and therefore may potentially leave the consumer exposed. Something that we agree needs to be resolved.

#### **4. Moving forward**

- 4.1 All that said, to further improve consumer protection and address any identified gaps when dealing with new home problems, we are working closely with Homes for Scotland, the Home Builders Federation and representatives from other warranty providers. To date, those discussions have included:
- Working towards a single common Code;
  - Working towards an agreed set of warranty standards which conform to best practice;
  - Improving the independence of the existing governance structure;
  - Improvement of the existing Independent Dispute Resolution Scheme(s) by way of providing free access to consumers and extending it to cover any gaps identified between the home builder and the home warranty cover in relation to dealing with quality issues;
  - Implementation of an Ombudsman redress scheme.

#### **5. Working towards a single common Code**

- 5.1 Working with Homes for Scotland and HBF, we have already met with other existing Code providers and we are currently considering how we might form a single Code. Those that have currently met cover circa 95% of the UK's new homes market.

- 5.2 We acknowledge that complaint handling, and the time taken to resolve issues, can lead to major concern and/or upset for consumers and part of the discussions in relation to a single Code will be to see if more could be done to improve in-house complaint handling for housing consumers as is asked in the consultation.
- 5.3 Better promotion of complaint handling procedures for consumers and a set of good practice guidelines for dealing with complaints for businesses is set out by the Institute of Customer Service: <https://www.instituteofcustomerservice.com/research-insight/guidance-notes/article/handling-complaints>.
- 5.4 Our own Code requires that the home builder must have a system and procedures for receiving, handling and resolving home buyers' service calls and complaints. The home builder must let the home buyer know of this, and of the dispute resolution arrangements operated as part of our Code, in writing.
- 5.5 Furthermore, as part of these discussions, we have agreed to try and simplify access to consumers by signposting to other Codes from our existing websites. This is something which have already implemented.
- 5.6 In addition, we are seeking to implement a collaboration agreement which will prevent a home builder, that may have been excluded from one Code, from simply "hopping" to another, albeit we will need to be mindful of any anti-competitive practices in the process.

## **6. Working towards an agreed set of warranty standards which conform to best practice**

- 6.1 We strongly believe that you cannot have a single Code in isolation. The warranty provision that underpins the Code and provides the home buyer with protection is of equal importance.
- 6.2 We fully support the drive from Homes for Scotland and HBF to establish a set of warranty standards that are modelled on best practice within the home warranty market. It would be, for example, inappropriate to set the quality level at the lowest common denominator.
- 6.3 In doing so, consumers will better understand what they can expect as a minimum from their warranty provider in terms of the protection offered and, in addition, making it clearer for those involved in the conveyancing process, such as lawyers, to better advise their clients.
- 6.4 The standards currently in place under our Code means that 95% of the market is covered by a set of builder behaviour requirements that have been determined to meet best practice in the new homes market. The standards were developed in consultation with the Office of Fair Trading and with the benefit of advice from Clifford Chance, internationally acknowledged as leading experts in competition law. Whilst supportive

of the pursuit towards universal coverage, we would not want to see standards compromised simply to achieve an incremental increase in market coverage, as this would be of detriment to the consumer. This would be counterproductive to the overall objective of strengthening consumer redress in housing.

- 6.5 These standards go much further than simply requiring the home builder to comply with UK Building Regulations but requires that they also comply with a set of technical standards which are applicable to the design and construction of New Homes. The likes of which can be seen here:

<http://www.nhbc.co.uk/Builders/ProductsandServices/TechZone/nhbcstandards/>

- 6.6 Our Code already requires that the Home Buyer must be told about their right to terminate the contract. This includes where there is a substantial and significant change to the Home that the Home Buyer has not agreed to. Furthermore, any terms and conditions within the Missive must: be clear and fair; comply with all relevant legislation and clearly state the contract termination rights.

## **7. Improving the independence of the existing governance structure**

- 7.1 Our Code is overseen by a Management Board: <http://www.consumercode.co.uk/the-code/the-management-board/>, which has an independent Chairman and further independent representation through Citizens Advice.

- 7.2 However, we believe it can be strengthened further by making it more independent of the Industry. This would not preclude the Industry being represented on the Board; on the contrary we believe that this would be desirable in the interest of reaching effective and practical solutions. However, the Board should be balanced, but with a majority of independents. Plans are already in place to make such changes.

- 7.3 In addition, it is intended that our Advisory Forum continues and engages other stakeholders as appropriate such as the home warranty bodies. It already has a mix of consumer representation, lenders, legal professionals and other interested stakeholders including from the industry and the estate agency sector.

- 7.4 We believe an effective governance regime is essential not only to public perception, but also to ensure that there is an effective regime in place to regulate Code compliance. Effective complaint management does not resolve the cause of the problem, it simply puts the consumer back in the position they should have been in. The source of the issues also needs to be addressed, and any systems failures need to be identified if quality is to be improved in the longer term. Our Disciplinary and Sanctions Panel, which is independently chaired, currently has oversight of this compliance regime and it is our intention that this will continue to any new Code.

- 7.5 Sanctions for non-compliance are discussed further in this response at section 10.

## 8. Improvement of the existing Independent Dispute Resolution Scheme

- 8.1 We are currently looking at ways we can improve the existing Independent Dispute Resolution Scheme by way of providing free access to consumers and extending it to cover any gaps identified between the home builder and the home warranty cover in relation to dealing with quality issues.
- 8.2 You have asked within your consultation that you are considering whether purchasers of new build homes should have access to an Ombudsman scheme; we consider that the importance is not necessarily whether it is an Ombudsman scheme, but more that there should be access to an Independent Dispute Resolution Scheme that can determine on issues that arise.
- 8.3 Whilst we understand that the Property Ombudsman and Ombudsman Services (Property) have proved to be effective in addressing issues with estate agents in the second-hand homes market, our Code along with others in the sector already use CEDR Ltd: [https://www.cedr.com/about\\_us/](https://www.cedr.com/about_us/). They are the leading independent commercial Alternative Dispute Resolution (ADR) provider in Europe and one of the largest and leading ADR organisations internationally, dealing with over 300,000 people in commercial disputes and resolving over 100,000 consumer disputes across 30 differing sectors.
- 8.4 CEDR Ltd are accredited with the Chartered Trading Standards Institute under the ADR Directive and are an associate member of the Ombudsman Association and we are already in discussion with them as to how they may alter their services to meet any of Government's expectations.
- 8.5 Furthermore, as seen by recent reports into Ombudsman Schemes they have been found lacking:
- "Sharper teeth: The consumer need for Ombudsman reform"  
[https://images6.moneysavingexpert.com/images/documents/MSE-Sharper\\_teeth\\_interactive.pdf](https://images6.moneysavingexpert.com/images/documents/MSE-Sharper_teeth_interactive.pdf)
  - "Confusion, gaps and overlaps - A consumer perspective on alternative dispute resolution between consumers and businesses"  
<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf>
  - Channel 4 Dispatches programme:  
<http://www.channel4.com/info/press/news/investigation-at-fos-finds-staff-with-severe-lack-of-training>. These reports have been given emphasis by recent high profile reports concerning the Financial Ombudsman Service.
- 8.6 We do not believe an Ombudsman scheme in isolation would, or could, offer the same levels of protection to consumers as home buyers currently have under the Code as it would not, by definition, embody a compliance regime as referenced above. A voluntary Ombudsman scheme inevitably would not engage all home builders as

happens with the current warranty-led scheme where involvement in the Code is made mandatory by way of the warranty bodies' Rules of Registration.

- 8.7 A report by WPI Economics, carried out for the HBF, found that a single Ombudsman would be complicated to deliver as it would involve unpicking the legal framework of statutory responsibilities already conferred on the Financial Ombudsman Service (FOS) and the range of Ombudsmen covering estate agents (and others). This is likely to be time consuming and there is a strong possibility that other Ombudsmen (FOS in particular) would be extremely resistant to such moves.
- 8.8 We understand that taking into consideration all of the above, Homes for Scotland and HBF are proposing that the Independent Dispute Resolution Scheme is subject to a tender process, which sets out levels and standards of service that any chosen provider would be expected to deliver against. This would include timeframes for dealing with a complaint (which may vary due to the complexities of the case, the individual needs of consumers i.e. whether reasonable adjustments need to be made and the obtaining of evidence; albeit most complaint bodies will have standards against which they are measured any complaints provider here should be benchmarked against them); and to include promotion of access to the service (which should also form part of any Code).
- 8.9 We would urge you in any future considerations to agree to this process given it not only has the benefit of being open and transparent, it would also drive up service standards and control costs. This is a process that we whole heartedly support.
- 8.10 The fee, which was charged to home buyers using the Code's Independent Dispute Resolution Scheme, has been removed. This makes it consistent with the majority of other consumer protection Codes and Ombudsman Schemes. In doing so, it has removed a barrier to consumer access.
- 8.11 In relation to the remit of the Ombudsman, it is evident that there are currently issues in respect of the build quality of a very small percentage of homes being built in the UK and, as mentioned above, most of these issues are addressed by home warranty providers and through their own dispute resolution service (NHBC having dealt with 4,600 last year); while there are gaps in other instances.
- 8.12 For the new homes sector, many issues in respect to the build quality of the home and its compliance with standards and regulations are covered by a home warranty policy. Under the NHBC; MD Insurance Service and Checkmate warranty schemes, the home builder is made liable for the first two years for any defects that may arise; if the builder fails to put matters right, the home buyer can seek resolution through the home warranty body. Then, if the home buyer is dissatisfied with how the home warranty body has dealt with the case, they have recourse to complain to the Financial Ombudsman Service.

- 8.13 However, as mentioned above, there is a wide variety in warranty policies and not all warranty providers require builders to build to the same technical standards; neither do they all have their own dispute resolution service. Some do not even require the home builder to have a liability period for the first two years. This is where consumers may fall through the gap in redress. For other matters relating to the pre-purchase, advertising and sale of a new home, the majority are covered under requirements prescribed by the various Codes and in particular, our own.
- 8.14 Many of the issues being raised recently in the media are deemed to be “snagging” issues. This is a broad term and further clarity on what this means would help – some may be quality issues, others maintenance issues that appear over time as the property “settles in” and dries out, and others might relate to work that needs to be completed. An agreed timeframe for resolution of defects may reduce the volume of complaints and it is then possible to consider that those that are not dealt with in that time could then be escalated either through the home warranty provider or failing that, the Independent Dispute Resolution Scheme.
- 8.15 Our Code already requires that home builders must provide the home buyer with an accessible after-sale service, and explain what the service includes, who to contact, and what guarantees and warranties apply to the Home.
- 8.16 To strengthen this further, and in working with other Codes, we anticipate making further revisions to the Code so that at point of Conclusion of Missive, the home builder must:
- have completed the construction of the home to the appropriate standards (both technical and finishing standards);
  - have carried out their final quality assurance inspection provided the home buyer with a schedule of any incomplete or defective items, and a statement of timescales for completing/remediating such items along with the need for access at suitable times to enable remediation;
  - have agreed or provided an appointment for a home demonstration
  - provide the New Home Warranty Cover Note or Insurance Certificate;
  - have provided the home buyer with the opportunity (in writing) to visit and inspect the home in advance of Completion of Missive;
  - provide the home buyer with a statement of incomplete works, not being a part of the new home, but which serves it and directly affects it, as part of the Development under the relevant Planning Consent, and indicative timescales for their completion. (e.g. roads, open spaces, recreational areas, landscaping etc.) and
  - provide the home buyer with a copy of the Habitation Certificate.
- 8.17 Failure to comply with any of these requirements would give rise to the home buyer raising a complaint through the Code’s Independent Dispute Resolution Scheme.

8.18 In addition, the purchase of any home, not just a new home, is a complex legal process given issues around title, boundaries and the like. Lawyers therefore play a pivotal role and it is key that they are aware of the protection afforded their clients by the warranty body's insurance cover and any relevant Code (or indeed the requirements their clients should comply with if representing the seller/home builder). Our Code requires the home buyer's lawyer be sent a copy of the Code, which includes details on the Independent Dispute Resolution Scheme.

## **9. Equalities**

9.1 Our Code already recognises that home builders take account of the needs of vulnerable consumers. Many of whom may be first time buyers given they are new to the complexities of purchasing a new home.

9.2 In revising our Code, we will look to use the definition provided by the Financial Conduct Authority to explain consumer vulnerability: "Someone who, due to their personal circumstances, is especially susceptible to detriment, particularly when a firm is not acting with appropriate levels of care. Vulnerability can come in a range of guises, and can be temporary, sporadic or permanent in nature. It is a fluid state that needs a flexible, tailored response from firms".

## **10. Sanctions**

10.1 While your consultation doesn't address the issue of sanctions, we felt it important to point out that under our Code, a home builder may be expelled from the home warranty body's register, by way of sanction/enforcement action should a decision taken under our Independent Dispute Resolution Scheme not be adhered to.

10.2 It is not for the adjudicator to determine such sanctions, as their role is simply to put the home buyer back in the position they would have been, but for the organisation who monitors compliance against the Code's standards. As referenced above, we believe the engagement of the home warranty bodies is key here to ensuring that companies who fail to comply with the Code, notably those who do not honour the rulings made under the Independent Dispute Resolution Scheme, are excluded.

10.3 Effectively this could prevent a company trading and this sanction has been used on seven occasions since our Code was introduced (three times alone in 2016). This is a particular strength of the existing Code and distinguishes it from Ombudsman schemes, which do not have this sort of compliance leverage.

10.4 Our Code takes regulatory action when problems are evident and as referenced above, an independent Disciplinary and Sanctions Panel deals with issues of significant non-compliance.

- 10.5 The purpose of the Disciplinary and Sanctions Panel is to consider what action, if any, needs to be taken in relation to driving up performance and compliance of the Code either across the Industry as a whole, or in relation to individual home builders.
- 10.6 As appropriate, the Disciplinary and Sanctions Panel may write to the home builder outlining the issues and seeking a resolution; speak/meet with the home builder to better understand the issues and seek a resolution; seek a compliance undertaking from the home builder; provide advice/guidance on compliance with the Code; make a referral to the relevant Trading Standards Department and consider any breaches of the home warranty body's Rules of Registration.

## **11. Next steps**

- 11.1 95% of the home building industry is already supported by, and complies with, our Code and we believe that it important to find an industry-led solution that covers the whole of the UK, not just Scotland.
- 11.2 By expanding its remit to cover the issues currently being faced by home buyers in relation to redress, and by working with others within the home warranty and home building sector, supporting Homes for Scotland and the HBF, we believe we can provide an industry-led solution that could more easily be implemented with support of both the industry and key stakeholders.
- 11.3 If agreed, we will continue to work with Homes for Scotland and other colleagues to address the issues raised within the consultation setting out a framework and agreed timetable for implementation.

I trust this information is of assistance to you, but I would be happy to discuss such matters further and can be contacted via the Code Secretariat at: [secretariat@consumercode.co.uk](mailto:secretariat@consumercode.co.uk)

Yours sincerely



**Noel Hunter OBE**  
Chairman Consumer Code Management Board