REGULATION OF PROPERTY AGENTS WORKING GROUP

Final Report

July 2019

Embargoed until 00.01 18th July 2019

Chair

The working group was chaired by Lord Best, who has been an independent crossbencher of the House of Lords since 2001. He has extensive experience from his years working across the housing sector.

Membership

The membership of the working group was:

- Royal Institution of Chartered Surveyors (RICS)
- Association of Residential Letting Agents (ARLA Propertymark)
- National Association of Estate Agents (NAEA Propertymark)
- National Trading Standards (NTS)
- Professor Christopher Hodges, Oxford University
- Institute of Residential Property Management (IRPM)
- Leasehold Advisory Service (LEASE)
- National Landlords Association (NLA)
- Citizens Advice
- Ombudsman Services

Embargoed unt

REGULATION OF PROPERTY AGENTS

Final Report

CONTENTS

Executive Summary 5
Scope of new regulation 5
Licensing 5
Codes of Practice 6
Qualifications 6
Leasehold and freehold charges 6
The new regulator 7
Assurance and enforcement 7
Introduction 9
Chapter 1: The Case for Regulating Property Agents 11
Chapter 2: Scope of Regulation 15
Landlords, freeholders and developers 15
Varieties of property agent 16
Devolution and other matters 17
Firms and individuals 18
Chapter 3: Licensing 19
Chapter 4: Codes of Practice 21
The case for a mandatory Code of Practice 21
A system of codes 22
Setting the overarching code 23
Developing and maintaining the regulatory codes 24
Chapter 5: Qualifications 25
The case for qualifications 25
Who needs to be qualified, and to what level? 25
A system of qualifications 26
Transitional arrangements and grandparenting 27
Chapter 6: Leasehold and Freehold Charges 29

Embargoed until 00.01 18th July 2019

The case for change ... 29
Charges and managing agents ... 29
Commonhold ... 30
Chapter 7: The New Regulator ... 31
Governance ... 31
Funding ... 32
Professional bodies ... 32
Broader functions ... 34
Chapter 8: Assurance and Enforcement ... 36
Enforcement powers ... 36
Relationship with Trading Standards ... 38
A model of enforcement ... 40
Conclusion ... 42
Annex A: Leasehold and Freehold Charges ... 43
Annex B: Regulatory Systems ... 51

Embargoed until 00.01 18th July 2019

EXECUTIVE SUMMARY

a. Government has proposed that property agents be regulated by an independent regulator, with mandatory qualifications and a code of practice. We have been tasked with advising on how to make this proposition a reality. We agree that a new approach is needed: regulation will provide the opportunity to prevent bad practice and drive cultural change within the industry. We set out this approach in several parts, including proposals for:

   i. the scope of a new system of regulation;
   ii. a new licensing regime;
   iii. a framework for codes of practice;
   iv. mandatory qualifications;
   v. transparency and use of leasehold and freehold charges;
   vi. the set-up, functions and relationships of a new regulator; and
   vii. assurance and enforcement under the new system.

Scope of new regulation

b. Taking account of devolutionary matters, a new proposed regulatory framework should cover estate agents across the UK and letting and managing agents in England. ***We recommend that all those carrying out property agency work be regulated (including auctioneers, rent-to-rent firms, property guardian providers, international property agents, and online agents).***

c. Regulation should not extend to property portals (e.g. Rightmove) – which do not perform agent functions, the short-let sector (e.g. AirBnB) – which would add complexity to the new regulator as it becomes established, and local authorities acting as letting or managing agents (though we expect their staff to be appropriately qualified).

d. However, ***we recommend that the legislation required to regulate property agents should allow for future extension to the scope of regulation*** (e.g. to include at a future point regulation of landlords, freeholders and developers – as well as retirement housing managers and Right to Manage companies).

e. To clarify the functions of a property agent, the Government should create a list of 'reserved activities' which can only be performed by a licensed property agent at a regulated firm. The new regulator's scope should extend to both licensed agents (as individuals) and regulated agencies (as firms).

Licensing

f. To confirm appropriate qualifications and credentials, property agencies and qualifying agents should be required to hold and display a licence to practise from the new regulator. Before granting a licence, the new regulator should check that an agent has fulfilled its legal obligations (such as belonging to a redress scheme and submitting a copy of their annual audited accounts to the new regulator) – and that they have passed a fit-and-proper person test. ***We recommend that the new regulator should be able to vary licensing conditions as it sees fit and that it maintains accessible records of licensed property agents.***

Embargoed until 00.01 18th July 2019

Codes of Practice

g. Codes of practice set out clear standards of behaviour. ***The Government has already committed to requiring that letting agents adhere to a code of practice, and we recommend that all property agents be required to do so***. There should be a single, high-level set of principles applicable to all property agents which is set in statute: the ‘overarching’ code. Then, underneath, ‘regulatory’ codes specific to various aspects of property agent practice, binding only on those providing these types of services.

h. Key principles for the ‘overarching’ code should include that agents must act with honesty and integrity; ensure all staff are appropriately qualified; declare conflicts of interest; and have an effective complaints procedure in place. To develop and maintain the ‘regulatory’ codes, the new regulator should establish a working group for each sector of property agency to work up sector-specific detail.

Qualifications

i. Qualifications provide agents with the skills they need, provide a mark of competence to reassure consumers, and require commitment from agents.

j. In the new regime, every property agency should be responsible for ensuring their staff are trained to the appropriate level and clear oversight arrangements are in place for junior staff. To ensure levels of qualification are appropriate yet proportionate, the working group recommend that licensed agents should be qualified to a minimum of level 3 of Ofqual’s Regulated Qualification Framework; company directors and managing agents should be qualified to a minimum of level 4 in most cases.

k. While there are many roles within property agency businesses, mandatory qualifications should apply only to licensed agents who carry out reserved activities.

l. The new regulator should set and periodically review a modular syllabus for property agent qualifications, to be delivered by separate providers. The new regulator should also work closely with Ofqual to develop a robust system of quality control. Continuing professional development should also be a mandatory requirement for licensed agents.

Leasehold and freehold charges

m. The new regulator should be given a statutory duty to ensure transparency of leaseholder and freeholder charges, and should work with the sector (property agents, developers and consumers) to draw up the detail of the regulatory codes to underpin this aim as it applies to property agents. The regulatory code should include standards for transparency; potential conflicts of interest (e.g. mandatory disclosure of commissions and management fee charges); communication and use of service charges; administration charges; permission fees; use of covenants; and protection of client money. Standard industry cost codes, as have been developed for commercial service charges, should be developed to help consumers to more easily identify and compare items of expenditure, and to form a standard basis for accounts for managing agents.

n. ***We recommend that the new regulator takes over from the First-tier Tribunal the power to block a landlord’s chosen managing agent where the leaseholders have reasonably exercised a veto***. We also recommend that the new regulator provides information on

Embargoed until 00.01 18th July 2019

managing agent performance to allow landlord freeholders - and where relevant, leaseholders - to make an informed choice of managing agent.

o. As Government considers broader reforms to the leasehold and freehold charges regime, ***we recommend that the new regulator has a role in enforcing compliance with any new requirements that apply to managing agents***.

p. We have also provided suggestions for Government to consider around boarder reforms to the leasehold and freehold charges regime. These include introducing a standardised form for service charges; revisions to major works consultations; extending the use of sinking funds and asset management plans to help avoid surprise or large one-off bills for leaseholders; improving transparency and protection of client money; setting a framework around the use of administration and permission fees; and reviewing the process for replacing an under-performing managing agent.

Embargoed until 00.01 18th July 2019

The new regulator

q. We do not consider that an existing body could take on the role of the new regulator. Therefore, Government should establish a new public body to undertake this role. The new regulator should be established and run with regard to general principles of good governance, including: independence, openness and transparency, accountability, integrity, clarity of purpose and effectiveness. The new regulator, through its board, should be accountable to the Secretary of State for Housing, Communities and Local Government. It should publish an annual report on its progress in raising standards of property agents, using agreed key performance indicators – including customer satisfaction.

r. The new regulator should be funded by the firms and individuals it regulates – but Government should provide 'seed corn' funding to support its creation and help with its operation for an initial period. ***We recommend that it should be for the new regulator to determine whether professional bodies could, subject to an approval process, deliver some regulatory functions.*** No such delegation should be given without firm guarantees as to the professional body's suitability.

s. ***We recommend that the new regulator take over responsibility for the approval of property agent redress and client money protection schemes***. The new regulator should have the power to appoint a single ombudsman for property agents, rather than competing redress schemes, if they believe this to be the best way of improving standards.

t. There are numerous potential sources of complaints against property agents (e.g. other agents, whistle blowers, accountants) that have few if any places to go to raise concerns. The new regulator should be able to consider complaints from all sources. Where solicitors, lawyers or other professionals have evidence of possible illegal agent behaviour, they should be obliged to present it to the new regulator.

Assurance and enforcement

u. ***We recommend that the new regulator should have a range of options for enforcement action according to the seriousness of the infringement and how regularly it has occurred***. These options should range from agreeing remedial actions and issuing warnings up to the revocation of licences and prosecutions for unlicensed practice. The new regulator should publicise infringements and the enforcement action taken. For those wishing to dispute the new regulator's decisions or sanctions, there should be a right of appeal through the First-tier Tribunal. Furthermore, the First-tier Tribunal should also be granted in law the power to consider applications for judicial review against the new regulator.

v. The new regulator and other bodies (such as Trading Standards and redress schemes) will need to share information and work together effectively. There should be a system of flexible working between the new regulator and Trading Standards teams, and the new regulator should set out guidance clarifying their own and Trading Standards' roles with regards to enforcement action to avoid duplication.

Embargoed until 00.01 18th July 2019

INTRODUCTION

1. On 12 October 2018, the Minister for Housing and Homelessness – Mrs Heather Wheeler MP – announced that a working group would be established to help Government develop the details of its proposal for a new approach to the regulation of property agents.
2. We were delighted to be invited as members of that working group, under the leadership of our Chair, Lord Best. We began meeting in November 2018 and have formally met a total of eight times. We have also conducted four sub-group sessions; for each of these we invited oral and written representations from a wide range of stakeholders to allow those not included in our nominal membership to have their say. These sessions have been immensely helpful in enabling us to draw our conclusions and we are grateful to all of those who participated.
3. We owe sincere thanks to Gavin O'Leary and his colleagues at MHCLG, especially Sarah Callanan, Joe Harper, Paul Haezewindt and Sheldon Ferguson: the team has done a great job in organising our meetings and bringing this report together. Their support has been much appreciated. As Chair, I am also extremely grateful for the spirit of openness and cooperation shown by all the members of the Working Group. Many thanks to them for enabling a unanimous report and to all those who shared written and oral evidence with us.
4. In our work we have sought not only to use expertise from within the property sector, but also to learn lessons from other regulatory systems. We are particularly grateful to the representatives of the Scottish and Welsh Governments for taking the time to explain their recent approaches to regulating letting agents; and to officials from the Financial Conduct Authority and legal regulators for discussing their regulatory models. Lessons learned are, wherever possible, reflected in our recommendations.
5. This report is set out in seven chapters:
   - In Chapter One, we consider the case for and against the kind of regulation that Government envisages;
   - In Chapter Two, we relay the outcomes of our considerations, and the Chair's conversations with the Minister, regarding the scope of our work – what the new regulatory regime should and should not capture;
   - In Chapter Three, we begin our consideration of the detail of a new system with the first of its building blocks – a power to license agents;
   - In Chapter Four, we consider how codes of practice could set industry standards;
   - In Chapter Five, we outline an approach to qualifications to set standards across the sector;
   - In Chapter Six, we look at issues for property agents specific to the leasehold sector;
   - In Chapter Seven, we consider the governance and formal powers of the new regulator; and
   - In Chapter Eight, we address the existing enforcement structure for property agents and how it can be adapted into a new system.
6. Two annexes present additional learnings from our programme of work. **Annex A** covers leasehold and freehold matters more broadly than in the main body of our report, which focuses more closely on the role on agents. **Annex B** summarises some of the lessons relayed to us on the work and experiences of other regulators.

Embargoed Until 00.01 18th July 2019

Definition of property agents

There are a wide range of jobs performed by residential property agents, and in Chapter Two we work through some of those which are less familiar. For ease, we have adopted simple terminology throughout our report to refer to the most common types of agency work:

- By **'letting agents'**, we mean those who work for landlords to advertise their properties, negotiate tenancies and/or help the landlord to manage the property and tenancy on an ongoing basis on the landlord's behalf.
- By **'managing agents'**, we refer to agents in the leasehold sector who provide services to freeholders and collect certain fees and charges on the freeholder's behalf.
- By **'Sales agents'** is our catch-all term for agents who help with the sale and purchase of property; whether on a freehold, leasehold or commonhold basis.
- By **'Property agents**' is then our umbrella term for all of the above, in addition to the more specialised forms of agency outlined in Chapter Two.
- By **'auctioneers'**, we mean those agents engaged in the auctioneering of residential property.

Embargoed until 00.01 18th July 2019

CHAPTER 1: THE CASE FOR REGULATING PROPERTY AGENTS

7. Government has proposed that property agents be regulated by an independent regulator, with mandatory qualifications and a code of practice. We have been tasked with advising on how to make this proposition a reality. We begin by looking at the problems which regulation is trying to solve.

8. It has long been the case in the United Kingdom and elsewhere that those performing complex, high-risk tasks – whether the risk is to health, to liberty, or to finance – are required to meet certain levels of skill and ethics. Solicitors and financial advisers are among those regulated to established standards in order to safeguard the public.

9. Not all professions are regulated – with good reason. Regulation creates requirements (such as qualification and reporting provisions) which can discourage businesses and individuals from entering the sector; reducing supply could increase costs to consumers. In a well-functioning market, if agents provided a bad service they would struggle for repeat custom and fail; where they broke the law, they would be investigated and prosecuted.

10. Yet property agency is an imperfect market and there are two key reasons for this. The first is that residents, while affected by agents' behaviour, do not choose and cannot easily remove an agent. It is the owner – the landlord, freeholder or seller – who hires the agent rather than the tenant, leaseholder or buyer. When choosing an agent, owners will be concerned principally with whether their agent meets the owner's needs.

11. The second is that owners do not always have the right information to negotiate effectively with agents or hold them to account. Sales and lettings are complicated tasks governed by complex areas of law. It can be difficult for an inexperienced owner to know whether their agent is acting lawfully and in their best interests; and if not, how to switch to one who will. The average homeowner moves only every 19 years:[1] so the sales market does not encourage consumers to become expert. Equally, the amateur landlord may find it difficult to know which letting agent is offering the best value for money.

12. This lack of information, and of market power, can leave consumers at the mercy of substandard agents. Government has attempted to address this imbalance by requiring all agents to belong to one of two independent redress schemes,[2] which help resolve complaints. Last year, the two schemes dealt with over 30,000 enquiries and 5,000 formal complaints.[3] The larger of the two schemes, The Property Ombudsman, reported that complaints had increased by 12% and 13% for lettings and sales respectively since 2017. [4] This increasing rate of complaints is worrying. Furthermore, various surveys point to sector-specific problems, including:

    - in 2018, Which?[5] found that 64% of tenants who had recently moved and used a letting agent had experienced a problem;[6] and

Embargoed until 00.01 18th July 2019

---

[1] Barclays: Home Improvement Report 2018, as reported in https://www.mortgagestrategy.co.uk/homeowners-choosing-to-improve-not-move-barclays/, accessed 2 June 2019
[2] The Property Ombudsman or the Property Redress Scheme
[3] The Property Ombudsman, Annual Report 2018; Property Redress Scheme, Annual Report 2018
[4] The Property Ombudsman, Annual Report 2018
[5] The consumer association Which? is a charity which reviews products and services, and campaigns for consumer rights
[6] Which?, Reform of the private rented sector: the consumer view, June 2018, page 23

- a 2016 survey by LEASE[7] and Brady Solicitors found that 66% of leaseholders somewhat or strongly disagreed that the overall service provided by their managing agent was good.[8]

13. Trust in property agents remains low: for example, only 30% of respondents to an annual survey conducted in 2018 by the market research company Ipsos Mori agreed with the statement that they trusted 'estate agents' to tell the truth: this was less than half of the 62% who trust 'the average person on the street'.[9] This lack of trust harms agents, and many of those we have spoken to want to be regulated in order to improve public confidence in their industry. The lack of trust may also affect owners – private landlords in particular – encouraging them to let without using an agent which, if they do not understand the full extent of the task and responsibilities they are taking on, may well be to tenants' disadvantage. The 2018 English Private Landlord Survey found there are a range of legal requirements – such as installing a working carbon monoxide alarm, carrying out gas safety inspections, and issuing a copy of the 'How to Rent' guide – that agents were more likely to carry out than self-managing landlords.[10]

14. Some we have spoken to believe that the cost of further regulation would outweigh the benefits, and that consumers are adequately protected by three existing pillars – local Trading Standards, the redress schemes, and industry self-regulation. Yet it is our view that each of these pillars has limitations surmountable only by a new regulatory framework.

15. Most of the laws applying to property agents – including the Estate Agents Act 1979, the Tenant Fees Act 2019, and the Client Money Protection Requirements Regulations 2019 – are policed by local Trading Standards teams or a lead enforcement authority who acts on behalf of the others. National Trading Standards, an organisation established by Government to help coordinate and support action by local trading standards teams, runs two lead enforcement authorities on behalf of the Ministry of Housing, Communities and Local Government. These authorities, based at Powys County Council (for sales) and Bristol City Council (for lettings), operate under a joined-up superstructure as the National Trading Standards Estate and Letting Agents Team. The lead enforcement authorities receive funding from Government to provide support and guidance to local authorities, and have powers to take on cases in extremis and to ban sales agents from practice.

16. Trading Standards are, and will continue to be, essential in dealing with illegal behaviour by agents. However, the traditional approach to policing this sector by passing laws and asking Trading Standards to enforce them will not, in our view, tackle the increasing number of complaints about property agents and the pervasive lack of consumer trust. Trading Standards' role is reactive rather than proactive – they investigate after a problem has occurred. A regulator, on the other hand, could use tools such as a code of practice and mandatory qualification requirements to prevent the problem from arising in the first place. Trading Standards focus on individual cases of law-breaking and do not necessarily monitor or record more minor misdemeanours: this could mean agents who show a pattern of poor practice that falls short of clear illegality could go unnoticed. The engagement of Trading Standards teams also varies geographically due to limited resources in many areas. Finally, and perhaps most importantly, Trading Standards are rule-followers rather than rule-makers, and can tackle emerging issues in the sector only at the speed at which new regulations are brought into force. A new regulator would have greater flexibility to react quickly to new ruses and ambiguities in property agents' practice.

17. Above, we note that the redress schemes – The Property Ombudsman and the Property Redress Scheme – deal with a high number of individual consumer complaints each year. They would argue, and we agree, that despite their significant powers to resolve individual issues, they cannot always solve systemic problems in the market. All residential property

Embargoed until 00.01 18th July 2019

[7] The Leasehold Advisory Service, a Government-funded body
[8] LEASE and Brady Solicitors, 2016 National Leaseholder Survey, Chapter Four
[9] Ipsos Mori: Veracity Index 2018, November 2018
[10] MHCLG: English Private Landlord Survey 2018, December 2018

agents are required by law to belong to a redress scheme, and so the schemes are in a stronger bargaining position with their members than the professional bodies. However, the redress schemes focus on individual cases; they cannot mandate that agents be qualified or adhere to a code of practice. They can order agents to pay financial awards where those agents have harmed consumers, but the value of these awards cannot exceed the individual harm done; the schemes have no power to make punitive awards to deter wrongful activity in the future. And while it may seem obvious, redress schemes can only take action as and when a complaint is brought to them. Moreover, while agents are required to join a redress scheme, there is evidence that not all do;[11] even where they do so, consumers may not know how – or feel able – to formally make a complaint to a third party.[12]

18. Redress schemes focus on individual cases and cannot be expected to deal with issues such as:

- Complaints by agents against other agents;
- Complaints from related professionals (e.g. accountants and lawyers) who may wish to report irregularities or concerns;
- Whistleblowing;
- Complaints passed on by the media or other third parties where the victim is unable or unwilling to complain; or
- Groups of consumers with a 'class action'-like complaint (e.g. where the same managing agent's practice has harmed multiple leaseholders).

19. Local authority Trading Standards teams (supported by lead enforcement authorities) enforce current laws governing agents, but their engagement varies geographically and they have little latitude in interpreting existing statute. While consumers are, in some cases, able to take action in a court or tribunal against an agent, this can be a costly and burdensome course of action.

20. Many, but not all, agents, belong to a professional or trade body. The table below is illustrative but not exhaustive:[13]

Name	Specialism	Membership numbers (approximate)
ARLA Propertymark (Association of Residential Property Agents)	Letting agents - individuals	9,600 individuals
Association of Residential Managing Agents (ARMA)	Managing agents - firms	265 firms
Guild of Property Professionals (GPP)	Letting and sales agents - independent[14] firms	800 firms
Institute of Residential Property Management (IRPM)	Managing agents - individuals	5,000 individuals[15]
NAEA Propertymark (National Association of Estate Agents)	Sales agents - individuals	7,200 individuals
Royal Institution of Chartered Surveyors (RICS)	Letting, managing and sales agents - firms and individuals	2,000 firms

[11] Chartered Trading Standards Institute: "Problems with a letting agent in London - 'Report it to sort it'", 13 September 2018
[12] BEIS: Resolving Consumer Disputes: Alternative Dispute Resolution and the Court System, April 2018, page 5
[13] Numbers in the final column reflect whether the primary form of membership is at individual or firm level (although many of the bodies above have a relationship at both levels).
[14] GPP membership is not open to those whose shares are publicly traded.
[15] https://irpm.org.uk/public/page/about-irpm, accessed 2 June 2019

Embargoed until 00:01 18th July 2019

Safeagent[16]	Letting agents - firms	1,500 firms
UK Association of Letting Agents	Letting agents - firms	987 firms
Association of International Property Agents	Letting and sales agents - firms (specialises in overseas lettings and sales)	370 firms

All of these organisations offer training, and some make reaching certain membership levels conditional on completion. Some of these organisations require adherence to a code of practice. All can sanction or expel members for misbehaviour, though some have more robust approaches to doing so than others.

21. Membership of these bodies is voluntary, and many agents have not signed up to any; members can walk away at any point, if the body raises its standards too high. As a result, it is not clear that there is an effective self-regulatory system for the sector as a whole.

22. Not all professional associations' regulatory functions are independent, and hence there is potential for conflicts of interest, as those making decisions on standards and discipline may also have to consider the financial risk of a member opting out of the voluntary system. We turn later to the important role that professional bodies could play under a new regulatory regime, but we do not think that their existence makes a new regulatory regime unnecessary.

23. **In conclusion, we agree with Government that a new approach – property agent regulation – is needed.** Regulation will provide the opportunity to prevent bad practice and drive cultural change within the industry, focussing on prevention rather than enforcement after the event. Moreover, it could help drive efficiencies in the sector, including by improving processes and behaviours, for example:

    - Clarification of roles and responsibilities between a regulator; professional bodies; trade associations; redress providers; and enforcement bodies will add much needed clarity and simplicity to the sector;
    - Establishing a mandatory code or codes of practice will enable a reduction in unnecessary codes and the considerable costs of maintaining such codes; and
    - A new independent regulator that is open, transparent and publicly accountable will be in a position to challenge other stakeholders in the sector in terms of how they are offering a value-for-money service, remaining relevant and helping to raise standards, trust and confidence in the public about the sector.
    - There are also potential opportunities for other cost savings.

24. In the next chapter, we consider the scope of sector regulation; in subsequent chapters, we break down what sector regulation entails.

Embargoed until 00.01 18th July 2019

[16] Formerly the National Assured Letting Scheme (NALS); name changed in May 2019

CHAPTER 2: SCOPE OF REGULATION

25. Chapter One considered the general case for regulating property agents. This chapter clarifies:

    - Which areas of work by property agents should be regulated; and
    - Whether regulation should apply to the individual agent or to the agency they work for, or to both.

26. In our introduction we defined letting, managing and sales agency as the types of work which Government has specifically asked us to include in the new regulatory framework we propose. All are intermediaries, paid by clients to perform functions on their behalf.

27. We should clarify that we are only considering residential property agency, and that any work in relation to commercial property is beyond our remit. All subsequent references to 'property agency' should be taken as excluding commercial property agency.

Landlords, freeholders and developers

28. A great many property transactions involve no intermediaries. Research carried out by the Department for Business, Energy and Industrial Strategy in 2017 found that 10% of home sales involved no agent or auctioneer.[17] More significantly, the 2018 English Private Landlord Survey suggests that over half of private landlords do not use an agent,[18] instead letting and managing their property themselves. Some corporate landlords – including some Build to Rent developers – carry out ongoing management through an in-house team or a wholly-owned subsidiary company. None of the parties to these private arrangements come within the scope of our proposals.

29. We have raised these omissions with the Minister for Housing and Homelessness. Consumers who do not go through an agent – those who buy directly from the seller or from a developer and tenants who rent directly from a landlord, as well as leaseholders whose freeholders do not employ a separate managing agent – will not be protected by a regulatory system that does not cover landlords, freeholders or developers. Yet complaints against housebuilders about their sales services and about the contents of their leases and sale agreements are commonplace. Freeholders too are often criticised – as we note later – and private landlords are frequently the subject of dispute.

30. Homebuyers deserve the same attention to the service they receive, irrespective of whether their property is being marketed by the company that built it. Tenants deserve the same consumer protection whether their property is managed by an agent or directly by the landlord. Leaseholders deserve the same treatment whether their freeholder uses an agent or uses a subsidiary company.

31. We note that there are separate policy initiatives in these areas: Government has taken steps to combat rogue landlords and has recently announced reforms to leasehold arrangements in response to a consultation.[19] It has also announced that housebuilders, landlords and freeholders are to be required to belong to a redress scheme.

32. While we are encouraged that Government is taking these positive steps, there will remain gaps in consumer protection. ***We recommend that the new regulatory model we propose in this report is flexible and could therefore be extended to other areas, covering***

Embargoed until 00.01 18th July 2019

[17] BEIS: Research on buying and selling homes, October 2017, page 16
[18] MHCLG: English Private Landlord Survey 2018, December 2018, page 20
[19] MHCLG: Implementing reforms to the leasehold system in England: Summary of consultation responses and Government response, June 2019

freeholders, developers and private landlords (including new Build to Rent providers). We also recommend that the legislation required to regulate property agents should allow for future extension.

33. In the meantime, the creation of a new regulator for property agents, with Codes of Practice and the other changes set out in this report, will itself establish norms for consumer protection and, we hope, influence behaviour of all developers, freeholders and landlords.

Varieties of property agent

34. Throughout our work, we have come across many property professionals and intermediaries operating beyond the traditional lettings, management and sales models. Some may count as property agents under existing legal definitions; others would not. We considered which of these types of agent should fall within the scope of a new regulatory regime, examining the following:

- **Auctioneers** of residential property who sell homes directly via auction;
- **Rent-to-rent** or '**guaranteed rent**' **firms**, who take on a lease and then sub-let properties, offering the ultimate landlord a defined rental return regardless of occupancy or tenant behaviour;
- **Property guardian providers**, who find residents for unused commercial premises which they do not themselves own;
- **International property agents**, i.e. both UK-based agents and, in as far as is practical, agents based overseas, who provide a service to clients in this country who rent or sell overseas property or UK property to overseas buyers; and
- **Online-only** agents, who do not have a traditional high street presence.

In all of the above cases, the agent, or their company's activity, shares the essential characteristics of traditional lettings, management and sales: they are offering services as an intermediary to a property transaction. Excluding any of these from the scope of regulation could create potential loopholes. ***We therefore recommend that auctioneers, rent-to-rent firms, property guardian providers, international property agents and online-only agents are covered by the regulation of property agents.***

35. There are two leasehold-specific cases which are less clear-cut:

- **Retirement housing providers**, which manage leasehold or rental properties they have developed (as opposed to those that engage separate bodies to manage their property). These operators are the freehold owners/landlords as well as the ongoing managers, so fall outside our definition. However, we have spoken to key industry groups including the Association of Retirement Community Operators and the Association of Retirement Housing Managers and we understand them to be happy in principle to be part of a regulated sector.
- **Right to Manage companies**, established by leaseholders under powers in the Commonhold and Leasehold Reform Act 2002 to take over property management from the freeholder or managing agent. Some will manage the properties themselves, while others will employ a managing agent in turn (who will be covered under our proposals). While some of these companies are very small bodies for whom full regulation would be disproportionate, some are substantial entities upon whom many leaseholders depend. We have raised this with the Minister of Housing and Homelessness who confirmed

Embargoed until 00.01 18th July 2019

these companies as out of scope at this time, not least because, the Law Commission, as part of its 13th Programme of Law Reform, is looking specifically at Right to Manage.[20] Following the conclusion of this work, we expect the Government will make clearer its intentions in this regard.

36. To keep open the opportunity for the regulator's role to cover both these cases ***we recommend the legislation should contain powers for the Government to extend the scope of property agent regulation to all retirement housing managers and Right to Manage companies***.

Devolution and other matters

37. There are a few additional points on which we should be clear:

- Under the UK Government's constitutional settlement, policy relating to letting and managing agents is devolved in Scotland, Wales and Northern Ireland; sales agent policy is reserved by Westminster. The Scottish and Welsh Governments have developed their own regulatory systems for letting agents, which we have considered in our work. **Our proposed new regulatory framework will therefore cover sales agents across the UK, and letting and managing agents in England only.** However, it will be important that a new UK regulator has an effective working relationship with its Welsh, Scottish and any future Northern Irish counterpart for lettings.
- We are clear that we are covering agents but not property owners. By extension, we recognise that agents who are wholly-owned subsidiaries of their exclusive clients will not be regulated.
- Property portals (such as Rightmove, Zoopla, and OnTheMarket) are not currently doing agency work: they are just platforms on which agents advertise. ***We do not recommend that property portals be regulated***. Our recommendation would differ if a property portal began performing agency work.
- At this time, to avoid burdening the new regulator with too many tasks simultaneously, we do not recommend that the short-let sector (e.g. AirBnB) should be brought within the scope of a new regulator of property agents.
- ***We recommend that all those carrying out property agency work be regulated, even if it is not their largest or traditional core function***. In particular, we note that housing associations (Registered Providers) acting as managing agents of private leaseholder blocks are not regulated with respect to that function. It seems that the Housing Ombudsman (for those in homes provided by social landlords) does not cover these leaseholders; yet it appears that it is not obligatory for a housing association acting in the private sector in this way to belong to one of the two private sector redress schemes. ***We recommend this anomaly be addressed and regulation cover social landlords in these circumstances***.
- Where local authorities provide letting and/or management services, their customers should have the same protections as those using a privately-run agency. However, as public and democratically accountable organisations, councils cannot be regulated as a business by a national regulator. Instead, consumers have protection through their elected representatives and the Local Government and Social Care Ombudsman. Nevertheless, we would expect training and qualifications for staff employed in lettings and management roles at local authorities to be entirely equivalent to their counterparts

[20] Law Commission: Right to Manage

Embargoed until 00.01 18th July 2019

in the private sector. Housing associations running property agencies are not public bodies and would fall within the scope of the new regulator.

Firms and individuals

38. As a final point in considering the scope of our work, there is the question of whether regulation should cover property 'agents' (as individuals) or 'agencies' (as firms).

39. Government has made it clear that it expects agents to be suitably qualified to practise. While firms can be made responsible for the competence and training of their staff, only individuals can hold qualifications, so it seems clear that at least some of the new regulatory framework should affect individual agents. Moreover, there is a principle across regulated professions that recognises individual responsibility. A lawyer who misappropriated client funds or mishandled confidential information would not be expected to transfer consequence-free to alternative employment, with their employer bearing all responsibility. A culture of individual responsibility may help promote ethical behaviour within an industry, as there will be professional risks when agents refuse to speak out against inappropriate instructions from their clients.

40. However, there are things we expect of agencies that do not make sense as individual obligations – for example, client money protection and proper complaints-handling procedures, which are clearly matters for collective company responsibility. Lastly, we note that much as not every member of staff at a law firm is a lawyer – with responsibilities requiring personal accountability to a national regulator – not every employee of an agency is a property agent.

41. We therefore propose that Government create a list of 'reserved activities' – activities which can only be performed by a licensed individual at a regulated firm. Government will want to consider further the contents of this list; as a starting-point we suggest the following:

    - Conducting viewings;
    - Market appraisals;
    - Negotiating with and on behalf of clients;
    - Signing contracts;
    - Providing direct advice to clients;
    - Instructing contractors to undertake works;
    - Collecting or handling client money; and
    - Having responsibility for the health and safety compliance of a property.

42. ***We recommend that the new regulator's scope extend both to licensed agents (as individuals) and regulated agencies (as firms)***.

Embargoed until 00.01 18th July 2019

CHAPTER 3: LICENSING

43. We now turn specifically to the Government's expectations for property agent regulation. These expectations include that agents must be appropriately qualified and follow a code of practice. We look at these matters in more detail in the following chapters, but we note first that in order to set prerequisites for agents to practise, the new regulator must check their credentials. We believe that this is best achieved by a licensing system; so we set out here how such a system should operate.

44. Requiring agents and agencies to hold a licence from the new regulator in order to operate gives the new regulator the necessary controls over the sector. Requiring agents and agencies to display their licence publicly would give consumers an easy way to check that their agent was qualified and legitimate, helping to build trust in the profession. We note that desire of many individuals in the sector to be seen as professionals and we believe that being a "licensed property agent" will add status and recognition of competence. Where an agent practises while unlicensed, consumers and enforcement authorities alike will be able to identify them and avoid, report, or prosecute them as appropriate. ***We recommend that property agencies, and qualifying agents, be required to hold and display a licence to practise from the new regulator. The new regulator should hold the power to grant, supervise and rescind these licences.***

45. As a minimum to be licensed, property agents should be required to declare their adherence to any required code of practice, and to provide evidence that they have met the relevant qualification requirements. Licensing can therefore be the tool that the new regulator uses to ensure compliance with these basic obligations.

46. Licence conditions can and should go further. Property agents are already subject to obligations which are straightforward to check:

    - All residential property agents must belong to a Government-approved redress scheme;
    - Letting agents must also belong to a Government-approved Client Money Protection scheme if they handle client money; and
    - Letting and sales agents may also be required to fulfil certain Anti-Money-Laundering obligations.

    Agents must submit a copy of their annual audited accounts to Companies House. It is also important for agents to possess appropriate professional indemnity insurance and to have a clear procedure for handling complaints. If not part of the relevant code, these requirements may be part of the licensing system, rather than being covered by statute, in future. Regardless, ***we recommend that before granting a licence, the new regulator should check whether an agent has fulfilled its legal obligations, including those set out above.***

47. A 'fit-and-proper persons' test for directors of regulated property agencies would follow a pattern common in regulatory and licensing systems. Such tests typically involve high-level background checks to avoid unsuitable people from acquiring significant legal and financial responsibility. Both the Scottish and Welsh approaches to regulating letting agents incorporate fit-and-proper persons tests,[21] as do many other regulatory systems. These tests would allow the new regulator to prevent those with relevant criminal convictions (e.g. for offences of dishonesty or serious violent crime) from entering or remaining in the sector. These tests should, logically, apply not just to company directors but to all qualifying professionals.

Embargoed until 00.01 18th July 2019

[21] Scottish Government: Regulation of letting agents: monitoring compliance and enforcement framework, March 2018; Welsh Government: Guidance on the "fit and proper person" test for licensing of landlords and agents, October 2015

48. Fit and proper person tests would also be an answer to the problem of 'phoenixism' in the property agency industry. A 'phoenix' company is one which is resurrected to carry out the same business or trade after becoming insolvent, without transferring debts from the older company to the newer one. Of course, not all insolvencies are the result of malice or incompetence – market forces can also drive insolvency. The Insolvency Service leads in investigating suspicious insolvencies and judging whether directors are unfit for involvement in future ventures. However, we have heard reports of agents folding companies before restarting similarly-named enterprises in the same office, and with the same directors (sometimes with a family member nominally in charge of the new entity), seemingly as a move in bad faith to avoid debts (including redress-scheme-ordered financial awards or local authority fines). Phoenixism threatens both the effectiveness of any regulator and the industry's credibility. A fit and proper person test would combat this problem. ***We recommend that licensing include an appropriate fit-and-proper persons test.***

49. The new regulator could also apply additional licence conditions as it sees fit. Additional conditions may be useful when renewing licences for agents who have committed certain misdemeanours that, while not severe enough to merit disqualification, suggest that they need to go further to prove their continuing fitness to practise. Adding licence conditions could be part of the new regulator's enforcement toolkit (discussed further in Chapter Seven). ***We recommend that the new regulator be able to vary licence conditions as it sees fit.***

50. Records of licensed property agents should be held and maintained by the new regulator. Were they to be accessible online, they could be searched by members of the public and interested organisations, such as local trading standards teams. Online accessibility could help consumers to verify their agent's credentials and assist enforcement authorities in investigating agents. ***We recommend that the new regulator maintains records of licensed property agents. These should be accessible online.***

Embargoed until 00.01 18th July 2019

CHAPTER 4: CODES OF PRACTICE

The case for a mandatory Code of Practice

51. Codes of practice set out clear standards of behaviour for the professionals to whom they apply. They complement legislation by explaining in more detail what the law means, make additional rules and offer guidance to professionals on how to comply. In addition, codes of practice can set out good or best practice that, while not obligatory, represents a standard to which professionals should aspire.

52. There is no mandatory code of practice for property agents. However, there are two codes – the Royal Institution of Chartered Surveyors (RICS)' code, *Service Charge Residential Management Code*,[22] and the *ARHM Code of Practice for England*[23] (relating to retirement housing management) – which the Secretary of State for Housing, Communities and Local Government has adopted under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993. The existing codes do carry weight and are admissible as evidence in relevant proceedings before a court or tribunal whether or not the agent in question has signed up to the code. There are also a number of voluntary codes ('voluntary' in that not all agents must belong to them, although signing up may be a condition of membership for certain professional bodies). Some of these are exacting and comprehensive; we particularly note The Property Ombudsman's codes of practice for residential estate and letting agents, which are accredited by the Chartered Trading Standards Institute,[24] and the RICS-sponsored *Private Rented Sector Code*, developed in close collaboration with a range of experts.[25]

53. Codes of practice are a core component of many regulatory systems. Our evidence suggests they play several important roles. Based on the following factors, it is our view that mandating a property agent code of practice will drive forward sector improvement and, by doing so, support the professionalisation of the sector:

    - Firstly, codes of practice provide consumers with a clear statement of standards with which to hold their service provider to account. By filling in the detail for what they are required to do, this can help the provider to meet their legal and professional responsibilities and give them confidence that they are compliant.

    - Secondly, a code of practice can form the basis for judgements for a redress scheme. Most of The Property Ombudsman's members are signed up to the Ombudsman's codes.[26] Some of the Property Redress Schemes' members belong to a voluntary code of practice. In both cases, the redress schemes can use the relevant code as a basis for adjudication.

    - Thirdly, a code of practice provides **aspirational goals**. Where suggested 'shoulds' (i.e. points of best practice) complement obligatory 'musts' (legal requirements), a code can guide professionals in their attempts to provide the best possible service.

    - Fourthly, a code of practice gives industries a more **flexible way to adapt to change** than relying on legislation alone. For example, a service provider may offer a new product which has risks for consumers – in this situation, the regulator, as the code

[22] RICS, https://www.rics.org/uk/upholding-professional-standards/sector-standards/real-estate/service-charge-residential-management-code/

[23] ARHM, https://www.arhm.org/publication-category/code-of-practice/

[24] The Property Ombudsman, https://www.tpos.co.uk/members/codes-guidance

[25] RICS, https://www.rics.org/uk/upholding-professional-standards/sector-standards/real-estate/private-rented-sector-code-1st-edition/

[26] 96% of The Property Ombudsman's sales and lettings members belong to at least one of the codes of practice it maintains.

Embargoed until 00.01 18th July 2019

sponsor, can act relatively quickly and independently to change practice by revising the code. Without a code, only legislation (after the often-lengthy Parliamentary processes involved) could tackle those risks.

54. Government has already committed to requiring letting agents to adhere to a code of practice.[27] ***We recommend that all property agents be required to do so.***

A system of codes

55. When making codes mandatory, Government must bear in mind the variety of functions performed by property agents. Some of these functions are specific to certain types of property agent roles; for example, property maintenance is carried out by many letting and managing agents, but not by sales agents. However, there are also common principles that ought to apply at a more general level, such as protection of clients' money and proper complaints handling. A system of codes should reflect both these commonalities and differences.

56. We suggest that Government will also need to balance the code's legal standing with appropriate flexibility. Government has indicated that it would wish to see a code that is legally-enforceable, and this would entail at least part of the code being enshrined in law. However, the more of the code that is contained within legislation, the less flexible will be its operation, and the slower it will be to adapt to change, undermining one of the benefits of a code-based system. Setting the entirety of the code in legislation, whilst creating a firm legislative basis for the code, would also make it relatively rigid and unresponsive. The Scottish Government has taken the step of placing their code of practice for letting agents into statute; we fear it may therefore prove difficult to revise. The challenging Parliamentary timetable will allow only infrequent updates, and the code could rapidly become obsolete.

57. We proposed, and tested with experts from the sector, the idea that there should be a single, high-level set of principles applicable to all property agents which is set in statute (the 'overarching' code). This single set of principles would maximise consistency and allow for the strongest penalties against agents who fail to meet a basic minimum standard. Underneath the core principles, there should be provisions specific to various aspects of property agent practice which would be binding only on those providing the specific services described; these would form new 'regulatory' codes. None of this would prevent professional bodies from setting separate codes should they choose to do so, but these would have to supplement, rather than replace, the overarching and regulatory codes.

58. ***We recommend that there should be a single, high-level set of principles applicable to all property agents which is set in statute (the 'overarching' code). Then, underneath these core principles, there should be codes specific to various aspects of property agent practice, which would be binding only on those providing the services described: these would comprise the 'regulatory' codes***.

59. Adherence to the relevant code would be a key component for obtaining and retaining a licence from the new regulator.

60. As covered in Chapter Two, the codes should apply both to agency businesses and to individual qualifying agents. Some provisions (e.g. on client money protection) would apply only to the firm; other elements (such as ethical behaviour) would apply to both firms and individuals. Senior managers should be responsible for ensuring that their company complies with all relevant parts of the code of practice.

Embargoed until 00.01 18th July 2019

[27] MHCLG: *Protecting consumers in the letting and managing agent market,* Government response, April 2018, paragraph 69

61. The regulatory codes of practice should make clear agents' responsibility to disclose to the new regulator any information about their, or another's, material breach of standards or any action that could threaten residents' safety.

Setting the overarching code

62. We have looked at a variety of professional codes of practice to identify high-level principles for the new overarching code, most of which reflect professionalism in general rather than the specifics of property agency. These included:

- The Scottish[28] and Welsh[29] letting agent codes of practice;
- The Financial Conduct Authority (FCA) handbook;[30]
- The Solicitors' Regulation Authority (SRA) handbook;[31] and
- The RICS-sponsored International Ethical Standards for Property Professionals.[32]

63. We therefore recommend the following principles for the overarching code of practice:

- Agents must act ethically, with honesty and integrity.
- Agents must act with due skill, care and diligence.
- Agents must communicate clearly, accurately and transparently to represent correctly their service or product.
- Agents must manage their businesses and staff effectively.
- Agents must make appropriate arrangements to protect their clients' money.
- Agents must maintain appropriate accounts and records of their business activities.
- Agents must ensure that all staff are qualified and capable to handle responsibilities delegated to them.
- Agents must treat all customers fairly and equally.
- Agents must report breaches of the relevant code(s) to the new regulator.
- Agents must be open and transparent with the new regulator about matters that might affect their or others' trust in the profession.
- Agents must handle information sensitively and in accordance with data protection legislation.
- Agents must seek to avoid conflicts of interest, and where this is unavoidable, declare all conflicts of interest and ensure these are managed properly.
- Agents must have effective consumer complaints procedures in place.
- Agents must comply with all relevant legislation.

64. We further recommend that the regulatory codes of practice make it clear that agents have an additional responsibility to disclose to the regulator any information about their, or

Embargoed until 00.01 18th July 2019

[28] https://www.gov.scot/publications/letting-agent-code-practice/, accessed 3 June 2019

[29] https://www.rentsmart.gov.wales/Uploads/Docs/Code%20of%20practice%20for%20Landlords%20and%20Agents%20licensed%20under%20Part%201%20of%20the%20Housing%20(Wales)%20Act%202014%20-%20English%20-%20Doc%201.pdf, accessed 3 June 2019

[30] https://www.handbook.fca.org.uk/, accessed 3 June 2019

[31] https://www.sra.org.uk/handbook/, accessed 3 June 2019

[32] https://www.rics.org/uk/upholding-professional-standards/standards-of-conduct/ethics/ies-international-ethics-standards/, accessed 3 June 2019

another's, material breach of standards or any behaviour that could threaten residents' safety.

Developing and maintaining the regulatory codes

65. The regulatory codes will cover matters that are both complex and dynamic; good practice will change over time, both of its own accord and in response to policy and technological developments. Any content that we might suggest now could be outdated by the time the proposed new regulatory framework is implemented. Moreover, there are already high-quality and widely-used codes of practice for property agents; the work for which should where possible feed into a new regulatory code; (as earlier, we note in particular the codes of practice backed by The Property Ombudsman and RICS as well as those already adopted by the Secretary of State for Housing, Communities and Local Government). We see no need to reinvent the wheel in developing new regulatory codes.

66. Instead, it should be for each sub-sector of property agency (e.g. lettings, management and sales) to support the new regulator to design and update the regulatory codes. Consumer groups, enforcement agencies and redress schemes can identify the real issues that consumers face; property agents and their representative bodies can ensure that the provisions of each code are workable and not disproportionately burdensome. It will be important for the new regulator to maintain this cross-section of insight.

67. ***We recommend that the new regulator create a working group for each sector of property agency it covers to develop that sector's chapter of the initial regulatory code of practice, taking care to achieve the widest possible representation within each sector***.

68. ***We recommend that the new regulator develop a clear timetable for revising the regulatory codes in order to keep them up to date, and that it consults appropriately with consumers and agents within each sub-sector when considering or proposing revisions***.

69. Under our proposals, the RICS *Service Charge Residential Management Code* is likely to be superseded for managing agents by the relevant regulatory code. This change creates a risk of unintended consequences as, by virtue of having been adopted by the Secretary of State, the RICS code also binds on freeholders collecting service charges. Since Government should ensure that existing standards are not undermined when a new framework of codes of practice is created, it may be necessary for Government to legislate for the relevant regulatory code to apply to freeholders.

Embargoed until 00.01 18th July 2019

CHAPTER 5: QUALIFICATIONS

The case for qualifications

70. Property agents are not currently required to have any qualifications. However, professional bodies, trade associations and others offer a range of courses and certifications; and many agents have voluntarily undertaken one (or more) of these.

71. When agents obtain the right qualifications, they and their customers can benefit significantly:

- Qualifications provide agents with the **skills** they need;
- They provide a **mark of competence** to reassure consumers; and
- They **require commitment from agents**, potentially discouraging people from entering the sector for reckless, short-term reasons.

72. Agents can get the skills they need without formal qualifications, but not necessarily the wider benefits set out above. Moreover, agents who display poor behaviour can harm those other than their direct clients, and it is therefore risky to leave them to self-certify their competence. We therefore welcome Government's stated intention to introduce mandatory qualifications for property agents (set out in its responses to a number of recent calls for evidence).[33]

Who needs to be qualified, and to what level?

73. We set out in Chapter Two that agents performing reserved activities will need to be licensed. The universal qualification standards we propose will also apply to these agents. However, ***we recommend that every property agency be responsible for ensuring that their staff are trained to the appropriate level and that clear oversight arrangements are in place for junior staff***.

74. We have considered and taken evidence on the appropriate level of property agent qualification from experts in different areas of property agency work, with particular regard to the Office for Qualifications and Examination (Ofqual)'s Regulated Qualification Framework.[34] Although qualifications should not be overly burdensome in terms of time or cost, they should require some of both to demonstrate proof of commitment. A consensus therefore emerged among us that licensed agents should be qualified to a minimum of level 3 in the Framework (equivalent to an A-level).[35] Higher minimums should be set in specific areas; including for company directors who are themselves performing or supervising agency work, and for particularly complex aspects of property agents' work such as leasehold block management - for both, level 4 in the Framework (equivalent to a Higher National Certificate) would be more appropriate. ***We therefore recommend that licensed agents should be qualified to a minimum of level 3; company directors and management agents should be qualified to a minimum of level 4.*** The regulator should be given the flexibility to require a qualification below level 4 for property managers that carry out reserved activities with a reduced level of responsibility, such as combined caretaker/site managers.

75. We also recognise and encourage Government's desire to make property agency work accessible to apprentices. We therefore recommend that apprentices, students and trainees who are training towards their level 3 qualification should be able to participate in reserved activities appropriate to their experience, but they should be closely supervised by a qualified

Embargoed until 00.01 18th July 2019

---

[33] MHCLG: *Protecting consumers in the letting and managing agent market,* Government response, April 2018

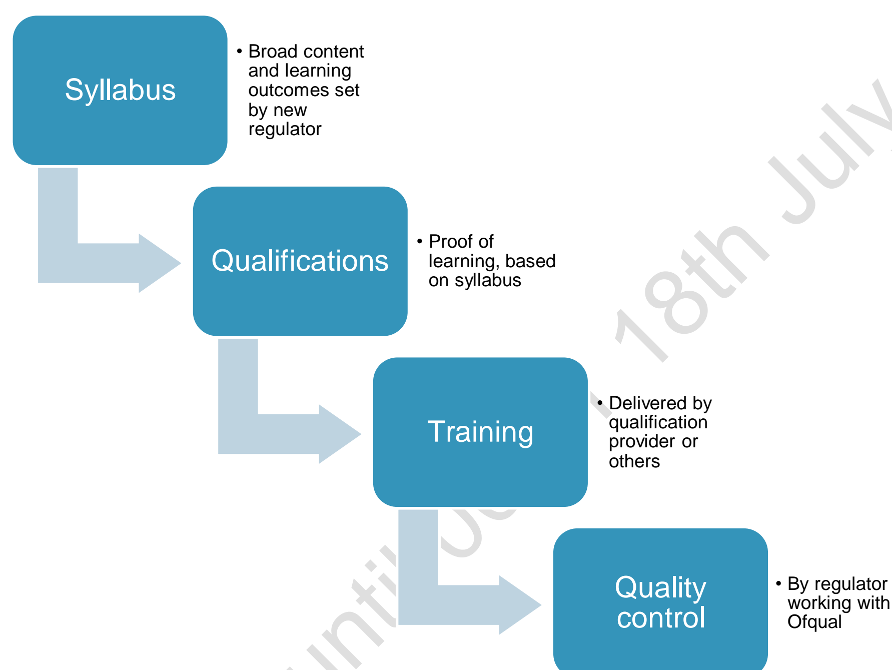
[34] Explanation of qualification levels, https://www.gov.uk/what-different-qualification-levels-mean/list-of-qualification-levels, accessed 3 June 2019

[35] Other equivalent qualifications are set out at https://www.gov.uk/what-different-qualification-levels-mean/list-of-qualification-levels

member of staff at all times when undertaking any of these functions and this practice should only be permitted for a defined length of time until the apprenticeship or traineeship is completed.

76. However, we also believe that there are roles within property agency businesses – such as general administrators – which do not require involvement in the property side of work. In these circumstances, mandating that all employees must hold property qualifications would not be an efficient use of time or financial resources, and would be overly burdensome upon property agency businesses. ***We therefore recommend that mandatory property qualifications should apply to licensed agents carrying out reserved activities.***

A system of qualifications



77. The new regulator will need assurance itself that agents' qualifications properly prepare them for their duties. Following the example set by regulation in the legal and other sectors, ***we propose that the new regulator set the syllabus for property agents***. This would include broad content and learning outcomes. Only qualifications which deliver accordingly would be recognised for licensing purposes.

78. Property agents engage in a diverse range of functions. Some activities apply to agents across the industry; for example, delivering good customer service; others, such as service charge handling, are specific to particular sub-sectors. Qualifications could best reflect this situation by using a modular syllabus, with modules both specific and general that can be mixed and matched across qualifications. The new regulator would make certain modules a general prerequisite (for example, customer service); others would be required for particular sub-sectors (such as lettings or sales). ***We recommend that the syllabus be modular – and encourage qualification providers to reflect this modularity in their offerings.***

79. Giving the new regulator control over the syllabus will mean qualifications can be adjusted quickly and flexibly in response to changes in legislation and developments in the industry. The new regulator will want to consult with agents and consumers when revising the syllabus. ***We recommend that the new regulator regularly reviews and updates the syllabus as needed.***

Embargoed until 18th July 2019

80. Throughout this report we note the importance of effecting cultural as well as technical change. ***We recommend that the syllabus should not focus too narrowly on technical skill – safety, consumer relations and ethical behaviour are also essential components which should be reflected in qualifications***.

81. There are already a number of qualification and training providers in the property agent industry, including several of the professional bodies.[36] It is important to maintain a diverse range of qualification providers so that there is genuine competition over cost and quality – subject to the standards imposed by the new regulator. It is also important that qualifications cover the required topics in an effective manner; and we believe that Ofqual can play an important role in supporting the new regulator to develop the syllabus and by accrediting qualification and training providers. ***We recommend that the new regulator works closely with Ofqual to develop a robust system of quality control in which, as a minimum, qualifications will only be valid insofar as their providers are recognised by Ofqual.***

82. Continuing professional development (CPD) which is already a feature of many professions, will be important in keeping agents' learning up-to-date. There are already some continuing professional development providers in the sector, but their offers are not standardised and the content varies. Moreover, the new regulator will want to be mindful of the risk that imposing an arbitrarily high number of hours of continuing professional development on agents may cause agents to take irrelevant courses. ***We recommend that the new regulator imposes continuing professional development requirements on licensed agents.***

Transitional arrangements and grandparenting

83. Many agents would not meet our proposed qualification requirements were they to be introduced tomorrow, so an appropriate phasing-in approach will be necessary. We noted the Scottish experience of regulating letting agents, where there was great pressure on training providers in the run-up to mandatory qualifications coming in to force.

84. There are several steps the new regulator should consider to alleviate this pressure, such as:

    - Offering an incentive (such as reduced licence fees or a longer licence period) for early adopters;
    - Ensuring there is no loss of licence length if agents acquire licences before the introduction date;
    - Supporting qualification and training providers to use e-learning, which unlike classroom learning does not have a physical limit on uptake; and
    - Allowing agents who have some (if insufficient) qualification extra time to meet requirements.

    We recommend that the new regulator have regard to avoiding bottlenecks during the phasing in of qualification requirements.

85. 'Grandparenting' arrangements enable a new regulatory structure to allow those in the sector before its introduction, and those who joined afterwards, to be treated differently. We expect all agents to have a recognised qualification to practise: as explained earlier, experience would not be a full substitute for qualification even if the new regulator were able to verify the quality of each agent's experience. If the new regulator sets the syllabus correctly, an agent who has provided good service for years should have no trouble becoming qualified. ***We***

[36] Including Propertymark, RICS, the Association of Residential Managing Agents, the Guild of Property Professionals, the Institute of Residential Property Management, Safeagent, and the UK Association of Letting Agents.

Embargoed until 00.01 18th July 2019

recommend that the new regulator does not exempt agents from a qualification requirement on the basis of experience alone.

86. Some agents will hold qualifications at a higher level than that required by the regulator. So long as these cover the content in the syllabus set by the regulator, these professionals will not need to evidence further training. Other agents will have a qualification but below level 3 (or the level appropriate to their role); the new regulator may approve some but not all previous or current level 3 qualifications. Nevertheless, it would be excessive to require these 'partially-qualified' agents to redo their training from scratch. Instead, ***we recommend that the new regulator allow partially qualified agents to make up the difference between their qualification and the required standard by taking specified continuing professional development.*** For each and any qualification in the market today which the new regulator decides not to approve, it should offer guidance on which modules agents with that qualification will need to take in order to be licensed.

87. The Working Group would not wish to see experienced, effective agents leaving the market because of anxieties around the need for new qualifications. By phasing in requirements for formal qualifications and making training and assessments increasingly accessible, we would hope the regulator can ensure that those well equipped to continue their work would not be deterred by this aspect of professionalising the sector.

88. There are other countries in which property agents become qualified, whether by requirement or voluntarily. Regulators in the UK are currently obliged to recognise certain overseas qualifications under the EU's Mutual Recognition of Professional Qualifications Directive. While it is unclear at this stage what the future of that device may be, the new regulator will want to ensure that those with equivalent or higher professional standards who come from other countries are not unfairly precluded from UK practice. ***We recommend that the new regulator establish a system for recognising appropriate overseas qualifications.***

Embargoed until 00.01 18th July 2019

CHAPTER 6: LEASEHOLD AND FREEHOLD CHARGES

89. Our core function and focus has been to advise on the regulation of property agents, but Government has also asked that we consider issues specific to leasehold and freehold charges. Some of these issues relate to managing agents, but others are broader. We have come to some conclusions particular to managing agents and to the role of the new regulator, and these are presented here. **Annex A** summarises our more general evidence on leasehold matters, with wider suggestions for Government.

The case for change

90. Government's *Protecting consumers in the letting and managing agent market* call for evidence identified many concerns around the transparency of service charges, and whether a range of other fees and charges were justified.[37] Concerns were also raised about how consumers could hold managing agents to account for the services they provide, and there were calls to make it easier for consumers to replace under-performing agents or take on the management of services themselves.

91. Service charges are the most common subject for enquiries to the Leasehold Advisory Service, accounting for more than 1 in 3 requests for advice.[38] The presentation of service charges can often be difficult for leaseholders to understand. There is no standard format for the presentation of service charge accounts: leaseholders can be left unsure of what they are paying for, how their contribution compares to others, and whether the costs are justified. They may not know if they are paying too much – particularly where charges increase over time. The same concerns can arise for freeholders living on private or mixed tenure estates where they may be charged.

92. Government asked us to explore how service charges for leaseholders (and equivalent estate rent charges sometimes charged for resident freeholders) could be made more transparent. We have also been asked to consider in what circumstances other fees and charges, such as administration charges or permission fees which affect both leaseholders and freeholders, are justified or whether they should be capped or banned.

93. Separately, Government has asked the Law Commission to look at what reforms may be needed to simplify the process of leaseholders obtaining their Right to Manage – where they take on responsibility for the management of their properties, including appointing a managing agent.[39]

94. We also understand that the Law Commission is considering the circumstances in which use of a professional managing agent should be mandatory for Right to Manage companies and Right to Manage directors should be required to meet training requirements. If such changes come to pass, the new regulator will clearly have a role in overseeing their implementation.

Charges and managing agents

95. In relation to how fees and charges should operate, our main focus is where a managing agent is employed. However, principles established for managing agents could also be extended to other parts of the market, overseen by other relevant bodies, or could be taken into account by the First-tier Tribunal or the courts. In addition, while the new regulator will be

[37] MHCLG: *Protecting consumers in the letting and managing agent market,* Government response, April 2018
[38] LEASE, Annual Report and Accounts 2017-18, page 43
[39] Law Commission, https://www.lawcom.gov.uk/project/right-to-manage/

Embargoed until 00.01 18th July 2019

established to oversee property agents, legislation could also provide the opportunity for the remit to be extended at a later point. Our focus in this chapter is on making recommendations which are directly applicable within the new regulatory regime for property agents.

96. Firstly, ***we recommend that the new regulator be given a statutory duty to ensure transparency of leaseholder and freeholder charges, and that it should work with the sector (property agents, developers and consumers) to draw up the detail of the regulatory codes, to include provisions related to these charges***. The issues to cover would include:

- Transparency around potential conflicts of interest (e.g. mandatory disclosure of commissions and management fee charges);
- Standards around transparency, communication and use of service charges, administration charges, permission fees and use of covenants; as a clear breakdown of costs may lead to greater acceptance of charges and give rise to fewer disputes; and
- Protection of client money.

97. Secondly, ***we recommend that as part of the regulatory codes, the new regulator also develops standard industry cost codes, as have been developed for commercial service charges.***[40] These will help to identify items of expenditure, more easily allow for comparison, and form a standard basis for accounts for managing agents.

98. Thirdly, ***we recommend that the new regulator take over from the First-tier Tribunal the power to block a landlord's chosen managing agent, where the leaseholders have reasonably exercised a veto***. This would be separate from the powers proposed elsewhere for the new regulator to bar managing agents from practice as an ultimate sanction for misconduct. In setting conditions for agents to satisfy when seeking to support a veto or replacement of managing agent, the new regulator will need to ensure that the terms are not so onerous as to have the unintended effect of deterring all potential agents.

99. Fourthly, ***we recommend that the new regulator provide information on managing agent performance to allow landlord freeholders, and where relevant leaseholders, to make an informed choice on selecting a managing agent***.

100. Finally, when Government considers broader reforms to the leasehold and freehold charges regime (as discussed in **Annex A**), ***we recommend a role for the new regulator in enforcing compliance with any new requirements applying to managing agents.*** For example, if the Government proposes mandatory use of a standardised service charge form, the new regulator should seek to ensure compliance by managing agents and introduce sanctions against those that fail to comply effectively.

Commonhold

101. The creation of a regulatory framework for property agents would also assist in the expected transition to greater use of commonhold and the greater use of Right to Manage in the future, by both providing information to help residents choose a property agent and providing assurance that they have protections if things go wrong.

Embargoed until 00.01 18th July 2019

[40] https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/real-estate/service-charges-in-commercial-property-1st-edition.pdf, page 42

CHAPTER 7: THE NEW REGULATOR

103. In this chapter, we explore the new regulator's establishment, governance and funding; and we also consider whether it could delegate any of its functions to other parties.

104. Government has asked us to consider options for the establishment of an independent regulator. We asked many experts and stakeholders whether there is an existing body that could fulfil this role. A consensus has emerged that none could. ***We therefore recommend that Government establish a new independent regulator of property agents as a public body.*** In addition to requiring primary legislation, we are advised that the establishment of such a new public body is subject, among other internal processes, to the approval of a business case by the Cabinet Office.

Governance

105. ***We recommend that the new regulator be established and run with regard to general principles of good governance, including:***[41]

- ***Independence;***
- ***Openness and transparency;***
- ***Accountability;***
- ***Integrity;***
- ***Clarity of purpose;***
- ***Effectiveness; and***
- ***The principles of better regulation.***[42]

106. We envisage the new regulatory body will be run by a chief executive (no doubt known as 'the regulator'), who will be publicly appointed through fair and open competition and will be accountable to a small board. ***We recommend that the new regulator, through its board, should be accountable to the Secretary of State for Housing, Communities and Local Government. It should publish and report annually on its progress in raising the standards of property agents, using agreed key performance indicators, including consumer satisfaction.*** The new regulator would be subject to the Regulator's Code.[43] Accountability to Parliamentary committees need not be set in statute, as all bodies established by Parliament and answerable to Ministers are accountable to Parliament.

107. The actual and perceived independence of the new regulator will be paramount. We are particularly concerned that the new regulator be able to work with the sector while remaining clearly visibly independent from it. ***We recommend that***:

- The new regulatory body's chief executive not be, nor have been employed by a licensable firm in the three years prior to their appointment, and not be employed by a registered firm for three years following the end of their appointment; and
- A majority of members of the new regulator's board not be or have been employed by a registerable firm in the three years prior to their appointment.

[41] Ombudsman Association: Guide to principles of good governance, October 2009
[42] BEIS: Better Regulation Framework, August 2018
[43] BEIS Regulators' Code: https://www.gov.uk/government/publications/regulators-code, accessed 12 June 2019

Embargoed until 00.01 18th July 2019

It would be for the new regulator's chief executive to determine whether such a prohibition needs to extend more widely among their staff.

Funding

108. Introducing a new licensing and regulatory body along the lines set out above will require significant resources to establish and operate.

109. It is a well-established principle across many industries that regulators should be funded by the firms and individuals they regulate. Government's response to the call for evidence, *Protecting Consumers in the Letting and Managing Agent Market,* states that this approach should apply for the property agent industry[44] and we accept this. Nevertheless, we also recognise that there will be initial costs of setting up the regulator and securing its operation in its early years. ***We recommend that government provide 'seed corn' funding to support its creation and help with its operation for an initial period.***

110. The precise terminology used to describe its funding from the industry – whether it is an 'industry levy' or a 'licence fee' – can be determined in due course. However, it is crucial that regulation does not lead to a 'closed shop' by pricing new or smaller agents out of the market. ***We recommend that the new regulator be appropriately funded by regulated firms and individuals, and that the new regulator determines a fee structure that does not unfairly disadvantage new and small agents.*** In making this determination, the new regulator should bear in mind that its fees are not the only cost of regulation, as licensed agents will also need to pay the costs of obtaining qualifications.

Professional bodies

111. We have referred throughout this report to the current, and important, role played by professional bodies and trade associations in supporting their members and encouraging the professionalisation of the sector. It is important to get their relationship with a new regulator right so that they can continue to play an important role.

112. Government has ruled out pure self-regulation (i.e. requiring agents to belong to a professional body which undertakes a regulatory role) due to potential conflicts of interest between these bodies' representative and their regulatory functions.[45] This does not, however, preclude a role for professional bodies in a regulated sector. Some of the functions they could perform include:

- Providing, at their own discretion, voluntary codes of practice representing an above-minimum standard to which their members can be held;
- Providing qualifications, training and continuing professional development for their members;
- Representing their members by acting as consultees on the development of codes and qualifications;
- Supporting their members in making licence applications; and
- Driving cultural change by fostering a sense of professionalism and ethical behaviour amongst their members.

113. We have considered the extent to which the new regulator could delegate further functions to professional bodies. We have loosely appropriated the concept of Designated

[44] MHCLG: https://www.gov.uk/government/consultations/protecting-consumers-in-the-letting-and-managing-agent-market-call-for-evidence

[45] MHCLG: Protecting consumers in the letting and managing agent market, April 2018, paragraphs 80-83

Embargoed until 00.01 18th July 2019

Professional Bodies from the Financial Conduct Authority to describe bodies to whom certain functions have been delegated. Some professional bodies have expressed willingness not only to perform certain administrative tasks – such as checking the adherence of their members to requirements to hold Client Money Protection insurance, to belong to a redress scheme, etc. – on the new regulator's behalf. Some have indicated a willingness to go further and take on responsibility for investigating complaints against their members; taking any enforcement action necessary. It is possible that, given these bodies are already up and running – and know their own members – this would ease the transition to a regulated sector, reducing cost and other burdens on a new regulator. However, we recognise that the new regime's credibility could be undermined by dependence on Designated Professional Bodies who are not believed to be acting in the public interest or with a clear and consistent approach.

114. It should therefore be for the new regulator to determine whether Designated Professional Bodies could deliver some part of their functions, including whether this would involve enforcement responsibility or be more administrative in character. The new regulator could delegate different levels of activity to different bodies depending on their suitability to undertake such functions. Any such delegation would be arranged through an open approval process, resulting in a time-limited contract between the new regulator and the Designated Professional Body. The new regulator should not abrogate the ultimate sanction – revocation of a licence – and there should be no decision that a Designated Professional Body could make which the new regulator could not countermand if needed.

115. ***We recommend that the regulator should be responsible for approving Designated Professional Bodies should it wish to involve them in the performance of its functions, and keeping their work under review***. It would be for the regulator to decide which functions, if any, could be delegated to these bodies (including whether they would involve enforcement responsibility or be more administrative in character), and it could delegate different levels of function to different bodies depending on their suitability for such functions. Any such delegation would be arranged through an open bidding process, resulting in a time-limited contract between regulator and Designated Professional Body. The regulator should not delegate the ultimate sanction (revocation of a licence), and there should be no decision that a Designated Professional Body could make which the regulator could not countermand if needed.

116. The new regulator should not appoint any Designated Professional Bodies without a firm guarantee that:

- All its regulatory functions would be operationally independent of its representative functions;
- It can demonstrate financial and ethical competence; and
- It demonstrates capacity to work in the public interest.

Moreover, the new regulator should only delegate functions if it can do so without undermining the consistency of its approach to regulation and enforcement across the board.

Embargoed until 00.01 18th July 2019

Broader functions

117. Since October 2014, all residential letting, managing and estate agents in the UK have been legally required to belong to a Government-approved redress scheme; these services are provided by private bodies reporting to Government. These schemes give consumers access to timely, effective and free redress when they have experienced a poor standard of service from their property agent. As noted in paragraph 11, the redress schemes receive enquiries and complaints about property agents on a variety of issues including communication, property management, and the handling of consumer complaints.[46] The redress schemes are thus an invaluable source of information on issues in the sector.

118. Responsibility for approving (or withdrawing approval from) the redress schemes currently sits between Government, National Trading Standards and the Chartered Trading Standards Institute. Redress schemes are required to regularly report to these oversight bodies in order to be held to account for their performance. ***We recommend that the new regulator take over responsibility for the approval of property agent redress schemes. The new regulator should have the power to appoint a single Ombudsman for property agents, rather than competing redress schemes, if they believe this is the best way of improving standards. As a condition of appointment, we recommend that redress schemes are required to share with the new regulator any data that the regulator might reasonably request.*** The possibility of the regulator appointing a single ombudsman for the sector might reduce costs. Appointing a single ombudsman, via competitive tendering, will also simplify the consumer complaint journey and end fragmentation of complaint data. A single ombudsman will then be able to fulfil the three roles of an ombudsman - resolving individual complaints; using complaint data to deliver insights to work with companies; and wider stakeholders such as the regulator, government departments, consumer bodies and policy makers to help raise standards across the sector for the benefit of all consumers.

119. Government is consulting on proposals for a New Homes Ombudsman[47] and has previously announced plans to require private landlords and freeholders to belong to a redress scheme.[48] If the role of the regulator at a later date is expanded to cover these parts of the property industry, then it would seem logical for the regulator to approve the providers of redress in these areas, should that be appropriate to the nature of that prover (e.g. where it is a private organisation).

120. As well as approving property redress schemes, Government currently approves client money protection schemes (which have been a legal requirement for letting and property management companies since April 2019). Landlords are required to protect their tenants' deposits in a Government-approved tenancy deposit scheme. In place of the Secretary of State for Housing, Communities and Local Government, these functions would naturally sit with a new property agent regulator. ***We therefore recommend that, in due course, the new regulator expands its role to include approving client money protection schemes and tenancy deposit protection schemes.***

121. Government's response to the call for evidence, *Strengthening consumer redress in the housing market*, affirmed their commitment to building on the redress and to making access to redress services easier for consumers.[49] This commitment includes proposals for a Housing Complaints Resolution Service – a one-stop-shop for consumer complaints about housing. ***We recommend that, should the Housing Complaints Resolution Service not***

---

[46] The Property Ombudsman: https://www.tpos.co.uk/news-media-and-press-releases/reports
https://www.theprs.co.uk/Resource/AgentResource/8
https://www.ombudsman-services.org/about-us/annual-reports

[47] MHCLG: Redress for Purchasers of New Build Homes and the New Homes Ombudsman: A Technical Consultation, June 2019

[48] MHCLG: Strengthening Consumer Redress in the Housing Market: Summary of responses to the consultation and the Government's response, January 2019

[49] MHCLG: https://www.gov.uk/government/consultations/strengthening-consumer-redress-in-housing

Embargoed until 00.01 18th July 2019

yet be operational or complete by the time the regulator is established, the regulator of property agents should play a role in informing consumers about where they can raise issues or complaints about agents.

122. There are, as noted in Chapter One, a number of potential sources of complaints against property agents – e.g. from other agents, whistle-blowers and accountants – that currently have few or no places to go.

We recommend that the new regulator be able to consider complaints from all these sources. Moreover, as is the case with financial regulation, ***we recommend that where solicitors, lawyers, and other professionals have evidence of likely illegal agent behaviour, they be obligated to present that evidence to the new regulator of property agents***.

Embargoed until 00.01 18th July 2019

CHAPTER 8: ASSURANCE AND ENFORCEMENT

123. In the previous chapter, we considered why a new independent regulator was needed and how it should be constituted. We now turn to how it can be effective.

Enforcement powers

124. In the case of professional regulation, enforcement should aim to protect consumers, support an ethical culture throughout the sector, and prevent bad practice; and it should take a proportionate approach to achieving these aims. We propose that a system with the following characteristics will best drive these outcomes:

- **Clarity**: it should be obvious to all who is responsible for enforcing what against whom;
- **Flexibility**: to maintain the efficacy and credibility of the system, it should not be forced to act in ways that may not suit the situation.

125. Property agents' current responsibilities can be thought of as sitting across three tiers:

- In the top tier, agents as individuals and companies must comply with consumer protection regulations, as well as meeting broader legal requirements;
- In the middle tier, there is specific property agent legislation (e.g. the Estate Agents Act 1979, the Tenant Fees Act 2019) which is generally enforced by Trading Standards; and
- In the lower tier, some agents volunteer to bind themselves to industry codes of practice – these are 'enforced' by the code's sponsors. This enforcement is of a lower magnitude than other kinds – it peaks at expulsion from a body (or some lesser penalty backed by the threat of expulsion). The diagram below illustrates the current system:

Embargoed until 00.01 18th July 2019

126. A new regulatory system offers new oversight opportunities. The new regulator could keep track of an agent's activities across the country and over a period of time; this means that rather than looking at each case in isolation, the new regulator can take into account the agent's activities and general approach to compliance, with penalties structured so that first offences (provided they are not overly severe) can be treated relatively leniently and with a focus on preventing recurrence (e.g. through training). Similarly, relatively minor but repeated breaches can be dealt with more severely. By receiving data from Trading Standards, from other enforcement authorities, and from redress schemes, the new regulator has the potential to be an unprecedented locus of information about the operation of the sector, enabling it to put intelligence at the heart of its enforcement work and to identify systemic problems that require a regulatory response. A new regulator taking a national approach will also be able to ensure that oversight and enforcement action is prioritised across the country.

127. There are a great many enforcement actions that could be undertaken by the new regulator including:

- Warnings;
- Orders for re-training or further training;
- Fines (or orders for financial compensation);
- Required undertakings;
- Modifications to licence conditions;
- Suspension of licences;
- Revocation of licences; and
- Prosecution, including for unlicensed practice.

128. ***We recommend that the new regulator should have a range of options for enforcement action according to the seriousness of the infringement and how regularly it has occurred***. These options should range from agreeing remedial actions and issuing warnings up to revocation of licences and prosecution for unlicensed practice.

129. The precise amount and schedule for fines, suspensions and bans should be guided by legislative direction from the Government and would be a matter for the new regulator to determine within these parameters. The new regulator should develop a matrix of appropriate sanctions along with aggravating and mitigating factors to provide a consistent approach to enforcement. This would provide the basis for determining appropriate enforcement action on a case-by-case basis.

130. ***We recommend that the new regulator publicise infringements and the enforcement action taken***. This could encourage other property agents to adhere to licensing conditions. The number and types of enforcement actions taken should also be included in the new regulator's reports on their performance to the Secretary of State for Housing, Communities and Local Government.

131. It is worth noting that what we recommend above will cause two significant changes to the enforcement architecture, quite apart from the creation of an independent regulator. Firstly, if adherence to the code of practice becomes legally mandated, there is no longer a meaningful distinction between the law and code of practice in enforcement terms. Government will want to consider whether it still makes sense to have freestanding duties on trading standards (for example, around prohibited payments under the Tenant Fees Act) to enforce aspects of property agent legislation, which they will be compelled to carry out – even if the matter is independently being dealt with by the new regulator.

132. Secondly, once licensing is introduced, practising without a licence becomes a new offence. We support the principle that the strongest proportionate deterrent should apply to those agents who fail to license so that unlicensed agents do not just accept their penalty as

Embargoed until 00.01 18th July 2019

'part of doing business'. We also note that this is a separate category of offence – those who breach it are not merely failing at being agents, but are fraudulently representing themselves as agents. We believe that Trading Standards will be the most appropriate enforcement body for investigating this type of offence.

133. It will also be important to ensure no duplication of regulation of agents by both the new regulator and by local authorities using discretionary licensing powers.

134. The new regulator will wish to offer an appellate process for those dissatisfied with its decision, not least because – as a public body – its decisions would be subject to judicial review, which is not an efficient way for agents to dispute fines or suspensions. ***We recommend that there be a right of appeal against the new regulator's decisions through the First-tier Tribunal, which should also be granted in law the power to consider applications for judicial review against the new regulator.***

135. While the above represent our central recommendations to the debate on enforcement under a new regulatory regime, we also want to ensure regulation is regularly revised and updated to remain relevant. The new regulator will need to be both well-informed of developments across the sector and agile enough to be able to respond quickly to new opportunities and threats as they arise. Strong information sharing protocols should be in place between all the key bodies involved in the property agent regulatory sector. The new regulator, Trading Standards, the approved redress schemes, the courts and any Designated Professional Bodies will need to share information in a timely manner.

136. There will also be interactions between the new regulator of property agents and both other regulators and official bodies, which will link closely with their work. The new regulator should engage with these related bodies early and agree a sensible division of responsibilities, potentially through a memorandum of understanding. ***We recommend that the new regulator maintain close working relationships with other key partners, including but not limited to the Scottish Government; Rent Smart Wales; the Insolvency Service; the Financial Conduct Authority; and any new building safety regime.***

Relationship with Trading Standards

137. Most property agent legislation is currently enforced by Trading Standards teams. Trading Standards, National Trading Standards, and particularly the National Trading Standards Estate and Letting Agency Team working as the lead enforcement authority for estate and letting agents, have significant experience and knowledge of the property sector which leaves them well placed to continue undertaking enforcement activity. It would seem perverse not to take advantage of the resource and expertise already in place by transferring all enforcement powers to the new regulator. Indeed, there are a number of regulatory systems, which work via flexible cooperation between a central regulator and local trading standards teams; we therefore suggest this approach. ***We recommend a system of flexible cooperation between the new regulator and Trading Standards teams, and that the new regulator should set guidance clarifying their own and Trading Standards' roles in enforcement action to avoid duplication.***

138. Local Trading Standards are currently funded from local authority budgets; they are also in receipt of various amounts of ringfenced Government grant funding for some of their enforcement duties, and some of their enforcement powers enable them to retain fines for further enforcement work. We propose in Chapter Six that the Government will provide set-up funding for the regulator after which it will be paid for through industry contributions. If the regulator and Trading Standards agree that Trading Standards should take on responsibilities additional to those for which they are currently funded, the regulator should provide appropriate funding to Trading Standards for these purposes.

Embargoed until 00.01 18th July 2019

139. There is currently a lack of consistency in enforcement across the country, depending on local priorities and resources. This is illustrated by a recent Freedom of Information (FOI) exercise which discovered that, in the four year period from 2014-15 to 2017-18, 53% of those local authorities asked had not prosecuted any letting agents. A further 32% had prosecuted three or fewer.[50] Low levels of enforcement are usually attributed to the constraints on Trading Standards' funding and resources, and the consequential need to prioritise other activities. If the new regulatory structure is to succeed, it is vital that Government ensures that Trading Standards is appropriately funded for its existing responsibilities to enable effective and reliable enforcement throughout the system and meet the public's expectation of a regulated industry.

140. We must also consider the future role of the lead enforcement authority for letting and estate agency. This function is currently commissioned by National Trading Standards on behalf of Government, which provides the funding. The lead enforcement authority produces guidance, supports local Trading Standards teams in their enforcement activities, and can take on cases where a local team is unable to do so. The lead enforcement authority will have accumulated significant expertise by the time a new regulator is in place; the new regulator may wish to avail itself of this expertise by continuing to employ the lead enforcement authority for some of its functions. ***We recommend that Government delegate to the new regulator the power to commission and fund the National Trading Standards Estate and Letting Agent Team.***

141. Many Trading Standards teams have entered into Primary Authority arrangements with agents, trade associations and The Property Ombudsman. These arrangements allow the Trading Standards team to establish a policy of interpretation in a particular area which is respected nationally. The new regulator may wish to become a party to such agreements in order to improve consistency of standards.

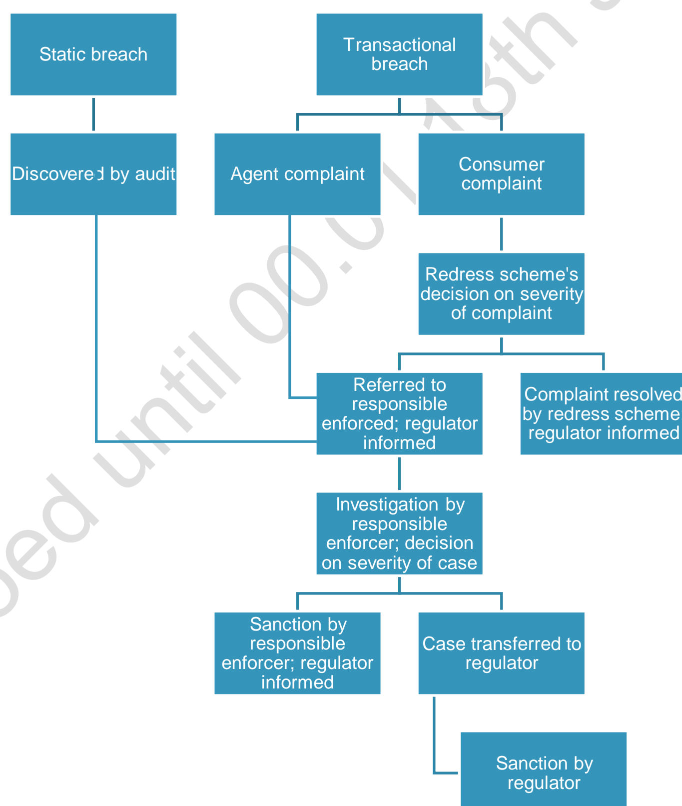
Embargoed until 00.01 18th July 2019

[50] National Landlords Association, https://landlords.org.uk/news-campaigns/news/local-authorities-failing-in-their-duty-prosecute-letting-agents-says-nla July 2019

A model of enforcement

142. Failure by agents to live up to their professional responsibilities could be categorised in one of two ways: 'static breaches' (e.g. failure to belong to a redress scheme or client money protection scheme) which are either demonstrably true or false at all times; and 'transactional breaches', where an agent performs a specific task in a way that breaches the appropriate code of practice. In the former case, the issue should come to light as the result of an audit (by the new regulator, enforcement or professional body) and be investigated directly by an enforcement body ('an enforcer'); in the latter, the issue will be raised by a third party, for example another agent – who should refer it directly to an enforcement body. Where a consumer reports a breach, for simplicity we propose that the issue be raised first with the Ombudsman or redress scheme, which would play a filtering role in deciding whether a case should be subject to direct resolution, or because it raises issues of malpractice that it merits a regulatory investigation.

143. To avoid duplication of enforcement and more than one body engaging in the same regulatory activity, we suggest the following model of enforcement:



Embargoed until 00.01 18th July 2019

144. In this model, every agent would be registered with a 'responsible enforcer' under a system overseen by the new regulator. This responsible enforcer would by default be the agent's local trading standards team or the lead enforcement authority, except:

- If for whatever reason (perhaps issues with capacity at the local trading standards) the new regulator proposed themselves as responsible enforcer for that agent; or
- If the new regulator saw fit to delegate enforcement powers to a professional body, then it could fulfil the role of responsible enforcer.

145. Trading Standards would maintain the power to enforce non-property-specific business law, and also have the added responsibility to prosecute businesses and individuals performing agency work without registering with the new regulator/responsible enforcer. Professional bodies would still be able, as they saw fit, to use the powers their members delegated to them to enforce as they saw fit any higher standard to which their members subscribe.

Embargoed until 00.01 18th July 2019

CONCLUSION

146. We regard the regulation of property agents as a matter of great importance, with the potential to significantly improve consumers' experience of renting, letting, leasehold, and the home buying and selling process. We commend the Government's decision to take this concept forward and we now urge Government to make progress at pace with their proposals. We hope that our work helps them to do so.

147. In the simplest terms, what we are proposing is:

- A new independent regulator to lead a new non-departmental public body to oversee a new regulatory regime for property agents;
- For that new regulatory regime to bind on companies, and certain individuals, that are acting as intermediaries to property transactions;
- For those regulated to be licensed by the new regulator;
- For the new regulator to be responsible for an overarching statutory code of practice, with modules binding on agents depending on their area of work;
- For the new regulator to be responsible for the syllabus for a modular approach to the qualifications, required for individuals within regulated companies, allowing agents to become proficient in those aspects of property agent work as suits the needs of their role and career, subject to minimum requirements on those carrying out restricted activities; and
- For the new regulator to sit at the heart of a system of enforcement and redress which takes on, at their discretion, the support of national and local trading standards, of redress schemes, and of professional bodies.

148. While Government prepares to take further steps in addressing these proposals, we note that there are many ways in which industry can prepare for the introduction of regulation, by working together to make as many of these steps as possible a reality prior to formal Government intervention.

149. To provide consistency for the consumer, we would like the requisite legislation for a new regulator of property agents to be sufficiently flexible to allow, in due course, an extension to the role of the regulator: this would extend regulation to cover developers when they sell their properties without using a property agent, freeholders when they manage their leasehold properties, and private landlords who do not use property agents.

150. We are pleased to have had the opportunity to consider these matters and we commend our report to the Government.

Embargoed until 00.01 18th July 2019

ANNEX A: LEASEHOLD AND FREEHOLD CHARGES

Introduction

1. Alongside advising Government on a new regulatory framework for property agents, Ministers asked us to explore the use and transparency of fees and charges faced by both leaseholders and resident freeholders. Following Government's consultation on *Protecting consumers in the letting and managing agent market*, we have also been considering how to empower consumers to have a greater say over who their managing agents are and to be able to review their performance.[51]

2. There are an estimated 4.3 million leasehold properties in England[52] - and most have some form of charges attached to them. We also hear of charges and conditions being placed on freehold homeowners on private and mixed tenure estates. Charges are collected by managing agents or others in order to carry out works, maintenance or the administration of properties. Managing agents also collect ground rents from leaseholders on behalf of freeholders.

3. We have been looking into these charges – both where landlords collect charges direct and where they employ a managing agent. We have been considering principles that should apply to all leaseholders and resident freeholders who pay charges. While the new regulator should have the jurisdiction to oversee standards for managing agents around the use of charges, the scope of such standards should ideally also be extended to other parts of the market overseen by other relevant bodies, or be taken into account by the First-tier Tribunal or the Courts.

4. Practice in the use of charges has evolved over time, and legislation has not always kept pace or been flexible enough to respond. While we make suggestions for changes for Government to consider, there will doubtless be other concerns with the current charging regime. We therefore believe there is merit in Government consulting on the issues raised by the working group. This would also provide an opportunity for leaseholders, freeholders, managing agents and other bodies to provide views on other aspects of charges and restrictions placed upon residential properties.

Service charge transparency

5. Ministers have asked the working group to consider how fees should be presented to consumers, including prospective consumers.

6. Leaseholders can often find the presentation of service charges difficult to understand. They can be left unsure what they are paying for, how their contribution compares to others, and whether the costs are justified.

7. We were keen to see better communication and transparency, including making it mandatory for commissions or managing agent fees to be disclosed. We also discussed the use of a

Embargoed until 00.01 18th July 2019

[51] Separately, the Law Commission have been tasked with simplifying the Right to Manage process so that more leaseholders who wish to can take on management responsibilities for their property, https://www.lawcom.gov.uk/project/right-to-manage/

[52] MHCLG: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750925/Estimating_the_number_of_leasehold_dwellings_in_England__2016-17.pdf

standardised format for the provision of information on charges. This could help improve consumer's understanding of costs and better allow for comparison between providers (managing agents or freeholders) and properties. This greater transparency could help both existing consumers and prospective buyers.

8. The recent Housing, Communities and Local Government Committee's report on leasehold reform has also called for use of a standardised service charges form for both leaseholders and freeholders.[53]

9. We think that information provided in a standard form on service charges should go beyond the basics. It might additionally include information about the number of years left on the leases; forthcoming major works and associated costs; and reminders of obligations or restrictions so that leaseholders and freehold homeowners are better able to plan their lives and finances and minimise the risk of surprises involving unanticipated costs or disruption.

10. We think that, to work most effectively, legislation is required to make it a mandatory requirement to use a standardised charges form. Compliance in terms of effective use and disclosure of information in a standardised form should be overseen by the new regulator where a managing agent is involved. Outside the scope of the new regulator, Government may wish to consider whether non-compliance with the form should make fees unrecoverable.

11. A mandatory form may also provide a vehicle to deliver a range of other policy objectives. It has been suggested that freeholders who are not based in the United Kingdom but who may be subject to complaints by consumers should supply the name and details of a nominated contact within the UK so that they are within reach of leaseholders and ombudsmen alike.

12. Potential complexity in the provision of information has been raised as a concern in the social sector for local authority and housing association landlords due to different accounting regimes. But while a standardised form may need to differ in the social sector to accommodate such issues, we think that the key outputs for all leaseholders should be the same in terms of the information provided.

13. *We think that the Government should consider consulting on the detail and use of a new mandatory standardised charges form for both leaseholders and freeholders, and should also explore standardising both the information that is presented and the form.* Government should also consider what other information might helpfully be provided (e.g. mandatory disclosure of commissions, managing agent fees, anticipated future major works, relevant contact details and signposting to routes to resolve disputes) so leaseholders are reminded of their obligations and forewarned of future costs or disruption.

14. There is also merit in considering whether, in addition to a standardised form, standard industry cost codes could be developed, as they have been for commercial service charges, to identify items of expenditure and more easily to allow for comparison.[54] These could be linked to the development of common accountancy standards across the whole sector.

15. While many freeholders and managing agents provide a good level of information already, Government should consider with industry and consumers, what an appropriate transitional period should be to allow all freehold landlords and managing agents sufficient time to implement these changes and be ready to provide information as required to consumers.

Embargoed until 00.01 18th July 2019

[53] HCLG Select Committee: https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/1468/1468.pdf

[54] RICS: https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/real-estate/service-charges-in-commercial-property-1st-edition.pdf, page 42

Consultation around major works

16. Section 20 of the Landlord and Tenant Act 1985 makes statutory provision for consultation on "Qualifying Works" (major works), and "Qualifying Long-Term Agreements" (contracts for a term of more than twelve months), where those works or agreements exceed a specified financial threshold. Consultation seeks to provide transparency to leaseholders regarding these major works and contracts; and an opportunity for leaseholders to influence decisions on the choice of contractor, the works to be carried out, or the proposed contract.

17. There can however, be tension between leaseholders who feel that the section 20 process does not allow for them to be meaningfully consulted or sighted on future costs, and landlords or managing agents, who can feel dissatisfied with the administrative and financial burdens related to consultation, especially when few leaseholders often engage with them.

18. Landlords are not required to specify the estimated cost of the works until they send out the second Section 20 notice. That is in part because they may not know the estimated cost of the works until estimates have been received. We have heard that, in nearly all cases, this means there is limited time for leaseholders to put money aside.

19. Where consultation is necessary, and where unexpected works are required, the group considered a range of improvements to the existing consultation process.

20. A key concern has been the threshold for consultation. The current £250 threshold to trigger a consultation has not been revised since 2003, and has created both an administrative and financial burden. The group suggested it could be revised to £350 – as an average per unit - and index linked for future updates. Alternatively, a threshold could be determined and kept under review by the new regulator.

21. A further potential role for the new regulator could be to highlight good practice around the planning of works, consultation and assistance for leaseholders where large bills do arise.

22. Other suggestions from the group included allowing potential dispensation from the requirement to consult, should all leaseholders confirm they agree. This is more likely to be applicable to smaller blocks.

23. To support greater leaseholder engagement, standard letters and standardised section 20 forms were considered to be potentially useful to increase familiarity with the process. A possible exemption from consultation for utility contracts was also suggested, as the best energy prices often change more quickly than the current consultation process allows.

24. *As for a standardised charges form, we think that there is merit in the Government considering consulting on a revised major works consultation process. Ideally major works and associated costs should be planned, and leaseholders sighted well in advance, which may reduce the need for multiple one-off consultations. In the next section we consider how a new sinking fund and asset management plan regime may be helpful in this respect.*

Planning to avoid surprise, unfair and large bills

25. Large one-off bills for major works can be a source of great distress, especially for vulnerable households or those on fixed incomes. There are examples of leaseholders facing unexpected bills of tens of thousands of pounds for major works.

26. We have heard that there can also be a lottery of timing for leaseholders. Bills for works fall on whoever lives in the property at the time.

Embargoed until 00.01 18th July 2019

27. We understand that it is considered good practice, where leases permit, to make advance provision for future expenditure through the use of a reserve or sinking fund and to have a costed long-term maintenance plan to manage works and projected income streams.

28. The intention of a sinking fund is to ensure monies are available when required for major or cyclical works. They spread the costs of major items of expenditure (like replacing a lift or boiler) as evenly as possible throughout the life of the lease to avoid penalising leaseholders who happen to be in occupation at the particular moment when major expenditure occurs.[55]

29. There are also advantages of sinking funds and asset management plans for managing agents, as the transfer of information and knowledge on the maintenance and repair requirements of a property can be problematic and time-consuming when taking on a new property.

30. The leasehold reform Select Committee inquiry made a particular call for greater use of sinking funds by local authorities. Some already do, but we have heard that there are often challenges around setting up new sinking fund arrangements in established blocks. *We concluded that Government should carry out further work to explore how the benefits of sinking funds could be extended to all leaseholders.*

31. The Housing, Communities and Local Government Select Committee also recommended capping major works bills at £10,000 over a rolling five-year period to help minimise large one-off bills. We concluded that this poses risks of unintended consequences; for example, encouraging repairs or lower quality work where higher cost work would ultimately provide greater value for money. The Committee also advocated the use of low-cost loans. These could be helpful where large bills arise, but not every landlord, particularly where resident-led, may be in a position to offer them. *Our view was that it would be better to plan works and payment for them effectively to avoid such one-off costs occurring in the first place.*

32. *We think that Government should consider making use of a sinking fund mandatory in both new and existing leases and freeholds on private or mixed tenure estates. Where a sinking fund is used, we think that Government should consider how to ensure that it is effectively funded, such as being underpinned by a professionally certified asset management plan.*

33. There is a potential role for the new regulator in overseeing the development and operation of accreditation for sinking funds and asset management plans.

Protecting client money

34. Where leaseholder and freeholder monies are held for service charges or a sinking fund, concerns have been raised about transparency and the risk of funds being lost due to fraud or insolvency. ARMA estimate that around £1.3bn of unprotected client money is held by managing agents, and have called for greater protections for those funds.[56]

35. Legislation was introduced in 2002 to regulate these funds (introducing sections 42A and 42B in the Landlord and Tenant Act 1987), requiring leaseholders' contributions to be held in a designated bank account, and empowering leaseholders to inspect documents that evidence compliance with this requirement. However, this legislation has not been brought into force. Concerns have previously been raised about administrative burdens and the costs such requirements would create for managing agents or freeholders.

Embargoed Until 00.01 18th July 2019

[55] RICS: https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/real-estate/service-charge-residential-management-code-3rd-edition-rics.pdf, page 25
[56] ARMA, cited in discussion at the sub-group meeting on 29 April 2019.

36. We appreciate these concerns about additional costs, which would likely ultimately fall on the consumer. However, time and technology has moved on and *we think there is merit in Government reviewing again the practicalities of implementing these reforms to improve the transparency of monies held.* We note that the recent Select Committee report has also called on the Government to bring those sections of the 1987 Act into force.

37. Separately, the Government has recently set out regulations to implement mandatory membership of insurance-backed client money protection schemes for all property agents in the private rented sector.[57] Such schemes ensure landlords and tenants are compensated if a property agent cannot repay their money, for example, if they become insolvent. *We think that Government should work with the insurance sector to explore the feasibility of extending client money protection to all leaseholders and freehold homeowners.*

Embargoed until 00.01 18th July 2019

Administration charges, permission fees and covenants

38. We have looked into fees that go beyond service charges and have considered under which circumstances they are justified and whether they should be capped or banned.[58] These include administration charges, permission fees and covenants or other restrictions placed on properties.

39. We have heard that the absence of regulation around these fees, charges and covenants has led to increased costs for consumers – and concerns have also been raised about whether charges are legitimately incurred or simply being used to support additional income streams for managing agents or freeholders. In 2011, *Which?* estimated that leaseholders were being overcharged by £700 million per annum. The Select Committee noted in its inquiry that the leasehold sector is now larger and that the £700 figure is likely to be much higher today.

40. There has been an increase in the use of covenants and requirements to seek and/or pay for consents. The Conveyancing Association told us that their analysis suggests that the number of new leases requiring the registration of a restriction against title has risen from 49% to 69% in the last three years.[59]

41. We have heard that there are a wide range of covenants which require consent to various activities, including the keeping of pets, subletting and the making of structural alterations.

42. A recent NAEA Propertymark report identified the following range of average permission fee charges: obtaining consent to build an extension (£1,597), installing new bathroom units (£1,472) and changing a front door (£411).[60] Leaseholders or freehold homeowners who breach restrictions without consent are liable to rectify the breach, pay a fee, face legal action or all three. *Which?* also identified high administration charges set by managing agents and/or freeholders, such as £108 as a flat fee to respond to any letter from a leaseholder, regardless of the issue at hand.[61]

43. Consumers rarely challenge such permission fees as the time and cost involved in litigating are nearly always disproportionately high relative to the amount in dispute.[62]

---

[57] MHCLG: https://www.gov.uk/government/publications/client-money-protection-for-letting-and-managing-agents/client-money-protection-for-letting-and-managing-agents

[58] MHCLG: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696148/Protecting_consumers_in_the_letting_and_managing_agent_market_response.pdf

[59] Conveyancing Association, cited in the working group meeting on 14 May.

[60] NAEA Propertymark: http://www.naea.co.uk/media/1047279/propertymark-leasehold-report.pdf

[61] Which? https://www.which.co.uk/news/2018/06/to-have-or-to-leasehold-inside-the-scandal-rocking-the-new-homes-industry/

[62] Which? https://www.which.co.uk/news/2018/06/to-have-or-to-leasehold-inside-the-scandal-rocking-the-new-homes-industry/

44. There may be good reasons why leaseholders or freehold homeowners should obtain permission before undertaking certain works to their property. Living in a flat, for example, a resident would want the owner of the flat below to obtain permission before removing a supporting wall. In such a case, a suitable professional, such as a surveyor, may be required, at cost, to determine the appropriate conditions for the grant of the permission.

45. We note that the Select Committee recommended that permission fees are only ever used where absolutely necessary and that charges set should not exceed the true administrative costs. We agree with these principles and have been considering how they could be implemented.

46. One solution we considered was to draw up a list of inappropriate or unnecessary permission fees – such as those reported for changing a door bell on a house – which could be banned. But there is always a risk that if some fees are banned, workarounds will be devised, or definitions stretched to impose a variation of that permission fee. An alternative would be to set a prescribed list of fees. A statutory list of permissible fees could be reviewed by the new regulator and be updated periodically via a statutory instrument. This could enable permission fees to be kept up to date with any technological advances such as renewable energy building modifications or other legislative changes. We believe that, if such a list were implemented, the growth of unnecessary restrictive covenants for revenue raising purposes would fall away.

47. Requiring permission fees to be reasonable, as the law currently provides for, is open to interpretation. It might be easier for consumers to understand such fees through a set of tariffs, as suggested by the Conveyancing Association, which notes that tariffs already operate in areas including legal aid, regulation of legal work in Help to Buy, and HM Land Registry.

48. We understand that, currently, there is no guidance on the setting of necessary restrictive covenants. A way to address this issue could be for Government (or even the new regulator) to follow the example of planning guidance and to devise a framework around the conditions that would justify the need for restrictive covenants. Again, the guidance could be reviewed periodically – and ideally be applicable to all.

49. *We think that Government should consider consulting on the principle of establishing a statutory prescribed list of fees (what can be charged for) for inclusion into new leases – and what should be included on the list. Any fees that were not on the prescribed list could not be added to a lease nor charged to leaseholders. Alongside this, Government should also consider consulting on a set of tariffs of leaseholder and freeholder fees and charges (how much can be charged) – which unless explicitly stated in existing leases, could be applicable to both new and existing leases.*

50. The new regulator could have a role in setting tariff levels and periodically reviewing them to keep them up to date, and Government should allow flexibility for landlords or managing agents to ask the new regulator or an ombudsman to consider cases by exception where the tariff of fees is not reflective of the genuine costs incurred. This is in recognition that a building manager should be able to recover appropriate costs incurred in ensuring that the building complies with building safety standards. It would also be important to stipulate in legislation that, where charges are capped, they should still be "reasonable" and not automatically charged at the level of the cap. The list and tariffs should ideally apply to both those covered by the new regulator and other parties.

51. On the issue of restrictive covenants, *we think that Government should promote better use of restrictive covenants by implementing the recommendations from the Law Commission's*

Embargoed until 00.01 18th July 2019

report Making Land Work.[63] In addition, Government should consider providing guidance on setting restrictive covenants.

Reviewing, switching and vetoing managing agents

52. Choosing the right managing agent is crucial to protecting the value of people's property and ensuring that residents are safe and secure in their homes. However, consumers are almost always disempowered in the process. Those paying for and receiving the services provided by property agents often have no say on who their agent is and how their performance is monitored.

53. It is important to note that a managing agent is normally answerable to the landlord or management company with which it has its agreement, and not to the leaseholders (or resident freeholders on private estates) who pay the service charges. We think there is merit in considering whether this relationship needs rebalancing so that the choice of managing agent is satisfactory to both residents and the freeholder landlord.

54. When something goes badly wrong, section 24 of the Landlord and Tenant Act 1987 does allow for a managing agent to be appointed by the First-tier Tribunal.[64] Concerns have been raised about how effective this is in practice, particularly where either party (resident or landlord/management company) can frustrate the new agent's attempts to carry out their responsibilities.

55. The working group discussed a range of possible approaches. There is a potential role for the new regulator in providing information on managing agent performance to allow both freehold landlords and residents (leaseholders, or freeholders on a private estate) to make an informed choice. Consumers could be given the opportunity to veto the landlord's choice of managing agent. However, a veto should not be used unjustifiably to frustrate a landlord's choice of managing agent. Rather, a set of conditions could be devised to offer a framework for any veto.

56. We considered whether in such circumstances there could be a limit of perhaps three uses of a veto by leaseholders, to recognise that the landlord is still required to fulfil their obligations of ensuring the safe running and maintenance of a building. Where three vetoes had been invoked, both residents and the landlord/management company could, we think, have recourse to, the new regulator.

57. The working group was clear that any veto power should rest with a representative group of leaseholders such as, but not restricted to, a recognised tenants' association (where one exists).

58. Consideration also needs to be given to:
    a) the circumstances in which leaseholders should be able to switch managing agent before the end of the agent's contract – outside of a formal section 24 notice;
    b) how the managing agent's performance is to be monitored and what the trigger should be for any switch; and
    c) how many leaseholders should be supportive before a veto can be effective.

59. Performance review of existing contracts is good practice in industry and it is desirable that it should be replicated in managing agent contracts.

60. *We think that Government should consider a review of the effectiveness of the existing Section 24 process, as well as consulting on options to support more informally the vetoing*

[63] Law Commission: https://www.gov.uk/government/publications/making-land-work-easements-covenants-and-profits-a-prendre
[64] LEASE: https://www.lease-advice.org/advice-guide/what-does-appointing-a-manager-mean/

Embargoed until 00.01 18th July 2019

(prior to commencement) or switching (during an existing contract) of a managing agent; this will empower residents and simplify the process for removal of an underperforming agent, subject to an agreed set of criteria for any veto/switch.

61. *We think that there is merit in Government considering extending the powers of Recognised Tenants' Associations. However, there should also be room for powers to be potentially extended to other formations of representative groups of leaseholders.*

62. *The new regulator will be able to intervene in cases of poor managing agent performance. We suggest that consideration is given to whether it would be simpler, cheaper and quicker for consumers for the new regulator to take over from the First-tier Tribunal the power to block a landlord's chosen managing agent where the residents have reasonably exercised a veto.* This would be separate from the powers proposed elsewhere for the new regulator to bar managing agents from practice as an ultimate sanction for misconduct.

Embargoed until 00.01 18th July 2019

ANNEX B: REGULATORY SYSTEMS

1. We considered a number of different regulatory systems, both within the property sector and more widely, to learn what lessons we could for the regulation of the property agent sector. We examined the following in particular detail:

    - Scottish Government's regulation of letting agents;
    - Welsh Government's regulation of letting agents;
    - Property Services Regulatory Authority (Republic of Ireland);
    - Financial Conduct Authority;
    - Solicitors Regulation Authority;
    - General Medical Council; and
    - Architects Registration Board.

2. This Annex is a commentary on the lessons we learned from our examination of these systems and how they influenced the conclusions in the report proper.

Embargoed until 00:01 18th July 2019

Scottish and Welsh governments' regulation of letting agents

3. The regulation of letting agents is a devolved power, and the Scottish and Welsh Governments have undertaken different approaches to do so. We would like to thank representatives of the Scottish and Welsh Governments who met us in February 2019 to share their experiences of letting agent regulation.

4. Both Governments regulate both letting agents (individuals) and agencies (businesses). In Scotland, Part 4 of the Housing (Scotland) Act 2014 provides for the regulation of letting agents including establishing a mandatory register; a compulsory Code of Practice; and redress for code breaches through the First Tier Tribunal for Scotland (Housing and Property Chamber). To be admitted to the register, those in control of the agency must pass a fit and proper persons test and key individuals in the business must hold an appropriate qualification. The Code of Practice requires letting agents to have clearly defined procedures in place for a range of functions including for handling complaints and handling clients' monies. The Code also sets standards for engaging landlords; undertaking lettings; management and maintenance; ending tenancies; and insurance arrangements.[65]

5. In Wales, both landlords and letting agents who manage properties are subject to a licensing regime which includes a fit and proper persons test, a qualification requirement, a mandatory Code of Practice, and enforcement powers through the Housing (Wales) Act 2014. All landlords must register any properties they let under an assured shorthold tenancy, an assured tenancy or a regulated tenancy if they want to let or manage the properties themselves. Otherwise they must use a licensed letting or managing agent, who must abide by a Code of Practice and have appropriate qualifications.

6. We believe that both the approach of regulating individual agents and companies; and implementing a licensing system backed by compulsory membership of an agents' register, are appropriate for regulating property agents. We discuss these factors in more detail in Chapter Three.

7. Both the Scottish and Welsh regulatory systems require those admitted to the register to hold a relevant qualification in order to hold licences and practise. However, the two governments

[65] The Code of Practice is available via https://www.mygov.scot/letting-agent-registration/before-you-register/

differ in approach. The Scottish Government has prescribed through regulations (The Letting Agent Registration (Scotland) Regulations 2016) the level and content a qualification must meet for it to be acceptable for registration. There are currently four programmes that are considered to meet the requirements of the regulations– the LETWELL programme (CIH level 3 certificate in letting and managing residential property); the Propertymark qualifications programme (Residential Letting and Property Management – Scotland); NALS (now Safeagent) Foundation Lettings Course (Scotland); and an MRICS qualification with certain conditions attached.

8. By contrast, Rent Smart Wales (RSW) approves individual qualification providers whose courses meet the content requirements set out in the Regulation of Private Rented Housing (Training Requirements) (Wales) Regulations 2015. Each provider is also audited by RSW for the quality of the training provided and to ensure they have appropriate administrative procedures in place.

9. The different approaches to approving qualifications has impacted upon their content. The Welsh approach sets out the required content in the Regulation of Private Rented Housing (Training Requirements) (Wales) Regulations 2015, which requires training to include the following topics:

   - The statutory obligations of a landlord and tenant;
   - The contractual relationship between a landlord and tenant;
   - The role of an agent who carries out lettings work or property management work;
   - Best practice in letting and managing dwellings subject to, or marketed or offered for let under, a domestic tenancy;
   - The role of a landlord who carries out lettings activities or property management activities; and
   - Any other requirements in relation to training which the licensing authority considers necessary to be included in an approved training course.[66]

10. The Scottish system goes further by specifying the persons who must meet a minimum standard of training and that these individuals must hold a qualification at, or at the equivalent of, Scottish Credit and Qualifications Framework level 6 or above, covering the essential aspects of letting agency work. This includes (amongst other topics):

    - Different types of tenancies;
    - Preparing and marketing a property to let;
    - Selecting a tenant and setting up a tenancy;
    - Ending a tenancy and the legal process for a landlord to obtain possession;
    - Legislation relating to property maintenance and repair;
    - Financial aspects of letting;
    - Legal duties of agents; and
    - Business procedures including accounting and handling clients' monies.

11. There are benefits and drawbacks to each approach. The Scottish approach enables the content of qualifications to be set by Government and requires relatively limited resource to oversee; however, there are relatively few courses and providers compared with Wales. The Welsh system has led to a more diverse training offer from the marketplace, but requires a significant amount of resource to operate.

12. We prefer the Scottish approach in terms of level of ambition, particularly setting the qualification requirement at SCQF level 6 (equivalent to an A-level or advanced apprenticeship in England and Wales). The Scottish system has also shown the importance of a carefully managed transition, which takes every opportunity to encourage compliance

---

[66] The Regulation of Private Rented Housing (Training Requirements) (Wales) Regulations 2015 http://www.legislation.gov.uk/wsi/2015/1366/contents/made

Embargoed Until 00.01 18th July 2019

well in advance of the day new qualifications requirements come into force. We also believe there is merit in encouraging a diverse offering of courses, provided they meet with regulatory requirements on content.

13. We have therefore adopted a new tack which we believe will capture the strengths of both systems: a modular approach where the key content of qualifications is set by the regulator and the market develops courses which meet these requirements and the needs of students. Training providers will be overseen by the Office of Qualifications and Examinations Regulation (Ofqual). We discuss this approach in more detail in Chapter Five.

14. The Scottish and Welsh Governments both have codes of practice in place. The Scottish Code sets out overarching standards of practice which include key principles (such as honesty and fairness), and underneath sets activity-based requirements focused on the individual roles of property agents – for example, marketing and engaging with landlords. The Scottish code is wholly mandatory and is written into statute in the Letting Agent Code of Practice (Scotland) Regulations 2016.[67] This creates a firm legal basis for the code, but may also reduce its flexibility to adapt to emerging challenges and opportunities.

15. The Welsh code is part mandatory and part discretionary. It consists of two parts – the Requirements, which constitute minimum standards; and Best Practice, which is designed to be aspirational and drive sectoral improvement.

16. We have looked both at the approaches taken and the content of the Scottish and Welsh codes in detail, which has helped inform the structure we recommend for an equivalent property agents' code. We particularly feel the Scottish approach would be helpful in providing appropriate legislative oversight whilst retaining the flexibility to adapt as needed. This has helped shape the recommendations we make in Chapter Four.

Property Services Regulatory Authority (PSRA)

17. The PSRA is an independent statutory body established in the Republic of Ireland in April 2012 to regulate Property Service Providers (PSPs) as defined by the Property Services (Regulation) Act 2011 – including estate agents, letting agents, managing agents, and property auctioneers. The PSRA licenses, audits and inspects PSP businesses; and provides a complaints investigation service for consumers along with a compensation fund. Agents are required to meet minimum qualifications standards and adhere to standards in providing property services. They are also required to contribute to a Property Services Compensation Fund, which awards compensation to those who have suffered loss due to the dishonesty of a PSP.

18. The PSRA is empowered to investigate agents for failing to comply with their statutory obligations or for practising without a licence. Following investigation, the PSRA can sanction a licensee up to and including licence revocation and fines of up to €250,000 where a PSP is found to have engaged in improper conduct.

19. A significant part of the PSRA's focus is on the regulation of agents' financial practice, particularly through compliance audits. Given separate legal requirements on English letting agents to protect client money, the focus of a UK property agent regulator will be different, although they will still oversee areas of financial compliance including anti-money laundering regulations.

Embargoed until 00.01 18th July 2019

[67] Scottish Government: https://www.gov.scot/publications/letting-agent-code-practice/

Financial Conduct Authority (FCA)

20. The FCA is responsible for regulating the UK's financial markets to make them work well for individuals, businesses and the economy as a whole. They are the conduct regulator for 58,000 financial services firms and the prudential regulator for over 18,000 of these firms.[68]

21. The FCA authorises and registers both firms and individuals to carry out regulated functions in financial markets. The FCA Handbook sets out high-level standards expected of their members, plus a series of specialist sourcebooks which explain the responsibilities of companies when carrying out regulated activities. The FCA specifies Appropriate Exam Standards for each area of regulated activity, ensuring that all members are qualified for the roles they carry out. The organisation is also empowered to take robust enforcement activities against members who infringe authorisation requirements. This varies from issuing warnings through to withdrawing a firm's authorisation and enforcing competition law.

22. The size and complexity of financial markets has necessitated a powerful regulator backed by significant resources. The FCA has significant running costs reflecting their role in regulating a large part of the UK economy, and consequently has relatively high licensing fees to fund this activity. Regulation on the same scale is unlikely to be feasible for the property agent industry, but there are still lessons we can learn from the FCA's approach and we would like to thank the FCA for hosting members of the working group in March 2019 and sharing their experience.

23. We were particularly interested to note the FCA's approach to regulating individuals and firms. Following the 2008 banking crisis, the FCA applied new regulations passed by Parliament to introduce a new accountability framework for senior managers in the banking sector, which was extended further in 2016 to all firms regulated under the Financial Services and Markets Act 2000. This Senior Managers and Certification Regime requires senior managers to obtain FCA approval before starting their roles and to have a clear statement of responsibilities setting out what they are responsible and accountable for. Some responsibilities are defined by the FCA as prescribed, meaning they must be given to senior managers to ensure that there is a senior member of staff accountable for key conduct and prudential risks. The Certification Regime applies to employees whose role means they may be able to cause significant harm to the firm or customers. Firms need to check that they are fit and proper to perform their role, at least on an annual basis. The Certification Regime also includes high-level standards of behaviour that apply to senior managers.

24. We believe that this approach of placing more stringent standards on senior staff should be adopted in regulating the property agent sector. We discuss this in more detail in Chapter Four.

25. We were also interested to note the range of sanctions the FCA can use to address rule infringement and malpractice in the financial sector. These sanctions include:

- Decision and final notices;
- Publishing details of warning, decision and final notices issued;
- Issuing warnings and alerts about unauthorised firms or individuals;
- Issuing fines against firms or individuals;
- Applying to the courts for injunctions, restitution orders, winding-up and other insolvency orders;
- Bringing criminal prosecutions to tackle financial crime such as insider dealing and false claims to be FCA-authorised;
- Requesting that web hosts deactivate associated websites;

Embargoed until 00.01 18th July 2019

[68] FCA: https://www.fca.org.uk/about/the-fca

- Suspending firms or individuals from undertaking regulated activities;
- Withdrawing a firm's authorisation; and
- Prohibiting individuals from carrying out regulated activities.

26. We feel that a broad range of sanctions is also appropriate for a property agents regulator to enable a proportionate response. However, we also feel that regulatory action should not be wholly focused on punitive measures, and should include a strong emphasis on sectoral improvement. We have therefore recommended that both of these elements are included in a new regulatory regime.

27. The FCA have established clear relationships with a number of professional bodies in the financial sector. We were interested in their approach of authorising designated professional bodies to undertake certain regulatory functions on their behalf. Sanctioned under section 326 of the Financial Services and Markets Act 2000 and subsequent orders, the FCA has appointed a number of designated professional bodies including the Law Society of England & Wales; the Institute of Chartered Accountants in England & Wales; the Council for Licensed Conveyancers; and the Royal Institution of Chartered Surveyors.

28. As we discuss in more detail in Chapter Seven, we believe that this approach of appointing designated professional bodies could be appropriate to the property agent industry, and the regulator should determine where such arrangements may best be adopted.

Solicitors Regulation Authority (SRA)

29. The SRA is responsible for regulating both solicitors and law firms in England and Wales, including overseeing a code of practice; qualifications standards; and imposing sanctions for contravention. It is an independent regulatory arm of the Law Society and is regulated by the Legal Services Board; a public body.

30. We believe that this form of guided self-regulation would not be appropriate for the property agent industry; we recommend instead the establishment of an independent regulator to oversee the sector. We discuss our proposals in more detail in Chapter Seven.

31. The SRA Handbook sets out the rules which all member solicitors must follow, including a number of overarching principles intended to underpin all aspects of practice. These include factors such as delivering the best service for clients; retaining independence; and complying with all legal obligations. Under these broad factors are rules on specific aspects of solicitors' work including rules for practising, for accounts, and for qualification requirements. As mentioned above, we believe this two-tier structure for governance codes should be applied to the property agent industry, and we discuss in more detail in Chapter Four.

32. The SRA imposes a strict training/qualifications regime; and sets standards for and approves training providers.

33. Solicitors are required to complete both academic and vocational training from approved providers, as well as completing a Suitability Test, before they can apply for SRA membership. As part of the vocational stage, solicitors must have completed a Legal Practice Course; a period of recognised training; and a Professional Skills Course, all with authorised training providers.[69]

34. The Suitability Test is intended to gauge whether prospective solicitors have the appropriate character and are suitable to join the profession. The Test considers and will, unless under exceptional circumstances, refuse membership to applicants convicted of a range of criminal offences; who have withheld relevant information from their application; been involved in

[69] SRA Handbook, https://www.sra.org.uk/solicitors/handbook/trainingregs2014/part3/content.page

Embargoed until 00.01 18th July 2019

dishonest, violent or discriminatory behaviour; exploited their position; cheated or plagiarised; mismanaged finances; or been sanctioned by a regulatory body.[70]

35. The length, complexity and expense of legal training would constitute a significant barrier if it were implemented as a mandatory requirement of becoming a property agent in the UK. It would also risk penalising those agents who are already delivering a good service to their customers.

36. However, we do believe there is merit in introducing a qualification requirement for agents to practise and that the training should be approved by the regulator. As we discuss in Chapter Five, we do not propose adopting the approach of approving each qualification provider; we advocate instead that the regulator establish the content of qualifications and Ofqual oversee provision to ensure these standards are upheld.

37. We also believe there is merit in introducing a fit and proper persons test as a compulsory part of licensing requirements; in a similar way to SRA's Suitability Test. Applied to individual practitioners, these tests could help tackle the issue of phoenix companies – those which repeatedly reform following insolvency but with the same individual in charge.

Architects Registration Board (ARB)

38. The ARB is an independent public interest body responsible for regulating the architectural profession in the UK. The ARB's powers and duties are set out in the Architects Act 1997 and include prescribing mandatory qualifications; keeping the UK Register of Architects; ensuring that architects meet ARB standards for conduct and practice; investigating complaints; acting as the UK's Competent Authority for architects; and ensuring that only registered professionals are able to practise as architects.

39. The ARB is overseen by MHCLG; their work directed by a framework agreement and overseen by a periodic review. This approach provides the opportunity for Government to provide strategic direction to the industry, and we believe it should be adopted for the property agent regulator.

40. In line with a number of the other regulatory regimes we looked at, the ARB's main source of income is through membership fees from professionals. Regulators are funded by the regulated firms and individuals themselves in many industries, and we believe that this approach should also apply for the regulation of property agents.

41. The ARB is empowered by Section 13 of the Architects Act 1997 to issue a code of practice and maintains the Architects Code, which sets overarching standards of professional conduct and practice including honesty, integrity, competence and trustworthiness.[71]. Failure to comply with this code is not treated as unacceptable conduct but is taken into account during disciplinary proceedings. As discussed above, we agree that the property agent regulator should be empowered by legislation to prepare the regulatory codes of practice in a similar way.

42. However, our views differ from the ARB's approach in two significant ways. We believe that compliance with the property agent code of practice should be mandatory and that enforcement action could be taken for a failure to comply. We also believe that an overarching code, consisting of high-level principles applicable to all property agents, should be set in statute.

Embargoed until 00.01 18th July 2019

[70] SRA: https://www.sra.org.uk/solicitors/handbook/suitabilitytest/content.page
[71] ARB: http://www.arb.org.uk/wp-content/uploads/2016/05/Architects-Code-2017.pdf