

Letting Agent Regulation: Code of Practice Business and Regulatory Impact Assessment

Title of Proposal

1. This Business and Regulatory Impact Assessment (BRIA) relates to section 46 of the Housing (Scotland) Act 2014 which provides Scottish Ministers with the powers to introduce a letting agent code of practice.

Purpose and intended effect

Background

2. The scale of the letting agent industry in Scotland has grown in recent years, providing a range of property management services to landlords in the sector. The letting agent sector is a varied one comprising of solicitors, estate agents and accommodation agencies. Businesses range from small sole traders to large franchises.
3. Currently, there is no definitive count of the number of letting agents operating in Scotland. There are several alternative data sources with which to make an estimate and the Scottish Government has undertaken to do this. Taking into account the pros and cons of each data source, there are an estimated 1,800¹ letting agent businesses in Scotland accounting for around 50% of all annual lettings. The businesses are involved in around 150,000 lettings in Scotland per year.²
4. In a sector with a large number of small scale landlords, the letting agent industry already plays an important role in providing a wide range of services, and ensuring those are of a high quality, to tenants and prospective tenants. Such services can help ensure that a landlord meets their regulatory responsibilities and also enable effective management and maintenance of privately rented properties.
5. Many letting agents in Scotland operate in a professional manner, complying with voluntary codes of practice and ensuring high quality levels of service for the landlords and tenants they assist. Professional organisations such as the Association of Residential Letting Agents (ARLA), Council of Letting Agents, Landlord Accreditation Scotland, Law Society of Scotland, the Property Ombudsman (TPO) and the Royal Institution of Chartered Surveyors (RICS), provide members with a code of practice and or rules of conduct to adhere to, encouraging responsible business practice and providing a route of redress for landlords and tenants, should any dispute arise.
6. Such good practice is not shared by all however, and evidence gathered from

¹ Estimate is based on letting agent members of the UK Property Ombudsman, Ombudsman Services UK, the Property Redress Scheme (2014) and Scotland's Landlord Registration Database (2015).

² A Place to Stay, A Place to Call Home A Strategy for the Private Rented Sector in Scotland - Scottish Government (2013)

stakeholders and correspondence from members of the public to Ministers suggests that landlords and tenants can be subject to poor standards of service and, in some cases, illegal practices by some letting agents.

7. In response to these issues, the Scottish Government legislated in the Housing (Scotland) Act 2014 for a framework for the regulation of letting agents in Scotland, including:
 - a mandatory register of letting agents with an associated ‘fit and proper’ person test;
 - a training requirement that must be met to be admitted to the register;
 - a statutory code of practice all letting agents must follow;
 - a way for tenants and landlords to resolve complaints against letting agents for breaches of the statutory code of practice through a new specialist First-tier Tribunal; and
 - powers for Scottish Ministers to obtain information and of inspection to support monitoring of compliance and enforcement.
8. Once implemented, these will help increase the overall standards of service and professionalism within the letting industry and provide customers (tenants and landlords including former tenants and landlords) with an effective way to resolve complaints.
9. This BRIA considers the business impact of the implementation of the statutory code of practice. It builds upon the BRIA undertaken as part of the policy development process on letting agent regulation for the Housing (Scotland) Bill 2013.

Objective

10. The objective of a letting agent code of practice is to help increase overall standards of service and professionalism within the letting agent industry, whilst providing customers of letting agents with an effective course of redress.
11. This policy contributes to the Scottish Government’s work on improving standards and quality within the Scottish private rented sector.
12. The objective fits with the Scottish Government’s strategic ‘Safer and Stronger Scotland’ objective. This helps local communities to flourish, becoming stronger, safer places to live, offering improved opportunities and better quality of life.

Rationale for Government intervention

13. From April to June 2012, the Scottish Government consulted on a draft Strategy for the private rented sector. As part of this, views were sought from stakeholders on whether further regulation of the letting agent industry was required and, if so, what form that further regulation should take.
14. Three potential options were presented to stakeholders:

1. Expand the existing landlord registration system to include all letting agents;
 2. Create a separate system for agents, similar to that in place for property factors; and/or
 3. Introduce a legal obligation that all agents must be a member of a recognised professional trade body.
15. Analysis of consultation responses showed broad support from across the sector, including from within the letting agent industry, for some form of further regulation of letting agents.
16. Following detailed consideration, Scottish Ministers took forward option 2 – to create a separate system for agents, similar to that in place for property factors. A framework for this was introduced under the Housing (Scotland) Act 2014.
17. As part of the implementation of the provisions within the 2014 Act, Scottish Ministers will be taking forward a number of Scottish Statutory Instruments in order to implement regulations that will:
- set out additional information requirements for administration of the registration process;
 - set out a code of practice which makes provision on standards of practice for those carrying out letting agency work; the handling of tenants' and landlords' money; and the professional indemnity arrangements to be kept by letting agents;
 - set out the training requirement those applying to the register of Letting Agents must have met to be admitted; and
 - the form of notice to be used by Scottish Ministers when exercising their power to obtain information.
18. Individual BRIAs are also being prepared in relation to the additional information requirements and training requirement and in relation to the fee that will apply to those undertaking registration.

Consultation

- **Within Government**

We have engaged with a number of different areas within the Scottish Government to support and inform the development of the code of practice and our consideration of wider implementation. These include Scottish Government Legal Directorate, Landlord Registration colleagues, Housing Tribunal colleagues, Property Factors Team, and local authority Landlord Registration Teams.

- **Public Consultation**

We have undertaken informal consultation with a number of stakeholders in developing the draft code of practice including the Association of Residential Letting Agents (ARLA), Royal Institution of Chartered Surveyors (RICS), Council of Letting Agents (CLA), Letscotland, Citizens Advice Scotland (CAS), CRISIS, Living Rent Edinburgh (formerly EPTAG), National Union of Students (NUS) Scotland, Law Society of Scotland, Chartered Institute of Housing (CIH) Scotland,

Landlord Accreditation Scotland; Scottish Association of Landlords (SAL), Shelter Scotland, Scottish Land and Estates and Capability Scotland.

A formal public consultation was undertaken between August and November 2015 on a draft statutory code of practice and training requirement proposals. As part of raising awareness of the consultation and encouraging responses from letting agents, landlords and tenants we worked with the Council of Letting Agents, Scottish Association of Landlords and Shelter Scotland to hold a number of focussed events in a variety of locations across Scotland. 92 responses were received and analysed in total of which:

- 27 were from letting agents;
- 20 were from members of the public;
- 14 were from professional or membership bodies;
- 11 were from a local authority;
- 8 were from tenant/community groups; and
- 12 were from other groups, (including estates, academics, equality organisations).

Independent analysis by Research Scotland (available in full on the Scottish Government's webpages) of the responses on the eight sections of the code revealed the majority of respondents agreed with Scottish Government proposals on the code but requested further guidance and clarification on certain aspects.

Analysis of the questions on the inclusion of a requirement within the code for letting agents to hold Client Money Protection Insurance (CMP) revealed:

- The majority of respondents agreed that the code should include a requirement for letting agents to hold CMP.
- There was strong support amongst respondents who are members of a professional body and consequently already belong to a CMP scheme.
- The Council of Letting Agents were the only key stakeholder who disagreed. This was driven by concerns around the impact on their members, the majority of whom do not currently have CMP.
- Concerns were raised about the ability of smaller agents, namely those acting on behalf of friends/family, to meet the financial costs of having CMP especially when considered alongside the other costs which will be required of them.

- **Business**

The consultation also sought views on the impact of the introduction of the code and the proposed training requirement on businesses. We received 21 separate comments in relation to our partial business and regulatory impact assessment. We also approached 12 letting agency businesses across Scotland directly to seek their views on the impact of the implementation of regulation on their business. Two agents took up the offer to meet with them.

Comments included:

- some organisations welcomed the introduction of letting agent regulation and the highlighted the benefits it would bring;
- a number indicated the costs associated with regulation were manageable;
- a number of respondents provided information on the likely type and costs to letting businesses in relation to implementation of the draft code and training requirement;
- a number raised concerns regarding the cost of regulation, particularly in relation to the impact on small businesses; and
- a few agents highlighted additional costs of meeting regulation may lead to landlords deciding to self-manage instead of using agents.

These views have been taken into account in this assessment.

Options

Option 1 – Do nothing

Doing nothing is not an option in this instance. Introducing a code of practice is a vital element of the regulatory framework introduced by Scottish Ministers under the Housing (Scotland) Act 2014. Under this Act, Ministers are legally required to lay before the Scottish Parliament regulations containing a draft code of practice within 18 months of Royal Assent (Royal Assent was received on 1 August 2014). The code of practice is also a fundamental part of the new avenue of redress for landlords and tenants to the First-tier Tribunal. Without the code of practice, landlords and tenants would not be able to access this means of dispute resolution. Alongside this, compliance with the code is one of the factors Scottish Ministers will be able to take into account in determining whether a letting agent is a fit and proper person to be admitted to the letting agent register. Without a code, this aspect of the process would be weakened.

Option 2 – Introduction of a statutory letting agent code of practice

This option requires development of a statutory code of practice for those carrying out letting agency work which covers those aspects provided for by the 2014 Act. These are: the standard of practice; the handling of tenants' and landlords' money; and the professional indemnity arrangements to be kept. The code of practice is a vital component of the overarching regulatory framework. Once in force, it will be the mechanism for landlords and tenants to seek redress through the new First-tier Tribunal where they believe a letting agent has failed to meet the requirements of the code. It will also be one of the factors Scottish Ministers will be able to take into account in determining whether a letting agent is a fit and proper person to be admitted to, or remain on, the letting agent register.

Sectors and groups affected

The main sectors affected are:

- the letting agent industry;
- private rented sector.

Those groups directly affected are:

- letting agency businesses;
- solicitors providing letting agency services;
- surveyors providing letting agency services;
- individuals working in letting agency businesses;
- private landlord; and
- private tenants.

Option 1 – Do nothing

- Landlords and private tenants - Not introducing a code of practice would have an adverse impact on landlords and tenants. This is because they would not be able to access redress through the First-tier Tribunal.
- Letting agents and broader private rented sector - Individual letting agencies may also be adversely affected by the continuation of bad practice by some in the sector undermining their business and damaging the reputation of the sector as a whole.

Option 2 – Introduction of a statutory Letting Agent Code of Practice

- Letting agents - The impact of option 2 on letting agencies will depend on the extent to which their current practices reflect the standards set out in the code. Those agencies who are currently part of an industry membership organisation will already have signed up to comply with a voluntary code of practice and are therefore less likely to be required to make any significant changes to comply with the statutory code. We anticipate as a minimum all letting agents will need to familiarise themselves and their staff with the requirements of the code and review and, where necessary, update their policies, procedures and their terms of business. The extent of these changes will differ depending on the current practices of individual organisations.
- Landlords and private tenants - The introduction of a code of practice should impact positively on both landlords and tenants enabling them to understand the standard of service they can expect and providing them with a new way to resolve complaints through the First-tier tribunal where a letting agent fails to meet the requirements of the code.

Benefits

Option 1 – Do nothing

We do not consider there are any benefits to this option.

Option 2 - Introduction of a statutory letting agent code of practice

The code will provide a mechanism for enabling consumers (tenants and landlords including former tenants and landlords) and Scottish Ministers to challenge poor practice and service. It will assist in raising standards, where this is needed, to help

build a more effective private rented sector that meets the needs of tenants, landlords and letting agents. This should help to improve the reputation of the sector and contribute to achieving the Scottish Government's vision for "a private rented sector that provides good quality homes and high management standards, inspires consumer confidence, and encourages growth through attracting increased investment."

Costs

Option 1 – Do nothing

There are no direct costs associated with this option.

Option 2 - Introduction of a statutory Letting Agent Code of Practice

Letting agents – The exact costs for letting agents will depend on the current practices of each organisation. However, all letting agencies will need to ensure that they familiarise themselves and their staff with the requirements of the code and review and, where necessary, update policies, procedures and terms of business as required. We would anticipate that letting agents should already be regularly reviewing their policies and procedures to take account of legislative change and that there will be sufficient time prior to the code coming into force for this work to be built into their business plans.

We expect the costs to be minimal for those already signed up to an existing voluntary code of practice through an industry or professional body who also require their members to hold professional indemnity insurance and provide their members with, or access to, client money protection insurance, or equivalent cover, linked to their membership. Agents in these circumstances should also have robust and appropriate procedures so in most cases they are already compliant with the majority of the statutory code's requirements resulting in minimal additional work.

Costs of Professional Indemnity Insurance (PII) and Client Money Protection (CMP)

The code includes a requirement for letting agents to hold professional indemnity insurance and client money protection. Whether this will be an additional cost is difficult to quantify as it will depend on the current practice of individual businesses.

For those agents without professional indemnity insurance and client money protection insurance there will be costs associated with putting this cover in place. It is unclear the number of agents who do not currently have professional indemnity insurance. While many agents may already hold professional indemnity insurance we have assumed for these purposes that the numbers requiring PII are the same as those requiring CMP.

The Council of Letting Agents (CLA) surveyed their members in September 2015, which indicated that CMP insurance is currently held by 42% of respondents and that most respondents pay in the region of £300 per year for this insurance. Like client money protection insurance the exact costs of professional indemnity insurance depend on the level of cover required. However, we anticipate these costs will be around £160 per annum resulting in an overall additional cost each year of £460 for those who do not already hold these.

Assuming that the CLA membership is representative of the broader letting industry in Scotland, and that we estimate that there are 1800 letting agent businesses in Scotland, this would mean around 1000 agents will be required to pay approximately £460 per annum for CMP and PII. Resulting in an overall additional cost of £460,000 to the industry as a whole for CMP and PII.

Landlords and tenants - There are no direct costs for tenants and landlords related to the introduction of a statutory code of practice for letting agents. However, some agents may decide to pass on some or all of their additional costs in complying with the code to landlords through their fees, which in turn could be passed on to tenants through their rents.

As the letting sector is a varied one we have based our assessment of the impact on two property portfolio sizes – 50 properties and 250 properties (the average number of properties of a respondent to the CLA survey in September 2015 was 256 properties).

If these additional costs for CMP and PII were passed to landlords this would mean £9.20 per landlord per year for an agent with a property portfolio of 50.

If these additional costs for CMP and PII were passed to landlords this would mean £1.84 per landlord per year for an agent with a property portfolio of 250.

We have therefore determined that, if agents do decide to pass on these costs to landlords, we anticipate these should have a low impact and that the benefits of CMP and PII to landlords and tenants outweigh the costs.

Scottish Firms Impact Test

We used the consultation on the draft code and proposals for the training requirements to gather views on the impact of the introduction of the code and the proposed training requirement on businesses. We received 21 separate comments in relation to our partial business and regulatory impact assessment. We also approached 12 letting agency businesses across Scotland directly to seek their views on the impact of the implementation of regulation on their business and to offer to meet them. Two agents took up the offer to meet with them.

Competition Assessment

The changes will affect private landlords, letting agents, private tenants. But given our answers to the four questions below, we do not expect the changes will distort any competition in the affected markets.

The Competition and Markets Authority (CMA) advise that the competition assessment questions given below should be used as an initial assessment of competition. They suggest that if 3 or more of the questions are answered with a 'no' then it is unlikely the proposals will have an impact on competition. The questions and answers are included within this BRIA to provide evidence that our proposals do not have any impact on competition.

Will the proposal directly limit the number or range of suppliers? **No**

Will the proposal indirectly limit the number or range of suppliers? **No** – a few

respondents to our consultation on the draft code of practice indicated that small businesses would be disproportionately impacted by the requirement to hold professional indemnity insurance and client money protection. However, other respondents indicated that this should not present an undue burden as costs could be taken account of as part of the business model. We are also aware of a number of smaller agencies who currently hold PII and CMP and this does not affect their continued operation.

Will the proposal limit the ability of suppliers to compete? **No**

Will the proposal reduce suppliers' incentives to compete vigorously? **No**

Test run of business forms

No new forms will be issued as part of the introduction of the code of practice.

Legal Aid Impact Test

The introduction of the code of practice will enable landlords and tenants to take cases to the First-tier Tribunal. Recent estimates³ for complaints to the First-tier Tribunal suggest that there are likely to be around 1,100 enquiries to the Tribunal with around 150 being acted upon as formal complaints.

While we anticipate some of those taking cases may be eligible to access Advice and Assistance before they go to the tribunal, we think the impact on legal aid spending will be minimal due to the low number of cases expected. In addition, the new tribunal system is designed to be easily accessible and simple to use, which should also limit the numbers requiring legal assistance.

It is not intended that legal aid will be available for representation for letting agent cases. This is in line with current policy in relation to cases referred to the Homeowner Housing Panel.

Appeals against decisions by the First-tier Tribunal will be heard by the Upper Tribunal. Operational details are still under consideration, however, should access to Legal Aid be required we anticipate only 1 or 2 cases a year resulting in minimal impact.

Enforcement, sanctions and monitoring

Option 1 – Do nothing

This option would not require any additional enforcement, sanctioning and monitoring.

Option 2 – Introduction of a statutory Letting Agent Code of Practice

Enforcement of the code of practice will be through the new First-tier Tribunal (FtT).

³ Both estimates are based on the number of letting agent complaints received at the UK level based on the caseload figures from the three UK Government approved property redress schemes that letting agents operating in England must be a member of. Some letting agents in Scotland also choose to join one of these schemes. These figures have then been constrained to the proportion of the UK Private Rented Sector in Scotland (8%).

Under section 48 of the 2014 Act, where the FtT identify a letting agent has failed to meet the requirements of the code, they can make an enforcement order requiring the letting agent to take such steps as the tribunal considers necessary to rectify the failure.

Where the Tribunal finds that a letting agent has failed to comply with an enforcement order the letting agent is liable on summary conviction to a fine not exceeding level 3 on the standard scale. The FtT must also inform Scottish Ministers of a letting agent’s failure to comply. Ministers can then take this into account in considering their registration status. If necessary, Ministers can seek to remove an agent from the register, preventing them from practicing.

Scottish Ministers also have powers to obtain information and of inspection to facilitate the monitoring of compliance and enforcement.

Implementation and delivery plan

The Scottish Government is required under the Housing (Scotland) Act 2014 to lay regulations for a draft code of practice within 18 months of Royal Assent. We anticipate the code coming into force alongside the establishment of the relevant jurisdiction of the First-Tier Tribunal, anticipated late 2017. We therefore do not anticipate the code of practice coming into force prior to January 2018. This will provide letting agents with reasonable notice of the standards of practice set out in the code and provide sufficient time to undertake, where necessary, any changes needed to comply with the code prior to it coming into force.

Post-implementation review

It is expected that a post-implementation review will take place within 10 years of the legislation introducing a statutory code of practice.

Summary and recommendation

Option 2, introduction of a statutory letting agent code of practice, is recommended

Summary of broad costs and benefits

Option	Benefits	Costs
Do nothing	We do not consider there are any benefits to this option.	There are no associated additional costs to this option.
Introduction of a statutory letting agent code of practice	A statutory code of practice will ensure letting agents understand the standards that are expected of them; provide a mechanism for enabling consumers and Scottish Ministers to challenge poor practice and	The exact costs of introducing a statutory letting agent code of practice will depend on the current practices of each organisation. All letting agencies will

	<p>service; and assist in raising standards across the sector.</p>	<p>need to ensure they familiarise themselves and their staff with the requirements of the code and review and, where necessary, update policies, procedures and terms of business.</p> <p>We expect the costs to be minimal for those letting agents already signed up to an existing voluntary code of practice through industry body or membership organisation.</p> <p>The code includes a new requirement for letting agents to hold client money protection insurance and professional indemnity insurance. The exact costs of these will depend on the level of cover required. However, we anticipate these costs will be around £160 per annum for professional indemnity insurance and £300 for client money protection resulting in an overall additional cost each year of £460 for those who do not already hold these.</p> <p>Assuming that around 1000 agents do not currently hold this insurance, and therefore will need to obtain it, they will be required to pay approximately £460 per annum for CMP and PII together. This will result in an overall additional cost of £460,000 to the industry.</p>
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Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date: 14 January 2016

**Margaret Burgess
Minister for Housing and Welfare**

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