

Submission by the Council of Property Search Organisations to the Office of the Deputy Prime Minister on the Housing Bill – Consultation on draft legislation

Introduction

1. In March 2003 the Office of the Deputy Prime Minister published “Housing Bill – Consultation on draft legislation”. The ODPM has invited comments by 9 June.
2. This paper is the submission of the Council of Property Search Organisations (CoPSO). CoPSO is a newly established trade association set up to represent the interests of the growing number of private sector organisations that provide property information reports. Currently, the Association has six members (Richards Gray, One Search Direct, STL, Landmark Information Services, PSA and Sitescope). The Council is currently in the process of expanding its membership by inviting all relevant organisations to join. CoPSO also seeks to safeguard the interests of professional users. It requires its members to have professional indemnity insurance and will introduce a mandatory code of practice.
3. Property search organisations assist the house purchase process by providing the results of necessary searches of information held by local authorities and other public agencies more efficiently than the authorities and agencies can themselves provide. The companies are retained mainly by conveyancers acting on behalf of purchasers. Property search organisations are now involved in over 40% of all house purchase transactions.
4. It follows that property search organisations have a major interest in the provisions of the draft Bill requiring anyone marketing a home to assemble a Home Information Pack (HIP) and in the contents of that pack. They are also well placed to comment on whether the government’s proposals will achieve their desired effect. The comments of the Council are restricted to this part of the Bill.

Executive summary

5. The key points are -
 - The consultation concentrates on two narrow points. In view of the changes in the housing market over the last few years, there should be a comprehensive review of the potential impact of HIPs.
 - HIPs would mark a huge change in the way the private housing market operates and a massive increase in government regulation. The implications need to be fully thought through.
 - If HIPs are to work, it is essential to address the problem of delays in obtaining information from local authorities. This could partly be achieved through the activities of property search organisations.
 - The regulatory impact assessment is suspect, partly because it is based on a small sample and the data is now five years old.
 - As drafted the bill would seek to prevent people revealing that they intend to put their house on the market until they had assembled a full HIP.
 - It is difficult to see why trading standards officers or individual home-buyers should wish to use the enforcement powers.

The consultation process

6. The consultation document asks just two questions in respect of home information packs, relating respectively to civil remedies and penalties and circumstances which would prevent preliminary non-marketing activity by estate agents. This implies that the decision has been taken to introduce HIPs and that the concept is not open for discussion. The ODPM rightly argues that there has already been extensive consultation and discussion on the issue. This is correct and is also part of the problem in that the issues have changed significantly over the last few years. The case for HIPs is partly based on research conducted in 1997 and 1998 and a regulatory impact assessment which is open to question (see below).

7. There is a good case for the government to stand back from the current examination of minutiae and to have a fresh look at the concept. While most of the participants in the housing market might express themselves as being in favour of HIPs some are doing so probably because they know this is the government's view and there is little merit in them seeking to oppose this bearing in mind that it will not adversely affect their members. Indeed, CoPSO members would have no difficulty with HIPs but do feel it important to have a debate as to whether the concept will achieve its intended purpose.
8. More importantly, the world has moved on since the research was conducted. In particular, much greater use is made of electronic means of accessing and communicating information. Property search organisations themselves have greatly contributed to speeding up local authority searches and are now involved in some 40% of all transactions. It may well be that the problems which the HIP is seeking to address have partly been addressed by market and technological developments.
9. While the government is to be commended for publishing a draft Housing Bill there is no guarantee that this Bill will be considered in the next session of Parliament and, even if it is, implementation could well be some time in 2005 or 2006. If consideration of the Bill is further delayed then the proposals could be still some four to five years away from implementation. In a fast moving world, introducing arrangements in 2006 or 2007 to deal with a situation that applied eight or so years previously is risky.
10. CoPSO proposes that the government commissions an independent study on how the house purchase market has changed over the last five years and also to review the partial regulatory impact assessment. This would help inform the debate about the concept of HIPs.

The principle of HIPs

11. The purpose of HIPs is to make the house buying process more efficient by reducing the time taken between an offer being accepted and completion and by reducing abortive costs. This objective is of course fully supported by all parties. The issue is how this objective can be achieved. CoPSO agrees that the provision of more pre-contractual information would be useful. However, the proposals for HIPs go much further.
12. This government, like most others, is firmly committed to the principle of deregulation. What is proposed in the Bill is a major increase in regulation of an activity that is currently largely unregulated. There will be detailed rules prescribing the information that must be given to potential house buyers and penalties for those that fail to comply precisely with the regulations. The proposals would also mark a significant change in the house purchase process with responsibility for assembling information being shifted from the purchaser's solicitor to the vendor's estate agent. While this may well be a good thing, there will inevitably be massive consequences from this sort of change which need to be fully thought through. There would also be a change in the nature of the housing market to some extent. The government's proposals rather assume a fairly mechanistic process in which people decide to sell or to buy a house and then do so, albeit after a substantial delay in many cases. In practice, the market is far more fluid than that. People may put a property on the market to get an indication of likely interest and then withdraw it if it seems unlikely that they can get the price that they want. People may also legitimately change their mind after putting a property on the market for a variety of personal or emotional reasons. Similarly, people consider buying houses with varying degrees of enthusiasm and commitment. This is perfectly reasonable.
13. Having made these points, if the government is determined to go ahead, it is vital that it addresses the key problem of delays in obtaining information from local authorities. Paragraph 7 of the regulatory impact assessment on HIPs is relevant in this respect. It states that the government is proposing the following measures to ensure that HIPs can be put together quickly –

- “Lenders have agreed to provide title documents quickly – within five working days of a request from a solicitor or licensed conveyancer – and to monitor and publish details of their actual performance against this target;
- We will expect strict observance by local authorities of their adopted target of dealing with standard search enquiries within a maximum of ten working days. Water companies have agreed to adopt and observe similar targets and the same will apply to other organisations that may provide search information for the home information pack”.

It is significant that, while lenders have agreed to provide documents within five days, local authorities are merely expected to observe their own adopted target of providing the results of enquiries within ten days. There is no reason for this difference in treatment. Having said this, it is clear that not all local authorities are able to provide information in a reasonable time period. For this reason it is essential that property search organisations should be allowed to put together information for HIPs otherwise the policy will fail.

14. The fact is that many local authorities are very slow to respond to search enquiries. It is unfortunate that in this important area few statistics are available. However, some data is available from the Audit Commission analysis of “Best Value” reporting by local authorities. The benchmark is that 90% of searches should be completed within 10 days. The analysis for 2001/02 showed that a number of authorities, included major cities such as Manchester and Birmingham, had a 100% record. However, a significant number of authorities were well below the 90% target. Among the poor performers were Hackney (25%), Hillingdon (43%), Redbridge (24%), Knowsley (44%), Southend-on-Sea (37%) and Rutland (16%).
15. The NLIS experience is also instructive. One purpose of NLIS is to speed up the provision of information held by local authorities. Progress has been very slow. As at July 2002 (the last date for which figures appear to be available) only 11% of local authorities had introduced the technology necessary to fully interact with NLIS. It is significant that a system designed to speed up the house purchase process is unable to provide data on its activity in the past year. It is understood that in fact few if any local authorities have introduced the necessary technology since last July.
16. The general principle is that those public organisations that hold relevant information should concentrate on making that information correct, up-to-date and accessible. There should then be free competition through a number a channels for organisations to provide that information. The Coal Authority is one public sector body that has adopted a sensible approach in this respect. The Bill should make provision for data holders to make their data available on a wholesale basis to companies able to provide an efficient service that meets the need of the housing market.

The regulatory impact assessment

17. The partial regulatory impact assessment (RIA) is largely based on data collected in a survey conducted in 1997 and 1998. It is also based on a fairly small sample. There is at the very least a case for an updated analysis and for independent verification of the figures.
18. The assessment is based on a critical assumption that 28% of transactions fail. It is not entirely clear where this figure comes from. The analysis of research showed that 10% of buyer’s transactions that were tracked failed to proceed after the offer had been accepted. The 28% figure is based on the fact that nearly a third of buyers who were recruited into the tracking survey claimed to have had an offer accepted on a previous property which subsequently fell through. It is noted that no information was collected on the stage in the process at which these previous transactions failed nor their costs. In practice, many of them may have been a verbal offer tentatively accepted with no costs having been incurred. For the RIA, these figures seem to have taken a much firmer status.

19. The RIA also makes a heroic assumption, that is that there is a failure rate of 28%, of which 43% are due to a survey or valuation inspection finding and that “failures attributed to this reason will no longer occur after the new measures are introduced”.
20. More generally, it is difficult to understand the summary table of the RIP. This gives figures for the costs of the proposed system, current costs (described as potential savings) and benefits (described as assumed savings compared with current practice). It is difficult to relate the figures back to the analysis. It would be helpful to have a revised RIA setting out more clearly the expected benefits, how they derive and sensitivity analyses around those figures.

Detailed comments on clauses

21. CoPSO has few comments on the clauses as drafted as they are of little practical importance in themselves, lying as they do between the concept of HIPs and the content of HIPs. If the concept is accepted then the draft clauses are generally adequate for their purpose. However, in the interests of ensuring that the implications of the draft clauses are fully understood (in particular the extent to which they seek to outlaw perfectly normal behaviour and are unenforceable) CoPSO offers comments on three points.
22. Clause 133(3) states that a residential property “is put on the market when the fact that it is or may become available for sale is, with a view to marketing the property, first made public ...” Clause 134(6) requires that the seller becomes responsible for marketing the property when action is taken to make public the fact that the property is on the market. Clause 137 (2) requires the “responsible person” to have in his possession a Home Information Pack. Paragraph 8 of the introduction to this part of the Bill makes clear that the intention is that a person acting as estate agent must have a copy of the Home Information Pack before taking any action to communicate to any person that the property is, or may become, available for sale. The implications of this need to be thought through. It would seem that if Posh and Becks announce on TV that they are moving to Spain and selling Beckingham Palace through Harrods Estate Agency then an offence has been committed under the Act in that the fact that a property is to be made available for sale has been communicated to the public while a Home Information Pack is not available. At a more mundane level, if someone tells his mates in a pub that he is going to put his property on the market and one of his friends asks if he could have a look round it then the person would be committing an offence by allowing him to do so. It would even seem to be an offence to provide information about a property which is publicly available. There is thus the paradoxical position that an estate agent or an individual is able to provide any amount of information about a property provided that it is not intended that the property should be for sale. By contrast, if the property is to be put on the market, they are banned from providing any information at all until such time as all of the information is available. This is a classic example of “the best being the enemy of the good”.
23. An even more mundane example is also helpful. Paragraph 9 of the consultation paper states: “Clauses 137 and 139 would not prevent an agent advising an enquirer that instructions had been received to market the property but that marketing, for example providing details of the property and arranging viewings, could not commence until the Pack was ready.” Consider the following discussion in an estate agent’s office –

Prospective purchaser: I understand from a friend at the golf club that 26 Acacia Avenue is for sale. Can you give me some details and can I see the property.

Estate agent: All I can tell you is that we have received instructions.

Prospective purchaser: Can you tell me if the property is detached.

Estate agent: I am sorry sir, I cannot reveal that information.

Prospective purchaser: My pal tells me that the purchaser is quite happy for people to view the property now. I am going on holiday at the end of next week for a month. Can I see the property

before then?

Estate agent: I am very sorry sir; that would be a serious offence. The local authority will not give us the search results until the week after.

Prospective purchaser: Can I ask the purchaser to show me round.

Estate agent: I will need to ask my lawyer on that one but in no circumstances must you reveal that I have said you could.

Prospective purchaser: You know the area well. Can you confirm that the house was built in the 1930s by William Old?

Estate agent: I know the answer to that question but it would be more than my job's worth to tell you that.

Prospective purchaser: Has the road been made up?

Estate agent: I know the answer to that question but it would be more than my job's worth to tell you that.

Prospective purchaser: How can I find out the answers to these questions?

Estate agent: We have an arrangement with the estate agent across the road. He can give you all this information and full details about the property, in fact everything except the results of the local authority search. We do the same for his clients. In fact the only people who are prevented from giving you any information are the vendor and his estate agent.

Prospective purchaser: This seems daft.

Estate agent: I couldn't possibly comment on that.

Prospective purchaser: Can you tell me if there are any significant planning applications for neighbouring properties, and what the neighbours, schools and bus services are like.

Estate agent: Certainly. Here is a folder that gives all of this information.

Prospective purchaser: Why can you provide me with this information but not tell me if the house is detached?

Estate agent: Because this information is not deemed important, even though it is, and I can therefore give it to you; by contrast all the information about the building itself is deemed important and therefore I cannot give it to you.

Prospective purchaser: A final try. I read in the local paper that a pedestrian crossing is going to be put in the road and workmen appear to be building it now. Can you confirm this?

Estate agent: I know the answer to that question sir as do hundreds of other people but it is a serious offence for me to reveal that information to you. I suggest you ask the shoe repairer next door.

Prospective purchaser: Has the world gone mad?

24. Clause 143(2) provides that if a Home Information Pack is not provided then the potential purchaser is entitled to recover from the responsible person any fee paid by him for the purpose of obtaining any prescribed document not provided. It is difficult to imagine somebody going to

court to claim the sum of £10 for the provision of a local land charges search. If, in practice, if this right is never likely to be exercised because it is impractical to do so, it is questionable whether it should be included within the Bill.

25. Clause 144 deals with the contents of Home Information Packs. Given part of what is in the separate consultation document on this matter, it is important to define closely the nature of the information that should be included in HIPs. At present, the Secretary of State is able to prescribe the information that must be included but it must be relevant although in subsection (4) this is described as “information about any matter connected with the property (or the sale of the property) that would be of interest to potential buyers”. This is so wide ranging as to cover everything. It would be sensible to add at the end of this clause the words “material to the decision to purchase the property”. A corresponding amendment would need to be made to subsection (5).
26. Clause 146(3) seeks to empower a trading standards officer to require anybody who says to a gathering of people (for example, in a pub) that he is putting his property on the market to require that person to produce a Home Information Pack. The trading standards officer can then issue a fixed penalty notice. It is impossible to imagine the circumstances in which this would be done in practice and accordingly the provisions serve no purpose. More generally, it is difficult to see why local authority trading standards officers, already grossly overworked, and having to enforce a multitude of government initiatives, should have any enthusiasm for seeking to fine individuals or indeed estate agents for a technical offence for which there is no victim.
27. As a general point, it seems unnecessary to provide that the requirements of the Act will not be met by providing an HIP in electronic form. Improvements in information technology have greatly speeded up the house purchase process and the Bill should seek to extend this trend rather than frustrate it.

Consultation document on HIPs

28. CoPSO will be responding in detail to the consultation document on the content of HIPs, concentrating in particular on –
 - Who should be able to provide search information for the HIP, for which it will favour option B, that is any person who has adequate insurance to protect the buyer in the event of inaccurate supplies.
 - The sort of environmental enquiries which should be included in the pack.
 - The contents of the Con 29 form. At present this includes a great deal of information of no interest to the house buyer.

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