

OFT approval of estate agents redress schemes

A consultation paper

May 2007

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FOREWORD

The Consumers, Estate Agents and Redress (CEAR) Bill was introduced in Parliament on 16 November 2006. Once enacted, the CEAR Act will enable the Secretary of State by means of an Order, to make it compulsory for estate agents in the UK to belong to an approved redress scheme that relates to all complaints about the buying and selling of residential property. Under the CEAR Bill, these redress schemes will need to be approved by the OFT.

These provisions follow on from the redress measures in the Housing Act 2004, under which estate agents in England and Wales will be required to join an approved redress scheme by 1 June 2007 for the purpose of dealing with complaints about Home Information Packs (HIPs). Under the CEAR Act estate agents will be required to join a redress scheme that covers all complaints arising from residential estate agency work, so a requirement to belong to a separate redress scheme relating to HIPs will then no longer be necessary, and the relevant provisions of the Housing Act will be repealed.

The purpose of this consultation exercise is to set out our proposed criteria for approving estate agents redress schemes and to seek your views. We have highlighted some specific questions to which we would like your response and these are set out on page 11.

The OFT may only approve a redress scheme which makes satisfactory provisions as prescribed in the CEAR Bill and in assessing this the OFT must have regard to what are, in OFT's opinion, generally accepted principles of best practice in relation to consumer redress schemes which are applicable to the scheme. Therefore we have based our proposed criteria on what we have identified in our view, as being 'accepted principles of best practice' from a number of sources. These sources are set out at Annex A.

The final criteria together with the procedures for applicants are scheduled to be published in September 2007.

The consultation period

The consultation period began on 30 April 2007 and will run until 25 June 2007. Please ensure your response reaches us by that date.

This period is shorter than the 12 weeks set out in the Cabinet Office's revised code of practice. (The code's six criteria for consultation can be found at

Annexe B.) The consultation period has been shortened in order to allow sufficient time to publish the criteria and assess applications as effectively as possible following Royal Assent of the CEAR Bill.

Responding to the consultation

This document sets out and seeks views on the OFT's proposed criteria for approving an estate agents redress scheme. We are particularly keen to hear from those who operate or have a specific interest in the estate agency sector.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents, and where applicable, how the views of members were assembled.

A list of those organisations formally consulted appears at Annexe C. This consultation paper can also be found on the OFT's website at www.of.gov.uk If you have suggestions of others who may wish to be involved please contact us.

Next steps

We will collate responses and publish a formal response to the consultation exercise during August 2007 on www.of.gov.uk

The information you send us may need to be passed to colleagues within the OFT and/ or published in a summary of responses received in response to this consultation. We will assume that you are content for us to do this, and that if you are replying by email, your consent overrides any confidentiality disclaimer that is generated by your organisation's IT system, unless you include a request to the contrary in the main text of your submission to us.

Please ensure that if you want your name or response to be kept confidential, you state this clearly in your response. (Confidential responses will be included in any statistical summary of numbers of comments received and views expressed).

All responses and comments should be sent to:

Melloney Smith
Room 3C/06
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

Tel: 020 7211 8479

Email: earscondoc@oft.gsi.gov.uk

Data use statement for responses

Please note that we may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business ('confidential information'). If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential. All information received is subject to Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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Please note that in this document when we use the term ombudsman, it refers to both men and women who perform this function.

1. PROPOSED CRITERIA FOR OFT APPROVAL OF ESTATE AGENTS REDRESS SCHEMES

Criterion 1

The ombudsman must be independent

Requirements to meet this criterion

- The ombudsman must be and be seen to be impartial and free from bias.
- The ombudsman must not be appointed by those who are subject to investigation by him. Procedures for appointing the ombudsman must be independent of the industry to be regulated.
- The jurisdiction, powers and method of appointment of the ombudsman should be publicised.
- The ombudsman should be appointed for a period of office for sufficient duration to ensure the independence of his actions and not be removable from his duties without just cause.
- The ombudsman should not, during the three years prior to assuming his present function, have occupied a position in the industry to be regulated, remunerated or otherwise, which may cast doubt about his independence from the industry and his ability to reach impartial decisions.
- The appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause. The grounds on which dismissal can be made should always be stated. Those subject to investigation by the ombudsman should not be entitled to exercise the power to terminate the ombudsman's appointment, but this does not exclude their minority representation on the body which is authorised to terminate.
- The ombudsman alone (or an appointed deputy) must have the power to decide whether or not a complaint is within the ombudsman's jurisdiction.

If it is, the ombudsman (or an appointed deputy) must have the power to determine it.

- The ombudsman should be required to report to a body independent of those subject to investigation, but this does not exclude their minority representation on that body. That body should also be responsible for safeguarding the independence of the ombudsman.

Criterion 2

The scheme must be adequately staffed and funded

Requirements to meet this criterion

- The scheme must be adequately staffed and funded in such a way that complaints can be effectively and expeditiously investigated and resolved and to allow the ombudsman to function impartially, efficiently and appropriately.

Criterion 3

The scheme must be easily accessible to all those entitled to use it

Requirements to meet this criterion

- The scheme should be directly accessible to complainants.
- The scheme's procedures should be straightforward for complainants to understand and use and not be unduly rigid or formal.
- Those complaining to the ombudsman must be able to do so free of charge.
- The right to complain to the ombudsman should be publicised by the scheme's members in such a way as to come to the attention of all the member's customers at any early stage of the relationship between the member and the customer.

- The scheme must be easily accessible to complainants without the need for legal representation or assistance.
- The special needs of disadvantaged or vulnerable consumers should be considered so that they, or their representatives, can access the scheme easily.
- The scheme should not deprive the complainant of the right to be represented or assisted by a third party at all stages of the procedure.

Criterion 4

Members of the scheme should be required under the terms of the scheme to have an effective internal complaints procedure set out in writing which should include:

- **full contact details**
- **any information the complainant must provide - this must be reasonable and not require excessive detail or form-filling**
- **reasonable timescales for dealing with the complaint, including a timescale for resolution, and**
- **details of the approved redress scheme and how the complainant can access it.**

Criterion 5

The ombudsman must proceed fairly and in accordance with the principles of natural justice

Requirements to meet this criterion

- The ombudsman is required to make reasoned decisions in accordance with what is fair in all the circumstances, having regard to principles of law and good practice including the principles of good administration. The ombudsman may take into account such factors as he considers relevant in accordance with such practice including, but not limited to, any inequitable conduct or maladministration.

Criterion 6

Complainants must be informed that the decision will not be legally binding on them, but will be binding on the estate agent. They must also be kept informed of what their alternative actions could be at each stage of the procedures.

Criterion 7

The scheme must make provision for dealing with all types of complaints from actual and potential buyers and sellers of residential property against those engaged in estate agency work in the UK. The scheme's complaints handling procedures must include reasonable timescales for dealing with the complaint, including a timescale for a decision to be made

Requirements to meet this criterion

The provision should set out:

- The scope of the matters which may be investigated and determined and the criteria to be used to determine whether a complaint should be investigated.
- The duties and powers of the ombudsman in relation to the investigation and determination of complaints.
- The scope of investigation of matters relating to non-compliance with voluntary codes of practice or other documents.

- Complaints handling procedures which must set out reasonable timescales at all stages of the process, including a timescales for a decision to be made

Criterion 8

The scheme's operation and its procedures must be transparent

Requirements to meet this criterion

The scheme must publicise:

- The types of dispute which may be referred to the scheme.
- The rules governing the referral of matters to the redress scheme.
- The costs of the procedures.
- The decision making arrangements.
- The rules serving as a basis for decisions.
- The legal force of a decision.

The scheme must also:

- Make its decisions and the reasons for them transparent. The names of the parties do not need to be publicised but the content of the complaint and the decision should be.
- In all cases investigated, notify in writing the decision and the reasons for it to the parties concerned.
- Ensure that complainants are provided with clear, comprehensible, and accurate information on the procedure including the process for initiating

a complaint, duration of the procedure, possible outcomes, avenues for appeal or review of the decision, and whether the outcome is binding.

- Ensure that wherever possible, complainants are provided with information or help other than legal advice in the completion of necessary forms and documents (for example through the use of standard forms to facilitate the submission of necessary documents).
- Prepare and publish an annual report to the OFT to include details of the outcome of its monitoring and reports of its investigations and decisions.
- Publish easily available information for consumers on the operation of the scheme.

Criterion 9

There must be a free exchange of information between all parties relating to a complaint

Requirements to meet this criterion

- The procedures must allow all the parties concerned to present their viewpoint before the ombudsman and see or hear the arguments and facts put forward by the other party and any experts' statements.
- The ombudsman must have the authority to request and receive all necessary information and documents from those being investigated subject to parties' rights to refuse to disclose information on legal grounds were the matter proceeding in a court.

Criterion 10

There must be a range of awards which take into account the level and type of detriment caused

Requirements to meet this criterion

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The range of awards must include the following:

- providing an apology or explanation
- paying compensation
- taking such other actions in the interests of the complainant as the ombudsman may specify

The level and applicability of awards must be publicised.

Criterion 11

The scheme shall ensure that decisions are implemented and that procedures are in place to deal with non-compliance with the ombudsman's decision and/or the scheme's rules

Requirements to meet this criterion

- There must be procedures in place to ensure that decisions and the scheme's rules are complied with.
- There must be procedures for non-compliance with decisions and the scheme's rules which include a specified range of sanctions, for example warning letters, fines, expulsions from the scheme, etc.
- The procedures must be fair to the member agent and only allow expulsion for serious issues of non-compliance.
- There must be an appropriate appeals procedure to consider expulsion decisions from the scheme.
- There must be procedures in place for readmittance to the scheme following expulsion.

Criterion 12

Appropriate information on complaints dealt with by the redress scheme must be routinely provided to:

- **Other OFT approved estate agent redress schemes**
- **Other consumer redress schemes**
- **The OFT or any other person/organisation exercising regulatory functions in relation to the activities of persons engaging in estate agency work**

Requirements to meet this criterion

- Agreements such as Memoranda of Understanding or similar should be made with other organisations as appropriate.
- Information provided to the OFT or other regulators must include the names and details of the parties involved.
- Procedures ensuring compliance with the Data Protection Act 1998 must be adopted.

Criterion 13

Membership requirements to join the scheme must be fair and ensure that all those who are required to sign up to a redress scheme can do so

Requirements to meet this criterion

- Membership requirements must not unfairly restrict access to the scheme.
- Only estate agents who have been expelled from a scheme or banned by the OFT in accordance with section 3 of the 1979 Estate Agents Act can be excluded from membership.

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- A compulsory requirement to sign up or comply with a voluntary code of practice cannot form part of the membership criteria.

Criterion 14

The scheme's effectiveness must be monitored on a regular basis

Requirements to meet this criterion

- Performance indicators on the scheme's operation to be agreed with OFT.
- Scheme operator to provide information on customer satisfaction surveys and performance indicators to OFT at specified intervals.

Criterion 15

The scheme operator must publicise the scheme to consumers and to existing and potential members

Requirements to meet this criterion

- Consumers will need to be made aware of the scheme at the point at which they make a choice to use an estate agent.
- Scheme operators must implement marketing and awareness plans to raise awareness of the scheme among consumers and estate agents.

Criterion 16

There must be independent procedures in place to consider and resolve complaints by consumers or member businesses about the service provided by the ombudsman

Requirements to meet this criterion

- These procedures should relate only to the service provided by the ombudsman when dealing with the case and not to the decision itself.
- The final decision on the complaint must be made by an independent adjudicator with the authority to direct how the problem will be resolved.

2. CONSULTATION QUESTIONS

1. Do you agree with the proposed criteria? If not, please say why. What changes would you suggest?
2. Are there any other criteria that you think should be included? If so, please explain why.
3. Do you have any suggestions regarding changes to the wording of any of the criteria? Please explain why you propose these changes.
4. The draft criteria at criterion 11 require schemes to have in place sanctions for non-compliance, which include expulsion of agents from the scheme for serious non-compliance. Do you think schemes should be able to expel members?
5. Do you think there should be a requirement for an independent appeals procedure for the Ombudsman's decisions? Please explain why you think there should/ should not be such a procedure.
6. Is any additional guidance on meeting the criteria necessary? If so, please specify the format and content of such guidance.
7. Are the criteria clear and understandable? If not, please suggest how clarity and ease of use could be improved.
8. Do you believe that the criteria omit any elements of generally accepted principles of best practice applicable to consumer redress schemes either from the sources listed at Annexe A or any other relevant sources?

ANNEXE A

SOURCES USED FOR COMPILING THE OFT CRITERIA

1. British and Irish Ombudsman criteria for recognition to the BIOA.
www.bioa.org.uk/criteria.php
2. European Commission recommendations on out-of-court settlement of consumer disputes (98/257/EC).
http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just12_en.pdf
3. Consumer Codes Approval Scheme criterion 4d (Independent redress schemes).
www.offt.gov.uk/shared_offt/consumer_codes_approval_scheme/oft390.pdf
4. Chartered Institute of Arbitrators code of professional and ethical conduct.
www.arbitrators.org/joining/ethical_conduct.asp
5. Draft OECD recommendation on consumer dispute resolution and redress¹.
6. DTI HIPS Redress scheme under the Housing Act 2004.
www.dti.gov.uk/consumers/business/estate-agents/index.html
7. Which? Briefing on the CEAR Bill.
https://www.which.co.uk/reports_and_campaigns/house_and_home/Campaigns/Estate%20agents/Move%20it%20campaign/Move_it_campaign_overview_559_53904.jsp
8. Financial Ombudsman Service
www.financial-ombudsman.org.uk/

¹ The OECD recommendation is in draft as at the time of publication of this document so no link is available.

In addition we met with the following organisations:

British and Irish Ombudsman Association
Independent Dispute Resolution Services
Financial Ombudsman Service

ANNEXE B

THE SIX CRITERIA FOR CONSULTATIONS BY PUBLIC BODIES

Public bodies are required to perform consultations in accordance with the following criteria wherever possible

Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.

Ensure that your consultation is clear, concise and widely accessible.

Give feedback regarding the responses received and how the consultation process influenced the policy.

Monitor your Department's effectiveness at consultation, including through the use of a designated Consultation Co-ordinator.

Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

Further information on the Code can be found on the Cabinet Office's website: www.cabinetoffice.gov.uk/regulation/consultation/consultation_guidance/the_code_and_consultation/index.asp

Comments or complaints about the consultation process

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Catherine Mason
OFT Consultation Co-ordinator
Room 5C/029
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

Phone: 020 7211 8890

Email: catherine.mason@oft.gsi.gov.uk

ANNEXE C

LIST OF CONSULTEES

Age Concern

Advice UK

Assist UK

Association of Home Information Pack Providers

Association of Residential Letting Agents

Association of Residential Managing Agents

British Chambers of Commerce

British and Irish Ombudsman Association

Cabinet Office

Chartered Institute of Arbitrators

Citizens Advice

Citizens Advice Scotland

Confederation of British Industry

Convention of Scottish Local Authorities

Department for Constitutional Affairs

Department of Communities and Local Government

Department of Enterprise, Trade and Investment (Northern Ireland)

Department of Trade and Industry

Federation of Small Businesses

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Financial Ombudsman Service

Financial Services Authority

General Consumer Council for Northern Ireland

Guild of Professional Estate Agents

Housing Ombudsman Service

HM Treasury

Independent Dispute Resolution Services Ltd

Institute of Directors

Local Authorities Co-ordinators of Regulatory Services

National Association of Estate Agents

National Consumer Federation

National Consumer Council

OFCOM

OFGEM

Ombudsman Service Ltd

Ombudsman for Estate Agents Company Limited

Postcomm

Royal Institute of Chartered Surveyors

Scottish Consumer Council

Scottish Executive

Team Association Ltd

Trading Standards Institute

Welsh Assembly Government

Welsh Consumer Council

Which?