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Response to
DCLG Call for Evidence
Protecting consumers in the letting and managing agent market

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This response deals with high-level policy issues, rather than all of the detailed questions.

The Case for Change

Q1.1. The evidence of real and widespread problems in these markets is clear and convincing.

Q1.2. A new regulatory approach is needed. However, I suggest that it may not be what many people envisage.

The answers to the problems lie in a sophisticated response of adopting current best practice in regulation, market monitoring, enforcement and redress. Fortunately, best practice is identifiable in those areas from other sectors, so some transference is able to occur if the right lessons are learnt.

It is instructive to begin by asking the following questions:

1. *How* does evidence of poor practice come to be identified?
2. *How* can poor practice be rectified, both in individual cases and systemically?

Traditional answers to those questions have resolved around the ideas that individual cases can be solved by empowering individuals to take action, typically in courts, to challenge illegal actions by the particular letting or property agents, or landlords, with whom they have a problem. The theory has been that most agents comply with the law and act fairly, and that it is only necessary to facilitate individual responses to individual acts of poor practice, and that such responses will be taken effectively by the individual tenants themselves. The models, therefore, involve self-regulation and individual dispute resolution. The reality, however, is far from the idealistic picture presented by those models, as the Call for Evidence indicates. There are several real problems with the model, which it is unnecessary to outline here.

The real illumination here occurs when one considers the problems from the perspective of *behaviour* by agents that may be *systemic*. At which point, we revert to the two questions set out above, but with different answers.

Q1.4. All agents and individuals have to be covered. The approach cannot be selective, as this would not protect the public nor provide a level playing field.

Entry Requirements

Q2.1. Minimum entry requirements and other aspects of good practice can be set by agreement between the regulator and self-regulatory bodies. The latter should be incentivised to have codes that exceed the minimum standards.

Q2.5 and Q2.6. Yes, Codes can play a useful role, see below.

Approaches to Enforcement and Regulation

Q3.1 – Q3.6. The Call for Evidence refers to whether an 'independent regulator' is required, giving three choices in para 51. In general, I support option (b), but would describe the model in slightly different terms.

The objective is an integrated model of:

(a) identifying specific and generic problems through focused collection of information on market practice,
(b) ensuring response to individual disputes that is as swift and efficient as possible,
(c) aggregation of data from multiple cases,
(d) the ability to investigate instances where problems appear to be clustered or widespread (risk-based regulation and enforcement), hence enabling effective self-regulatory enforcement and risk-based public enforcement.

The choice is not between extensive and expensive public regulation or ineffective self-regulation. The way forward has rightly been indicated by a horizon-scanning discussion amongst 30 or so regulators, adopted as official UK policy. The model is of 'Regulated self-assurance'. This is a co-regulatory model, in which the responsibility for controlling risk and compliance in all activities rests firmly with individual businesses who create the risk, with the objective of benefitting from it commercially, and who are closest to the sources of risk to be effective in controlling them.

Thus, individual firms should satisfy themselves that they self-assure their own compliance with market rules. Those who do this would be low risk in the regulatory context. Regulators may enforce where required, but ought generally to be able to support good practice and improvement.

To this model has been added the requirement that individual organisations should demonstrate that they can be trusted to act ethically on a consistent and holistic basis (Ethical Business Practice) thereby benefiting from a positive relationship with regulators (Ethical Business Regulation). There are numerous and increasing examples of EBP and EBR, such as under the Primary Authority structure, the future regulation model of the Food Standards Authority, the well-established and highly

effective activities of the Civil Aviation Authority, the HSE, the Environment Agency and various other regulators.[1]

In this model, self-regulatory bodies—such as several of the established bodies that already exist in the property and lettings sector—can perform useful and effective functions, but under the scrutiny, and with the support, of an effective, modern and informed regulatory body. Many examples of this are developing in other sectors. One is the Advertising Standards Authority, which is a private sector body that operates under the umbrella of public enforcement powers that the relevant public bodies rarely need to use. In other words, the model is 'light touch' regulation, like para 51(b), but—critically—it includes powerful mechanisms to incentivise agents and landlords to behave ethically, and to demonstrate that behaviour, on a consistent basis. This model offers effective and efficient means.

The description of regulation enforced by sanctions (paras 54-58) is both ineffective and old-fashioned in terms of UK regulatory best practice. Relying on post-facto enforcement is inherently ineffective compared to consistent ex ante performance and compliance. Further, ex post enforcement relies on the theory of deterrence, which has been widely undermined in theory, and been shown to be effective in achieving control of future behaviour. Most UK regulators now adopt the 'supportive' approach to compliance and growth, rather than deterrence.[2] However, a toolbox that includes the possibility of strong sanctions is essential, not least to be able to deal with clear criminal activity.

Delivering Dispute Resolution

The Call for Evidence sets out the intention that all landlords will have to be covered by a redress scheme, but the issue is not pursued in the subsequent Questions. I fully support the requirement for redress, but submit that the design of the redress landscape and scheme is critical to the success of *both* the redress objective and the regulatory objective.

It is a red herring to look at redress in the context of the development of dispute resolution from courts to ADR schemes, such as stand-alone mediation or arbitration models. The really effective model is that of ombudsmen who have developed in several regulatory sector, such as the Financial Ombudsman Service, and the ombudsmen for energy, communications, property and so on. The point about such 'consumer ombudsmen' is that they deliver several different functions: an easily-identifiable and consumer-friendly source of consumer advice and dispute resolution (integrating advice, triage, mediation and decision services), a source of data on market behaviour, unfair practice and trends, and an ability to aggregate and feedback such data to drive improvements in performance and enforcement where necessary.

[1] A summary of relevant aspects of how these and some other regulators act is in C Hodges and R Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart, forthcoming 2017).

[2] See C Hodges, *Law and Corporate Behaviour* (Hart, 2015); C Hodges, *Ethical Business Regulation: Understanding the Evidence* (Department for Business Innovation & Skills, Better Regulation Delivery Office, 2016); C Hodges, *Ethical Business Regulation: Understanding the Evidence* (Department for Business Innovation & Skills, Better Regulation Delivery Office, 2016).

Thus, ombudsmen operate *both* as part of the dispute resolution system and the regulatory system.

However, the design of the landscape is critically important if these functions are to be delivered. First, the ADR system must involve the ombudsman model rather than stand-alone mediation or arbitration ADR models. Second, there must only be a single property ombudsman: if there are more, consumers will be confused, standards of service may vary and undermine consumer confidence in the best ombudsmen, and the pool of data on market practice will not be sufficiently large. The best ombudsmen are currently operating extremely well, although improvements are being actively considered. It is hoped that BEIS will engage with important rationalisations of the advice and ombudsman landscape soon. Much more detail on these issues can be given.

The lesson for this sector is that existing redress schemes need to be reformed. One should start with identifying the functions that are needed, including with those noted above providing deposit protection. It was identification of the critical functions that were missing in various business-to-business situations (the ability to make anonymous complaints to an independent body, and then for that body to investigate them so as to identify and then change *systemic* behaviour) that led to the creation of new various intermediaries the Groceries Code Adjudicator, the Pubs Code Adjudicator, and the forthcoming Small Business Commissioner, which look like proving to be highly effective.

The three property redress schemes operate in different ways, with different functions, and hence provide a confusing landscape for consumers. Ownership and control of some of the schemes is always not fully independent. The model should be of independent boards.

The creation of a single Property Ombudsman, or at least closer integration between the three existing players, and banning any others from being created, is in my view essential. Such a body, working closely with a new overarching regulator and self-regulatory bodies, can successfully address the lack of power that DCLG has rightly identified. Such a mechanism is possibly the only such mechanism that can achieve that. The ombudsman and regulator combined body can be empowered to assist in advising both sides on challenging poor practice, and the existence of such forces will exert real pressure on many agents and self-regulatory bodies to take effective action. That segmentation of the market on a risk-basis would enable between the regulator to distinguish clearly between agents and landlords, and to direct hard enforcement action against bad agents.

Rights to switch agents and challenge changes

Q4.1-4.6. I am fairly sceptical that empowering consumers to switch providers is effective, especially in markets such as property where contracts involve services that can last lengthy periods. Consumers International has evidence that consumers often make incorrect switching decisions in simpler services and goods.