

Ian A Melville and Ian A Gordon



Inspections and Reports on Dwellings Reporting for Sellers



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Reporting for Sellers

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Preface

Three books in this series of four with the overall title *Inspections and Reports on Dwellings* have already been published. *Assessing Age* appeared in September 2004, *Inspecting*, the lynchpin of the series, was published in January 2006 and *Reporting for Buyers* in 2007. This, the concluding book in the series, *Reporting for Sellers* reflects the sea change in the mechanics of buying and selling dwellings brought about by the passing of the Housing Act 2004 for England and Wales and the Housing (Scotland) Act 2006.

The idea of seller's surveys is not new. In the past both selling and buying have been made unnecessarily stressful by the lack of information available early on in the process with the result of delay even when the outcome was finally successful but also failure in over a quarter of all cases in England and Wales when abortive expenses may be incurred, or by all in Scotland other than the successful bidder. The sheer inefficiency of the procedure coupled with the fact that buyers generally relied on minimal information about the condition of the dwelling itself has attracted strong criticism from consumer groups and others for a very long time.

With the knowledge that mandatory seller's surveys work successfully in other countries, the introduction and implementation of the above Acts has meant that for England and Wales since August 2007 a Home Information Pack has had to be assembled and made available to potential buyers before a dwelling is marketed for sale. While an Energy Performance Certificate is a mandatory document for inclusion in the Pack, a Home Condition Report remains initially a matter of voluntary inclusion

though expected to be made mandatory in due time. In Scotland from 1 December 2008 a similar but less comprehensive raft of details has to be made available to potential buyers before bids are invited but with the cardinal difference that while information on the dwelling's physical condition and an Energy Performance Certificate are mandatory by way of the Home Report, a valuation is also required for inclusion.

The book sets out the background and reasons for the changes, describes the legislation and fully covers the regulations which flow therefrom. Although the two types of report covered are by no means identical, both have to be commissioned and paid for by sellers, both are primarily about condition, and both require the attribution of either 'Condition Ratings' or 'Repair Categories' in one of three grades to the main elements of the dwelling. The concerns of sellers commissioning Home Condition and Single Survey Reports together with buyers who will be reading them are discussed since these concerns are common throughout the UK and if they are not met, the changes are unlikely to be considered successful. It is for these reasons that the book is recommended for reading in its entirety. What is said about one type of report can apply equally to the other.

For England and Wales the qualification requirements for the new breed of Licensed Home Inspector are examined with candour and thoroughness as are those of the Certification organisations who will watch over their activities through monitoring, a task which will also be required from the professional body in Scotland whose members

are authorised to prepare Single Survey Reports. Both types of report are analysed in detail together with the requirements of the Energy Report common to both. As three-quarters of buyers in the UK require a loan, a substantial section is devoted to the historical background of lending on dwellings, to valuers, to the current factors which determine a dwelling's value and to the procedures involved in their valuation by the comparative, investment and residual methods.

Those providing the service of inspecting and reporting on dwellings throughout the UK have been given, through legislation, a much wider framework to give advice to both sellers and buyers than hitherto. However, this will only take full effect when the inclusion of a Home Condition Report in the Home Information Pack becomes mandatory in England and Wales in addition to the mandatory requirement to have a Single Survey Report available before a dwelling is marketed for sale in Scotland from 1 December 2008. Perhaps the successful introduction and true general acceptance of the latter through 2009 will prove a spur to completing the process of change throughout the UK. Should this be the case, a fair amount of notice will need to be given for an implementation date as, at the time of writing, only about 1800 have qualified and been awarded the Diploma in Home Inspection.

Whereas before in this series of books the terms 'surveyor,' 'inspector' and 'valuer' have been considered interchangeable, in this concluding volume 'Inspector' is used for those producing the seller's Home Condition Report in England and Wales and 'Surveyor' for those producing the Single Survey Reports in Scotland. 'Valuer' is used with reference to both when acting in that capacity. As before, where a pronoun is unavoidable, the masculine and feminine are to be considered interchangeable.

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 London, May 2008

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Section 1

Background

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Background

As the level of home ownership in Great Britain has grown from 10% at the beginning of the 1914–1918 War to the 80% of today, so have the grumbles about the systems (both north and south of the border between England and Scotland) of buying and selling dwellings. Between the two World Wars from 1919–1939, the growth had come about because of the decline in the building of new dwellings for rent, due mainly to control on the amount that could be charged, together with the availability of new houses for sale in the suburbs along with the mortgages that made their purchase possible. Although there might have been a few complaints about poor construction which resulted in some of the larger builders forming the National House Building Council and offering a guarantee, most were only too delighted with their move and had little to grumble about. After all, repayments were often less than the rents charged for inferior accommodation available nearer the city centres, jobs were available on the new industrial estates and the public transport of the time worked. The idea of having a survey never arose.

Where existing older houses exchanged hands, it was generally among the more wealthy, perhaps necessitating and involving a bank loan because building society mortgages were usually only available on new dwellings, but it was probably not their last penny that was being used for the purpose. A less than satisfactory outcome in regard to repair often did not matter to quite the same extent as it would have done to those of

comparatively limited means. A structural survey might or might not have been carried out, but even if it had and something not too damaging had been missed, in a more tolerant age it might have been passed over as an honest mistake among friends, an attitude that would seem beyond belief to many nowadays.

Following the end of World War II, however, shortages and government policy initially restricted new development until the mid 1950s to local authorities and New Town Corporations, who often employed innovative constructional methods. When older rented houses became empty in the private sector, landlords endeavoured to sell rather than re-let. This proved difficult at first, but it became easier with active government encouragement and the availability of local authority mortgages coupled with statutory and discretionary improvement grants. Eventually building societies found with government help that they too were able to lend on older dwellings and flats, as well as new houses. It was a requirement for building societies to have a formal written valuation before lending money on residential property and most charged the buyer for this but kept the contents of reports to themselves. Applicants increasingly grumbled about not being able to see what they were paying for and following growing discontent and articles in the Press in the 1970s, one society broke rank and started to disclose the report to the applicant, to the consternation of valuers. Other societies rapidly followed suit.

Although the market for structural surveys at that time was growing, the disclosure

of valuation reports certainly put the brake on. Few purchasers could see the sense of paying many times the amount of the valuation fee for their own survey in addition. The view of the vast majority of the public had always been that if a loan was forthcoming there could not be much wrong with the property, little realising that many valuations were based on the briefest of inspections. They held to this view, even more so, on being shown the report.

The Courts, however, following their consistent policy considered that valuers should have known that buyers would rely on disclosed reports and awarded substantial damages against valuers if major faults had been missed, even though the indications, although positive, may have been very slight. These damages seldom placated aggrieved buyers, since they were awarded damages on the long standing basis, as reaffirmed in the case of *Philips v Ward* 1956, of the difference in value between the house as reported on and its value if the defects had been known about at the time of the inspection. This rarely equalled the cost of the necessary repairs and purchasers were left to meet the additional costs themselves, over and above the damages awarded, a crippling amount to many. A wave of such decisions and, of course, many others settled out of Court resulted in a vast increase in professional indemnity insurance premiums and led some building societies to make available to their applicants a choice of mortgage valuation or a more detailed survey and report. The considerable variations in these from one society to another spurred the Royal Institution of Chartered

Surveyors and the Incorporated Society of Valuers and Auctioneers to develop their respective House and separate Flat Buyers Survey and Valuation Report Forms, which were first offered to the public by their members in 1981. When launched they were said to be suitable for use 'when time is short and economy important' and involved 'a less comprehensive inspection'. Agreement was reached that building societies would offer applicants a choice of Mortgage Valuation, Homebuyer Survey and Valuation (as it later became, merging the separate House and Flat Buyer forms) or a full Building Survey (as Structural Surveys came to be titled) with a suggestion that they should have something better than a mortgage valuation. Few purchasers took up the suggestion and at most it was reckoned that only about 20% of all purchasers had anything more than a mortgage valuation. They could still see no reason to pay more while building societies continued to send copies of mortgage valuation reports to applicants who still had redress, through the Courts if the valuer had missed signs, however small, of major defects.

The grumbles about the quality of surveys on dwellings other than those which were new, their cost and the inadequacy of compensation for aggrieved purchasers, were additional to all the other perceived difficulties arising particularly at times when property prices were increasing and there was a scramble for accommodation. Unlike in other parts of the world and, for that matter, even here for the sale of goods in the course of business, motor cars for example, there was no duty on the seller of residential property to disclose anything

about the condition of the property in either England, Scotland or Wales. If the seller knew about subsidence and chose to paper over the filled in cracks and render over the affected parts outside, he needed to say nothing about it either to his agent or a purchaser and the latter would have no redress whatever against the seller if the subsidence continued. Indeed the practice of 'doing a property up for sale' is long established, a phrase which can involve far more than the mere cosmetic.

The principle of *caveat emptor*, let the buyer beware, has never been ameliorated or relaxed for the purchase of property as it has been for the purchase of many goods and even as it was in Roman times. The seller who papered over the cracks was described by Cicero in 44BC as 'shifty, deep, artful, treacherous, malevolent, underhand and sly'. It is still the law, even though the seller may be required to provide a Home Condition or Single Survey Report which, in effect, means disclosure of visible defects. The seller, however, can still keep quiet about the covered over defects which he knows about. As long as the report is produced at the time of marketing the property, the seller has complied with the law. Hopefully both Inspector, or Surveyor and/or purchaser will be smart enough to see through such a seller's tactics.

Another factor contrasting the purchase of property as against goods, is that all contracts for the sale of the former have to be in writing. In practical terms this means that, perhaps, after months of searching, the property is viewed and, aware of the asking price, in England and Wales, an offer is made which the seller

says is acceptable. Unfortunately this means nothing in legal terms and after the further expense of having a survey and engaging a solicitor for searches some weeks have passed and it may be found that the seller has been dazzled by an offer of a higher price and, not being a man of his word, has accepted it. As a result the first buyer is heavily out of pocket, much delayed and very disillusioned. Gazumping was very much a word of the last half of the 1900s and early 2000s. Out of spite, the prospective purchaser could hope that his successor would back out at the last minute, having found something better and leaving the seller with a bill for legal fees, gazundered in other words. However, the seller would be in no way as badly off as the disillusioned purchaser who is completely frustrated. He at least has a contract already prepared for the next purchaser who comes along, the one gazumped having to start all over again. Since market growth has outpaced periodic slumps, the seller has generally proved to be the winner on such occasions. In Scotland problems of gazumping or gazundering did not arise and still do not. However, because of the system whereby the seller invites bids over a certain figure and when a bid is accepted a contract is formed, a number of prospective purchasers may well go to the expense of hiring legal advisers and commissioning inspections and reports upon condition. All except those incurred by the successful bidder are wasted, however.

Possible solutions to the problems bringing about all the stressful conditions for buying and selling homes were considered quite often during the last 25 years of the 1900s. While the Law

Commission considered that a general duty of disclosure would not necessarily compel sellers to commission surveys and reports, it thought that they would be well advised to do so. This would be so that they could fulfil the 'should reasonably have known about' aspect of disclosure. Yet the idea of sellers surveys was considered and rejected by the Law Commission for England and Wales in both 1975 and again in 1985. The year before in Scotland a committee of experts set up by the Secretary of State to consider the problem of multiple surveys by prospective bidders had also rejected the idea. The Law Commission Conveyancing Standing committee for England and Wales issued a further Consultation Paper in 1989 but, despite identifying 10 excepting cases in Great Britain where *caveat emptor* did not apply, considering the law in Australia, California and Denmark and enlisting the support of a major building society, the commission bowed to the responses. These, including those from the National Consumer Council and the Royal Institution of Chartered Surveyors, overwhelmingly rejected the idea of abolishing *caveat emptor* and rejected the idea of compulsory sellers' packs. In its recommendations following responses to the consultation paper, entitled 'Let the Buyer be Well Informed', the Commission backed off and tamely suggested that perhaps sellers would voluntarily supply more information about their property. A pious hope indeed since there has never been anything to stop them from doing so but, in the main, they have generally chosen not to, unless they had urgent reasons for a quick sale.

What was strange about the last Law Commission consultation exercise was that the Consumers' Association missed the boat and failed to respond even though in 1983 it had announced that 79% of a sample of 3,500 of its members favoured sellers' packs. This failure to respond was surprising since as home ownership has grown so has the consumer lobby, providing evidence that, with a general rise in the standard of living, the average person is now much more wary about accepting sub-standard goods and inferior services. Over the last 30 years, the Association has looked at the problems of home buying and the services provided by surveyors on a number of occasions. In 1970 it found that one out of five, in a sample of 1,750 members, were not pleased with the service their surveyor provided. In 1983, of those who had had a survey, 20% found further faults and again in 1987 about 25% were dissatisfied. Not much difference therefore in satisfaction levels over the years and by no means a good bill of health for surveyors.

Not too dissimilar levels of dissatisfaction had been found by other research sponsored by Nationwide Building Society. This found, in 1988, that 16% of purchasers who had commissioned a survey were unhappy with the result and, in 1990, some 11% had considered making a claim. This research also found that 4% of all surveys failed to identify defects which would cost £2,500 to put right and that such defects were to be found in at least 5% of all properties.

In the 1990s and in an effort to speed up the house selling process, thereby reducing the risk of gazumping, a

number of estate agents, surveyors, solicitors and at least one insurance company, took heed of the Law Commission Conveyancing Standing Committee's advice about letting the buyer be better informed. Some of these initiatives which operated in East Anglia, Somerset and the London area amounted in effect to the preparation of a full seller's pack including the legal aspects, consents, warranties and guarantees as well as the seller's survey, while others were restricted to either the legal aspects or the survey. One firm offered an insurance backed scheme for surveys, another free title insurance, while a firm operating both north and south of the border provided the former for both buyer and seller in England as required, but also on line for the seller in Scotland which could be bought by the purchaser in whole or in part thus offsetting the cost to the seller. The Government monitored both the schemes and the results following its election in 1997. Its consultants thought that, because of their small number and that take up had been small, because of being entirely voluntary, a too positive conclusion could not be drawn. Nevertheless the consultants considered that a scheme for sellers' packs could operate successfully, but would likely have to be compulsory, and that charges would need to be recovered at the point of sale rather than in advance.

Commitments had been made by the political parties 'to do something' about the traumas of buying and selling dwellings and to an extent the legislation of the Housing Act 2004 for England and Wales and the Housing (Scotland) Act 2006 follow the recommendations of the Law Commission Conveyancing Standing

Committee and the Consumers' Association, without altering the basic principles of the law. *Caveat emptor* remains the law in both countries, gazumping is still possible in England and Wales but, the opportunity reduced if transaction time is reduced and it is left to the Courts to decide the level of damages for breach of contract or negligence in the case of defective surveys.

What has been extraordinary since the Government's election in 1997 is the shilly-shallying about the introduction of changes in England and Wales which formed part of its manifesto. The lack of progress on implementing the manifesto was explained away by ministers as being due to other priorities in the legislative programme but some thought more likely to be due to cold feet by the advocates of change. Whatever the reason this has resulted in 10 years elapsing before change is implemented and even then in a watered down version. The delay gave encouragement to the opponents of change, who were by no means lightweight and the impression that the Government was lukewarm about the proposals in the first place. Even the legislation was slow in arriving. A Homes Bill was presented to Parliament in 2000 to enact legislation to introduce compulsory seller's packs including a seller's survey but this was lost in the run up to the general election the following year and amazingly not brought forward again when the Government was re-elected. Understandably many of those who would have been affected by the changes thought their opposition had succeeded and that the idea would go away and not reappear. Any ideas estate agents or the surveying profession might

have had about how the proposals were to be implemented were put away.

However, to a mixed response varying from surprise to consternation, the proposals did reappear in a slightly different form and eventually became incorporated as Part 5 of the Housing Act 2004 to form the primary legislation outlining a requirement for a Home Information Pack (HIP) to include a Home Condition Report (HCR) which would incorporate an Energy Performance Certificate (EPC) to be prepared before a dwelling was marketed for sale and be made available to prospective buyers. In the way of much legislation the detail was to be filled in by regulations which would follow. A further two years went by before the Home Information Pack Regulations 2006 appeared comprising 56 close typed A4 pages accompanied by procedural guidance of a further 87 pages. Implementation was put down for June 2007, under a year away.

To be included in the pack were:

- terms of sale
- evidence of title
- replies to standard preliminary enquiries made on behalf of buyers
- copies of any planning, listed building and building regulation, consents and approvals
- for new properties, copies of warranties and guarantees
- any guarantees for work carried out on the property
- replies to local searches
- a Home Condition Report based on a professional survey of the property, including an energy efficiency assessment

and for leasehold property:

- a copy of the lease
- most recent service charge accounts and receipts
- building insurance policy details and payment receipts
- regulations made by the landlord or management company
- memorandum and articles of the landlord or management company.

The short period before implementation was perceived as a possible problem but the fact that the information not normally available until after the buyers offer had been accepted by the seller was now to be provided upfront was thought likely to greatly assist the speed of transactions and reduce the relatively high level of failure, put by Government research at approximately 27%. The regulations were welcomed generally but particularly by lenders who thought the only novel feature, the Home Condition Report, for the carrying out of which the Government had devised a new profession, that of Home Inspector, suitably qualified, certified, insured and licensed, would eventually enable them to offer mortgages far more quickly for the 75% of buyers requiring a loan.

Astoundingly, a mere month after the regulations were published, the Government back tracked on that only novel feature, the mandatory Home Condition Report, leaving it to be included only on a voluntary basis. The announcement was bodged so that those training for the new profession of Home Inspector felt that the rug had been pulled from under their feet and were hugely aggrieved. The only item left from

the Home Condition Report which had to be included in the Home Information Pack was the Energy Performance Certificate for which it was thought unlikely that there would be enough assessors trained to produce it to satisfy the demand. Without the mandatory Home Condition Report lenders thought that the changes would make no difference in the way they operated.

The Government later confirmed its intention to require mandatory Home Condition Reports at some date in the future but by then the damage had been done. The problem was that the Energy Performance Certificate was left high and dry in the market place; a costly item on its own divorced from the Home Condition Report, delivering information of some, but marginal, value to the home owner and buyer. Grasping on the subject of climate change, the Government switched the emphasis from helping buyers and sellers to helping the planet, a manoeuvre which left it with no option but to produce feeble advertisements and pamphlets for the introduction of Home Information Packs extolling the virtues of Energy Performance Assessments which misleadingly concentrate on savings with little mention of costs, often state the obvious and usually require professional interpretation if they are not to confuse the buyer totally. Whether buyers need or even want the information has never been demonstrated.

Of course, the July 2006 *volte face* by the Government over Home Condition Reports necessitated the revocation of the Regulations produced a month before, possibly a level of incompetence not previously achieved by any Government in

housing matters. They reappeared as the Home Information Pack Regulations 2007 of 58 pages just over two months before implementation with the procedural guide of 96 pages just over a month before. That there was a degree of confusion in the housing market in mid 2007 is not surprising and this has taken some months to settle down but with no indication because of the absence of a Home Condition Report, of any real improvement in speed or a reduction in the failure rate.

The delays in the implementation of changes to the process of buying and selling dwellings in Scotland following the election of the Government in 1997 were due to different causes. The Scottish Executive set up a Housing Improvement Task Force in 2001 to examine the condition of the private sector housing stock and the mechanism of buying and selling dwellings. Its report of March 2003 recommended the monitoring of a pilot scheme for a Single Survey paid for on a voluntary basis by the seller in four areas of Glasgow, Edinburgh, Dundee and Inverness to be organised by the RICS and based on a type of survey report developed by a private firm of surveyors. The hoped for response from about 1,200 surveys over a period of about a year was not achievable by a very wide margin and it was concluded that only a compulsory scheme would achieve the level playing field considered desirable and provide buyers with the information they needed on condition with the valuation providing sellers with a realistic figure likely to be achieved and obviate the setting of unreasonably low 'offers in excess of ...' asking prices which were causing problems when demand was high.

The advice of the task force was followed and the Housing (Scotland) Act 2006 legislated for a mandatory Single Survey with Energy Performance Assessment and a valuation to be made available to prospective buyers along with a Property Questionnaire completed

by the seller. Consultation with interested parties took place in Spring 2007 and the Housing (Scotland) Act 2006 (Prescribed Documents) Regulations 2008 became law and come into force on 1 December 2008.

Section 2

Legislation

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Scotland

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England and Wales

Housing Act 2004

The Housing Act 2004 is a substantial piece of legislation of seven Parts in 270 sections and 10 Schedules covering housing standards, emergency measures, slum clearance, licensing of houses in multiple occupation, empty dwellings, overcrowding, secure tenancies, mobile homes and other related matters. A comparatively small element, Part 5 of 31 sections from 148 to 178 covers Home Information Packs, which from their introduction on 1 August 2007, have had to be provided for every dwelling put on the market for sale in England and Wales to include an Energy Performance Certificate produced either by a qualified Domestic Energy Assessor or by a Home Inspector, both of whom are required to be members of a recognised Certification Scheme. Initially a Home Condition Report on the dwelling can be included in the Home Information Pack but on a voluntary basis only. This will be the case until such time as the Government decides that it should become a mandatory element. The Housing Act 2004 thus forms the primary legislation. The precise details of, for example, what has to be included in Home Information Packs and matters relating to Home Inspectors, Certification Schemes and Energy Performance Certificates are covered by secondary legislation in the form of Regulations promulgated by the Secretary of State under Sections 163 and 164 of the Act. The Home Information Pack Regulations 2007 were published in March 2007 and are accompanied by a procedural guide.

Since the Housing Act 2004 as with all Acts of Parliament is couched in the incontrovertible terminology of the Parliamentary draftsman, the language over which lawyers will happily pick their way to find a meaning satisfactory to the Courts, it is considered that a run-down of the relevant sections in as close to everyday language as possible would be helpful. This run-down is extended to all those sections dealing with Home Information Packs so that it can be seen how the Home Condition Report and Home Inspectors are intended to fit into the general scheme. Because of the absence of a Home Condition Report as a compulsory element of the Home Information Pack, much of the information included in regard to searches, environmental factors, guarantees and the like will be meaningless to buyers and lenders without some comment from a surveyor or Home Inspector to explain the implications.

The part of the Act dealing with Home Information Packs sets out the parameters and kicks off with three sections of definitions. 'Residential Property' means premises in England and Wales consisting of a 'single dwelling house' which can include a separate part of a building either as existing or in construction or to be constructed. Any ancillary land is also to be included. A 'Home Information Pack' is described as a collection of documents in hard copy or electronic form relating to a residential property and the terms on which it is, or may become, available for sale (section 148).

'On the market' is when information is intentionally first 'made public' by or on behalf of the seller that a residential

property is or may become available for sale and the property remains on the market until taken off or sold (section 149).

‘Marketing instructions’ from a seller are defined as acting as an ‘estate agent’ by way of a business in England and Wales carrying out activities to effect the introduction of a person wishing to buy the property or selling the property by auction or tender (section 150).

Under the Act only the seller or sellers including, for example, a person or persons acting for a deceased person’s estate or an estate agent acting for the seller may be ‘the responsible person’ for marketing the property (section 151).

When the above responsibility arises is identified in the Act, in the case of an estate agent, when he puts the property on the market or makes public the fact that it is on the market and that responsibility ceases when his contract with the seller is terminated or when anyone acting on his behalf has ceased to take any action which makes public the fact that the property is on the market. It also ceases when the property is taken off the market or sold (section 152).

In a similar manner the seller becomes ‘responsible for marketing the property’ when action by him or on his behalf puts the property on the market or makes public the fact that it is on the market. That ‘responsibility’ ceases when there is at least one person acting as his estate agent who is responsible for marketing the property or that he or anyone acting on his behalf has ceased to take any action which makes public the fact that

the property is on the market. An important sub-section makes it clear that references to any action taken on behalf of the seller exclude those taken by a person acting as his estate agent. As with the estate agent any responsibility ceases when the property is taken off the market or sold. It will be seen therefore that should the seller endeavour to sell the property himself he will be the person responsible for marketing the property. If he is unsuccessful and decides to appoint an agent or agents then the responsibility for marketing the property passes to the agent or agents provided they practise in England and Wales and if not, the responsibility remains with the seller. The Act then proceeds to impose duties on those responsible for marketing the property (section 153).

Where a residential property is on the market a person or persons responsible for marketing must fulfil the various duties relating to Home Information Packs set out in Sections 155 to 158 inclusive subject to any exceptions set out until such time as the responsibility ceases (section 154).

The primary duty is to be in possession of a Home Information Pack, or to be in control of its whereabouts, complying with all the requirements of any regulations made by the Secretary of State under Section 163. The duty does not apply to sellers where an estate agent is the responsible person for marketing the property and the seller believes on reasonable grounds that other persons are in possession or have under their control a Home Information Pack complying with the regulations (section 155).

There is a duty placed on the responsible person holding the Home Information Pack to produce a copy or a copy of any document or part of a document which is or ought to be included in the pack when requested to do so. This should be done within the normal permitted period of 14 days beginning with the day the request is made unless the property has already been sold or withdrawn from the market in the meantime. Such copy must comply with the regulations made under section 163. The responsible person has the discretion within the permitted period to refuse to supply the copy on reasonable grounds if he considers the request is from a person unlikely to have sufficient means to buy the property or is not genuinely interested in properties of that type or furthermore that the seller is unlikely to be prepared to sell for no particular reason to that person although, of course, there must be no hint of unlawful discrimination in the adoption of this viewpoint. Common sense suggests that 'responsible persons' need to be very careful about exercising such discretion should a request be received from a potential buyer agreeable to paying the cost, having seen the usual particulars supplied and having viewed the property. If the responsible person knows or suspects that the person making the request is an enforcement officer from the local Weights and Measures office the copy will need to be produced within a period of seven days unless there is a reasonable excuse for not doing so. Should the seller receive the request directly, the duty does not arise if he has an estate agent holding the Home Information Pack, although in these circumstances he must take reasonable steps to inform the potential buyer to direct his request to the agent. The

responsible person can charge the reasonable cost of making and sending a paper copy or a copy in electronic form if the person making the request consents (section 156).

It is possible to impose two types of condition before a copy of the Home Information Pack is supplied, provided they are made within the permitted period of 14 days. The first of these is a requirement to pay the reasonable charge mentioned in the previous section if required. The second is to accept any terms specified in writing by the seller, always provided they are lawful, which relate to the use or disclosure of the copy or any information in it. In the case of only the one condition on payment, the period permitted for supplying the copy is extended to 14 days beginning with the day on which the payment is made. In the case of the other it is 14 days from the day of acceptance of the conditions put forward or alternatively such as may be agreed between the seller and potential buyer (section 157).

Where a responsible person provides a potential buyer with what is purported to be a Home Information Pack or any part of it or allows it to be inspected, he has a duty to ensure that the document is 'authentic' ie it is for the actual property concerned and that it complies with the regulations made by the Secretary of State under section 163 of the Act (section 158).

The Act recognises that information regarding a dwelling may become available from an estate agent before it is actually on the market and available. However, it ensures that any document which purports to be a copy of part of the

contents of a Home Information, or the whole pack for that matter, is authentic by making it a duty to ensure that such document complies with the regulations made under section 163. Nevertheless, the full Home Information Pack duties are only triggered where any communications are part of a direct and intentional attempt to market the dwelling by a responsible person (section 159).

There are exceptions from the duties imposed by the Act set out in the three sections from 160 to 162 inclusive. These relate in the first instance to dwellings not available with vacant possession when none of the duties set out in sections 155 to 159 apply (section 160). Subsection 2 of that section does state, however, that a residential property shall be presumed to be available with vacant possession so that the duties under sections 155 to 159 will apply unless from the way the dwelling is being marketed vacant possession cannot be presumed or the marketing makes it clear (section 160(2)). Section 161 gives the Secretary of State power to provide for further exceptions and section 162 for suspending and later reviving or temporarily suspending for a fixed period and repeating the process, all by way of regulation.

Section 163 with its 10 subsections previously referred to sets out the type of documents and relevant information about 'any matter connected with the property' or its sale which the Secretary of State considers 'would be of interest to potential buyers' and which the Secretary of State may by regulation prescribe for inclusion, or even exclusion, in or from a Home Information Pack. Subsection 5 provides what might be

considered early warning of what the Secretary of State 'may consider' to be relevant information for inclusion in a Home Information Pack without restricting his scope for eventually including either more or less. Among the items mentioned are:

- (a) the interest for sale
- (b) the title
- (c) anything contained in a register required to be kept by law and in any records kept by a person who can reasonably be expected to give the information to the seller (on payment if required)
- (d) the physical condition including any particular characteristics or features
- (e) the energy efficiency
- (f) any warranties or guarantees
- (g) any taxes, service or other charges
- (h) replies to standard preliminary enquiries.

The section also states that the regulations may require the inclusion of replies the seller proposes to give to prescribed pre-contract enquiries and documents in the nature of an index and an explanation of the contents of the pack. Regulations may also be made to require the documents to be in prescribed form and be prepared by persons of a certain description and on prescribed contract terms which might also include those which would render it enforceable by a potential or actual buyer, a mortgage lender or any other person involved in the sale who is not a party to the contract. The timing for the inclusion or, for that matter, the removal of any document from the Home Information Pack along with the facility for making distinctive provisions for separate areas,

types of property, circumstances and marketing of property by regulations is also retained by the Secretary of State. Such regulations are, of course, merely laid before Parliament and do not need its approval. The Home Information Pack Regulations 2007 were laid before Parliament in March 2007 setting out the requirements in greater detail.

Section 163(5) outlined above may provide for the Secretary of State to include information in a Home Information Pack on (d) the physical condition and (e) the energy efficiency of the dwelling. A document covering these aspects is defined as a Home Condition Report in section 164 which goes on to indicate that the Secretary of State may make regulations requiring such reports to be made by an individual known as a Home Inspector who is a member of an approved Certification Scheme following an inspection carried out by him in accordance with the provisions of the scheme.

The regulations may make provision for the Secretary of State to approve and, if necessary, withdraw his approval to a Certification Scheme and requires him to be satisfied before approving a scheme that it contains 'appropriate' provision for:

- (a) ensuring that members are fit and proper persons who are 'qualified (by their education training and experience)' to produce reports
- (b) ensuring that members have in force suitable indemnity insurance
- (c) facilitating the resolution of complaints
- (d) requiring Home Condition Reports made by members to be entered on

the register mentioned in the next section

- (e) keeping a public register of members and
- (f) such other purposes as may be specified in the regulations.

The regulations may require or authorise a scheme to contain provision about any matter relating to the Home Condition Reports with which it is concerned, including the terms on which members may undertake to produce Home Condition Reports although the Secretary of State retains the power under Section 163 to make provisions through regulations about Home Condition Reports, (Section 164).

The register for Home Condition Reports under the regulations mentioned above may be kept by or on behalf of, the Secretary of State or by such other persons as the regulations may specify and it may be that a person wishing to enter a Home Condition Report on the register may have to pay a fee. Once a Home Condition Report is registered no person may disclose the register or any document or part of a document contained in it, or any information contained in or derived from the register except in accordance with the regulations which authorises or requires such a disclosure to be made. Home Inspectors will therefore need to be wary about disclosing information contained in the reports they have prepared and registered since contravening the regulations in this respect is an offence and the Home Inspector could be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Circumstances will be prescribed in the provision of the regulations in which a person or a person of prescribed description may on payment of a fee, if any:

- (a) (i) inspect the register or any document or part of a document contained in it
- (ii) take or be given copies of the register or any document contained in it
- (iii) be given information contained in or derived from the register or
- (b) may disclose anything obtained by virtue of the above provisions.

The purposes which may be so prescribed may be public purposes or purposes of private undertakings or other persons (section 165).

The requirements of Part 5 of the 2004 Act dealing with Home Information Packs are enforced by the local weights and measures authority (section 166). These are required to see that in their area the duty to provide a Home Information Pack for every dwelling put on the market for sale is fulfilled, that it is made available to potential buyers on payment of a reasonable charge, that the contents are authentic, that it can be produced within seven days for inspection by an officer of the enforcement authority should it be required and that if the Secretary of State so decides, every estate agent is a member of an approved redress scheme.

The power of an authorised officer of an enforcement authority to require a Home Information Pack or any document included therein to be produced for inspection is enlarged upon in section

167. Any document in electronic form can be required to be produced in a 'visible and legible document' and there is power to take copies. There is a limit of six months in which the power can be exercised from the last day on which the person concerned was subject to the duty although he can avoid complying if he has reasonable excuse.

If the authorised officer of an enforcement authority believes that a person has committed a breach of any of the duties referred to in the previous section above, he may give that person a 'penalty charge notice' provided that it is given within a period of six months from the day the breach was committed (section 168).

It is an offence to obstruct an officer of an enforcement authority seeking to obtain a Home Information Pack or document contained therein as it is for anyone purporting to act as one. A person found guilty of an offence under this Section is liable to a fine not exceeding level 5 on the standard scale (section 169).

A potential buyer is empowered to obtain for himself any document and recover the cost of doing so from the 'responsible person' provided the dwelling concerned is on the market or he is attempting to reach agreement with the seller for the sale of the dwelling and he has not been provided with the document which ought to have been included in part of, or in the whole of the Home Information Pack (section 170).

A series of supplementary provisions conclude the Part of the 2004 Act

concerning Home Information Packs. These are sections 171 to 178 ranging from the application of the Part to subdivided dwellings, the power to require estate agents to belong to a redress scheme, approval and withdrawal of approval to such schemes, references to the Office of Fair Trading should there be a breach by an estate agent, the power of the Secretary of State to make grants for the development of the schemes involved, the interpretation of Part 5 and an index of defined expressions.

Section 171 envisages a case where an originally constructed single dwelling house has been divided into flats and where the whole building is for sale including one or more flats with vacant possession. In such a case the whole building is treated as a residential building as if Section 160 of the Act, which says that the 'duties' do not apply where residential property without vacant possession is marketed. In other words, the duties do apply in respect of the whole building as well as the part or parts with vacant possession. The most typical occurrence where this situation arises is where a single long leasehold flat is sold in a block along with the freehold or long leasehold interest in the whole block. It can also arise where a block, either freehold or long leasehold containing some vacant and some occupied flats is sold as an investment to a buyer who wishes to occupy one of the vacant flats.

The following three sections 172 to 174, dealing with the subject of redress schemes for estate agents, are of minimal reference to the subject matter of this book although for completeness, a brief summary is included.

The primary legislation sets out the possibilities rather than firm intentions leaving it to secondary legislation to set out the requirements in detail if and when it is intended to proceed. Once again, as with the Certification schemes for Home Inspectors carrying out Home Condition Reports, the intention is that much of the operation of any schemes should be paid for by the estate agents affected. Following this principle, while the Secretary of State may, by order, require every estate agent to be a member of a scheme, he has to be satisfied that he has approved one or more such schemes so that every estate agent subject to the duty imposed by the order, is eligible to join a scheme. For this purpose a redress scheme is defined as one approved by the Secretary of State under which 'certain relevant complaints made by the seller or potential buyer may be investigated and determined by an independent person' referred to as 'the ombudsman' but only in cases where a Home Information Pack is required (section 172).

In determining whether a redress scheme is satisfactory for approval, the Secretary of State has to have regard to its provisions, its manner of operation and the interests of its members as well as those of sellers and potential buyers. Satisfactory provision has to be made about the matters on which complaints may be made (which may include non-compliance with a code of practice), the ombudsman's duties and powers and the provision of information by the ombudsman to operators dealing with other redress schemes for consumers and the Secretary of State exercising regulatory functions in relation to estate agents (section 173).

The Secretary of State can withdraw his approval of a redress scheme but has to give notice to the person administering the scheme giving his grounds and inviting representations about the proposal to withdraw approval (section 174).

Notification to the Office of Fair trading shall be given by the local weights and measures authority when a penalty charge notice under section 168 has been given to an estate agent together with the details of any notice confirming or withdrawing it along with the results of any appeal from the confirmation of the notice so that the terms of the Estate Agents Act 1979 can be applied should a breach of duty under this Part of the Housing Act 2004 be confirmed (section 175).

The Secretary of State is empowered to make grants for the development of proposals in relation to the contents of Home Information Packs, Certification Schemes for Home Inspectors and a register of Home Condition Reports (section 176).

The penultimate section of Part 5 of the Act provides an interpretation of a number of the phrases used while the concluding section provides an index of where definitions may be found of various expressions used in this part of the Act. Where these expressions have been used in the foregoing section by section commentary the expressions and the definitions are enclosed by quotation marks.

The Home Information Pack Regulations 2007

The Home Information Pack Regulations 2007 for England and Wales were laid before Parliament on 29 March 2007 having been published a week before on 23 March. They came into force by stages from 1 August 2007 and are divided into nine parts comprising 62 regulations with 11 schedules running to 58 pages of fairly close typed text on A4 sheets. The bulk of the regulations concern the content of the Home Information Pack with the Home Condition Report, as an authorised document, covered in schedule 10 and referred to elsewhere, while Approved Certification Schemes are dealt with in Part 8 and the Register for Home Condition Reports in Part 9.

This subsection of the book, however, is limited to a consideration of references to the Home Condition Report in general terms throughout the Regulations but, more particularly, to Schedule 10 which deals over three pages with the terms of engagement for the production of a report and its content.

The Regulations are accompanied by another document which runs to a further 96 pages entitled 'The House Information Pack Regulations 2007: Procedural Guidance' which is intended to provide a commentary on the regulations and assist those compiling Home Information Packs, those under a duty to be in possession of a pack and those under a duty to provide a copy to a potential buyer on request. While the guidance has no statutory force, it serves as an explanation where such is considered necessary and regulations and

guidance can usefully be considered together.

Regulation 9 in Part 3 of the regulations gives a list of 'required pack documents' which have to be included in a Home Information Pack. Three of those listed are of particular concern to the Home Inspector while others may be, depending on circumstances arising out of local authority and environmental searches. The three of particular concern are:

- (b) an energy performance certificate accompanied by the recommendation report for a property
 - (i) which is physically complete before or at the first point of marketing
 - (ii) to which paragraph (c) does not apply

The exceptions referred to in paragraph (c) covered circumstances where an 'interim energy assessment' had to be provided for a dwelling put up for sale during a transitional period and which obviously are now no longer of concern.

Paragraph (d) however, is of concern since it covers a property not physically complete before or at the first point of marketing and which requires a 'predicted energy assessment' complying with the following as set out in Schedule 3 and which must:

- (a) display prominently the title 'Predicted Energy Assessment'
- (b) contain the following statement: 'This document is a Predicted Energy Assessment required to be included in a Home Information Pack for properties marketed when they are

incomplete. It includes a predicted energy rating which might not represent the final energy rating of the property on completion. Once the property is completed the Pack should be updated to include information about the energy performance of the completed property'

- (c) contain the address or proposed address (which may include a plot number) of the property
- (d) be complied otherwise than by a visual inspection of the property
- (e) contain the predicted asset rating of the building:
 - (i) based on its plans and specifications and
 - (ii) expressed in a way approved by the Secretary of State under regulation 17A of the Building Regulations 2000 and
- (f) contain an explanation of that predicted asset rating.

In (d) above 'complied' is presumably a misprint in the regulations for 'compiled.'

As to whether a property is physically complete or not, the regulations provide that it is if it:

- (i) is wind and weatherproof
- (ii) is safe and sanitary in relation to its occupants and visitors
- (iii) has facilities for the supply of space heating, hot and cold water and electricity, and
- (iv) washing and drainage facilities.

Energy Performance Certificates are produced by qualified Home Inspectors and qualified Domestic Energy Assessors who are members of a recognised Certification Scheme approved by the

Secretary of State. The former will have obtained the Level 4 Diploma in Home Inspection and the latter the Level 3 Diploma in Domestic Energy Assessment both from the Awarding Body for the Built Environment. It is said that all those who have become qualified to do the work will have demonstrated an in-depth knowledge of building construction and energy matters since they will need to be able to recognise the materials used in the construction of a dwelling's enclosing walls, the roofs both pitched and flat, the floors both solid and hollow, the windows with their types of glazing and identify the means for space heating and the provision of hot water along with the types of controls involved. The data collected on site is passed to a Government approved organisation for processing to produce an Energy Performance Certificate. Automatically created by the software in the processing is a suggested list of improvements on which comment is required according to their appropriateness to the dwelling concerned. Aspects of the required data to be collected and the implications of Energy Performance reports and their recommendations were, of course, considered in the second book of the series, 'Inspecting,' between pp 381 and 384 and again in sections 4 and 5 of this book.

As part of the procedure to produce a Home Condition Report, the addition of the work required to produce an Energy Performance Certificate can be considered cost effective since the collection of the extra data involved adds very little to what is required already to produce the Home Condition Report. Detached, an Energy Performance Certificate produced entirely

on a separate free standing basis cannot be considered to be so having regard to the time involved in travelling and inspecting in relation to the benefit likely to be derived.

Why the Government in England and Wales went up the path of requiring the compulsory provision of Energy Performance Certificates for certain dwellings marketed from 1 August 2007, is hard to discern. This is particularly so when in Scotland, ministers find it acceptable to introduce the requirement for an Energy Performance Certificate to be coincidental and part of the legislation to produce a Single Survey with valuation later in 2008 for every dwelling marketed for sale.

A further range of documents is described in regulation 10 as 'authorised pack documents'. These can be included in a Home Information Pack on a 'voluntary' basis as distinct from those which are 'required' to be included. Among those listed is:

- (a) a home condition report which complies with Schedule 10.

Others of possible interest to Home Inspectors, of which there are quite a few, will be discussed later.

Schedule 10 to the regulations provides some information in general terms about the content of the Home Condition Report and on the terms by which it is prepared. However, it is indicated in the guidance that the detailed form and content is not prescribed in the regulations because it is envisaged, over time, that it will be necessary to make

amendments to reflect changes in building construction and the experience of Home Inspectors, sellers, buyers and lenders in using the report. Nevertheless, to begin with, all Certification Schemes are required to ensure that their members use the standard format including certain prescribed terms developed by the Government and issued in June 2006 so that all those involved can readily use the reports and potential buyers can compare those on different dwellings. The format of the report adapts electronically to cater for the specific reporting needs of different types of property such as houses, flats and maisonettes.

For the purpose of the regulations paragraph 1 of Schedule 10 states that a Home Condition Report must be prepared by a Home Inspector following an inspection carried out by him in accordance with the provisions of the approved Certification Scheme of which he is a member and in which capacity the report is made. Such schemes are approved by the Secretary of State only if they contain safeguards for the public and ensure that a Home Inspector is a competent, insured, fit and proper person to carry out the inspection.

Furthermore, the Home Condition Report on a dwelling is only valid if it is entered on a central register subject to separate regulations specifying who keeps it and who has access to the reports stored therein and on what terms. Registration enables buyers to check the authenticity of reports and enables any other reports prepared in the previous 12 months for the same property by the current seller to be identified. These should, of course, have been included in the Home

Information Pack. It is also stated that registration will enable Certification Schemes to monitor the performance and conduct of their members.

Minimum core terms are prescribed in paragraph 2 of Schedule 10 for the preparation of Home Condition Reports to ensure consistency. These must all be expressly included without exclusion or limitation to ensure that the same fundamental terms underpin all reports prepared and enable comparisons to be made. These are set out below:

The Home Inspector will:

- use reasonable skill and care in the preparation of the report
- provide in the report an objective opinion about the condition of the property based on his inspection. The guidance indicates that objectivity will be ensured by Certification Schemes requiring their members to work to inspection and reporting standards and use preferred text as published by the Government as an aid to consistency and for the comparison of reports
- identify in the report such conditions within the dwelling as appear to:
 - (i) be defects that are serious or require urgent attention or both
 - (ii) give rise to repair or replacement or
 - (iii) give rise to further investigation.

The guidance states that the inspection and reporting standards laid down require the Home Inspector

to allocate numerical ratings to prescribed parts of the dwelling to indicate their condition and provide a commentary explaining why the rating is given. However, where the condition cannot be properly assessed, the Home Inspector may recommend further investigation

- allow responsible persons to copy or issue a copy of the report for the various purposes required by the regulations or the Housing Act 2004 and allow any other person for the purpose of disclosure to rent or lend, communicate or make an adaptation of a report. The guidance points out that while copyright in the report remains with the author the whole purpose is to dispense information about the dwelling to potential buyers and lenders through the Home Information Pack although those using the data will be required to abide by specified rules on disclosure. The guidance also points out that the amount of time of payment of the Home Inspector's fee is not covered by the regulations and is entirely a matter of the contract under which the report is prepared.

Paragraph 3 of the schedule requires the Home Inspector to prepare a Home Condition Report on terms enabling the provisions of the contract to be enforced by the seller and, as now, enabled under the Contracts (Rights of Third Parties) Act 1999 by a potential or actual buyer or a mortgage lender in their own right, irrespective of whether they are a party to the contract or not. The guidance indicates that this provision is made to ensure that the report can be relied upon

and does not depend on aspects of the law of negligence being perhaps applicable only in individual circumstances. The intention, it is said, is to minimise the need for buyers or lenders to seek their own survey reports although of course lenders, for example, will not necessarily find a Home Condition Report to contain all the information required for a valuation regarding location and resale possibilities. Likewise, buyers may have their own ideas of what they wish to do with a dwelling and whether these are possible or not are unlikely to be answered in a Home Condition Report.

Paragraphs 4 and 5 deal with aspects of the terms for the preparation of a Home Condition Report which might be more or less favourable to the seller, buyer or mortgage lender. While the inclusion of less favourable terms is absolutely excluded since the resultant report would not comply with the requirements of the schedule, there is the possibility of terms more favourable to either of the parties being included in the contract. Unfortunately, no examples are given in the guidance apart from the rather silly one of the Home Inspector's fee and time of payment which can hardly be considered as more or less favourable to anyone other than the Home Inspector himself. However, it could well be that the seller in the interests of providing more information decides to include for the Home Inspector to carry out a test for the water tightness of the drainage system, arrange for tests on other service installations or to provide for the inspection of a flat or pitched roof covering normally inaccessible without the use of a long ladder. The provision of

more information on the dwelling such as this than the core terms require, could be considered more favourable to all the parties concerned, for the seller by speeding up the sale, for the buyer and lender by removing perhaps an element of doubt which might arise and, in the case of the Home Inspector, avoiding the need for advising that further investigation is necessary in the Home Condition Report.

Curiously this possibility of enlarging on the core conditions for providing a Home Condition Report which might prove more beneficial to seller, buyer or lender was denied in standards produced by the Government in June 2006. In the Certification Scheme Standards Part 2, Technical Standards section 16, 'Inspecting and Reporting Requirements,' Part 1, Mandatory Requirements paragraph 1.1 headed 'The Terms on which a Home Condition Report is prepared' it is stated boldly 'the terms are mandatory and cannot be altered, restricted or expanded'. Later it is said at paragraph 1.1.6 that 'neither the seller or the Home Inspector can amend the terms' but that any further services the Home Inspector may provide (which obviously must be to the seller otherwise there would be a conflict of interest) must be covered by a separate contract. Since the objective is to provide a standard form of report to enable a comparison to be made of different dwellings, a separate contract rather than an alteration of pre-set terms is infinitely preferable. Confusion will continue to arise if this loophole in the 2007 Regulations is not plugged. It is more straightforward to prepare a Home Condition Report on the pre-set terms and along with its inclusion in the Home Information Pack either on a voluntary or

mandatory basis add the outcome of the additional work separately contracted as an 'additional document'. If all the additional work and that carried out for the Home Condition Report is completed on a single inspection, extra cost to the seller could surely be held to a manageable level.

Paragraph 6 is by far the longest of the schedule and sets out the core contents of a Home Condition Report and the Regulations require that it be completed by a Home Inspector to include the following information.

- (a) His name.
- (b) Whether he has or is likely to have any personal or business relationship with any person involved in the sale of the property. This is to ensure that all parties are aware of the situation enabling them to consider whether any such relationship is prejudicial to their interests. Certification Schemes are required to issue a Code of Conduct for members setting out rules covering conflicts of interest and guidance for Home Inspectors on required standards of behaviour and what sort of business and personal relationships should be disclosed in a Home Condition Report.
- (c) The unique reference number or code against which the report is registered. This will lead to the identification of multiple reports for one address to comply with the requirement that all reports made within the previous 12 months for the seller should be included in the Home Information Pack.

- (d)/ The names of all approved
- (e) Certification Schemes of which the Home Inspector is a member and the membership numbers or codes which have been allocated to him. This is required so that in the event of any complaint about him not being resolved in-house, it can be sent to the independent complaints procedure put in place by the Certification Scheme.
- (f) The name and address of the Home Inspector's employer or if self employed, the name under which he trades.
- (g) The date of the inspection and the date the report is completed. The first is very relevant since the report is a record of the condition on the particular day of the inspection and, although perhaps remote, events occurring between the date of inspection and the date the report is completed may alter the condition, fire, flood or sudden subsidence being examples. Weather conditions on a particular day can, of course, be relevant to the performance of gutters and downpipes in pouring rain. Reflective thought following the inspection is considered beneficial in many instances and the completion of the report on the date of the inspection would suggest that this might be lacking.
- (h) The address of the property.
- (i) The year of building of the dwelling or the Home Inspector's assessment if this cannot be ascertained.
- (j) (i) The number of storeys in the dwelling and
(ii) the number of rooms in each storey.
- (k) Such provisions as are made for the parking of vehicles relating to the occupants or visitors.
- (l) Such mains utility services as are connected to the property and the condition rating of their visible parts.
- (m) If the property is situated in a flat or maisonette the Home Inspector is required to give:
 - (i) the number of storeys of the building in which the flat or maisonette is situated
 - (ii) the number of flats or maisonettes in that building or, if this cannot be ascertained his estimate of the approximate number
 - (iii) whether the building contains a lift for passengers to the storey on which the dwelling is situated
 - (iv) the general condition of such areas that lead to the dwelling as are common to both it and any neighbouring premises
 - (v) the general condition of the building in which the flat or maisonette is situated.

The guidance indicates that the Home Inspector will only report on the general condition of the outside of the whole building containing the dwelling but report specifically on the outside of the flat itself. Similarly inside, the Home Inspector will report on the roof structure only if it is

accessible from the flat and only on the common areas leading to the flat

- (n) The Home Inspector is required to report on risks to the health and safety of the dwelling's occupants or visitors 'so far as he can ascertain them' and where building or repair work is needed. The guidance indicates that the risks to be identified are specified in a list prescribed in the Home Inspector Inspection and Reporting Requirements. Reference to these requirements shows that the list includes 11 items ranging through a lack of windows for emergency escape, absence of safety glass, lead water pipes, radon gas, asbestos risks and the absence of test certificates for services. Mandatory text is provided for use where such risks are identified which it is said cannot be altered or expanded but condition ratings are not required. The use of the suggested unalterable mandatory text about such risks is inadequate for the purpose in a number of instances and a responsible Home Inspector would consider it necessary to advise a seller, who is after all as the current occupant, subject to the risks, to add to the text even though methods to either reduce or eliminate the risks or the cost are not included in the Home Condition Report.

- (o) The condition of the outside parts of the dwelling including such:
- (i) roof coverings
 - (ii) rainwater pipes and gutters
 - (iii) chimney stacks and
 - (iv) walls, doors and windows as relate to the dwelling. The

guidance states that condition ratings are required for each element.

- (p) The condition of the inside parts of the dwelling including:
- (i) roof structures accessible directly from the dwelling
 - (ii) ceilings and floors
 - (iii) internal walls and
 - (iv) kitchen and bathroom fittings

and whether their appearance suggests that they have been materially affected by dampness. The guidance indicates again that condition ratings are required for each element.

- (q) The general condition of such outbuildings as are part of the dwelling but here the guidance points out that condition ratings are not required.

At this point the Home Information Pack Regulations produced in 2006 when the Home Condition Report was a mandatory 'required pack document' for inclusion in the Home Information Pack stated:

- (r) the energy performance of the property, including an Energy Performance Certificate'. The guidance pointed out that the latter is to provide consumers with information about the energy efficiency of the dwelling and to give information about ways that this can be improved. A valid certificate has to comply with legislation implementing EU Directive 2002/91/EC (Energy Performance of Buildings Directive). The certificate has to be prepared using a government approved methodology. For the majority of dwellings up to +50m²

the Reduced Data Standard Assessment Procedure (RDSAP) is used but for larger or more unusual dwellings the alternative methodology Simplified Building Energy Model (SBEM) needs to be employed.

This is omitted from the 2007 Regulations on the premise, no doubt, that as a Home Condition Report was now down graded to an 'authorised document' only to be included on a voluntary basis but the provision of an Energy Performance Certificate was retained as mandatory, it was no longer necessary for it to be included in a Home Condition Report. If it was, it, along with the recommendations would have to be extracted to comply with the 2007 Regulations for highlighting, after the index, as the first and only novel feature in the Pack as it was introduced in June 2007. Instead subparagraph (r) now consists of what was sub-paragraph (s) in the 2006 Regulations thus:

- (r) whether any parts of the dwelling to which he would normally expect to have access were not accessible to him on the day of the inspection. The guidance gives as an example the roof space and points out that the Home Inspector might be able to draw conclusions about the condition from observations of other parts, external condition, ceilings etc, and might recommend further investigations where appropriate.
- (s) Any other provision required by an approved Certification Scheme of which he is a member and in which capacity the report is made. The

Guidance points out that a Certification Scheme could add to the matters on which a Home Inspector must comment subject to the scheme's approval by the Secretary of State. No mention, however, is made about the meaning of the word 'capacity' in this context.

Paragraph 7 deals with the conduct of inspections and states that nothing in Schedule 10 shall be construed as requiring the Home Inspector to:

- (a) inspect such parts of the dwelling as are not reasonably accessible on the day of the inspection
- (b) move furniture, fittings or personal items at the dwelling during an inspection though as indicated in the second book in the series, *Inspecting*, it is not considered that a Home Inspector should rely on this subparagraph when turning back loosely fitted carpets or moving light furniture or effects would reveal defects on which he should report. The guidance points out that a Certification Scheme must make provision for the conduct of inspections by its members based on the policy standards published by the Government, such as the 70 page Home Inspector Inspection and Reporting Requirements published as part of the Home Information Pack: Certification Standards in 2006. These form the basis of a scheme's approval by the Secretary of State.

Paragraph 8 deals with personal and security information and states that a

Home Condition report must not contain any of the following:

- (a) information or data from which another living individual can be identified from the report
- (b) any expression of opinion about a living individual or
- (c) information about security features at the dwelling and, in particular, burglar alarm systems, safes or locks.

The Guidance points out that subparagraphs (a) and (b) above are designed to protect the privacy of individuals and are equivalent to the definition of personal data in Section 1 of the Data Protection Act 1998 so that the Act is unlikely to apply if such information is excluded from reports. The danger of misuse is the reason for the prohibition of information about security in the report so that any defects found in the locks of doors and windows can only be discussed with the seller in person and not included in the report.

Schedule 10 covers the requirements for a Home Condition Report included in the Home Information Pack on a voluntary basis as set out above. When a Report was intended to be a mandatory requirement the 2006 Regulations provided for circumstances where the dwelling was not physically complete, as defined on page 5 of those regulations and where a Predicted Energy Assessment has to be provided in lieu of an Energy Performance Certificate accompanied by the recommendation report. Schedule 7 of the 2006 Regulations stated that:

1. A report on a home not physically complete must consist of:
 - (a) a statement of the day or the predicted day on which the property is likely to be physically complete
 - (b) a statement of whether the property will be:
 - (i) a house
 - (ii) a bungalow
 - (iii) a flat or
 - (iv) a maisonette
 - (c) if the property will be a house or bungalow, a statement of whether it will be:
 - (i) detached
 - (ii) semi-detached or
 - (iii) terraced
 - (d) if the property will be a flat or maisonette, a statement of:
 - (i) the total number of floors in the building
 - (ii) the total number of flats or maisonettes in the building
 - (iii) whether there will be a lift to the floor on which the entrance to the property will be situated
 - (e) a statement of the approximate total useable floor area in the dwelling (in m²)
 - (f) a description of the proposed methods of building (including any trade names for the materials described)
 - (g) a description of the materials used or to be used on the outside parts of the dwelling

- (h) a description of the heating and hot water systems to be used for the property
 - (i) a description of the standards to which the garden or other land being sold with the dwelling will be finished
 - (j) a statement as to whether any land on the site has been, or will be brought up to the level of the surrounding area artificially
 - (k) a statement as to whether a new home warranty complying with Schedule 6 has been offered for the building, completion or conversion of the dwelling and whether the dwelling will qualify for such a warranty and
 - (l) if the dwelling will not qualify for such a warranty, a statement of the name and qualifications of the person monitoring the building, completion or conversion of the dwelling.
2. A report on a home not physically complete must attach:
- (a) a plan (to a scale of not less than 1:1250) showing the location and actual or approximate boundaries of the dwelling (with the length of the boundaries indicated in meters as it will be once it is completed and marking:
 - (i) neighbouring buildings and structures, and surrounding land and
 - (ii) the roads, public highways and footpaths that serve or will serve the dwelling
 - (b) a plan (to a scale of not less than 1:100) showing the layout and actual or approximate height, width and length (in meters) of each of the proposed rooms in the dwelling and
 - (c) a predicted energy performance certificate for the dwelling.
- The guidance pointed out that as it is not possible to inspect the condition of an incomplete dwelling and that therefore a Home Condition Report could not be prepared, a form setting out the statements contained in Schedule 7 must be included in the Home Information Pack. The form gives the potential buyer important information about the dimensions, layout and construction intended for the dwelling. Obviously it had to be prepared before inclusion in the pack either by the seller or in most cases, by the developer or the developer's architect or builder. Should the dwelling have become physically complete during marketing the form was to be removed from the pack and substituted by a New Homes Warranty meeting the minimum requirements of Schedule 6 with a freestanding Energy Performance Certificate or a Home Condition Report containing the Energy Performance Certificate. The Government anticipated that organisations providing New Home Warranties would publicise which of their schemes would provide the exception from the Home Condition

Report requirement and intended to publish an informal view listing the warranty schemes that met the minimum criteria for simple reference by sellers, those putting together Home Information Packs and potential buyers.

It was not clear from the guidance whether the suggested form for a report on a home not physically complete said to be available from a government website was different from the requirements set out in Schedule 7 of the 2006 Regulations. Whether it was or not seems academic since the guidance acknowledged that if the requirements in the schedule were met the report could take another form. The requirements could hardly be clearer and it is surely immaterial at what stage the construction has reached when the form is prepared.

Referring back to regulation 10 in Part 3, Contents of Home Information Packs covering 'authorised' as distinct from 'required' documents, others, apart from the Home Information Pack at (a) already dealt with, would be of interest, in particular to a potential buyer. Also to a Home Inspector should he be employed by a seller to prepare a Home Condition Report for inclusion on a 'voluntary' basis or even the seller if having read them, he thinks it might be helpful towards a quick sale to have their content and significance explained include:

- (b) documentary evidence of such safety, building, repair or maintenance work carried out in

relation to the property since the date of any Home Condition Report included in the pack. These might include works to rectify defects identified in the report.

- (c) any warranty, policy or guarantee for defects in the design, building or completion of the dwelling or its conversion for residential purposes. These might include warranties other than those issued for new homes
- (d) information about the design or standards to which a property has been or is being built
- (m) one or more of the following search reports, which must be in accordance with Part 1 and may be made in accordance with Part 2 of Schedule 8 which records the results of a search relating to the dwelling and which covers any of the following matters:
 - (i) information held or derived from a local authority and dealing with matters supplementary to those contained in the search reports required by regulation 9(k) (search of the local land charges register or 9(l) (local enquiries)
 - (ii) common land or town or village greens. A 'commons registration search' is often made when the dwelling is near to common land or a village green
 - (iii) rights of access to, over or affecting the property

- interest. Particularly wise in rural areas
- (iv) ground stability, the effects of mining or extractions or the effect of natural subsidence. The guidance indicates that a coal mining search will indicate whether a dwelling is within the vicinity of workings and similar reports are available covering other mining activities such as tin (affecting Cornwall, Devon and parts of Somerset) salt (Cheshire), limestone (West Midlands) and china clay (Devon, Dorset and Cornwall). A report on natural subsidence can be obtained from the British Geological Survey.
 - (v) actual or potential environment hazards, including the risks of flooding or contamination from radon gas or any other substance. The guidance states that the Environment Agency and others provide search reports that include information on flood risk, proximity to landfill sites, industrial processes, radioactive materials etc, while commercially available reports provide a view on whether land is potentially contaminated and might require further investigation. Information on whether a property is in an area known to be affected by radon gas is included in replies to CON29 Part 1 (standard enquiries to Local Authorities). There are also commercially available radon gas reports on the market. The inclusion in Home Information Packs of information on these actual or potential hazards by sellers without obtaining a view on their implications from a Home Inspector and including his analysis is likely to cause puzzlement at least and possibly alarm to potential buyers. This could well delay a sale while the buyer obtains a view from his adviser. The second book in this series *Inspecting* deals with these aspects from the Home Inspector's point of view and the advice he should give to the seller.
 - (vi) telecommunications services. The guidance indicates that British Telecom and other communication companies provide search reports on matters affecting the dwelling. These include the existence of wayleaves and licenses concerning the services connected to the dwelling or its neighbours but whether the proximity of mobile phone masts is included is not mentioned.
 - (vii) sewerage, drainage, water, gas or electrical services. Similarly electricity companies provide search reports on wayleaves,

electricity equipment, electricity supply and other matters affecting the dwelling while gas suppliers provide the information on the location of pipes and whether the dwelling can be connected to a gas supply if not already so connected. Searches should also reveal any unexpected drainage runs across the property. Whether in regard to electrical supply, the proximity of the dwelling to overhead high voltage cables carried on pylons is mentioned or not is unclear. These can be of concern to some buyers.

- (viii) the potential or actual effects of transport services, including roads, waterways, trams and underground and overground railways. The guidance gives the Highways Agency, Port of London Authority, Transport for London as examples but many others provide search reports on matters affecting transport infrastructure that may be of interest to potential buyers.
- (ix) liability to repair or maintain buildings or land not within the property interest being bought. The Guidance indicates the need for a Chancel Repair Search in some areas to ascertain the little known, but which can be formidable, liability to contribute towards the repair

costs at the local parish church. The Church of England has recently indicated that it has no intention of giving up such a right since it is worth many millions of pounds and has been successful in a recent House of Lords case in an action of enforcement.

Search reports on any other matter relating to the dwelling or other neighbouring property which would be of interest to a potential buyer, may be included in the pack provided they comply with the general conditions described in Schedule 8. Illustrated as an example is where a dwelling is to go on sale with the benefit of a desirable view. A potential buyer would be interested to know if there were any proposals currently lodged which might interfere with what would be considered an asset. If there were none this would clear a seller of any suspicion of choosing the right moment to sell but would not, of course, protect the buyer in the future.

Regulation 12(1) precludes the inclusion of a Home Condition Report complying with Schedule 10 if it was not completed for the purposes of the sale while 12(2) provides that no pack document may be described as a Home Condition Report unless it complies with Schedule 10.

The 'authorised' documents which on a voluntary basis may be included in a Home Information Pack under regulation 10 may or may not be favourable towards a quick sale and this would seem likely to govern whether they are included or not. If unfavourable the seller could leave them

out and no-one would be the wiser unless the buyer was himself knowledgeable or employed his own adviser to review the contents of the pack and identify omissions which may prove to be detrimental to the seller.

Scotland

Housing (Scotland) Act 2006

The Housing (Scotland) Act 2006 contains 9 parts, 195 sections and 7 schedules and covers a broad range of subjects relating to housing including repairing standards, the repair, maintenance and improvement of houses together with the right to adapt rented houses, tenancy deposits, the licensing of houses in multiple occupation and mobile homes along with the duty to provide information on the sale of dwellings. The provisions to cover this latter aspect are contained in Part 3, sections 98 to 119 inclusive. In the way typical of legislation of the present day, the Act provides the general framework of what the Scottish Parliament lays down by primary legislation, the detail to be filled in by regulations made subsequently.

The Act requires that a person who is responsible for the 'marketing' of a dwelling which is 'on the market' must be in possession of prescribed documents relating to it (section 98).

The person carrying out the marketing must comply with any request for a paper copy, or electronic information if acceptable, of any or all of the prescribed documents from a potential buyer subject

to reasonable payment and must do so within the time specified in regulations, 'the permitted period,' unless he reasonably believes that the person making the request has not the means or is not genuinely interested in buying the dwelling or perhaps is not a person with whom the seller would do business always provided, of course, that none of these considerations involves an unlawful act of discrimination or that they are used to avoid complying with a request from a person who is suspected, or known, to be an officer of an enforcement authority (section 99).

The potential buyer may be required as a condition to pay the reasonable charge mentioned above and comply with terms laid down in writing by the seller relating to the disclosure or use of any information derived from the prescribed documents before a copy is supplied, provided that the amount of charge and any conditions are notified to the potential buyer before 'the permitted period' expires in which case 'the permitted period' is allowed to start afresh from the later date of the potential buyer's agreement to meet the charge or acceptance of the conditions (section 100).

The person responsible for marketing the dwelling is not necessarily the only person who must possess the prescribed documents. A seller can have another person acting as his agent but before that agent takes any 'qualifying action' such as communicating with any person that the dwelling is or may become for sale but does not himself put it on the market, he must be in possession of the documentation (section 101).

Such a person for example in the course of his business of auctioning a dwelling or effecting the introduction to the seller of a person wishing to buy the dwelling acts as an agent and similarly must be in possession of the prescribed documents (section 102).

All persons who are under a duty to be in possession of prescribed documents are required to ensure the authenticity of any copy supplied to a potential buyer or seen by a potential buyer (section 103).

The Act provides for the Scottish ministers to make regulations prescribing the documents to be in the possession of the person marketing a dwelling but only if the ministers consider that they disclose information about the physical condition, including any characteristics or features, the value or any other matter connected with it that would be of interest to potential buyers (section 104, subsections 1 and 2).

In particular the regulations may make provision about the form and the information to be included in a prescribed document, that documents are to be prepared by a person specified, that they contain information only within a specified period before the dwelling was put on the market and state the length of time a prescribed document can be valid or would become invalidated (section 104, subsection 3).

Furthermore the regulations may make provision for a register of prescribed documents to be kept by the Scottish ministers or other appointed persons of such type as may be specified together with provision for their payment and with

directions as to the manner and to whom and at what charge the information contained in the register can be inspected, copied or otherwise obtained and the necessary enforcement procedures (Section 104 sub-section 4).

There is provision in the Act for the Scottish ministers, by way of regulations, to exempt over specified periods of time certain persons from the duty to be in possession of prescribed documents or to provide information on their contents (section 105).

The Act prescribes the seller or his agent as the only persons who can be responsible for marketing a dwelling but excludes the seller from the responsibilities if he has an agent, although he must inform a potential buyer that any request for a copy of all or part of the prescribed documents should be made to the agent if he reasonably believes them to be in the agent's possession. It is specifically indicated that a person may be responsible for marketing a dwelling on more than one occasion (section 106).

The responsibilities of both agent and seller are spelt out by the Act. An agent becomes responsible for marketing the dwelling by taking action which results in it being on the market and ceases when the dwelling is sold or taken off the market, when his contract is terminated or he, or anyone acting on his behalf, ceases to take any action which makes public the fact that the dwelling is on the market (section 107).

Similarly the seller becomes responsible for marketing the dwelling by taking action, or action is taken on his behalf, which

results in the dwelling being on the market and again ceases when the dwelling is sold, taken off the market or when the seller or anyone else acting on his behalf ceases to take any action which makes public the fact that the dwelling is on the market (section 108).

Enforcement of the requirements of the Act is a duty of the local weights and measures authority in the area which it covers (section 109).

The officers of the enforcement authority can require the production of the prescribed documents in a legible non-electronic form and are empowered to take copies but only within six months after the last day when that person was believed to be liable to the duty to be in possession of those prescribed documents unless he considers that he has a reasonable excuse for not doing so (section 110).

An enforcement officer can give a penalty charge notice to a person who he believes has breached the duty to be in possession of the prescribed documents, failed to provide an authentic copy to a potential buyer or, when acting as agent for a seller, is not in possession of the prescribed documents when taking any qualifying action. Such penalty charge notices must be served within a period of six months of the breach and the Scottish ministers may, by regulation, make other provisions about the form the notices should take, circumstances both where they may or may not to be given and methods by which they may be paid (section 111).

It is an offence to impersonate or obstruct an officer of an enforcement authority for which a fine not exceeding Level 5 on the standard scale may be imposed (section 112).

There is a section setting out the duty to provide information to a tenant exercising his right to purchase a dwelling and providing for the Scottish ministers to make regulations about that information which may include a reasonable estimate of costs of maintaining the dwelling and common parts and a statement setting out how long any common parts, any fixtures and fittings and any other items forming part of the dwelling are expected to last together with a reasonable estimate of the cost of replacing each of the items to which the information relates. There is, however, provision whereby the information need not be provided unless the tenant pays or undertakes to pay the costs (section 113).

The Scottish ministers can make grants for covering the cost of developing proposals in relation to prescribed documents and their contents including conditions on how the grants are used and with provision for recovery in certain circumstances (section 114).

The duties set out by the Act only apply in relation to dwellings for sale with vacant possession and there is a presumption that that is the case unless the contrary is apparent from the manner in which the dwelling is being marketed (section 115).

The Act applies in cases where a single dwelling which has been subdivided into two or more dwellings is put on the

market for sale as a single unit but only one dwelling is available with vacant possession (section 116).

Where there is a breach by the person acting as an estate agent for the seller of a duty under the Act, the local weights and measures authority may notify the Office of Fair Trading but must do so if a penalty charge notice is given by one of its officers which is later confirmed or withdrawn and the outcome of any appeal against a confirmed notice (section 117).

The Act is at pains to provide that documents held in electronic form can only be considered to be in the possession of a person if they are able using their equipment to view them in a form that is legible and able to produce copies in a legible documentary form (section 118).

Part 3 of the Act concludes with defining some of the expressions used in its Sections. For example, 'on the market' means that it is made public by advertisement on behalf of a seller that a freehold or leasehold dwelling with a term exceeding 20 years is, or may be for sale in Scotland and remains so until it is sold or withdrawn. 'Potential buyer' means a person who claims to be interested or may become interested in buying a dwelling (section 119).

The Housing (Scotland) Act 2006 (Prescribed Documents) Regulations 2008

The Scottish ministers under the powers conferred on them by the Housing (Scotland) Act 2006 laid the above regulations in draft form before the

Scottish Parliament which subsequently gave its approval by resolution in February 2008 for the requirements to come into force on 1 December 2008.

Prior to the preparation of the draft Regulations, the results of a pilot scheme recommended by the Housing Improvement Task Force in March 2003 for a market led Single Survey had been considered. The Single Survey was intended to provide information on the property, a valuation and an EPC to potential purchasers of dwellings. The pilot scheme was conducted by the RICS in four areas, north and west Glasgow, north Edinburgh and Leith, along with Inverness and Dundee and their surrounding areas. It had been hoped to have information derived from around 1200 surveys commissioned for the purpose but, in the event, only 74 were undertaken, mostly in Glasgow, but with only one in Edinburgh. It was concluded, after discussion with interested parties, that there was no market-driven solution to the concept of a Single Survey but, generally, prospective buyers found that getting information about a dwelling's condition in advance did influence their decision and that the inclusion of a valuation informed the level of the figure put forward by the seller, above which offers were invited. As a result the Scottish Executive decided to proceed with a compulsory scheme, the Housing (Scotland) Act 2006 became law and preliminary draft regulations were sent out to interested parties in Spring 2007. Following the submission of comments, the draft regulations were finalised and laid before the Scottish Parliament. The cost to purchase is £21.60 but they can be downloaded free of charge from

www.homereportscotland.gov.uk. There are 14 regulations governing the production and handling of the three Prescribed Documents; the Single Survey, the Energy Report and a Property Questionnaire, which together make up the Home Report and which is to be made available to potential buyers when a dwelling is marketed for sale.

The first two regulations comprise the formalities of citation, commencement and interpretation. The citation is as the heading of this subsection with the commencement date given as 1 October 2008. To come into operation the regulations require a commencement order with a date any time after 1 October 2008. This has been set for 1 December 2008, a supposedly quiet time in the housing market. The regulations use the phrase 'the 2006 Act' throughout to refer to the primary legislation of the Housing (Scotland) Act 2006. Also used throughout is the phrase 'the duties' which mean any of the duties set out in sections 98, 99(i) and 101(2) of the 2006 Act, while the phrase 'on the market' has the same meaning as in section 119.

Regulation 3 sets out the 'permitted period' mentioned in section 99(2) of the 2006 Act within which a person responsible for marketing the dwelling must comply with any request by a potential buyer for a copy of any or all of the prescribed documents relating to the dwelling. This is set at nine days.

The fourth regulation describes the three prescribed documents, two of them with reference to Schedule 1 included at the end of the Regulations, which must be

made available to prospective buyers. They are a survey report containing the information in, 'or as nearly as may be in,' the form set out in part 1 of Schedule 1 and the information on energy efficiency in part 2 of Schedule 1 together with a property questionnaire in, 'or as nearly as may be in,' the form set out in Schedule 2. In this book all three documents are dealt with in section 10, the two former in detail while the third is dealt with in so far as it is designed to provide information for the Surveyor before he carries out his inspection. Neither document is to contain any information advertising goods or marketing services other than trade names used to describe materials used in the building of the dwelling or the names of sewerage and water undertakers.

The addition of the words 'or as near as may be in' to (a)(i) and (b) of regulation 4 which were not included in earlier drafts is considered unwise and indeed not necessary. The information to be contained in the Single Survey Report and Property Questionnaire is set out in Part 1 of Schedule 1 and in Schedule 2. The age, size, type and condition of the property will determine whether all the information required can be included or even needs to be supplemented. If particular elements do not form part of the property being considered, a simple 'none' or 'not applicable' can be indicated, whereas with a feature present but not mentioned as required information can be added if thought likely to be appreciated by a potential buyer. The words 'as near as' could be open to wide interpretation and might encourage the cutting of corners which would be a pity when simple solutions

are readily available for any problem likely to be encountered.

The persons who may prepare the prescribed documents are set out in regulation 5. For the Single Survey and Energy Reports covered by Schedule 1 only members registered with, or authorised to practice by, the RICS will be permitted to carry out the work. For the Property Questionnaire set out in Schedule 2 only the seller or a person authorised by the seller to act on his behalf may prepare the document.

As to comments so far on the Single Survey and Energy Report, the Scottish Executive has expressed confidence that there are sufficient appropriately qualified members of the RICS operating in Scotland to meet the needs of sellers to produce the Single Survey and Energy Reports required when a dwelling is put on the market for sale. It is considered that this confidence could prove to be misplaced. Its own consultation paper issued in Spring 2007 indicated that 'most buyers tend to commission the cheapest form of report available to satisfy the needs of their lender' and this is said to be confirmed by an RICS estimate that around 90% of 'purchasers' rely only on a mortgage valuation report. There is no indication whether the 'purchasers' in this estimate mean 'all' purchasers or only those who require a loan. If the latter then, as the Council of Mortgage Lenders has stated in its 2006 Research Paper *Mortgage Lenders, Home Information Packs and the future of Valuations*, there are a further 30% of purchasers not requiring a loan who currently may not have any form of survey at all. At present, sellers do not supply a survey for such purchasers but

will have to do so when the requirement for a single survey comes into force.

Furthermore, there is the aspect which seems to have been overlooked that the Single Survey is more comprehensive as far as 'condition' is concerned than a mortgage valuation report and also includes an energy report. Whereas a mortgage valuation report for an average dwelling might take a short while to compile, a Single Survey is bound to take considerably longer.

It has to be anticipated therefore that to cope with a mandatory requirement for a Single Survey to be produced for the sale of every residential dwelling in Scotland, whether a loan is required or not, the existing capacity of the surveying and valuation profession is likely to need considerable expansion.

There is little point in asking the RICS if it considered that there were a sufficient number of their members to satisfy the demand. Presented with the likelihood of a virtual monopoly for its members it is hardly likely to say 'no' in case the Scottish Executive decides to set about creating a new profession especially for the purpose. It is more likely to say 'yes' and keep its fingers crossed. Of course, if it was perceived that there was a demand for surveyors and valuers far in excess of available supply, suitably qualified members of the RICS from south of the border could decamp into Scotland provided sufficient inducements were offered by existing practices. This could well happen and to an extent the aggrandisement policy of the RICS could be said to be paying off as it provides that virtual monopoly for its members, at

least in Scotland. It also puts the RICS itself in a strong position to influence policy and it could be said to give it the whip hand even though it may hesitate to use it in the light of the strength of the proponents.

Part 1 of regulation 6 provides that the information in a prescribed document relating to a dwelling must be no earlier than the date at the beginning of the period of 12 weeks before the date on which the dwelling is put on the market ('the market date'). The same date applies in Part 2 even when a dwelling is not sold and is withdrawn from the market for a period or periods not exceeding four weeks at a time and is then put back on the market. For example, the valuation included in a single survey must be no older than 12 weeks before the original market date even when the dwelling is withdrawn and then put back on the market.

There remain eight Regulations which provide exemption from the duty to possess prescribed documents and make them available in the case of sales of certain types of dwelling. These are:

- *Regulation 7:* Where a person either as seller or agent is responsible for marketing a dwelling which is to be sold with one or more other dwellings and it is clear from the marketing that there is no intention to accept an offer on one in isolation. The exception contained in this Regulation does not apply where the dwellings to be sold comprise only a principal house with one or more dwelling houses, for example a 'granny' flat or more than one flat contained in a larger house or, in general, 'portfolios' either large or small.
- *Regulation 8:* A dwelling is subject to a condition imposed under section 41(1)(a) of the Town and Country Planning (Scotland) Act 1997
 - (a) regulating the dwelling to either or both of the following:
 - (i) occupation for less than 11 months in any 12 month period or
 - (ii) use only for holiday occupation and
 - (b) where regulation of the use of the dwelling is clear from the manner in which the property is marketed.
- *Regulation 9:*
 - (a) a dwelling which is to be sold with one or more non-residential premises
 - (b) which is or forms part of the property ancillary to those non-residential premises and
 - (c) it is clear that the seller does not intend to accept an offer to buy the dwelling in isolation from any one of those non-residential premises from the manner in which the property is marketed.
- *Regulation 10:*
 - (a) a dwelling which was used most recently for both residential and non-residential purposes where
 - (b) the manner in which it is marketed suggests it is suitable for
 - (i) non-residential use or
 - (ii) both residential and non-residential use.