

HOUSING ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5 - Home Information Packs

Section 148: Meaning of "residential property" and "home information pack"

305. For the purposes of this Part, a residential property means a single building or part of a building together with any ancillary land - a garden for example - that is, or is meant to be, occupied as a separate dwelling. The definition includes homes that are still under construction or not yet built and so the duties described elsewhere in this Part would potentially apply to homes being sold 'off-plan'.
306. In this section, the home information pack is given a general description as a collection of documents relating to the property being sold, or the terms on which it is being offered for sale. The actual content of a home information pack will be prescribed in regulations made under section 163 and for most purposes, the Act defines the pack as something that fulfils the requirements of these regulations, or purports to. The pack may include electronic documents and could indeed consist entirely of electronic documents. However, copies of the pack should be made available to a potential buyer in hard copy unless the buyer agrees that they can be made available in electronic form. Section 156 sets out when a copy of the pack should be provided.

Section 149: Meaning of "on the market" and related expressions

307. The duties described later in this Part apply to a "responsible person" and sections 151 to 153 describe this further. Generally, a person becomes responsible when he puts a property "on the market" or makes public the fact that the property is "on the market". This section defines "on the market" and related expressions used throughout this Part of the Act.
308. References to "the market" are to the residential property market in England and Wales. A property is put "on the market" when its availability, or possible availability, for sale is advertised or otherwise made known to the public or a section of the public in England and Wales. This carries with it an intention to market the property, so does not apply where information about the sale of a property is made public unintentionally or inadvertently. A property is considered to remain on the market until it is taken off the market or is sold. The phrase "taken off the market" is not defined in the Act and carries its ordinary meaning.
309. The expression "section of the public" is not defined in the Act either but has been used in other legislation. Case law indicates that "the public" relates to the public at large. A "section of the public" indicates a more restricted group. Thus, for example, the placing of an advertisement in a national newspaper could be described as marketing to "the public" but placing it in a local shop window would only be marketing to a "section of the public".

310. Family members, individuals or small, defined groups of people would not be considered a "section of the public" for these purposes. Marketing which is limited to such people will therefore not count as putting the property on the market. The duties in sections 155 to 158 will not apply to marketing of this kind, but the duty in section 159 may apply if the seller uses an estate agent to carry it out. Generally speaking, the seller would know these people in a private capacity and the property would therefore not be available for sale on the open market. Someone who revealed that they were going to market their property, with no intention of marketing, would not be affected by the duties in this Part of the Act.

Section 150: Acting as estate agent

311. A person acting as an estate agent for a seller of residential property can be a "responsible person" for the purposes of the duties imposed by this Part of the Act. This section identifies when and in what circumstances a person is to be regarded as acting as an estate agent for the seller. A person acts as an estate agent under the Act if his or her business is in England and Wales, and he acts under "marketing instructions" from the seller.
312. "Marketing instructions," mean instructions to introduce a potential buyer to the seller, or to sell the property by auction or tender. This is similar to the definition of estate agency work used in section 1 of the Estate Agents Act 1979. Marketing instructions would not include advertising-only instructions, so printing firms, web sites and newspapers that carry a "for sale" list or advertisements would not be acting as an estate agent simply by doing so. "Marketing instructions" imply that the person being instructed exercised some independent judgement about how a property is marketed. There are also likely to be contractual arrangements under which the estate agent earns a fee for introducing a potential buyer to the seller. It is not relevant for these purposes whether or not the person describes himself as an estate agent, so another professional such as a solicitor would be covered if he undertook these activities.
313. In order for the duties in this Part of the Act to apply, the estate agent's business must be carried out from a place in England and Wales. It does not matter if that place is not used exclusively or mainly for business purposes, such as a residential property. Nor does it matter that only part of the estate agent's business is not located in England and Wales. However, if a residential property in England and Wales is marketed only by an agent from another country who does not have a business in England and Wales, that agent will not be regarded as the responsible person. Instead, the seller would be considered to be the responsible person for the purposes of this Part, regardless of his place of residence.

Section 151: Responsibility for marketing: general

314. This section describes who is to be regarded as responsible for marketing a residential property that is being, or has been put, on the market in England or Wales, and is therefore required to have a home information pack.
315. The Act provides for various duties (and the penalties for breaching them) only to apply to the person who is responsible for marketing the property.
316. There are only two categories of person who can be responsible persons. These are the seller himself or someone who is acting as the seller's estate agent. Under section 153(2) described further below, a seller is not required to have a home information pack where there is another responsible person and the seller reasonably believes that this person is in possession of a pack which meets the requirements of the relevant regulations (made under section 163).

Section 152: Responsibility of person acting as estate agent

317. This section identifies when an estate agent becomes the responsible person and when his responsibility ceases.
318. A person acting as an estate agent (see section 150) becomes responsible when he first puts the property on the market or, if it is already on the market, makes public the fact that it is on the market. It does not matter whether the person describes himself as an estate agent.
319. The responsibility of an estate agent ceases when his contract with the seller is terminated and he (or anyone acting on his behalf) stops taking an action which makes public the fact that the property is on the market. The responsibility also ceases if the property is sold or otherwise taken off the market, even if this occurs before the contract is terminated or marketing actions have stopped.
320. The Act does not define "taken off the market" but this should be given its ordinary meaning. If an estate agent whose contract with the seller has ended wishes to cease being responsible under the Act and the property has not been taken off the market or sold, he must cease marketing activities. If some marketing activity has been taking place, for example, a "for sale" sign has been erected or an advert placed in a shop window, it would be necessary to take steps to discontinue that marketing activity - by taking down the "for sale" sign or removing the advert from the shop window.

Section 153: Responsibility of the seller

321. This section identifies when a seller becomes the responsible person and when his responsibility ceases. A seller becomes responsible when he first puts the property on the market or, if it is already on the market, makes public the fact that it is on the market. The latter situation could arise if, for example, there is more than one seller.
322. The seller's responsibility ends when he engages an estate agent to market the property on his behalf and stops taking any action designed to market the property himself. The seller's responsibility also ceases when any marketing actions taken on his behalf stop, other than those taken by his estate agent. The seller's responsibility also ends if the property is sold or is otherwise taken off the market even if this occurs before any marketing actions stop.
323. Individuals who market their own homes without the services of an estate agent will be responsible under the Act for their own actions. A casual acquaintance or friend of the seller who helps with the marketing of the home cannot become a "responsible person" for these purposes, even though they might be acting on the seller's behalf. The seller will also be responsible if he instructs an estate agent who does not have a place of business in England or Wales. As a general rule of thumb, a residential property marketed for sale in England and Wales should have at least one responsible person, whether they are the seller or an estate agent.
324. A "seller" in this Part of the Act is defined in section 177(1) as meaning a person contemplating disposing of a freehold or leasehold interest or an option for a freehold or leasehold interest. It does not necessarily mean that the seller owns the interest, so for instance a seller could include someone dealing with a deceased person's estate. "Seller" does not necessarily imply the authority to sell, as it will be for the buyer to check title documents and satisfy himself that the owner wishes to sell once he receives the home information pack. The contents of the pack will be prescribed in regulations under section 163 and will include evidence of title.

Section 154: Application of Sections 155 to 158

325. This section provides that where a residential property is on the market in England or Wales, the duties described in sections 155, 156, 157 and 158 apply to each "responsible

person" who markets it. The duties in these sections may be subject to the various exceptions or conditions described below.

Section 155: Duty to have a home information pack

326. This section provides that the "responsible person" must have a home information pack in his possession or under his control that complies with regulations made under section 163. The duty does not apply to sellers in cases where an estate agent is responsible for marketing the property and where the seller reasonably believes that the estate agent has a home information pack that complies with the regulations in his possession or under his control.

Section 156: Duty to provide copy of home information pack on request

327. This section requires a responsible person to provide a copy of the home information pack to a potential buyer where he makes a request for one. Nothing in the Act stops estate agents from making available general particulars or other descriptions of the property that they are marketing on the seller's behalf.
328. The "responsible person" is under a duty to provide a copy of the pack, or any part of it, within the "permitted period". In most cases this period is 14 days from the date of the request (subsection (9)). The seller may, however, apply either of the conditions described in section 157 before providing a copy and, where he does so, the permitted period starts from when they are complied with. Section 157 describes the effect of these conditions further.
329. Subsection (2) requires that the copy is a copy of the home information pack, or of the requested document from the pack, as it stands at the time when it is provided. In other words, the copy must be the most recent version. The pack, or document, must conform to any regulations made under section 163. Subsection (10) provides that copies should be in paper form unless the potential buyer agrees to them being made available in electronic form.
330. There are three circumstances in which the responsible person may turn down a request for a copy of the home information pack without breaching any duty. These are described in subsection (4). The first of these is where there are reasonable grounds to believe that the person making the request cannot afford the property. For example, the agent might know the financial circumstances of the person in question or the seller may want to exclude people who cannot demonstrate that they have arranged an "in principle" mortgage.
331. The second applies where the responsible person believes that the person making the request is not really interested in buying this particular property or one like it. An example of this might be a journalist posing as a buyer in order to see the home information pack relating to a celebrity's home. Another example might be a request for a copy from someone who the estate agent knows to be a habitual time waster.
332. The third arises if it is believed that the potential buyer is not a person to whom the seller would wish to sell the property. There are human rights implications here and this right of refusal simply reflects the current position where someone can refuse to deal with a particular person if he wishes to, and for no particular reason. However, the section makes it clear that these exceptions do not over-ride existing laws concerning racial, sexual and other types of discrimination.
333. Subsection (5) provides that the exceptions described above do not apply in cases where the responsible person knows or suspects that the person making the request for a copy of the home information pack is an officer of an enforcement authority. Sections 166 to 170 deal with enforcement further.
334. Subsection (6) provides that a seller who is marketing his own home (and is therefore treated as a "responsible person") is not under a duty to provide a copy of the home

information pack where there is another responsible person (such as an estate agent) and the seller reasonably believes that that other person has a pack in his control. This exception only applies where the seller informs the potential buyer that requests for copies should be made to that other responsible person (subsection (7)). So, a seller who employs an estate agent to market a property and markets it himself at the same time would not be under a duty to provide a copy of the pack provided he believed that the estate agent had the pack and informed the potential buyer of this.

335. Subsection (8) allows the responsible person to make a reasonable charge to cover the costs incurred in making and sending a copy of the pack.
336. Subsection (9) provides that the duty to provide a copy ceases to apply in cases where the responsible person ceases to be responsible before the end of the permitted period. Sections 152 and 153 set out when responsibility ceases.

Section 157: Imposition of conditions

337. This section permits a seller to decline to provide a copy of the home information pack if the potential buyer has failed to comply with one or both of the following conditions.
- The payment of a reasonable charge for making a copy of the pack and sending it.
 - The acceptance of specified terms relating to the use and onward disclosure of copies of home information pack documents. An estate agent acting for a seller cannot impose these terms on a potential buyer unless they result from the seller's instructions.
338. The seller will only avoid being in breach of the duty to provide copies of documents requested if the potential buyer is informed of the conditions before the end of the 14 day period following his request for a copy of the pack.
339. Where one or both conditions is applied the "permitted period" will be the period of 14 days following the day on which the potential buyer complies with it or them. In this respect, the potential buyer would comply by:
- Making the payment demanded, or
 - Reaching an agreement on the use or disclosure of copies.
340. The Act does not impose any restrictions on the conditions that can be imposed on a potential buyer which relate to the use or onward disclosure of pack information. There are privacy implications here and this right to impose conditions simply reflects the current position where a seller can enter into a confidentiality agreement with a potential buyer. As such, these conditions are likely to be construed using common law confidence principles. This would mean that the use of these conditions would not be completely limitless. Some examples of conditions that might be unenforceable are:
- Those attempting to restrict the use of information that is already in the public domain.
 - Those preventing or inhibiting compliance with a legal obligation, or attempting to do something which is unlawful.
 - Those which are inconsistent or conflict with this legislation or its purposes. For instance, it would be inconsistent with section 156(8) to use these conditions to require a potential buyer to pay more than a reasonable charge for making and sending a copy of the pack.
341. In addition, there may be practical limits to conditions restricting the use and onward disclosure of pack information. For instance, a condition that prevents or inhibits the successful completion of the conveyancing process is unlikely to be imposed by sellers

who genuinely wish to make a sale and is equally unlikely to be accepted by many potential buyers.

Section 158: Duty to ensure authenticity of documents in other situations

342. This section provides that where a responsible person provides a potential buyer with a copy of the home information pack or of any document (or part of a document) included in it, or allows him to inspect it, it must be an "authentic" copy. A document is not authentic unless it is a copy of (or of part of) the home information pack for the property and complies with regulations made under section 163.
343. **Section 156** provides that where a responsible person complies with a request for a copy of the home information pack, the copy supplied must comply with the requirements of regulations made under section 163. The similar duty imposed by this section covers other situations where the potential buyer sees or receives a copy of the pack otherwise than by virtue of his right under section 156. For example, he may be shown the copy without actually asking for it. Subsection (4) removes an unnecessary duplication of the duty in cases where a copy of the pack has been provided under section 156.

Section 159: Other duties of person acting as estate agent

344. This section imposes a separate duty that only applies where a property is being marketed by an estate agent in a way that is too limited to trigger the other home information pack duties.
345. The duty under this section will apply in cases where, when the estate agent undertakes the marketing activity (the "qualifying action"), the property is either not on the market at all, or is on the market but the agent is not a responsible person within the meaning of the Act.
346. So, for example, a person acting as estate agent who approaches a few buyers directly but does not market the property to a section of the public would be subject to this duty.
347. The duty imposed by this section on the estate agent is a duty to have a copy of the home information pack available when "qualifying action" is taken by him or is taken on his behalf. Subsection (3) defines "qualifying action" as action taken "with the intention of marketing the property" which communicates that the property is or may become available for sale but which does not put the property on the market or make public that it is on the market.
348. An estate agent is not in breach of the duty if, for example, he or she tells a spouse or colleague that a particular property is going on the market. This would not be a "qualifying action" within the meaning of the Part, provided that the communication was not itself aimed at marketing the property. Another example is where an estate agent is seen at a property that is not yet on the market and asked whether it is up for sale. If the estate agent were to answer, truthfully, "not yet but it will be as soon as the home information pack is ready" that would not be a "qualifying action" either. The home information pack duties are only triggered where any communications are part of a direct and intentional attempt to market the property in question.
349. Where the provisions of this section do apply, and an estate agent provides a copy of a document purporting to be from the home information pack for the property, it is his duty to ensure that it complies with any regulations made under section 163 and is an authentic copy.

Section 160: Residential properties not available with vacant possession

350. Where a residential property is not available for sale with vacant possession, the duties set out in sections 155 to 159 will not apply. A property that is being sold subject to a tenancy does not therefore have to be marketed with a home information pack. For

These notes refer to the Housing Act 2004 (c.34) which received Royal Assent on Thursday 18 November 2004

the purpose of the Act, a property is presumed to be available with vacant possession unless the manner in which it is being marketed suggests differently.

351. Subsection (2) provides that any residential property marketed will be assumed to be available with vacant possession, and therefore subject to the home information pack duties, unless the manner in which the property is marketed makes it clear that it is not.

Section 161: Power to provide for further exceptions

352. This section allows the Secretary of State to prescribe in regulations other circumstances in which the duties described in sections 155 to 159 do not apply.

Section 162: Suspension of duties under sections 155 to 159

353. This section allows the Secretary of State by order to suspend any duty imposed by sections 155, 156, 158 and 159. Such a suspension may be time limited or indefinite and in either case can be revived. This power will only be used in exceptional circumstances.

354. ***Section 163: Contents of home information packs***

355. This section deals with the contents of the home information pack. It gives the Secretary of State power to prescribe the documents to be included in the pack, the time at which they should be included and the information that may be included in, or excluded from them. It also allows the Secretary of State to prescribe documents that may be included in the pack. In other words, optional pack documents.

356. Before prescribing any document for inclusion in the pack, the Secretary of State must be satisfied that it contains information that is relevant to the property being sold and concerns matters that are of interest to a potential buyer.

357. The contents of the home information pack will be specified in the regulations. Subsection (5) gives an indication of the sort of information that is likely to be considered relevant and includes:

- The terms of sale.
- Evidence of title.
- Information in public registers that is relevant to the property, such as replies to local searches.
- Information on the physical condition of the property.
- Information on the energy efficiency of the property.
- Any warranties and guarantees on the property.
- Information concerning service charges and other taxes and charges affecting the property.
- Replies to standard preliminary enquiries made on behalf of buyers;

358. This is information that is, for the most part, obtained by or on behalf of buyers or sellers under the current system. An item which, under current arrangements, is not normally available but which is intended to be included in the pack is information about the energy efficiency of the property. This will contribute towards the implementation of EU Directive [2002/91/EC](#) (Energy Performance of Buildings Directive) which requires member states to introduce requirements for energy performance certificates and to ensure that these are made available by the owner to prospective buyers when properties are sold.

359. Subsection (7) permits the Secretary of State to prescribe the form in which and the terms upon which a prescribed document may be prepared and who should prepare it.

These notes refer to the Housing Act 2004 (c.34) which received Royal Assent on Thursday 18 November 2004

Subsection (8) provides that the power to prescribe the terms of a document includes the power to impose a requirement that three specified categories of person should be able to enforce terms under which the document is prepared. This is intended to ensure that buyers and lenders, as well as sellers, are able to rely on the contents of the pack, including the home condition report commissioned by the seller of a property.

360. Subsection (9) enables the Secretary of State to vary the contents of the pack. The regulations may make different provision for different areas, for different types of property or for other different circumstances. An example of the use of this power could be the exclusion of a home condition report from the home information pack where a new home was marketed for sale "off plan" before construction had started or been completed. In addition, different documentation will generally be required depending on whether the interest in a property is leasehold or freehold. It also allows the Secretary of State to vary the time at which particular documents should be included in the pack.

Section 164: Home condition reports

361. **Section 163** enables the Secretary of State to make regulations requiring the home information pack to include a document that contains information on the physical condition of the property and its energy efficiency. This is referred to as a "home condition report".
362. This section allows the Secretary of State to make further regulations where home condition reports must be part of a home information pack. Subsection (3) provides that regulations may require the home condition report to be prepared by a member of an approved certification scheme (these persons will be known as "home inspectors") and in accordance with the provisions of the scheme.
363. Subsection (4) provides that the Secretary of State may approve one or more suitable certification schemes, or withdraw approval from these schemes.
364. Before approving a scheme, subsection (5) provides that the Secretary of State must be satisfied on a number of points, that is,
- That home inspectors are appropriately qualified and that proper standards are maintained
 - That home inspectors have suitable indemnity insurance.
 - That an adequate complaint resolution procedure exists.
 - That arrangements are in place for requiring the registration of home condition reports where provision for a register is made under **section 165**.
 - That arrangements are in place for a public register of home inspectors
 - And any other issues required by the regulations.
365. Subsection (6) allows the regulations to require or authorise a certification scheme which is approved to contain any matters relating to the home condition reports, including the terms of engagement under which home inspectors can carry them out.

Section 165: Register of home condition reports

366. Regulations made under section 163 and 164 may be made requiring a home condition report made by a home inspector to form part of a home information pack. This section allows those regulations to make provision for a register of such home condition reports.
367. Subsection (2) provides that the regulations may specify that the register is to be kept by either the Secretary of State or some other person.
368. Subsection (3) provides that a person wishing to put a report on the register may be required to pay a prescribed fee for doing so.

369. Subsection (4) provides that information from the register may only be disclosed in the circumstances set out in the regulations. Subsection (7) provides that anyone who makes an unauthorised disclosure is guilty of a criminal offence and subject, on conviction, to a fine of up to level 5 on the standard scale (currently £5,000). Home condition reports which are properly compiled should not contain personal information about any person, but this provision allows the Secretary of State to ensure that appropriate controls are in place on the use of information so that privacy is safeguarded.
370. Subsection (5) provides that the regulations may prescribe the persons who may gain access to the register or any information contained in or derived from it, and the purposes for which such information may be used. These persons may, upon payment of a fee if required, inspect the register, take or be given copies of documents in the register or be given information contained in the register. The persons who are likely to be given access to the register include sellers, buyers and potential buyers, their professional advisers and, for the purposes of valuations, mortgage lenders.
371. Subsection (6) provides that the purposes for which the information in the register may be used can be public (such as the purposes of local enforcement authorities) or private (such as the purposes of mortgage lenders).

Section 166: Enforcement authorities

372. Sections 166 to 169 and Schedule 8 provide for the enforcement of the home information pack duties by local weights and measures authorities (who act through trading standards officers). This section places a duty on local weights and measures authorities to enforce the home information pack duties, including the duty to belong to an approved redress scheme as set out in section 173, in their areas. Local weights and measures officers are already responsible for enforcing the Property Misdescriptions Act 1991 and parts of the Estate Agents Act 1979. The enforcement of the home information pack duties is in many respects complementary to the activities of trading standards officers under those Acts.

Section 167: Power to require production of home information packs

373. This section sets out the powers of the enforcement authority to require the production of any document included in a home information pack for inspection and to take copies if it is deemed necessary. The section provides that the duty should be complied with within the period of seven days following the date of the request unless there is a reasonable excuse for not doing so.
374. The section also provides that the requirement cannot be made more than six months after the last day on which the person was under a duty to have a pack available for inspection.

Section 168: Penalty charge notices

375. Section 162 gives enforcement officers a power to give penalty charge notices to persons whom they believe have failed to comply with any of the duties described in sections 155 to 159, 167(4), or 172(1).
376. The section provides that a penalty charge notice may only be given within the six-month period following the date on which the breach of duty occurred (or the date of the last day of a continuing breach). It also introduces Schedule 8, which makes further provisions for fixed penalties.
377. Enforcement officers have a number of options other than giving a penalty charge notice when they believe that a breach has occurred. It is anticipated that they will simply provide advice or a warning in most cases. In more serious cases they may issue a formal caution. The penalty charge is likely to be in the region of £200.

Section 169: Offences relating to enforcement officers

378. This section provides that it is an offence to obstruct or impersonate an enforcement officer. Upon conviction, a person guilty of an offence under this section is liable to a fine not exceeding level 5 (currently £5,000 maximum).

Section 170: Right of private action

379. This section provides a right for potential buyers to take action against any responsible person who has not complied with the home information pack duty in section 156 to provide a copy of a prescribed document in response to a request.
380. If a potential buyer has not been given a copy of the pack in response to a request, he may commission his own version of a pack document and recover from the responsible person the reasonable costs of doing so. In order to recover costs in this way, the following conditions must be satisfied:
- The property is on the market, or the potential buyer and seller are in negotiations for the sale of the property.
 - The potential buyer has not been provided with an authentic copy of the document. An authentic document is one which forms part of the most recent home information pack and complies with any regulations made under section 163 on content.
381. The potential buyer's rights described in this section still apply if the request was for a home information pack or part of a pack, but did not specify the particular document sought.

Section 171: Application of Part to sub-divided buildings

382. This section provides that the home information pack duties apply in cases where two or more dwellings located in a sub-divided building are marketed for sale as a single property, notwithstanding that some of those dwellings are available with vacant possession and others are not. This could cover, for example, a situation where a house that has been converted into flats is offered for sale with vacant possession as a single property. This might typically be a house with a separate flat in the basement or a house that has had a "granny flat" added to it.

Section 172: Power to require estate agents to belong to a redress scheme

383. This section provides that the Secretary of State may make an order requiring estate agents marketing homes with home information packs to belong to an approved redress scheme in which particular complaints are investigated by an independent person, known as "the ombudsman" (subsection (6)). Failure to comply with such an order is treated as a breach of duty under Part 5 of the Act. As section 175(1) describes, enforcement authorities must notify the Office of Fair Trading ("OFT") of any breaches of duty committed by estate agents. By virtue of section 175(3), such breaches of duty are treated in the same way as "undesirable practices" prescribed under section 3(1)(d) of the Estate Agents Act 1979 which the OFT may take account of in making an order under that Act prohibiting a person from practising as an estate agent.
384. Subsection (3) provides that, before making an order requiring all estate agents to belong to a redress scheme, the Secretary of State must be satisfied that he has approved one or more redress schemes such that every estate agent (other than one who has been prohibited under the Estate Agents Act) is eligible to join an approved scheme. The approval of redress schemes is dealt with in section 173.
385. Subsection (4) provides that the order may exclude certain estate agents from the duty to belong to a redress scheme. This power could be used to exclude others whose professional activities are already regulated. For instance, solicitors who act as estate agents should already be subject to the remit of the Legal Services Ombudsman.

386. Subsection (4) also provides that the order may limit the duty so that it applies only to prescribed relevant complaints. A relevant complaint is defined in subsection (6) as a complaint against an estate agent made by a seller or potential buyer and relating to an act or omission in the course of the agent's activities in relation to the home information pack. This includes the giving of advice as to whether a pack is required.
387. Subsection (5) allows membership of an approved redress scheme to be open to persons who are not subject to a duty to belong to an approved redress scheme. This could include estate agents who deal in commercial properties that are not subject to the home information pack duties. It also allows an approved redress scheme to provide, on a voluntary basis, for investigation and determination of complaints about agents' activities other than those relating to home information packs. It also provides that the scheme may specify cases or circumstances in which a complaint will not be investigated or determined. For instance, a scheme could exclude investigation of complaints about an act or omission taking place a significant time before the complaint was made.
388. Subsection (7) provides that, for the purposes of law relating to defamation, the investigation and determination of a complaint is to be treated in the same way as court proceedings. The effect of this is to allow the ombudsman to conduct investigations and determinations freely without the threat of defamation proceedings. Similar provision exists for most other statutory ombudsmen.

Section 173: Approval of redress schemes

389. This section provides that the Secretary of State may approve a redress scheme established by another body or establish one himself.
390. Subsection (2) requires the Secretary of State, when determining whether a scheme is satisfactory for these purposes, to consider the provisions of the scheme, the way in which it appears it will be operated and the interests of buyers and sellers and those of members of the scheme.
391. Subsection (3) provides that the Secretary of State can only approve a scheme that makes satisfactory provision on the following issues:
- The matters about which complaints may be made. These may include complaints that an estate agent failed to observe a code of practice.
 - The ombudsman's powers and duties with regard to complaints, including any circumstances in which he would not investigate or determine a complaint.
 - How the ombudsman will deal with providing information to other redress schemes (this could cover, for instance, the case of an agent switching schemes while a complaint was under investigation or immediately after the matter being complained of occurred).
 - How the ombudsman will deal with providing information to the Secretary of State or others who regulate the activities of estate agents (for example, the Office of Fair Trading).
392. Subsection (4) allows the Secretary of State to require that applications for approval of a scheme must be made in a particular way and subsection (5) requires the administrator of an approved scheme to notify the Secretary of State of any changes made to the scheme as soon as practicable.

Section 174: Withdrawal of approval

393. This section provides that the Secretary of State can withdraw approval of a redress scheme. Subsection (2) specifies that before withdrawing approval the Secretary of State must serve a notice on the scheme administrator stating: that he proposes to

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withdraw approval, the reasons why, and that representations may be made within a specified period, which must not be less than 14 days.

394. If after this, the Secretary of State still wishes to withdraw approval from the scheme, he must then give a second notice of his decision, with reasons, to the scheme's administrator. The withdrawal of approval will take effect from the date specified in the second notice. The scheme administrator must give a copy of this second notice to every member of the scheme.

Section 175: Office of Fair Trading

395. Subsection (1) provides that any breach of the home information pack duties by a person acting as estate agent may be notified to the Office of Fair Trading (OFT). Subsection (2) requires that the OFT must be notified where a penalty charge notice has either been given, confirmed or withdrawn and be notified of the outcome of any appeal against the confirmation of a notice. Under the Estate Agents Act 1979 (the 1979 Act), the OFT has powers to prohibit unfit persons from doing estate agency work and to issue warnings. In deciding whether to make a prohibition order, the OFT must be satisfied that one of the events specified in section 3(1) of the 1979 Act has occurred. These events include:

- the agent having been convicted of one of various specified offences;
- discrimination in the course of estate agency work;
- failure to comply with his obligations under the 1979 Act;
- engaging in a practice which, in relation to estate agency work, has been declared undesirable by an order made under section 3(1)(d) of the 1979 Act.

396. If the OFT is satisfied that any person is unfit to undertake estate agency work generally or of a particular description, it may issue an order prohibiting that person from doing any estate agency work at all, or of a type specified.

397. Subsection (3) provides that a breach of any duty under this Part of this Act (such as failure to market property with a home information pack or failure to belong to a redress scheme) amounts to an "undesirable practice" for the purposes of section 3(1)(d) of the Estate Agents Act 1979. The OFT could therefore use evidence of such a failure as a trigger to take enforcement action under section 3(1)(d) of the 1979 Act which could ultimately lead to the agent being prohibited from working in the estate agency business.

Section 176: Grants

398. This section enables the Secretary of State to provide grant assistance in connection with the development of proposals for regulations made under section 163 (Contents of the home information pack), the development costs of a certification scheme for home inspectors making home condition reports or the development of a register of home condition reports.

399. Grants given under this section may include conditions. These conditions can specify the purpose for which grant monies can be used. They can also require repayment of all, or part of, the grant in specified circumstances.

Sections 177: Interpretation of Part 5

400. This section contains definitions of expressions used in Part 5 of the Act. In particular, subsection (1) defines:

- "ancillary land" as land being sold with a house or flat - for example, a garden.
- "long lease" is a lease granted for more than 21 years, or one capable of perpetual renewal. For these purposes, "lease" does not include a mortgage term;

These notes refer to the Housing Act 2004 (c.34) which received Royal Assent on Thursday 18 November 2004

- “potential buyer”, is a person who claims that he is or may become interested in buying a residential property.
- "sale" means the sale, agreement to sell, or creation of:
 - the freehold interest
 - the interest under a long lease, or
 - an option to acquire the freehold interest or the interest under a long lease
 - and "seller" means a person who is contemplating making such a sale.

401. Subsection (3) provides that a document actually in the possession of another person and not in electronic form can only be regarded as being under the possession or control of a person if he has the right to take immediate possession of it without payment. So, for example, if a seller terminates a contract with an estate agent and the former agent retains a paper copy of a home information pack, the pack can only be regarded as within the control of the seller if he does not owe the agent any money for the pack. This may be relevant in determining whether the seller has complied with any duty he has as a “responsible person” to market property with a home information pack.

402. Under subsection (4), a document which is held in electronic form is to be regarded as being in a person’s possession or control if he is able (using equipment available to him) to:

- View the document in a form that is visible and legible; and
- Produce a legible copy in documentary (e.g. paper) form.

Sections 178: Index of defined expressions Part 5

403. This section contains an index showing where definitions of expressions used in Part 5 of the Act can be found.