



Society of Chartered Surveyors

Submission to the Department of Justice, Equality & Law Reform

on

**General Scheme of
Property Services Regulatory Authority Bill 2006***

(*December 2006 Version of the Bill)

18 April 2008

INTRODUCTION

Purpose of this Submission

The purpose of this submission is to set out the views of the Society of Chartered Surveyors ("the SCS") on a number of aspects of the General Scheme of Property Services Regulatory Authority Bill 2006 which are of particular concern to the SCS. In doing so, we are happy to share with the Department of Justice, Equality and Law Reform, our membership's perspective of the impact which this Bill will have, particularly any unforeseen effects which the Bill, in its current form, will have on the property market. It is intended therefore that this Submission should be viewed as a constructive and positive contribution to the Department's efforts at shaping the Bill prior to its initiation.

About the Society of Chartered Surveyors

The SCS is the professional body for Chartered Surveyors practising in the Republic of Ireland. The Society currently has over 1,800 qualified members practising in all areas of the Property and Construction Industry.

The Society regulates the profession in the public interest and oversees all aspects of the profession, from education through to qualification and the continuing maintenance of the highest professional standards and the Society requires that its members carry professional indemnity insurance.

Approximately 800 of our members are involved in the valuation of property as well as the sale and letting of all forms/types of commercial real estate as well as residential property.

SCS and the Bill

We wish to state at the outset that the SCS is largely supportive of the draft Bill. Members of the SCS are already required to subscribe to and adhere to high standards within the profession and in that context are, save for some matters highlighted in this submission, welcoming of the Bill.

The SCS had previously reviewed the Auctioneering/Estate Agency Review Group Report which was published in October 2005. The SCS initially reviewed this Bill upon its publication in December 2006. When the Bill was viewed in the context of the October 2005 Report from which it derived, the view taken at that stage was that the focus of the Bill was solely the residential market. However, upon closer scrutiny, the SCS has determined that some aspects of the Bill are of concern to its membership, as well as affecting the general property market and accordingly, warrant the making of this submission.

CONTEXT

The Red Book

The Royal Institution of Chartered Surveyors ("the RICS") has adopted an internationally recognised valuation appraisal manual entitled *RICS Valuation Standards* which is more commonly known as "the Red Book". The Red Book has been devised by the International Valuation Standards Committee.

Among other things, the Red Book defines the bases of valuation, assumptions and material considerations that must be taken into account by Chartered Surveyors when preparing a valuation of property. The Red Book also sets out the procedural rules and guidance to be used in the conduct of valuation instructions. Paragraph 2.2 of the Red Book provides as follows:

"The role of the *RICS Valuation Standards* is to provide an effective regulatory framework, within the Rules of Conduct, so that users of valuation services can have confidence that a valuation provided by an RICS member is not only in accordance with internationally recognised standards but that there is an obligation placed on the individual valuer or firm to follow these standards, and an effective sanction in the case of a material breach."

Compliance with the standards set out in the Red Book are mandatory for members of the RICS regardless of whatever jurisdiction the members are operating in.

The Red Book sets out ethical standards with which Chartered Surveyors are required to comply. It also defines several terms which are central to the services provided by a Chartered Surveyor. Some of those terms are discussed below.

Role of the Valuer

It is perhaps helpful to briefly refer to the role which a valuer plays in the property market in relation to the sale and letting of property. A valuer can be engaged for a number of reasons, including:

1. by the owner of a property in advance of its sale;
2. by the owner of a property in advance of its letting;
3. by a financial institution for the purposes of a mortgage;
4. by a potential owner or lessee in advance of a possible purchase or lease arrangement.

The value of the property is determined by reference to a large number of factors, including the purpose of the sale or letting; synergistic opportunities for nearby properties; the context from which a potential purchaser might emerge; the uniqueness of the property; the availability of other similar properties; prices achieved by recent transactions in the area; established or anticipated demand; varied or potential uses of the property; infrastructure; local authority zoning, etc etc. In performing that task, the valuer is guided by the Red Book.

The valuer is charged with the task of applying his or her skills and experience with a view to assessing what the value of a particular property is or ought to be. It involves a wholly subjective judgement or assessment. The valuation of property has always been regarded as an art form, not a science.

That is essentially how the role of a valuer may be characterised today.

Auctioneering/Estate Agency Review Group

The Auctioneering/Estate Agency Review Group's Report was submitted to the Minister for Justice in July 2005 and was published the following October.

The scope of the Auctioneering/Estate Agency Review Group's Report is delimited by the Terms of Reference of the Review Group which are set out on page 5 of the Report. They indicate that the Review Group was asked "to carry out a review of all aspects of the auctioneering profession in Ireland and equivalent services in appropriate comparable jurisdictions.". The Review Group was also asked to make recommendations in relation to the qualifications of auctioneers/estate agents; the need for a code of ethics for auctioneers/estate agents; the need for a body to regulate auctioneers/estate agents; and, the desirability of a system for the investigation of auctioneers/estate agents.

The 42 recommendations contained in the Report are very much focussed on the regulation of auctioneers/estate agents and letting agents particularly in relation to the residential market. Whilst the terms auctioneer and estate agent may be used interchangeably, many Chartered Surveyors may practice as either or both but only those who have undertaken the rigorous examination programme and post qualification study and practice may refer to themselves as Chartered Surveyors.

The role and function of chartered surveyors and commercial property transactions would appear to have been beyond the remit of the Review Group and consistent with that, the role of chartered surveyors was not addressed, nor we understand was it intended to be addressed, in the Report of the Review Group.

Context from Which Bill Emerged

It appears that the Review Group's Report formed the basis of the Property Services Regulatory Authority Bill 2006 and it is clear that the Bill was drafted at a time when the housing market was experiencing a period of particularly high growth and when some questionable practices came to the fore – such as unrealistically low auction guide prices. The Review Group Report very much pointed towards the vulnerability of the ordinary members of the public in conducting property transaction in such a heated market. Consequently, it was assumed by the Society and it seemed reasonable to suggest that the Bill is very much intended to be a consumer protection measure and specifically designed to alleviate a specific problem centred on the heated residential sales market.

If the Report, with consumer protection for the residential market at its focus, has formed the basis of the draft Bill, the SCS finds it very difficult to understand the basis for the Bill venturing, as it does, well beyond its remit of consumer protection, into sales and lettings in the commercial property market.

It is perhaps helpful to emphasise that the vast majority of commercial property transactions many of which involve chartered surveyors, are transactions between businesses and trade related entities – mainly involving offices, shops, warehouses, factories and other commercial premises. Such transactions do not have the same dynamic as a normal transaction between two ordinary people buying and selling a residential property and therefore do not warrant the same level of protections or safeguards.

The distinction between commercial transactions as against transactions between ordinary people (sellers and buyers of residential property) is already enshrined in Irish law (For example, see Sale of Goods Acts Restatement).

The SCS is of the view that while there may be a need for some consumer protection measures to be introduced in the residential market, such measures should not seek go beyond protecting consumers within the ordinary meaning of that term.

HEAD 2 - DEFINITIONS

Definition of "Land" & New Section

Head 2 contains a very wide definition of the term land. As the concept of "land" is central to the Bill, the precise scope of this definition is of the utmost importance.

The SCS requests that the Department replace the definition of "land" with two separate definitions of "residential land" and "commercial land". Those definitions should provide as follows:

"residential land" means land which is occupied by buildings or structures whose purpose is solely residential and includes an estate or interest in or over such land, whether corporeal or incorporeal.

"commercial land" means any land which is not residential land.

Consistent with the foregoing amendments, the SCS is of the view that a new section should be inserted at a later point in the Bill. Immediately following Head 69, the following new Head should be inserted:

"Application of the Act.

70. This Act does not apply to commercial land."

Letting Transactions

It is wholly unclear from the Bill as to whether, and the extent to which, letting transactions are intended to fall within the scope of the Bill. Letting transactions are only referred to in Heads 2 and 66.

The SCS is firmly of the view that commercial lettings should be excluded from the scope of the Bill. The terms of any proposed lease would/could materially alter the rental level and the wide variety of covenants, concessions-rent free periods, fit out allowances etc, obligations, length of lease etc would in the Societies opinion make the inclusion of leased commercial property untenable.

Definition of "Management Company"

Head 2 contains a very wide definition of the term "management company". It is assumed that the management companies at which this provision is principally directed is management companies of apartment blocks and housing estates. Housing estates increasingly contain some commercial element, such as shops and offices etc.

Whilst it is accepted that the Bill is intended to capture the housing element of those housing estates which include a commercial element, the inclusion of the commercial element of such estates would need to be very carefully considered to avoid interfering with the market and the operation of businesses.

Definition of "Property Management Services"

Again, the definition of "property management services" appears to be unduly wide in its scope. The imposition of a new regulatory framework on an established and well managed commercial property management service where high levels of skills and training and compliance are already in place could lead to confusion and unintended conflict with existing contractual agreements.

Definition of "Property Service"

The definition of "property service" also requires some amendment. The exclusion of the Local Authorities could lead to difficulties with advice and subsequent consumer problems.

If the service is restricted to residential property this should address the principal complaints raised in recent years.

HEADS 60, 61 & 62

Introduction

It is appreciated that when the housing market was rising, there may have been instances where guide prices, particularly those involving properties for auction, were set at an unrealistically low level.

It is in that context, the SCS recognises that the Department wishes to implement the Report of the Auctioneering/Estate Agency Review Group and to introduce some measures which are intended to in some way address that issue.

However, Head 60, 61 and 62 are both individually and collectively, of major concern to the SCS. Those provisions seek to turn established practice on its head, without, in the view of the SCS, a full awareness of the consequences in the property market which such fundamental changes will have.

In short it can be said that the SCS would have expected that such radical reforms and the introduction of property market control measures of the scale provided for in Heads 60, 61 and 62 would have been preceded by, and be wholly grounded upon, a report from a commission or consensus of economic consultants with a particular expertise in the Irish property market. It is the view of the SCS that the Report of the Auctioneering/Estate Agency Review Group cannot be said to be a basis for the introduction of these measures.

Head 60 – Advised Value

Head 60(1) requires a licensee to provide a valuation (“advised value”) within seven days. When read alone, the SCS has no difficulty with this particular sub-head.

Head 60(2) defines the term “advised value” and envisages that a single, fixed value of a property would be provided or that, alternatively, a valuation range would be provided. Head 60(2) envisages that the value would be determined by reference to the licensee’s reasonable estimate, based on experience, which “a willing but not anxious buyer” would pay. In circumstances where a price range is provided, the maximum permissible difference between the two figures must be no more than 10% of the lower figure.

In plain terms, Head 60(1), when read in conjunction with Head 60(2) requires a valuer and every selling agent to somehow to apply formidable foresight in determining with unrealistic precision, the price at which a property will sell for on the open market. In the SCS’ view, the current terms of Head 60(2) are materially unreasonable and clearly unworkable in practice.

The failure of the valuer to predict with absolute precision, the price at which a property will sell for on the open market will then be punishable under Head 62 and will also expose valuers to liability, as will be discussed later in this Submission.

The Red Book provides a widely recognised and utilised definition of the term “Market Value” at Paragraph 3.2. It provides that “Market Value” means:

“The estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.”

It is significant that the highest international standards in this area (the Red Book) do not purport to compel a Chartered Surveyor to somehow foresee with great precision, the exact price which a property will achieve upon its sale. The contrast between the internationally recognised best practice as provided for in the Red Book, and the terms of Head 60 is striking.

The Red Book recognises the concepts of Special Value, Synergistic Value and distinguishes between Market Value, Market Worth and Fair Value. These considerations can cause the value of property to vary significantly between one buyer and another. For example, a commercial site will be worth more to a buyer who owns adjoining land and is known to want to expand an existing premises. The same land will be of significantly less value to a buyer who simply wants to place a stand-alone warehouse on it. Head 60 is fundamentally flawed in that it fails to recognise that valuation is informed by several internationally recognised factors which cause a property to have varying levels of value dependent on different circumstances, including the context from which the purchaser emerges.

Head 60(2) fails to recognise that the task of valuing a property is not an exact science, determined through the application of fixed, mathematical formulae.

The SCS has no difficulty with its members being required to utilise his or her skills and experience when providing a valuation and to comply with the highest possible standards. However, the members of the SCS find it

very difficult to accept a situation where the focus of their profession is being shifted from the valuation of a property to the task of second guessing with unrealistic precision, the price which a property will achieve on the open market.

The SCS find it very difficult to comprehend how the legislature can in such a clinically objective way require a valuer to set a fixed price with such precision or to set a very confined margin within which the value of property will fall.

If Ireland adopts Head 60 in its current form, it will, the SCS believes, be alone in adopting an approach which is totally at variance with internationally recognised best practice. In addition the SCS believe that Head 60 introduces oppressive requirements which are, in law, disproportionate to the objective to be achieved.

As already stated, the SCS has little difficulty with Head 60(1), which, when read alone, requires a valuation to be provided within 7 days of having valued or examined a property. The difficulty begins however when one reads Head 60(1) in conjunction with Head 60(2) because the valuer is not required to provide an estimate of value, in the normal sense of the word, but is in fact being required to provide a very precise assessment of the price which the property will achieve upon its sale. This is completely objectionable for reasons already stated.

The requirements of Head 60 are made all the more unpalatable by virtue of the fact that the failure of the valuer to estimate the sale price with precision will potentially expose him or her to sanction by the regulator and to the prospect of a court action mounted by the vendor or other party, as is discussed below.

Even if the concept of "advised value" were to be replaced with the internationally recognised concept of "market value" this would still expose the valuer to potential sanction by the regulator and to liability from other parties, as already mentioned. This effectively introduces a new concept where confidential advice given to a vendor (or lessor) can become a public document which opens the valuer/selling agent to a duty of care to all and sundry.

The role of a valuer has been outlined earlier in this Submission. In a property valuation matter, the relationship is between the client and the valuer. Whilst the primary task of valuing involves the exercise by the valuer of his or her skills and experience, he or she must also take into account the views or considerations of his or her client. In short it may be said that the valuer owes a duty of care to his or her client. Head 60 will irreversibly alter the role of the valuer from being a task of assessing the perceived value, at the request of a potential vendor/lessor etc, of a property to one where the valuer will be forced to second-guess the price at which the property will sell for in the future, with no regard for the views or expectations of the client by whom he or she was engaged.

The operation of the market is such that there is a massive difference in many cases between a formal valuation and a pre-sale estimate of value.

The SCS wishes to be constructive in assisting the Department in its efforts to arrive at a piece of legislation which is workable and effective. Despite the good faith of the SCS in this task, and despite our best endeavours to devise and propose a workable alternative to Head 60, we find that Head 60 in its current form is fraught with difficulty and we unavoidably have found that it is a provision which cannot be improved by amendment.

That therefore leads the SCS to urge the Department to give serious consideration to the consequences and impact which Head 60 will have on the property market and accordingly requests the removal of Head 60 from the Bill.

Head 61 – Restrictions on the Selling Price

Head 61(l) provides that an auctioneer/estate agent must not discuss or publish an estimate of the sale price which is below the advised value.

The effect of this provision is to force a vendor to offer his or her property for sale at a price determined by a third party, and not at a price or level of his or her own choosing. Through the operation of Head 61 – i.e. the requirement to sell at the advised value, a vendor is effectively being forced to reveal the price at which he or she will sell his or her property. This drastically reduces the prospect of the vendor ever achieving a price which is much above the advised value and points towards an unprecedented degree of State interference in a person's established right to sell their own property at a level of their choosing.

Another effect of Head 61 is that if a vendor is finding it difficult to sell his property at the advised value, he is precluded from having his auctioneer discussing the possibility of a lower sale price with any prospective purchasers.

The SCS feel that the freedom of the vendor to have the final say in the level at which his or her property is placed on the market is one of the core elements of a free market. This provision is completely at variance with a person's established right to market and sell their property at whatever level they wish.

Head 61 will be particularly unworkable in the context of transactions involving commercial land. A large portion of transactions in the commercial property sector are carried out by investment bodies, pension funds and financial institutions in what is termed an "off market" setting. A prohibition on discussing figures, as is provided for in Head 61 will severely restrict the operation of this market.

The SCS would have expected that the prevailing Government policy was towards de-regulation and the removal of State interference in markets. A relatively recent demonstration of this was the revocation of the controversial Restrictive Practices (Groceries) Order 1987. Significantly, the Government's White Paper entitled *Regulating Better* pledged (at p.45) that "alternatives to 'command and control' type regulation/legislation will be promoted for wider use by Government Departments ...". Head 61 would seem to be at variance with that policy.

In addition to constituting an unprecedented level of State interference in the property market, the SCS believe, and have been legally advised, that this measure is constitutionally dubious and, if enacted in its current form, is highly vulnerable to legal challenge.

The SCS has grave difficulty with this very problematic measure and as with Head 60, believe it to be most inappropriate and disproportionate to the objective to be achieved.

Head 62 – Reasonableness of Advised Value

Head 62(l) allows the regulatory authority (of its own volition, or on foot of a complaint) to require a licensee to justify a previously supplied “advised value” relating to a property. If the regulatory authority believes that the advised value was unreasonable, it may reprimand or warn the licensee.

Clearly, by providing an “advised value” under Head 60, a licensee is exposing themselves to potential liability under Head 62 and it is noted that any sanctions imposed under Head 62(l) must be published pursuant to Head 69(l)(c).

This provision is designed to empower the regulator to question the professional character and integrity of a licensee. Such a provision will inevitably lead to conflict between the regulator and a licensee.

As already stated, the task of valuing a property is not an exact science, determined through the application of fixed, mathematical formulae. To provide a mechanism by which valuers may be brought to account for their professional judgment appears, to the SCS, to be grossly unreasonable.

The unworkable nature of this provision is perhaps best demonstrated by reference to just one of its weaknesses. Head 62 does not provide the Authority with guidance on how its powers under this Head should be exercised. In the context of a booming market, one would have expected that the Authority would be prohibited from comparing a recent, high valuation with a less recent lower valuation of a similar property. The valuation date and the date upon which that valuation is examined by the Authority are very important considerations which the legislation seems to have overlooked.

The SCS find this provision to be an unwarranted and unjustifiable intrusion into the professional judgment of its members and interference in the open market and for those reasons, requests that the Department give serious consideration to the removal of this provision.

Exposure of Chartered Surveyors to Liability

Heads 60, 61 and 62 each expose a Chartered Surveyor and any other licenced agent/seller to potential liability. These provisions fundamentally alter the task of a surveyor and the status and role of a valuation in a property transaction. One consequence of this is that Chartered Surveyors are placed in an invidious position, as now explained.

By providing an “advised value” pursuant to Head 60, a surveyor, in circumstances where the courts find that a duty of care is owed to third parties, may be exposed to legal action being taken:

(i) by the vendor in circumstances where he or she is unable to sell his or her property on the grounds that the surveyor valued the property too high;

OR

(ii) by a vendor in circumstances where he or she has already sold his or her property and who finds that an identical, neighbouring property was valued higher and sold for a higher price than the first mentioned vendor’s property;

OR

- (iii) by the purchaser in circumstances where he or she felt that the property had been overvalued;

OR

- (iv) by a disappointed purchaser in circumstances where the property had been valued at a lower level than the price achieved upon sale.

In addition, by providing an "advised value" pursuant to Head 60, a surveyor who has had substantial academic and practical professional training and a selling agent who may not have had the same level of training may be sanctioned under Head 62.

The SCS is firmly of the view that the exposure of its members to liability in this way is untenable and will have a drastic effect on the work of the profession. If highly skilled and trained surveyors foresee these difficulties then selling agents many of whom would not have had the same levels of training are likely to encounter substantial and regular problems with possible legal consequences.

OTHER ISSUES OF CONCERN

Compensation Fund

The establishment of a compensation fund is envisaged by Head 9(2)(m) and is provided for in Heads 52, 53 and Head 72(2)(h).

The SCS in principal supports the establishment of a compensation fund where a selling agent does not have a professional indemnity policy. However does the establishment of an adequate Professional Indemnity Policy lead to double counting and additional costs for properly insured practitioners? The SCS questions whether the insurance industry which manages this aspect of insurance has been consulted. Whilst the SCS accept that it may be necessary to have the precise contribution prescribed and updated by way of statutory instrument, the SCS is of the view that the basis for the imposition of the charge, in other words, the necessary principles and polices, must be set out in the Act and must not be left to be determined by statutory instrument.

The explanatory note which accompanies Head 52 clearly indicates that a compensation fund along the lines of the Solicitors Compensation Fund will be established. The SCS note that contributions by solicitors to the Compensation Fund are made on a per-head basis. The Solicitors fund relates to and is drawn from similarly qualified people whereas the variety of qualifications and the total lack of them in many instances is likely to lead to a situation where the better trained and qualified practitioners are effectively cross subsidising poorly trained/unqualified people.

The SCS is firmly of the view that a licensee's contribution towards the fund, assuming properly and adequately insured practitioners will require this additional cover must be on a per-head basis rather than by reference to the turnover or size of an organisation in which an individual works and this must be explicitly stated in the primary legislation.

Membership of the Authority

Membership of the Authority is provided for in Head 8. The SCS is anxious that it be assured of having a representative as a Member of the Authority.

It is common in membership provisions in legislation of this kind that the precise make-up of the body be spelled out. We believe that such an approach is fair and open and therefore the SCS request that Head 8(1), 8(2) & 8(3) be deleted and be replaced with the following:

"(1) The Authority shall consist of a chairperson and a maximum of 8 ordinary members, appointed by the Minister as follows:

- (a) 4 auctioneers, estate agents, letting agents or chartered surveyors nominated for such appointment by bodies which are representative of those professions;
- (b) 4 persons nominated for such appointment by the Minister, being persons who are not members of the professions referred to in (a)."

Making of Regulations

The SCS recognises the need for the Authority to be bestowed with some degree of discretion as regards less substantive and procedural matters through a regulation making power.

However, the SCS is ever conscious of the requirement contained in Article 15.2.1 of the Constitution and the case-law under that provision which requires parent legislation (such as Head 67 and 72 of this Bill) to articulate in the body of the parent Act, the principles and policies which are to inform the subsequent making of any regulations.

Accordingly, desirous of ensuring that any regulations made in the future are legally sound and enforceable, the SCS draws the Department's attention to the need to much more clearly define the circumstances in which regulations can be made whilst also spelling out the policy considerations which must underpin the making of such regulations.

Gazumping

The SCS wishes to express its surprise that the Department does not propose to avail of this opportunity to introduce reform measures specifically in the area of gazumping. Whilst the Law Reform Commission's Report on Gazumping (LRC 59-1999) did not propose the introduction of a statutory prohibition on the practice, it did recommend a number of law reform measures aimed at tackling the practice. The SCS favours the implementation of the recommendations of the Law Reform Commission in this area. This Bill provides a real and tangible opportunity to introduce strong consumer protection by legislating against this unfair practice.

Regulatory Impact Assessment

The SCS requests that the Department conducts a Full Regulatory Impact Assessment of the proposals contained in the draft Bill. As already made clear, the SCS has particular concerns about the impact which this Bill in its current form will have on transactions involving commercial land, and is also very concerned about the impact which aspects of the Bill will have on rights of citizens and the extent to which the Bill will interfere with or distort the market.