The Law Society

Flood Insurance Consultation
Department for Environment, Food and Rural Affairs
3rd Floor, Zone C, Nobel House
17 Smith Square
London
SW1P 3JR

8 August 2013

Dear Sir/Madam,

Securing the future availability and affordability of home insurance in areas of flood risk consultation paper

The Law Society is grateful for the opportunity to respond to Defra's consultation paper on securing the future availability and affordability of home insurance in areas of flood risk.

We do not intend to submit a formal response, but having consulted the Conveyancing and Land Law Committee and the Planning & Environmental Law Committee, we would like to make the following observations that relate, in the main, to the proposed exclusions from Flood Re.

New homes built after January 2009

- Defra proposes to exclude new homes built after January 2009 from the scheme. Such properties are already excluded from the Statement of Principles, and current Government planning policy is to avoid inappropriate development in areas of flood risk.

However, new properties continue to be built on flood plains. The latest figures from the Department for Communities and Local Government, cited in Hansard on 17 July, estimate that 9,600 homes were built in flood risk areas in 2010. From 2005 to 2009, over 12,000 homes a year were built in flood risk areas. Under Defra's proposals, these properties will be excluded from flood risk cover, despite the fact that, in many cases, development has taken place against the advice of the Environment Agency and, since March 2012, contrary to the National Planning Policy Framework (NPPF). Whilst we understand the pressing need for new homes to be built, it is unlikely to be sustainable to continue to build in flood risk areas whilst at the same time excluding these properties from any schemes providing insurance support . We would prefer to see a position whereby the Government took active steps to discourage new developments from being built in areas of high flood risk.

If properties continue to be built contrary to the NPPF, it is important that developers consider their responsibility to communicate the risks to potential purchasers. Buyers of new homes need to be warned by the developers and/or their agents that they may not be able to obtain insurance, on suitable terms or at all. It should be made clear to buyers that difficulties in obtaining insurance cover could prevent their being able to obtain appropriate funding to buy the property. Even if they are cash buyers or are able to raise their own funding funds they need to be warned that they could have difficulties when they come to sell. Disclosure should be made under the provisions of the Consumer Protection from Unfair Trading Regulations (CPRs) and the OFT Guidance on Property Sales 2012.

Solicitors will consider flood risk during the conveyancing process but if the information is available it should be given to prospective buyers at the earliest stage of the process so that they can make an informed choice at the point of choosing a property to buy.

Council Tax Band H properties

- Defra also proposes to exclude Band H properties from Flood Re on the basis that, unless eligibility is targeted towards lower income households, a disproportionate amount of Flood Re support would go towards higher value properties that have more expensive insurance premiums anyway. However, this reasoning does not take account of the fact that Band H properties may be occupied by individuals who are retired and may have little to no income, and who may be most in need of affordable flood cover. According to figures cited by Richard Benyon on 4 July, Band H properties comprise just 0.6% of households in England and Wales, and 2,000 of them are in areas of significant flood risk. To exclude such a small number of properties from access to affordable and available flood insurance, particularly when Band H properties are already covered by the Statement of Principles, seems somewhat arbitrary. Whilst it seems entirely reasonable that those with the most valuable properties should not benefit at the expense of others of more restricted means, it does not seem a reasonable outcome that an elderly person with a very modest income should be pushed to sell a property at a large loss – if, indeed, there was a buyer for such a property – if it were to be flooded because their insurance did not cover it. We appreciate that means testing does not sit happily here, but, if there is a desire not to spend a disproportionate amount of any fund on the most valuable properties, might it be possible to provide some relief by making reference to an existing government recognised status of low income?

'Genuinely uninsurable' properties

- 'Genuinely uninsurable' properties are also excluded from Flood Re under Defra's proposals. Arguably these properties are the ones that are most in need of access to affordable insurance cover. As stated in the consultation paper, it is vital that a consistent definition is found for 'genuinely uninsurable', otherwise there is a risk that households would be covered by some insurers but not by others, which would only serve to replicate the uncertainty of the present situation. Will this phrase capture more and more properties as time goes on? Are there clear ways to ensure that the installation of certain flood measures would enable these properties to be removed from such a categorisation?

Small Businesses

- Small businesses are not covered by Defra's proposals on the basis that there is not sufficient evidence to justify Government intervention in this area of the market. However, we believe Defra should consider including small businesses in the Flood Re scheme. Whilst profitable and long-established small businesses may be able to absorb the higher insurance costs associated with being based in a flood risk area, new small businesses face many high, upfront costs and take longer to become profitable. Many small businesses also operate from residential properties. This raises an issue as to whether such small businesses would be eligible for Flood Re in any event. Given that the Government is keen to stimulate business growth, we would argue that small businesses should be able to access affordable insurance cover. Regardless of the approach eventually taken by Defra, it is important that Government makes small businesses aware of the changes to flood insurance and makes them aware that they may not be able to obtain flood insurance on suitable terms or at all.

Register of Properties at Risk

- Finally, Defra proposes that an administrator should be appointed to create and maintain a register of domestic properties at high risk of flooding, and that this administrator should be the Environment Agency. Defra estimates the register could include up to 500,000 properties. Will those properties on this list constitute ‘genuinely uninsurable’ properties or will the list be used for some other purpose?

The Law Society understands the value in having such a list and thinks the Environment Agency or the Land Registry would be appropriate bodies to administer such a list. The register may provide a useful way of determining whether a property is in a flood risk area and therefore whether it could be difficult to obtain flood insurance for that property. However, maintaining a register of properties in flood risk areas also presents a serious risk of blighting properties that are on the list; owners of such properties are likely to find it more difficult to sell their properties. As the register could potentially include 500,000 properties and the number is likely to rise over time, this could have a detrimental effect on the wider property market. We are also concerned about the practicalities of keeping such a register – for example:

- Would it be possible for a property to be removed from the register if flood defence measures were installed in the local area or the property to lower the flood risk? Presumably removable would not be permitted in the case of installation of measures that need to be activated in case of flood occurring?;
- What criteria would be used to determine which properties should be on the list?

Establishing whether a property is in a high risk area is not always straight forward. Part of the property may be in such an area but part not, the precise boundary between high risk and not, is not a precise science. Not putting a property on the register also has serious consequences for a prospective purchaser (believing it is not high risk) and then finding out at a later stage that the ‘error’ is rectified and they are designated.

We note that opt-in, opt-out and appeals criteria are suggested. We consider that, if a register is established, the appeals procedure should be robust and be at the administrative level, with subsequent recourse to the courts.

Generally

Broadly we would say that whilst it is obviously preferable to have Flood Re (however the detail is settled) than have flood insurance left entirely to the market, the scheme only benefits certain prescribed groups of people/companies and excludes many sections of the market. We would like to see Government, once the details of the scheme are settled, undertake a major communications programme to explain to individuals and businesses how the scheme will impact on them particularly for those who will fall outside its remit.

We would say that we have recently issued a practice note on this issue as you are aware. This is the link http://www.lawsociety.org.uk/advice/practice-notes/flood-risk/.

As a result of the proposed changes it is likely that when the changes are implemented the note will be amended accordingly.

We hope that these points are helpful and would be happy to discuss them further with Defra if that would be useful.

Yours sincerely,

Mark Stobbs
Director of Legal Policy