



Law Society
of Scotland

Consultation response

Energy Efficient Scotland: Improving energy efficiency in owner occupied homes

April 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Property Law Committee and Property and Land Law Reform Sub-committee welcome the opportunity to respond to Scottish Government's consultation *Energy Efficient Scotland: Improving energy efficiency in owner occupied homes*¹. We have the following comments to put forward for consideration.

General comments

We consider that these proposals form part of a range of wider issues concerning housing stock quality. It is important to consider where the responsibility lies for improvement of housing stock and how individual owners can be encouraged to keep their property in good repair. Recent work on tenement maintenance and cladding raise similar issues in this regard.

We note that the proposals have the effect of charging individuals to make improvements to their property in order to achieve a Scottish Government aim. It is important that sufficient support is put in place for individual homeowners to achieve the desired outcomes, in particular, recognising that in some cases, there may be significant costs involved in bringing a property up to the required standard.

It is recognised that energy efficiency is a key feature for future housebuilding. However, it is important that there is sufficient resource and knowledge within planning and housing departments of local authorities to support housebuilders to deliver appropriate outcomes.

¹ <https://consult.gov.scot/housing-and-social-justice/energy-efficient-scotland-owner-occupier-proposals/>

Consultation response

Setting the standards

We note the proposals that standards should be legally binding. In this regard, we consider it appropriate that consideration is given to aligning standards for owner-occupied housing with those which will apply to the private rented sector. We note that if standards are to be legally binding and successful in achieving compliance, this will require monitoring and enforcement, and sufficient resources will be required in order for this to be carried out.

We note that consideration may require to be given to the efficacy and methodology of the EPC measurements. These are not currently clear and do not appear to have been thoroughly tested. It is important to consider that the EPC is a subjective assessment. While we note that section 1.1.1 of the consultation refers to desk-based audits of EPC energy assessors being carried out by accreditation schemes, these are audits of a small percentage of EPCs which have been lodged by members and therefore the scope of such audits is currently limited. We suggest that consideration is required as to the extent to which EPCs can be relied upon. There is a potential for EPCs to be open to misuse and improved audit processes may be merited. We also note that clarification is required as to the liability for errors or omissions in the certificate.

In determining the timeframe for the measures to be introduced, we suggest that the average length of homeownership should be considered. Owners will need sufficient time to secure or build-up finance and to carry out works. Furthermore, it could be a significant leap for some properties to move to a 'C' EPC rating. It is common for suggestions within current EPCs to take a property to a 'D' or 'E' standard and so a global standard for properties to reach 'C' would appear to be ambitious. In the circumstances, we do not consider it viable to bring the standard into force before 2030. We agree that not all properties will be capable of reaching a band 'C' rating. That being said, we consider that it is appropriate that standards are initially fixed with scope for them to be reviewed over time. It may be appropriate in time for standards to be raised but initially, homeowners will require a fixed standard to work towards. It is important that the required standards are well publicised and that this is done in good time before the measures are enacted. This is of particular significance where penalties may be levied to individuals for failing to meet their obligations. It is important that penalties are reasonable and proportionate, and that these are also sufficiently well publicised.

We note the potential for significant costs to be involved in bringing some properties up to the required standard. Separate from the work itself, we note that there may be additional costs involved for owners to carry out work, for example planning permission, building warrants, and/or listed building consent. We consider it crucial that technical feasibility and cost effectiveness are considered. However, it is important to bear in mind that an assessment of technical feasibility will also require funding.

We consider that there is a potential for these measures to affect the property market, both in terms of properties being listed for sale and prices. It is not possible to estimate the full effects. There is the potential that measures may be a deterrent for those seeking to move or purchase a property, perhaps particularly for first time buyers or those purchasing at the lower financial end of the property market. Additionally, there is the potential that this will impact upon property prices if work needs to be carried out before sale. Some properties

could suffer from 'statutory blight' where the cost of compliance would be prohibitive. This may be particularly significant in the investment sector. On the other hand, we recognise that these measures are likely to help to increase the quality of Scotland's housing stock.

An alternative option, which may help to reduce the effects on the property market relating to delay and property values, may be for Scottish Government to play a role in assessing works which are likely to be needed to achieve compliance with the proposed standard and to put in place a scheme to implement the work with financial and other assistance as may be required. Such a scheme may be of particular use in respect of flatted properties, for example by negating the need for each flat owner to obtain reports and quotes for works and assist where parts of properties are owned in common. This would allow for clarity on what work is required for each building and thereby allow sales to be tailored to reflect each party's expected liability. We consider that such a scheme would enable lenders to assess impacts of likely works on affordability for mortgage purposes.

It is not clear from the proposals whether the same standards will apply to properties sold from an executry estate or in the course of repossession proceedings. We suggest that consideration be given to this.

Abeyance/out of scope work

We suggest that exemptions need to be fully considered and we note the 'technical feasibility' and 'cost effectiveness' criteria proposed. We consider that these are necessary requirements for a successful scheme. These will be of particular significance for old properties and properties where the costs for improvements would be very significant, particularly where there will be little or no return from carrying out the works. We support the provision of a cost cap exemption, similar to that provided for in the private rented sector regime.

We consider it appropriate that if the standards cannot be met because it is not technically feasible or cost effective, owners should be able to apply for abeyance for a fixed period of time. It is important that there is a consistent standard applied in granting abeyances. The process of application should not be overly onerous or require significant cost, particularly given that it is likely that owners would require to obtain some kind of report to support their application. The abeyance should be for a reasonable period of time recognising the potential for technical developments and changes in costs. A minimum of 12 months would appear to be appropriate.

Helping homeowners to comply

Careful consideration is needed as to how the quality of work is controlled. This may be able to be monitored if work is carried out at the trigger point of remedial work where other checks may be in place (for example, building warrant) but likely harder to control at the point of sale.

In relation to the considerations for homeowners who are required to meet the legally binding standard, while matters such as quality assurance, skills, and consumer protection, we consider that financing any changes required and whether it is economically feasible to undertake the necessary works are likely to be significant considerations.

We note the proposal that a trigger point for work would be at the point of sale. There requires to be clarity as to whether the onus to carry out necessary work falls on the seller or the buyer of the property, or both. Depending on the approach taken, there is a potential for property values and the market to be affected.

If the onus for carrying out work is on the seller of the property and is a pre-condition for sale, we note that this could bring about challenges around quality assurance and would require sellers to have additional financial resources in advance of a sale in order to place their property on the market. As referred to above, it is not clear whether the same standards will apply to properties sold from an executry estate or in the course of repossession proceedings and these circumstances may bring about practical considerations if the onus is to lie fully on the seller.

If the onus for carrying out work is on the buyer of the property, there is a question as to where many buyers, particularly those entering the property market for the first time, will find cash to cover such works as are required. However, we note that buyers in some circumstances may be able to obtain further mortgage lending to cover costs of work required. Clarification would be required as to the time after purchase within which the buyer would be required to carry out work and how this would be monitored and enforced. In relation to the possibility of a system of charges being used to ensure that the work is carried out, we consider that this may be of concern to lenders in the context of ranking of securities and affordability of lending.

In the event that there is some kind of shared onus, it is a matter of agreement between selling and purchasing parties or the onus transfers to the buyer in the event that the work has not been carried out at the point of sale, some form of financial contribution by the seller may be required. We do not consider it appropriate that solicitors be involved in administering and enforcing the scheme nor would it be appropriate that monies be retained on account by buyers' solicitors for work to be carried out at some point in the future. In the event that retention of funds was necessary, we would suggest that this should be administered by an independent fund, for example, similar to the arrangements in place for Tenancy Deposit Schemes. We note that the opportunities for owners to draw-down funds in order to carry out work is to a large extent under the control of mortgage lenders. Lenders may seek to impose valuation criteria in connection with any work. Grant funding and loan schemes will be necessary to support owners to meet the required standards.

For further information, please contact:

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