

# Policy Briefing: unlocking investment in energy efficient flats

Legal proposals for making energy upgrades easier in blocks of flats

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## Introduction

This paper contains a set of proposals for legislative changes that will make it easier for freeholders and leaseholders to install energy efficiency measures in blocks of flats. The proposals are designed to be effective, proportionate and fit with existing property law.

These proposals related to English and Welsh property law. Scottish property law is very different and the Scottish Government has already taken steps to address the issues we describe below<sup>1</sup>.

## Context

Twenty-one per cent of English homes are flats. Flats are being refurbished with insulation and double glazing at a slower rate than houses:

	Pre-1980 houses	Pre-1980 flats
No loft insulation (percentage of top-floor flats only)	4.3%	17.9%
No double glazing (all flats)	4.3%	14.5%
Uninsulated cavity walls (cavity walled homes only)	33.8%	50.1%

One in every 8 top floor flat (of all ages) has no loft insulation at all – this must pose a very significant cold problem in winter for occupiers who have no downstairs to retreat to. The oldest flats - notably those in converted houses - are the least energy efficient homes in the housing stock, posing a significant health risk to residents: 26% of flats in converted flats have a serious health and safety hazard, with "serious excess cold risk" (at 11%) being more than twice as prevalent as in the rest of the stock.

This is an issue that will need to be overcome for achievement of ECO and fuel poverty targets: 23% of the remaining uninsulated cavities are in flats and 26% of the remaining totally uninsulated lofts.<sup>2</sup> The low rate of refurbishment of flats is a bigger issue for the

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<sup>1</sup> Specifically in redefining "installation of insulation" as maintenance in the 2009 Climate Change Scotland Act; and in a current consultation.. "seeking views on draft Regulations under section 19 of the Tenements (Scotland) Act 2004. These would prescribe district heating and communal heating as services for which an owner of a flat would be entitled to lead through, or fix to, common parts...."

<sup>2</sup> New analysis of English Housing Survey Department for Communities and Local Government. (2015). *English Housing Survey, 2013: Housing Stock Data*. [data collection]. UK Data Service. SN: 7802, <http://dx.doi.org/10.5255/UKDA-SN-7802-1>.

private sector than social sector (see below). Under the private-sector-only ECO HHCRO programme only 4.7% of all measures were installed in flats<sup>3</sup>.

### Making energy improvements in blocks of flats

Contributing to the low rate of refurbishment in flats is the issue that large number of different parties can have a title to - or responsibility for - any given block: landlords, leaseholders, short-term tenants, mortgagees and management companies. The current system makes it very difficult for these parties to reach agreement practically and lawfully for energy improvement works to proceed. Some of the specific issues are:

- Leases limit what works freeholders can do to the building – and charges they can incur - on behalf of leaseholders. The majority of leases do not permit improvements to be made. As energy efficiency measures e.g. installing insulation are generally improvements the freeholder cannot carry them out and cannot pass on the cost to leaseholders.
- Leases also limit what changes leaseholders can make even within individual flats.
- Leases can vary greatly, even within the same building.
- Getting a lease altered unilaterally by a court or tribunal is difficult and is rarely undertaken. The statutory grounds for doing so are limited and energy efficiency is not one of them.
- It is difficult to access specific information on the potential costs and benefits of energy efficiency measures to empower those in the building to make an informed decision.
- It can be difficult to bring parties together - absentee landlords are a problem particularly in private housing.

These problems hinder installations of insulation and heating upgrades to communal parts of blocks of flats. It can also affect installation of condensing boilers (where holes need to be knocked into walls) and efforts to bring electrically heated blocks of flats on to the gas grid and the retrofit of district heating to flat blocks.

Social housing providers are generally more aware of the benefits of energy efficiency measures and more motivated to take action – they usually own the freehold of a block of flats. However they have no special rights and they face the same issues as private owners, since right-to-buy leaseholders can and do block improvement projects, a trend that is likely to increase as right to buy is extended to housing associations.

### Ideas for action

On 17th September 2015 Future Climate, Oxford University, Westminster City Council, and TLT Solicitors brought together leading lawyers to consider possible solutions in this area (this was building on an earlier workshop with the energy efficiency industry in March 2015).

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<sup>3</sup> Household Energy Efficiency National Statistics, DECC, March 2016

We have developed the following proposals to tackle this issue. Focusing on measures installed across the communal areas of blocks of flats, approach 1a would enable freeholders to carry out improvements, while approach 1b would empower a majority group of leaseholders to take action. Approach 2 would make works undertaken by leaseholders within individual flats easier. Approach 3 would tackle the informational barriers to energy improvements in blocks. These solutions are not mutually exclusive. They are all designed to do slightly different things.

**Approach 1a: Government could “imply a term” into all relevant leases.** The Government could introduce legislation that would imply into any lease which imposes a repairing obligation on the landlord, wording to the effect that "maintain and repair" includes carrying out energy efficiency measures where they are "qualifying improvements".

What constitutes a qualifying improvement would be fleshed out in guidance that can be used by the First Tier Tribunal, which already adjudicates in freeholder/leaseholder disputes, and freeholders and leaseholders. Qualifying improvements could be:

- Basic energy efficiency measures:- cavity wall insulation; loft insulation.
- Any improvements required to bring flats in the block out of the F/G EPC band or to alleviate a Category 1 hazard;
- Any measures that meet a cost-effectiveness threshold and/or can be funded through grants.

There may of course be good reasons for a block of flats not to install certain “qualifying improvements” – high costs, aesthetic concerns, disruption or where leases are about to expire. In these cases, the Landlord and Tenant Act 1985 already includes various forms of protection for leaseholders that provide that the costs must have been reasonably incurred and the freeholder must undertake a consultation exercise with the leaseholders.

**Approach 1b: an independent right for a majority of leaseholders to undertake energy improvements to the block<sup>4</sup>.** This proposal would allow resident leaseholders to proceed with energy improvements in their block of flats, potentially overriding the freeholder and other, absentee, leaseholders.

The proposed right to make energy improvements would override lease wordings. Where a majority group of leaseholders want to install measures they would create a “right to improve” company.<sup>5</sup>

In establishing whether there is a majority in favour of installing the improvements, the freeholder would have a single vote, along with all leaseholders who pay energy bills. Thus, non-resident leaseholders would not be allowed to vote.

To ensure the minority of leaseholders who do not want the measures are appropriately consulted, a consultation process akin to that required currently under the Landlord and Tenant Act 1985 would ensure that minority views on the works and costs are taken into account.

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<sup>4</sup> This proposal first came from a senior First Tier Tribunal judge

<sup>5</sup> The process of setting up the right to improve company would mirror that already in place for leaseholders to set up right to manage companies.

**Approach 2: legislating to make it easier for individual leaseholders to carry out improvement works inside their flats.** This is effectively a more robust way of legislating the principle established in the Tenants Energy Efficiency Improvement Regulations<sup>6</sup> (TEEIR) that freeholders should not prevent energy efficiency works from proceeding that will not harm the building or the interests of other leaseholders<sup>7</sup>.

This would apply where a lease contains a covenant prohibiting a leaseholder from carrying out alterations within their flat. Legislation would override this and permit the leaseholder to undertake energy efficiency measures with the landlord's consent which could not be unreasonably withheld. In the case of private rented sector flats, because of the minimum energy efficiency regulations that are already on the statute book, after 2018 this would also have the effect of obliging action to reach the EPC E standard<sup>8</sup>. That's because leaseholders or freeholders would not be able to say that the wording of leases formed a reasonable basis to refuse consent for energy upgrades. *Note that this proposal would benefit leaseholders in houses, as well as those in flats.*

The legislation could set out the circumstances when it would be reasonable for the freeholder to refuse consent or impose conditions – for example where the work will adversely affect the structure or the use and enjoyment of the flats by other leaseholders.

**Approach 3: A solution to help freeholders and leaseholders make informed decisions on improvements to blocks of flats.** Government could introduce a requirement for the freeholder (or other party having control of the building) to undertake an energy efficiency survey of the whole building, to identify the costs and benefits and raise awareness of potential third party sources of funding. This would support the dwelling (flat) level Energy Performance Certificates which are already required at point of sale or rental. The costs of the survey could be recovered from leaseholders by implying a term (see above) into leases allowing freeholders to recover the cost of the survey. The survey could link to the new power for freeholders to act on improvements (see above) – but the main point would be to ensure all parties know what is possible in terms of improvements to the building. Production of the survey could be required every ten years and at trigger points such as enfranchisement (when leaseholders assert their right to jointly buy the freehold), when leaseholders utilise their right to manage, or appointment of a managing agent.

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<sup>6</sup> Put in place under the 2011 Energy Act

<sup>7</sup> The TEEIR say that neither the leaseholder/landlord nor freeholder of a private rented property can unreasonably withhold consent for energy efficiency improvements in certain circumstances. But lease wordings, which freeholders are obliged to enforce, may mean that freeholders cannot give consent.

<sup>8</sup> Assuming funding is in place and there are no other non-consent related barriers that are recognised in the regulations.