DECC consultation reference: URN 14D/229 22 July 2014 Private Rented Sector Minimum Energy Efficiency Standard Regulations (Non Domestic)

A paper from CIBSE responding to the Consultation Document

Introduction

The Chartered Institution of Building Services Engineers is the professional body that exists to:

> *'support the Science, Art and Practice of building services engineering, by providing our members and the public with first class information and education services'*

CIBSE is pleased to respond to this consultation on Minimum Energy Standards. Its members share the view that good engineering practice could deliver substantial cost effective reductions in energy use in buildings. CIBSE has argued for some time that greater attention to improvement of the existing building stock is essential, alongside improved standards of new building. We therefore support the principal of regulating for minimum energy performance of existing buildings, using changes in tenancy as the initial trigger point.

However, we have significant concerns that non compliance with the current EPC regime will undermine the proposals to the point where they become effectively voluntary. We therefore argue at length below for a far greater focus on non-compliance with the Energy Performance of Buildings Regulations.

To assist the Department in analysis of the responses CIBSE's answers to the questions posed by the Department is set out below.

Responses to the Consultation Questions

1. Do you agree with the proposed scope of buildings and leases that should be covered by the minimum standard regulations? If not, what building or lease types should be included or excluded?

CIBSE strongly believes that the Minimum Requirements should be applied as far as possible to all premises that require an EPC. Any exemptions or variations between the minimum standards requirements and the EPC requirements introduce at best potential confusion, and at worst opportunities to exploit the differences. In principle these differences need to be kept to a minimum to ensure that the requirements are clear to owners, tenants and regulators, and to the wider public.

In the case of the proposed six month minimum lease, the intention is understandable. However, it immediately opens the way for landlords to offer 6 month leases, with the assurance that it will be renewed after six months, but of course "if we do it this way we can avoid any 'problems' with the minimum energy standards rules". This is potentially a classic case of a well meant exemption turning into a significant loophole.

If this exemption is allowed, and it could be beneficial to charities and other bodies seeking short term accommodation, then it should at least be limited to new tenancies, not renewals.

2. Do you agree that where a property falls below an E EPC rating, the landlord would only be required to make those improvements which could be made at no net or upfront cost, for example through a Green Deal finance arrangement? For those properties that do not meet an E EPC rating, do you have any suggestions for how the process could be streamlined?

Whilst there appears to be a broad consensus around the E rating being the minimum acceptable, some CIBSE members have argued for D being the lowest. However, the broad view is that initially E is a reasonable starting point, as long as there are not so many loopholes that it affects few buildings. This is covered further in response to question 10 below.

Building Regulations only require cost effective improvements to non-domestic property where it meets a fifteen year payback test. The Green Deal has introduced the so-called "Golden Rule" to ensure that improvements funded under the Green Deal achieve a reasonable payback. Given that the Energy Act makes reference to the Green Deal, there is an implication that when the legislation was enacted, there was a presumption that those properties falling into the F & G rating bands would be expected to self-fund if they wished, and if not to take out a Green Deal to fund improvements, and that these improvements would be expected to meet the Golden Rule. The logic of this argument would remain valid if there were a non-domestic Green Deal.

As DECC will be aware, it is not currently possible to obtain Green Deal finance for non-domestic buildings. Apart from rendering the investment of organisations such as CIBSE and the Green Deal Advice Bodies we have certified so far stranded, this lack of a non-domestic Green Deal finance route leaves a significant flaw in the proposed energy standards. Unless the Green Deal is available to support the implementation of the proposed legislation, then it will be difficult to deliver improvements in many cases.

Assuming that a non domestic Green Deal arrangement is put in place to support the proposed minimum standards, there remains the question of how a landlord who wishes to make improvements by other means can demonstrate that although they have not achieved an E rating, they have in reality undertaken all reasonable and cost effective measures. CIBSE believes that there is a simple solution to this. When the improvements have been carried out, a further EPC must be obtained. This will rate the building, confirming whether or not an E rating has been achieved. If it has not been achieved, then the report which accompanies the rating will identify any cost effective improvements which could be made. An experienced non-domestic energy assessor, particularly one who is using dynamic simulation modelling software and operating at Level 5 under the EPC regime, will be well placed to undertake this, and to provide robust evidence that all reasonable cost effective measures have been undertaken.

Furthermore, where a building is known to require improvements under the minimum standards, a Level 5 assessor would be well placed to predict the impact of measures on the EPC rating using the Level 5 design modelling software (rather than the free to use SBEM rating tool, which is not a design tool), and to give the landlord a fair degree of certainty about what would achieve an E rating, and would also provide the same robust evidence where all cost effective measures are applied and yet the building still does not achieve an E rating.

The simple streamlined way to address F & G rated buildings is to require a Level 5 assessor to carry out an assessment on the unimproved building, confirm the rating, identify the cost effective improvements, assess their impact on the building and predict the rating once they are installed, and then confirm the rating and issue a new EPC once the work is undertaken.

This separates out assessing the impact of what is done from the funding mechanism. The work on the EPC undertaken in this way will also contribute to a Green Deal assessment if that is required, as long as the rules for the use of level 5 assessments in relation to the Green Deal are resolved.

3. Should the Government allow landlords the option of demonstrating compliance by installing those measures which fall within a maximum payback period, and if so do you have any evidence on an appropriate payback period? Do you have any views on how the process of identifying improvement payback periods should operate?

As noted above, the consequential improvements element of Part L of the Building Regulations for non-domestic buildings specifies a fifteen year payback. This appears to work well and it makes sense to adopt the same period under the proposed minimum standards framework. The same process should therefore be used for this legislation as for Building Regulations. It is possible that in a limited number of cases a cost effective measure to lift a building to an E rating will trigger consequential improvements under Building Regulations. In these cases it will be very confusing, perverse and probably unworkable to adopt a different time period or basis for demonstrating cost effectiveness under the proposed minimum standards.

If the Golden Rule payback period is not aligned with Building Regulations and EPC payback periods already, then it is essential that for non-domestic properties these rules are aligned.

4. Do you agree with the proposed method for demonstrating an exemption where works would result in a material net decrease in a property's value? What would be the most appropriate way to set the threshold?

Whilst this provision is a reasonable stop gap in extremis, it needs to be made clear that the situations in which improving the energy performance of a building will decrease its value are likely to be few and far between. CIBSE believes that where this exemption is permitted, the requirement for demonstrating that it applies should be challenging.

We believe that the expected future value should have to be assessed based on a full simulation of the energy performance expected from the proposed measures, and a valuation by a chartered surveyor which clearly details the reasons why the value is expected to fall as a result of the energy efficiency improvements.

Additionally, TSOs as enforcement bodies must be empowered to challenge every aspect of such an assessment, and to demand to see all evidence and correspondence relating to such claims, to enable them to see clearly what has been done and whether it is reasonable. (Please see the responses to question 11 below for more detail on enforcement).

5. Do you have any evidence that shows the scale of the costs and benefits (including non-financial costs and benefits) associated with improving the energy efficiency of a property, for example time taken to undertake cost effective improvements?

CIBSE recommends that the Department reviews the recent CBI report, "Shining a Light", which looks at energy saving opportunities in business.

The Carbon Trust and before that the Energy Efficiency Best Practice Programme have also undertaken extensive work on this over many years.

6. Does the proposed consents exemption strike the right balance between recognising existing landlord obligations, whilst also ensuring that the allowance is not used as a loophole to avoid undertaking improvements? Do you have any views on how beneficial owner consents should be taken into account?

CIBSE acknowledges that this is a difficult and complex area, and that is one reason why such minimum standards are needed, because of the split incentives and difficulty of gaining agreement of all parties to undertake energy efficiency improvement works. However, we have considerable concerns about the proposals as set out.

Paragraph 71 of the consultation offers any landlord who wishes the opportunity to go seeking consents, and if they are not keen to undertake work, they will go and ask as for as many as possible, seeking a negative answer which they can then use to justify doing nothing.

Paragraph 71 acknowledges that this is a complex area, usually requiring recourse to legal expertise. Since TSOs are not property lawyers, it is almost inconceivable that they will be able to challenge any serious arguments that improvements are not possible due to

withholding of consent (even where it may not actually be required) and that therefore a consent exemption applies. Or to put it more succinctly: the proposed regime of consent exemptions is unenforceable by TSOs, and is a dodgers charter for those who do not wish to comply with regulations (and who do not want to adopt the route of just not getting an EPC as described in answer to Q11).

Paragraph 73 talks about keeping written evidence – it is highly likely that risk averse lawyers will be able to argue that consent should be sought in a high proportion of cases simply by applying the precautionary principle that if there is any doubt their best legal advice is to ask!

Planners are employees of the state, and are carrying out the wishes of the state. If it is the wish of the state to make these proposed regulations work, then planners should be offered very clear guidance on the grounds on which they may withhold consent for such works. It may also be necessary to give specific guidance that where works are proposed under the minimum standards, planners have a duty to consent unless there is a very strong case not to, and that where such a case exists, they have a duty to advise on alternative proposals that would gain consent, so that the refusal of one proposed, and perhaps deliberately provocative, implementation could not be used as an excuse not to do anything.

Whilst there is almost certain to be a requirement for some sort of consent exemption, it needs to be constrained, and should be onerous to obtain, so that hesitant landlords are encouraged just to make the improvements, not seek to evade them.

7. Do you think the regulations should have a phased introduction applying only to new leases to new tenants from 1 April 2018? Do you agree the regulations should also have a backstop, applying to all leases from 1 April 2023? If not, what alternatives do you suggest?

Whilst CIBSE would support the application to all leases over time, we believe that there may be legal constraints on the application to existing legal arrangements.

We also believe that applying the requirements to new leases, and ensuring that all new leases do fully comply from the outset, and that this is not just seen as another bit of energy related legislation to be flouted, is vital. We would rather see a gradual introduction and extension approach rather than trying to introduce this widely at the start.

CIBSE suggests that attention is needed to consider how the enforcement bodies will be made aware that leases are being transacted, and that the requirements of this proposed legislation will be triggered. Unless there is a clear means for TSOs to know that there is a transaction which is subject to the rules, then they will struggle to enforce.

It is not reasonable or realistic to expect TSOs to go looking for transactions that fall within scope of the regulations. Some leases over a certain period have to be registered with the Land Registry. There is a case for requiring this to be extended, although this would have a small cost implication. However, it would be one simple way of helping TSOs to identify transactions requiring EPCs and assist them in their wider enforcement responsibility.

It is also essential that TSOs have free access (subject to appropriate data protection rules) to the Land Registry data. Given that the costs of TSOs taking responsibility for these proposed minimum standards will have to be funded by DECC, it may be appropriate for DECC to consider using some of that funding to make central provision for TSOs to access both the Land Registry and the Landmark register of EPCs to aid them in their enforcement duties.

8. Should the regulations apply upon lease renewals or extensions where a valid EPC exists for the property?

CIBSE believes that the requirement for an EPC for lease renewals and extensions should be considered as part of the overall trajectory of standards. We believe that whilst initially the focus should be on new leases and rentals, renewal of existing arrangements should, in due

course, be brought into scope. However, as this does not currently require an EPC, this will require the introduction of the requirement for an EPC on renewal at some point in the future.

9. Do you agree that an exemption for properties below an E rating should last for five years, or where the exemption was due to a tenant's refusal to consent, when that tenant leaves, if before five years?

Subject to the discussion above about limiting access to exemptions as tightly as possible, then where they are allowed they should indeed be time limited. In particular, any new tenancies that take effect after 1 April 2018 should be subject to a condition that any subsequent changes to the minimum standards will automatically apply to those leases, even in mid term. This will require further legal consideration, but avoids the risk that new leases may be written containing preventive measures to make future compliance more onerous.

We believe that a five year limit on exemptions is reasonable.

10. Do you agree that the Government should set a trajectory of standards beyond 2018, and if so, how and when should this be done?

CIBSE would like to see a trajectory set out when the legislation is introduced and set for at least ten years. Whilst this cannot constrain a future government, it is essential to the longer term success of these arrangements that there is a future plan and that it is broadly maintained and not changed in response to short term concerns at some point in the future.

Raising the minimum standard from E to D in about 2023-2025, and to C in 2030 should be given serious consideration.

11a. Do you consider where a property has a valid exemption for letting below an E EPC rating that certification of compliance would be helpful?

CIBSE has been actively involved in the EPC regime for non-domestic buildings since the original Energy Performance of Buildings (EPB) Directive was adopted in 2004. One of the lessons that we have learned over the past decade is that any opportunity to evade the requirements of the legislation will be exploited to the full.

One of the three strands of the EPB regime concerns air conditioning systems, and all those systems over 12kW rated output have been required to have a valid inspection report since 2011. Trading Standards Officers have responsibility for enforcement. Unfortunately, under the regulations, whilst a TSO has the power to require a report to be shown to them, if the building owner or operator claims that they do not need to have a report, because their system is under 12kW, the TSO has no power to require evidence that the claim is true. So the regulation is, in practice, widely flouted. (See below under 11c).

Unless there is some explicit requirement for all exemptions to be justified and documented, and unless TSOs have the power to insist on seeing and being permitted to challenge any such exemptions, then the whole system will fail at this point, because those that do not wish to apply will claim an exemption and TSOs will be powerless to argue.

11b. If so should this be voluntary or mandatory?

For the reasons given above, mandatory, with clear powers for TSOs to see and to challenge the basis for the exemption.

11c. Do you have any other comments regarding compliance and how Trading Standard Officers (TSOs) could be supported with enforcement, for example identifying landlords?

CIBSE understands that the Energy Act makes TSOs responsible for enforcement. However, based on our experience with the EPB Regulations since 2007, we believe that this makes the whole minimum energy efficiency standards proposal unworkable.

Ever since the EPB regime was introduced, under the previous administration, there have been problems with enforcement. These are not just anecdotal, but can be clearly documented by recourse to written answers and data which is on the public record.

Since January 2011 any air conditioning system over 12kW effective rated output must be inspected, and the inspection report lodged on the government's national database, every five years. There is considerable uncertainty about the number of these systems in existence, but the lowest estimates, made in the 2007 Regulatory Impact Assessment for the EPBR, suggest at least 300,000, based on historic sales data for this equipment. Other market data, and the higher estimates in the 2007 impact assessment, are much higher, but 300,000 is generally agreed to be a reasonable but conservative figure. This implies 60,000 inspections are required each year, on average, or 5,000 a month. Yet lodgement data is stubbornly stuck at around 1,000 a month, or 20% of what it should be. And as reported above, if a building owner or operator tells a TSO that they do not need a report, the TSO is legally powerless to continue the conversation.

The Department of Communities and Local Government (DCLG) is responsible for the Energy Performance of Buildings Regulations (EPBR). But it has admitted several times, under both this administration and the previous one, that it has no idea how many of the buildings that should have energy performance certificates (EPCs) have actually got them.

In May 2009 Grant Shapps asked "how many fixed penalties have been imposed on landlords in each month since the [EPBR] took effect in England?" Iain Wright, then Parliamentary Under-Secretary in DCLG replied "Penalty notices are issued by local weights and measures authorities…. There is no requirement for the Department to be informed when a penalty charge notice is issued."

Between 23rd April and 12th May 2009 Mr Shapps asked a further 21 questions about air conditioning inspections in government buildings. When he arrived in DCLG as Housing Minister in 2010 he was well aware that the EPBR regime was broken and unfit for purpose. The current administration has done nothing to address these problems since May 2010.

In November 2009 Andrew Murrison, then a shadow defence minister, asked a question about the number of commercial buildings which should have an EPC. John Healy, then Minister, told him "There is no centrally held information upon which to base such an estimate."

On 18th June 2013 Don Foster, then Building Regulations Minister, said in a Commons reply that "The Department does not hold information on the number of new commercial leasing transactions, and so is unable to estimate the proportion of new commercial leases granted together with a current [EPC]". 63 months after EPCs became a legal requirement, DCLG had no idea how many people are obeying the law. The Coalition had then run the Department for the previous 37 months.

On 1st July Mr Foster responded to a question from Clive Betts, who asked the Secretary of State for Communities and Local Government: "(1) if he will estimate the level of non-compliance with the requirement to (a) commission an energy performance certificate (EPC) for domestic properties listed for sale, taking into account the additional EPCs which would be expected to have been commissioned for the 30 per cent of listings which do not proceed to sale, (b) commission an EPC on domestic rental properties and (c) display a current Display Energy Certificate in public buildings of over 500 square metres; and what steps he plans to take to improve such compliance;

(2) what information his Department holds on how many fixed penalty notices have been issued by trading standards officers in respect of breaches of the Energy Performance and Buildings Directive regulations in the last 12 months.

Mr Foster, then Parliamentary Under-Secretary of State for Communities and Local Government, replied that "Enforcement of the regulations is the responsibility of local authority trading standards. We do not collate the information requested. More broadly, we

are seeking to reduce the burden of data reporting requirements on local government rather than increase it. We have issued and updated clear guidance on the requirements of the regulations."

To emphasise, when asked what information the Department holds on enforcement action under the EPB Regulations, the minister stated quite clearly that they have no information, and that they therefore do not know what is going on in relation to compliance with the EPB Regulations.

Industry concerns about lack of compliance with the EPBR have been articulated many times to DCLG in private. But there has been no attempt to tackle the problems that either CIBSE, or our assessors, or any of the other energy assessor schemes, or many other property professionals are aware of.

The response from officials to appeals for action on EPBR compliance is that the government does not want to increase burdens on small businesses, and that enforcement is the duty of Trading Standards. But action to improve compliance with the EPBR is not burdening business. It may require those breaking the law to comply and pay the costs, but that is only asking them to pay their fair share just like everyone else. NOT enforcing the regulations quite clearly burdens every law abiding business that complies with the EPBR and has to compete with a cheating competitor who has not.

If minimum energy standards are now superimposed onto the EPB Regulations, then the cost burden on the compliant will be increased, and the incentives to break the law will increase with them.

In CIBSE's view, to introduce a regulation requiring that F&G rated buildings be upgraded, when the government department responsible has not got the first idea how many lease transactions actually have an EPC, is futile, and doomed to fail. It hardly requires foresight to see that those properties which are expected to get and F or G rating will be transacted without an EPC, as is already widely happening. If they do not have an EPC, then the 2011 Energy Act does not apply, since it is clearly linked to those properties that do have an EPC.

This is not just an appeal to enforce for the sake of enforcing. The EPB regulations are in place in order to inform businesses about the energy efficiency of their buildings, and to enable them to choose buildings that have the potential to save them money on energy bills.

The proposed minimum standards aim to start the process of upgrading the poorest of our existing buildings. But the reality is that the proposed enforcement regime is so flawed and dysfunctional, and the Department responsible seemingly unwilling to remedy it, that the whole proposed minimum standards scheme is therefore in jeopardy. Without proper enforcement of the EPB regime, F&G rated buildings will continue to be let quite freely.

Lack of compliance is frustrating the well-intentioned efforts of Government and industry to reduce the energy consumption of UK buildings by encouraging the majority of building owners to cock-a-snook at the existing, but inadequately monitored, regulations whilst imposing an unfair burden on those that, in effect, volunteer to conform.

12. Do you agree that the penalty for non-compliance should be linked to a percentage of a property's rateable value? If so, what percentage should this be? If not, what alternatives do you suggest? Should the Government set a minimum and maximum fine level, and if so at what levels should these be set?

This question fails to define what is meant by non-compliance. If a property does not have an EPC, then clause 49 (1) c of the 2011 Energy Act does not apply to the property, and so there cannot be any penalty for letting a G rated building. The only offence that will be committed is to let a building without an EPC. So this question will be academic, unless the issue of compliance with the EPB Regulations is addressed, see response to 11c above.

Furthermore, if a building is let without an EPC, even if enforcement action is taken and an EPC obtained, and is a G rating, the letting will already have taken place, and the landlord will have avoided improving the building. In theory they would then have to improve the building prior to a subsequent letting, but in practice the EPC might get lost, or the transaction undertaken without reference to the EPC. As well as owners willing to ignore the law, there will be tenants willing to lease unimproved F&G rated buildings. Without meaningful sanctions then there is likely to be considerable evasion of the requirements.

If an owner has got an EPC and is found not to have carried out the required improvements, surely the primary penalty should be to carry them out, and to bear the consequential costs of keeping the tenants happy whilst this is done. There is a case for additional penalties, in order to incentivise the owners to undertake the work in the first place and not offend against these regulations, and to penalise those who quite clearly set out to evade their responsibility under the regulations.

However, alongside meaningful penalties for non-compliance with these regulations, there must be a serious effort to ensure (and to measure) compliance with the EPB regulations.

There appears to be a misconception that enforcing legislation is in some way burdensome. Failure to enforce legislation is a burden, as those who are responsible and law abiding bear the costs, whilst those who cock a snook at the law and flout it escape the cost of compliance and any penalties. They gain unfair competitive advantage at the expense of the law abiding. That is not good for growth of the law abiding compliant businesses, and it gives the message that evading legal responsibilities is fine, as long as its not evasion of personal tax liabilities. That is not an appropriate message.

13. Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals about decisions regarding non-compliance with the minimum standard regulations? Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals? If not, what tribunal could be used?

For there to be appeals there will have to be enforcement. This question could well be quite academic.

14. Do you have any comments not raised under any of the above questions?

15. Do you have any comments or evidence regarding the consultation impact assessment that could inform the final impact assessment, for example the average length of void periods or length of tenant stay in different sectors?

Appendix 1

About the Chartered Institution of Building Services Engineers

The Chartered Institution of Building Services Engineers (CIBSE) is the primary professional body for the engineers who design, install and operate the energy using systems, both mechanical and electrical, which are used in buildings. Our members therefore have a pervasive involvement in the use of electricity (and other energy carriers) in buildings in the UK.

CIBSE is one of the leading global professional organisations for building performance related knowledge and a pioneer in responding to the threat of climate change. It publishes numerous Professional Guides and other titles setting out best practice in support of the industry.

The Institution is the primary source of professional guidance for the building services sector on the design and installation of energy efficient building services systems to deliver healthy and effective building performance. CIBSE publishes Guidance and Codes which provide best practice advice and are internationally recognised as authoritative.

The CIBSE Knowledge Portal, which makes our Guidance available online to all CIBSE members globally, is the leading systematic engineering resource for the building services sector. Over the last year it has been accessed over 100,000 times, and is used regularly by our members to access the latest guidance material for the profession. Currently we have users in over 160 countries worldwide, demonstrating the world leading position of UK engineering expertise in this field.

CIBSE began to develop codes specifically intended to reduce energy consumption in the early 1980s, in response to the energy crises of that time. CIBSE is now at the forefront of efforts to reduce carbon emissions from our building stock.

In addition to the production of technical standards and guidance CIBSE provides professional development training for system designers and installers, covering design, installation, commissioning and system maintenance. CIBSE is also actively engaged in the gathering of performance data to help inform good practice and compliance with existing requirements.