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BRIEFING PAPER

Number 07307, 1 October 2015

Smoke Alarms, Carbon Monoxide Detectors and Legionella: Landlords' Responsibilities

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Summary

This short briefing paper lays out the requirements on private landlords with reference to smoke alarms, carbon monoxide detectors, and the avoidance of Legionnaires' Disease (caused by the Legionella bacteria).

Prior to 1 October 2015 there was no statutory requirement on all private landlords to install smoke alarms or carbon monoxide detectors in their properties. The Government have addressed this, following consultation, via the *Smoke and Carbon Monoxide Alarm (England) Regulations 2015* (SI 2015/1693) which came into force on 1 October 2015.

These Regulations require that smoke alarms be installed on every storey of a rented property and that carbon monoxide detectors be installed in any room housing a solid fuel combustion appliance.

Draft Regulations were brought before Parliament on 16th March 2015. They were considered by the Joint Committee on Statutory Instruments. That Committee reported doubts over whether the regulations were *intra vires*, as well as over their drafting and the extent of their powers. Subsequently the Regulations were considered by the Lords Grand Committee on 7 September 2015 where the motion to consider was negatived, raising doubts about whether the Regulations would gain the necessary approval of both Houses of Parliament in time for implementation on 1 October. However, they were approved by the Commons (without debate) and Lords on 15 September.

The Government has published an explanatory booklet for landlords, giving details on the regulations and also a booklet for local authorities.

In terms of Legionnaires' Disease (caused by Legionella bacteria), a number of consultants and letting agents appear to have mistaken guidance from the Health and Safety Executive (HSE) for new legislation requiring landlords of private rented property to seek Legionella testing certificates. This is not the case and the legislation on landlords' duties with relation to Legionnaires' Disease has not changed.

Landlords have a duty to carry out a full risk assessment on their properties, assessing for conditions that can encourage the spread of Legionella and subsequently mitigating or controlling such conditions. Provided an adequate knowledge of the property's water system and what to look for in terms of the Legionella bacteria exist; there is no reason why a landlord cannot conduct this assessment themselves.

Specific guidance on Legionella and the legal responsibilities of landlords can be found on the Health and Safety Executive website here: HSE - Legionnaires' disease - What you must do.

1. Smoke Alarms and Carbon Monoxide Detectors

Prior to 1 October 2015 there was no statutory requirement on private landlords to have a smoke or carbon monoxide alarm installed in their rented properties as standard[1]. The only legislative mention of smoke alarms was to be found in the *Housing Act 2004*, in reference to conditions that local housing authorities are to impose on landlords letting licensable properties (e.g. Houses in Multiple Occupation (HMOs)). Paragraph 1(4) of Schedule 4 to the 2004 Act states that:

> [a licence must include] Conditions requiring the licence holder—
>
> a) to ensure that smoke alarms are installed in the house and to keep them in proper working order;
>
> b) to supply the authority, on demand, with a declaration by him as to the condition and positioning of such alarms.[2]

The Government published a discussion paper in February 2014[3], seeking views from the housing sector and other interested parties into 'whether or not new rules [were] needed on installing smoke and carbon monoxide alarms'.[4]

In March 2015 the results were published and showed that:

> a regulatory approach [to smoke alarms] was supported by Fire and Rescue Authorities, industry representatives and over 96% of landlords, agents and fire officials who responded to the paper.[5]

In response, the Government committed to new regulations requiring private rented sector landlords 'to install smoke alarms on each storey of their property and check that alarms are in working order at the start of a new tenancy.'[6]

Draft regulations, titled *Smoke and Carbon Monoxide Alarm (England) Regulations 2015* , were laid before Parliament on 16 March 2015 and were subject to the affirmative resolution procedure.[7]

The explanatory memorandum for the draft regulations sets out their purpose:

> These Regulations require landlords in the private rented sector in England to ensure that a smoke alarm is equipped on every storey of their rented dwelling when occupied under a tenancy, and that a carbon monoxide alarm is equipped in any room which contains a solid fuel burning combustion appliance. They also require landlords to ensure that such alarms are in proper working order

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1 With the exception of homes where a solid fuel appliance has been installed or replaced post 2010 – see: Building Regulations 2010 – Approved Document J, p41
2 Paragraph 1(4) of Schedule 4, *Housing Act 2004*
3 DCLG, Review of Property Conditions in the Private Rented Sector, February 2014
4 Gov.uk, Government to review policy on smoke and carbon monoxide alarms, November 2013
5 DCLG, Review of Property Conditions in the Private Rented Sector - Government response, March 2015
6 Ibid.
7 Approval by both Houses of Parliament.

> at the start of a new tenancy. In addition, the Regulations amend the conditions which must be included in a licence under Part 2 or 3 of the Housing Act 2004 ("the 2004 Act") in respect of smoke and carbon monoxide alarms.[8]

1.1 Seeking of Parliamentary approval for draft regulations 2015

The regulations were reported by the Joint Committee on Statutory Instruments in their Second Report of Session 2015-16 (21 July 2015) and drawn to the attention of both Houses on the grounds that the Committee considered

> [there to be doubt whether the regulations are] *intra vires* in two respects, that they are defectively drafted in two other respects, and that in another respect they make unexpectedly limited use of powers.[9]

Specifically, the Committee drew attention to the following perceived defects with the Regulations:

Intra Vires

1 The Regulations had failed to require that smoke and carbon monoxide alarms were in working order 'during any period when premises are occupied under a tenancy'[10], instead only requiring checks on the day on which the tenancy begins.

2 Given that the Regulations required action to be taken by 'the first day on which a tenancy begins'[11] (thereby being time limited), any remedial action brought into force under *Paragraph 150 (3)(b) Energy Act 2013* could 'never be remedied' and therefore:

> in the view of the Committee it must be inappropriate to require remedial action with respect to such a breach.[12]

Defectively drafted

3 Regulation 1(2) stipulated applicability only to England despite the fact that Part 6 of the draft Regulation looked to amend Schedule 4 Paragraph 1 of the *Housing Act 2004*, with the amendments applying to both England and Wales.

4 Under Regulation 5, a local housing authority can issue a remedial notice which the landlord must take action on within 28 days from the notice being served under Regulation 6(1). Regulation 14 allows such a notice to be suspended, however nothing is said in the draft Regulations about the effect of such a suspension on the duty to take action within 28 days as per Regulation 6(1) and whether, on lifting of the suspension, the days expired at the point that the notice was suspended are discounted from the 28 day period. The response from the department implied an expectation that the 28 days would reset at the end of suspension, however the Committee stated that the 'provision

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8 Explanatory Memorandum to the Smoke and Carbon Monoxide Alarm (England) Regulations 2015.

9 Joint Committee on Statutory Instruments, Second Report of Session 2015-16, July 2015, p6

10 Ibid.

11 Ibid. 6.5

12 Ibid.

should have been included in the draft Regulations to give effect to that rather than relying on the discretion of local housing authority'[13].

Unexpectedly limited use of powers

5 In *Section 28(2)* of the *Small Business, Enterprise and Employment Act 2015* a Minister has a duty on any regulatory provision that falls within the meaning of *Paragraph 32* of the *2015 Act*.[14]

> to include a review provision in the secondary legislation, or to publish a statement that it is not appropriate in the circumstances to make provision for a review.

The draft Regulations do not include any review provision, despite qualifying on account of being made after 1st July 2015.

Approval by Commons and Lords on 14/15 September

The regulations were considered by the Lords in Grand Committee on 7 September 2015 but the motion to consider was negatived.

Subsequently, the Regulations were considered by the First Delegated Legislation Committee on 14 September and approved by the House of Commons (without debate) the following day.[15] They were also considered and approved by the House of Lords on the 14 September.[16] The Regulations came into force on 1 October 2015.

The House of Lords approval did not come without substantial cross examination however, and a number of concerns were raised and re-raised to Baroness Williams of Trafford who proposed the motion to approve. The majority of the examination centred on the perceived lack of publicity around the proposed Regulations; with calls for the commencement date to be moved back to either January or April 2016 to afford time to get the message out. Lord Marlesford reported that

> The British Property Federation states that the compliance date should be postponed until April 2016. The Association of Residential Letting Agents, responsible for 1.42 million properties, states: "It is not possible to undertake this amount of work before the regulations come into force", and that, "all existing tenancies should be allowed to have until 1st January 2016 to comply".[17]

Concerns were also raised around the practicality of both testing on the first day of tenancy and of rectifying issues should the testing return a negative result. Lord Best expressed fears that

> alarms in … mansion blocks are communal alarms that ring throughout the building. If you have a block with tenants turning

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13 Ibid.

14 *Small Business, Enterprise and Employment Act 2015 Paragraph 32 (4)(a)(b) "Regulatory provision", in relation to any qualifying activity, means—provision imposing requirements, restrictions or conditions, or setting standards, in relation to the activity, or provision which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions or standards which relate to the activity.*

15 HC Deb 15 September 2015 c1016

16 HL Deb 14 September 2015 cc1720-38

17 Ibid. c1723

> over quite regularly and the darn thing going off every time there is a new tenancy, bureaucracy is getting a little out of hand.[18]

Reference was also made to the Joint Committee on Statutory Instrument's session detailed above, and the fact that DCLG had only committed to addressing one of the perceived defects (that relating to a review provision.)

The lack of a grace period was also raised. Baroness Williams suggested that the 28 day notice following a local authority identification of a landlord's non-compliance would act as a de facto one, to which Earl Cathcart responded

> My Lords, to get this straight, is my noble friend the Minister saying, in effect, that landlords may ignore this regulation until such time as the health and safety officer or the housing officer gets round to feeling their collar because they have been reported by, let us say, their tenant and that, even then, they still have 28 days to comply? The noble Lords, Lord Beecham and Lord Hunt, talked about publicity for tenants because, without it, the possibility of a tenant knowing about this regulation is remote. Therefore, a landlord would be quite unlucky to have a tenant who knew about it, let alone reported non-compliance. It is just not going to happen in sufficient numbers to achieve what the regulation is seeking.[19]

A number of further apprehensions were raised, however the motion was ultimately agreed with the house adjourning at 9:09pm.

Baroness Williams of Trafford's response centred on, amongst other things, the fact that press releases had previously been distributed since the initial announcement in March 2015. She further highlighted the fact that the Chief Fire Officers Association had run an awareness campaign on the regulations between May and July, estimated to have reached 8 million people[20] and that a number of free fire and carbon monoxide alarms had been purchased for distribution to landlords. Further to that, she referenced the booklet published on the 4th September to assist landlords in understanding the Regulations[21] and made reference to intended updates to the How to Rent guidance document.[22]

With reference to the Joint Committee on Statutory Instruments' session, Baroness Williams expressed gratitude for the Committee's comment but added that '[we] believe that, with the addition of a review clause, the regulations should remain as drafted.'[23]

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18 Ibid. c1727
19 Ibid. c1734
20 Lord Hunt of Kings Heath questioned these figures however: 'Is she seriously saying that the fire officers reckon that 8 million people somehow or other got notice that these regulations were going to come into force? I have great respect for the fire and rescue services, but that is frankly not believable.' Ibid. c1735
21 Ibid. c1736
22 Ibid.
23 Ibid. c1735

1.2 Specific requirements for carbon monoxide detectors

The new regulations referenced above stipulate that landlords must ensure that:

> A carbon monoxide alarm is equipped in any room of the premises which is used wholly or partly as living accommodation and contains a solid fuel burning combustion appliance; and checks are made by or on behalf of the landlord to ensure that each prescribed alarm is in proper working order on the day the tenancy begins if it is a new tenancy.[24]

Solid fuel combustion appliances have solely been targeted (as opposed to including gas appliances) for multiple reasons; as laid out in the Government's impact assessment on Carbon monoxide Alarms in Private Rented Properties as follows:

1. Since 2010 building regulations have required Carbon monoxide alarms to be fitted when a solid fuel appliance is installed or replaced. However, there is no requirement that homes with solid fuel appliances installed before 2010 have a Carbon monoxide alarm. By targeting regulations to require a Carbon monoxide alarm in private rented properties with these high risk appliances would impose no additional costs on the majority of landlords who will be outside the scope of these regulations.
2. Solid fuel appliances are responsible for a disproportionate number of carbon monoxide deaths and injuries compared to other combustion appliances.
3. These regulations will not cover domestic gas appliances as the risk [of] Carbon monoxide poisoning [caused by gas appliances] is very low as a result of the safety features required to be incorporated into the appliance by Gas Appliances (Safety) Regulations (implementing the Gas Appliances Directive 90/396/EEC) which first took effect 6th April 1992. Additionally landlords are already required to carry out an annual gas safety check which should identify any unsafe gas appliances.

Why only solid fuel burning appliances?

1. Post 2010 solid fuel appliances already require CO detectors, so most landlords are out of scope.
2. Solid fuel appliances cause substantially greater CO deaths.
3. Gas appliances are lower risk due to strict regulations.

In terms of a precise definition of a 'solid fuel combustion appliance', none is given in the regulations; however the Residential Landlord's Association website suggests that 'any kind of wood burning stove or an open coal fire'[25] would qualify.

The Government has published an explanatory booklet for landlords, giving details on the regulations and also a booklet for local authorities. In addition, funding has been provided for local fire and rescue authorities to purchase a limited number of alarms for free distribution to landlords.[26] The Fire Kills campaign, run jointly by the Government and fire and rescue authorities, urges every householder, including tenants, to test their smoke alarms regularly.

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24 The Smoke and Carbon Monoxide Alarm (England) Regulations – Draft statutory instrument

25 Residential Landlord's Association, Carbon Monoxide and Smoke Detectors Requirements From 1st October 2015

26 See www.alarms4life.com

2. Legionnaires' Disease

Landlords of residential accommodation have a responsibility to take measures to combat Legionnaires' Disease in their properties.

Duties under the *Health and Safety at Work etc. Act 1974*, the *Management of Health and Safety at Work Regulations 1999* and the *Control of Substances Hazardous to Health Regulations 2002* provide a framework designed to assess, prevent or control the risk from bacteria like Legionella and take suitable precautions to protect against it.[27]

Detailed information on the approved code of practice and guidance from the Health and Safety Executive can be found at the following link: Legionnaires' disease. The control of legionella bacteria in water systems.

2.1 What is Legionnaires' Disease?

Legionnaires' Disease is a pneumonia like illness caused by the Legionella bacteria, which can be fatal. Infection is caused by inhalation of droplets of water carrying the bacteria, which leads to infection. It is non-contagious.

The bacteria are found in the natural environment and are able to contaminate, grow and thrive in water systems if conditions are not carefully controlled to prevent their proliferation. They survive low temperatures and prosper at conditions between 20-45°C; although they are killed at high temperatures of 60°C or above.[28]

2.2 Landlords' Responsibilities

Landlords are under a legal duty of care to ensure that the risk of exposure to Legionella for tenants, residents and visitors to their properties is adequately assessed and controlled.

Specifically, landlords are obligated to have a risk assessment conducted out on their properties (detailed below) followed by subsequent periodic reviews. Provided that the property is low risk (which includes most residential settings including houses or flats with small domestic type water systems where the turnover is high[29]) there is no reason why the landlord should not carry out the risk assessment themselves, provided that they are adequately knowledgeable about the water system in the property. It is advisable for landlords to familiarise themselves with the following HSE publications:

- Legionnaire's disease: A brief guide for dutyholders
- Legionnaire's disease Part 2: The control the relevant part of Legionella in hot and cold water systems

Landlords must understand how to:

- Identify and assess risk sources.

Risk Assessments

Can be carried out by landlords provided the property is low risk (most residential properties are).

Legionella testing certificates are not generally needed for domestic hot water systems

[27] HSE, Legionnaires' Disease - What you must do
[28] Residential Landlords' Association, Guidance on Legionnaires' Disease for Landlords
[29] Ibid.

- Prevent or manage identified risks.
- Keep and maintain the correct records.

Identifying and assessing risk sources

As mentioned previously, in most residential cases, it is suitable for a landlord to conduct a risk assessment themselves; however legal responsibility rests with the landlord to ensure that the assessment has been conducted correctly. It may be advisable to seek external support should landlords fear they are not able to conduct the assessment competently.

In order to conduct the risk assessment, an adequate knowledge of the water system in the property is required (including piping, pumps and water storage systems). The assessor must be able to identify the following risks:

- Through a knowledge of water temperature in **all** parts of the system, whether any water is between 20 - 45°C (at which Legionella thrives).
- Whether water is stored or re-circulated as part of the system.
- Whether sources of nutrients such as rust, sludge, scale, organic matter or biofilms exist.
- Whether conditions are likely to encourage bacteria to multiply.
- Whether it is possible for droplets to form and, if so, whether they can be dispersed over a wide area (as with showers.)
- Whether parts of the system are used infrequently (for example in guest bathrooms.)
- Whether tenants, residents or visitors are more susceptible to infection due to age, illness or a weakened immune system etc.[30]

The risk assessment must also record:

- Management responsibility, including the name of the competent person who conducted the assessment and a description of the system.
- The competence and training of the assessor (and any other parties involved).
- Any identified potential risks.
- Methods for mitigating or controlling the risks.
- Monitoring, inspection and maintenance procedures.
- Records of monitoring, inspection and checks carried out.
- Arrangements for regularly reviewing the risk assessment, especially where reason exists to believe changes may have occurred.[31]

Compliance with the above is adequate to complete the risk assessment, however it must be regularly reviewed and validated. It is advisable to brief tenants on the above. The Residential Landlords' Association (RLA) has created a leaflet for the purpose here: Guidance on Legionnaires' Disease for tenants and residents of rented domestic accommodation.

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[30] HSE, Legionnaires' Disease - What you must do
[31] Ibid.

See also the sample risk assessment checklist from the RLA here: Legionnaires' Disease risk assessment and guidelines.

Preventing or managing identified risks

If risks are identified, the landlord is required to appoint someone with relevant competency to meet health and safety duties and manage the risk. Who qualifies under this description will depend on the risk identified and again could be the landlord themselves and/or appointed specialists.

Note that, should the landlord employ contractors to conduct water treatment or other work; the appointed assessor will still retain responsibility for ensuring that the system complies with required standards.

Landlords may prefer to prevent risks by making adjustments to the water system in the property. If it is not possible to eliminate the risk by reasonable adjustments; a course of action must be created to control and monitor the risk. This is likely to take the form of a written control scheme, including:

- A schematic of the water system.
- Who holds responsibility for conducting assessment of the risk.
- Detail on how to safely operate the system.
- Control methods and precautions in use.
- Checks to be conducted, and how regularly.[32]

Box 1: Good Practice

1. Ensure release of water spray (from showers for example) is properly controlled.
2. Where possible, avoid water temperatures and conditions that favour the growth of Legionella or other bacteria.
3. Ensure water can't stagnate by keeping pipe lengths as short as possible or removing redundant pipework (dead-legs.)
4. Avoid materials that encourage Legionella growth (see the Water Fittings and Materials Directory for approved materials.)
5. Take measures to ensure water remains clean and uncorrupted.
6. Consider treating water in the system to control or limit growth of Legionella.
7. Monitor controls and record actions taken.

Keeping and maintaining the correct records

For properties housing five or more persons, significant risks and steps taken to control them must be recorded. It is good practice to keep comprehensive records in any case, which should include the following:

- Person(s) responsible for conducting the risk assessment and managing / implementing the written scheme.
- Dated findings from the risk assessment and actions taken.
- Written control scheme and records of its implementation.
- Details on the state of operation of the system and its use.

[32] Ibid.

- Results of any monitoring inspections or tests and checks conducted, including dates.[33]

This guidance is not comprehensive and the HSE material referenced above should be consulted for a complete picture.

[33] Ibid.

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BRIEFING PAPER
Number 07307, 23 September 2015