How to ensure the offer will meet the standards in the new statutory instrument on suitability

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1 Introduction: the Order (SI 2012 No 2601) and Guidance

This presentation addresses the matters in Article 3 of the Order. It does not address the matters to be taken into account in determining whether the accommodation is suitable for a person in Article 2, and which take into account matters related to location. Although drafted weakly in the Order these provisions are important for health and wellbeing, but outside the scope of this presentation.

What does the Order say?

" accommodation shall ***not*** be regarded as suitable where one or more of the following apply–

(a) the local housing authority (LHA) are of the view that the accommodation is not in a reasonable physical condition;

(b) the LHA are of the view that any electrical equipment supplied with the accommodation does not meet the requirements of regulations 5 and 7 of the Electrical Equipment (Safety) Regulations 1994; (*ie. It is safe*)

(c) the LHA are of the view that the landlord has not taken reasonable fire safety precautions with the accommodation and any furnishings supplied with it (*a Trading Standards issue*);

(d) the LHA are of the view that the landlord has not taken reasonable precautions to prevent the possibility of carbon monoxide poisoning in the accommodation;

(e) the LHA are of the view that the landlord is not a fit and proper person to act in the capacity of landlord, having considered if the person has:

> (i) committed any offence involving fraud or other dishonesty, or violence or illegal drugs, or any offence listed in Schedule 3 to the Sexual Offences Act 2003(2) (offences attracting notification requirements);
>
> (ii) practiced unlawful discrimination on grounds of sex, race, age, disability, marriage or civil partnership, pregnancy or maternity, religion or belief, sexual orientation, gender identity or gender reassignment in, or in connection with, the carrying on of any business;
>
> (iii) contravened any provision of the law relating to housing (including landlord or tenant law); or

(iv) acted otherwise than in accordance with any applicable code of practice for the management of a house in multiple occupation, approved under section 233 of the Housing Act 2004[1];

(f) the accommodation is a house in multiple occupation subject to licensing under section 55 of the Housing Act 2004 and is not licensed;

(g) the accommodation is a house in multiple occupation subject to additional licensing under section 56 of the Housing Act 2004 and is not licensed;

(h) the accommodation is or forms part of residential property which does not have a valid energy performance certificate as required by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007;

(i) the accommodation is or forms part of relevant premises which do not have a current gas safety record in accordance with regulation 36 of the Gas Safety (Installation and Use) Regulations 1998; or

(j) the landlord has not provided to the LHA a written tenancy agreement, which the landlord proposes to use for the purposes of a private rented sector offer, and which the LHA considers to be adequate."

The provisions in (a) to (e) in Article 3 are matters on which the local authority has to form a view (and this paper suggests how this might be done), but (f) to (j) are straight matters, on which the lack of the relevant certificate, agreement or licence means the property is not suitable and the local authority cannot use it.

As the November 2012 supplementary guidance[2] makes clear local housing authorities are obliged under section 3 of the Housing Act 2004 to keep the housing conditions in their area under review with a view to identifying any action that may need to be taken by them under Part 1 the Housing Act with regards to Category1 and Category 2 Hazards. The guidance then talks about action under the "Household Health and Safety Ratings System", but it the means of determining whether or not a Category 1 or Category 2 Hazard exists is the Housing Health and Safety Rating System. The local housing authority is also required to keep the housing conditions in their area under review in relation to other powers/duties such as licensing of HMOs. The HHSRS itself is not enforced, rather it is the first step in determining whether a duty or a power to act exists, and then which of the provisions in Part 1 is most appropriate. This basic error perhaps demonstrates some carelessness (or lack of understanding) in the guidance and approach.

The supplementary guidance has a section on "Health and Safety Matters" but makes no mention of the HHSRS – no doubt following on from the consultation document

[1] The only codes of practice for management made under s.233 are in The Housing (Codes of Management Practice) (Student Accommodation) (England) Order 2010 (SI 2010 No 2615) and are the Universities UK and the two for ANUK/Unipol for developments managed by the educational establishment and those not managed by the educational establishment

[2] DCLG, Supplementary Guidance on the homelessness changes in the Localism Act 2011 and on the Homelessness (Suitability of Accommodation) (England) Order 2012, November 2012 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/9323/121026_Stat_guidancewith_front_page_and_ISBN_to_convert_to_pdf.pdf

that suggested an HHSRS inspection was not needed (at least this comment is not repeated in the final guidance although such inspections are not encouraged). In the response to the consultation the Government says "we do not intend to require through the Order that the properties be free of category 1 hazards, as section 3 of the Housing Act 2004 already places an obligation on a local housing authority to keep the housing conditions in their area under review, with a view to identifying any action that may need to be taken by them under the relevant legislation. Section 4 of the 2004 Act provides that an authority must, where appropriate, arrange for an inspection of residential premises in its district with a view to determining whether any category 1 or 2 hazard exists on those premises."

The guidance does however says that for the new power to discharge duty in the PRS, LHAs should consider whether to arrange a PRS offer based on the individual circumstances of the household and undertake and develop clear policies around its use. The following sections look at matters that could be included in such policies.

2 So what is "reasonable physical condition" and the role of HHSRS?

Under section 4 of the Act LHAs are required to inspect a dwelling whether the result of meeting the duty under s.3, or for any other reason, where it would be appropriate to do so with a view to determining whether any category 1 or category 2 hazard exists. There is also a requirement for the proper officer to inspect and a report is prepared where there is an official complaint – i.e. on made by a JP of the district or made by a parish or community council.

It should be argued that the use of the PRS to meet the homelessness duty is a good reason where it would be appropriate to carry out an inspection (if the property has not been assessed recently using the HHSRS). The guidance does say that "existing aspects of suitability such as space and arrangement set out in statutory guidance will continue to apply" but says nothing further about the HHSRS. However it says only that in determining whether the property is in reasonable physical condition "attention should be paid to signs of damp, mould, indications that in determining whether the property would be cold, for example cracked windows, and any other physical signs that would indicate the property is not in good physical condition." Given that people who are homeless are already vulnerable and too often LHAs are using Part 1 only on receipt of complaint, this provides an opportunity to take the initiative. It would also ensure that where appropriate, remedial action is taken sooner rather than later. The placing LHA should ensure that the inspection is by staff who have been trained in the HHSRS, or if the premises are outside the borough then they should have an agreement with the LHA where the premises are situated to have a competent officer undertake a survey, or instruct an appropriately trained surveyor to carry out an HHSRS assessment (not necessarily an officer of the LHA).

In addition landlords have no excuse for not knowing anything about the HHSRS as along with the statutory Operating Guidance the government did publish Guidance for Landlords and Housing Related Professionals[3]. That said only about one-third of landlords and agents have heard of the HHSRS.

If the accommodation is or forms part of residential property which does not have a valid energy performance certificate as required by the Energy Performance of

[3] Available for download at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/9425/150940.pdf

Buildings (Certificates and Inspections) (England and Wales) Regulations 2007, then it will not be regarded as suitable. Local authorities should ensure they have had sight of a current certificate to ensure that this requirement has been met. The LHA should check that a valid EPC is available and also it should be noted that from April 2016 landlords of residential properties will not be able to unreasonably refuse requests from their tenants for consent to energy efficiency improvements, where financial support is available, such as the Green Deal and/or the Energy Company Obligation (ECO).

Following this, from April 2018, private rented properties must be brought up to a minimum energy efficiency rating of 'E'. This provision will make it unlawful to rent out a house or business premise that does not reach this minimum standard that is in the bands 'F' & 'G'. This requirement is subject to there being no upfront financial cost to landlords. Therefore, landlords will have fulfilled the requirement if they have either reached 'E' or carried out the maximum package of measures funded under the Green Deal and/or ECO (even if this does not take them up to an 'E' rating).

If in the meantime the property has an "energy rating" in the bands 'F' & 'G' it is highly likely that there will be a Category 1 hazard for Excess Cold. Indeed even a rating in the 'E" band will not mean for certain that there is no Category 1 hazard for Excess Cold. In the circumstances, it would again be appropriate for an HHSRS assessment to be undertaken to ensure that the accommodation can be kept sufficiently warm at an economic cost to the occupiers.

3 What are the electrical safety standards?

Another reason why a proper HHSRS assessment would be a sensible approach is that Electrical hazards are one of the 29 HHSRS hazards and the sort of things referred to in the guidance would be picked up on such an inspection (cracked or broken sockets, loose wiring). The supplementary guidance focuses on the electrical equipment provided by the landlord rather than the installation itself. The Electrical Equipment (Safety) Regulations 1994, and the Plugs and Sockets etc. (Safety) Regulations 1994, both of which come under the Consumer Protection Act 1987 apply and any equipment and appliances such as kettles, iron or washing machine should be checked to ensure that the item carries, at least, a CE Mark

The Electrical Safety Council recommends the purchasing of appliances that carry additional safety marks, such as the British Standard Kitemark or the 'BEAB Approved' mark, as these can provide greater assurance of electrical safety.

Landlords need to make sure that any appliance supplied is suitable for its location and its intended use and every appliance should be PAT Tested and marked accordingly. To help ensure tenants use appliances correctly, landlords should make copies of the manufacturers' instructions available for them. Any visit should ascertain and identify what, (if any) electrical equipment the landlord provides.

As an aside, if the letting is furnished, there is a common law duty to ensure that it is fit for human habitation and a pest infestation would be a breach[4].

[4] *Smith v Marrable* (1843) 11 M.W. 5

It should also be noted that disrepair to the electrical system falls within the repairing obligation of the Landlord and Tenant Act 1985 (s.11) (see below on the matter of "fit and proper" person).

The Building Regulations for England and Wales were amended to include Part P, which covers electrical safety in dwellings. This means that all electrical installation work undertaken in a home in England or Wales must, by law, comply with Part P of the Building Regulations.

Electrical Installation Certificates (EICs) and Minor Electrical Installation Works Certificates (MEIWCs) provide landlords, as the person responsible for the safety of an electrical installation, with a declaration that the new installation, or alteration or addition, is safe to use at the time it was put into service. These certificates should be retained and seen by a visiting officer. They can help save on costly exploratory work, which might otherwise be needed in future. Additionally, in the event of a claim that injury or fire was caused by an electrical installation, certificates are documentary evidence that helps show the installation had been installed to a satisfactory standard of safety.

The EIC indicates whether the electrical work that has been carried out is 'new', an 'addition' or an 'alteration'. How frequently an electrical installation needs to be inspected and tested during its life depends on factors such as the type of installation, and how it is used and maintained. The maximum period recommended between the initial inspection (when the installation was commissioned) and the first periodic inspection and test is five years and five years should be the maximum between tests.

4 What fire precautions must be present?

Again fire is an HHSRS hazard so any HHSRS assessment would identify those deficiencies contributing to a fire hazard whether the property is multi-occupied or in single occupation. The Fire Safety (Regulatory Reform) Order 2005 does not apply to single household dwellings. At the very least for such a dwelling (and some smaller HMOs that are shared houses) there should be mains operated (with battery back up) smoke detector and alarms in the halls and landings (Grade D LD3 System) and a fire blanket in the kitchen. There should also be a log maintained of the testing and servicing of the system.

Other matters to be taken into account are as in the HHSRS Operating guidance, and can include matters such as disrepair to the fabric e.g. ill-fitting doors, and defects in the electrical installation such as insufficient electrical sockets, and inadequate space heating provision.

For Houses in Multiple Occupation the requirements will be greater and the Fire Safety Order applies. This means that there should be a fire risk assessment covering the common parts (outside the individual lettings). The LHA should be satisfied that an adequate fire risk assessment has been undertaken. In addition for licensed HMOs the licence will only be issued if the LHA is satisfied that adequate fire precautions are in place, but what is adequate will vary according to various risk factors and there is guidance for LHAs on the standard of fire safety in HMOs[5] (and other housing). For HMOs in general there will need to be automatic fire detection and alarm systems of adequate coverage and adequate means of escape and in larger HMOs, an

[5] See: http://www.lacors.gov.uk/lacors/upload/19175.pdf

alternative means of escape. In some cases a fire suppressant system (sprinklers) can be included as an alternative to some requirements on coverage of alarms. The actual requirements will depend upon the LHA where the house is situated and what has been agreed with the Fire and Rescue Service. Again when placing a household outside the borough the LHA should check with the relevant department in the LHA where the house is.

The supplementary guidance merely follows some of the HMO licensing provisions in the 2004 Act in that there is reference to furniture. The Furniture and Furnishings (Fire) (Safety) Regulations 1988 (SI 1988 No 1324) as amended, apply to soft furnishings. In the case of rented accommodation the landlord is responsible for the soft furnishings such as beds, mattresses, chairs, cushions and stretch covers so it is important top make sure any furniture and furnishings meet the regulations. They must carry an appropriate permanent label at point of sale. It helps to demonstrate compliance by keeping all purchase receipts. The labels on the furniture should not be removed. The Trading Standards Officer who may be in a different local authority from the LHA enforces these provisions.

5 What is a 'fit and proper' landlord and good management - is there a role for landlord accreditation?

It would be sensible for LHAs to use only accommodation that is provided by a landlord who is part of a reputable accreditation scheme, as this would at least indicate a higher or more professional standard of management than much of the PRS. The guidance appears very much based on the provisions in the licensing criteria in the 2004 Act.

The LHA should ensure (and see) that the landlord provides written tenancy agreement, which they propose to use for the purposes of the private rented sector offer. To be adequate it should be clear and comprehensible and contain no unfair terms such as call-out charges for repairs or professional cleaning at the end of the tenancy [6]. It should include the tenant's obligations, including a clear statement of the rent and other charges.

Local authorities are required to consider any convictions in relation to landlord and tenant law, fraud or other dishonesty, violence or drugs as well as any discrimination and/or sexual offences as set out in the legislation. Under the HMO provisions it is only necessary to have any evidence of any offences, this in itself does not require a conviction. Also for HMO licensing this includes evidence of a contravention of the law relating to landlord and tenant law (section 66) including a breach of the repairing obligation. As the supplementary guidance suggests they can check their own records for any prosecutions for offences of harassment and illegal eviction brought by the local authority. However this will in itself not show whether or not the landlord is fit and proper to the same standard as in HMO licensing or whether there is any breach of landlord and tenant law. It is sensible for the homelessness section of the local authority to check with the HMO licensing section (and the section dealing with the PRS in general whether there is any evidence that the landlord would not be fit and proper under the licensing regime. LHAs can, and should check with other advice agencies to ascertain whether the landlord is fit and proper.

[6] See OFT guidance at http://www.oft.gov.uk/shared_oft/reports/unfair_contract_terms/oft356.pdf

If the local authority's internal checks do not satisfy them that the landlord is a fit and proper person to act in the capacity of a landlord then the guidance suggests the local authority can require the landlord to carry out a Criminal Records Bureau check, but they are not required to do this in every case. The "recommendation" from CLG is that when placing a household outside the area the authority should liaise with the receiving local authority to check whether it has taken any enforcement action against the landlord. Firstly this should be done in every case where a household is being placed outside the district, but as formal enforcement activity is generally low this will not be much assistance, better to ask more generally whether they have any evidence that the landlord is not a fit and proper person.

So far as tenancy deposits are concerned, a local authority may not be able to check that a tenant's deposit has been placed in a tenancy deposit protection scheme prior to them taking the tenancy. However the use of accredited landlords will be some reassurance that the landlord deals with deposits correctly. If this approach is not used then before placing a household with a landlord, they should be asked which scheme they use as part of the assessment of whether they are fit and proper. This is more than the guidance suggest which merely recommends that local authorities remind prospective landlords and tenants of their responsibilities in this area.

The Codes of Management for student accommodation may not be strictly applicable but they contain substantial guidance as to how a responsible landlord should operate including on dealing with repairs and maintenance. The codes also refer to the need to comply with the requirements of the local housing authority including on matters relating to the HHSRS and Part 1 of the 2004 Act.

5 What if the property is an HMO?

HMOs, which have been specifically defined in the 2004 Act, have additional provisions on requirements. First if the HMO is three storeys or more and has five or more occupiers it falls within the national licensing regime and should be licensed. To operate such a house without a licence is an offence and LHAs should not be using such properties to fulfil their duty.

Some LHAs also have additional licensing this means that in their area (or parts of the area) HMOs in addition to those prescribed for the national scheme should be licensed. It is necessary to check whether additional licensing powers have been used by the LHA where the accommodation is located and to check whether that accommodation falls within the scope of that regime and is licensed (and the terms of the licence)

Finally there is selective licensing; usually specific areas in which all private rented housing (not just HMOs) have to be licensed. Again this is a discretionary power for LHAs and so checks need to be made whether this power has been used, and whether accommodation to be used is within the area and has the necessary licence.

All HMOs whether licensable or not should comply with the HMO Management Regulations[7]. These place certain duties on the manager for example to provide contact details to occupiers, to take safety measures and to maintain and keep clean common parts. Failure to meet the requirements is an offence and so it is important to

[7] The Management of Houses in Multiple Occupation (England) Regulations 2006 (SI 2006 No 372)

check first that the landlord does not have a conviction in this regard (which would also mean they are not "fit and proper"), and also that the HMO complies with the Regulations whether or not the LHA has taken any action.

6 What licence does the landlord need (if any)?

Reference has been made to HMO licensing (and selective licensing) above.

The LHA seeking to meet its homelessness duty should check whether the property should have a licence under any of these provisions.

If the property is not an HMO then except in selective licensing areas, they will not need a licence under the Housing Act 2004, which is another argument for using only landlords who are members of an accreditation scheme (in which case a certificate of membership should be available).

Unlike boarding kennels, there is no general requirement for a landlord to have a licence to let out a property, nor planning consent.

Certain HMO.s have needed planning consent (if they contained over 6 occupants). However from April 2010 however, local authorities have had the power to impose Article 4 legislation and insist on landlords obtaining planning consent before operating any property where three or more non-related people live in the property and share facilities. The intention was to address "studentification" in certain areas in towns and cities and local authorities might not apply the legislation across the whole district. The classifications for a property as far as planning is concerned, would need to be changed from a dwelling house (Class C3) to a House in Multiple Occupation (a 'small HMO' – Class C4). This changes was not retrospective as to effect so existing shared houses would be unaffected. It would therefore be sensible where a household is being placed in a house that falls within Article 4, to check that there is no contravention of planning law.

7 What certificates must the landlord have and precautions to prevent CO poisoning?

The presence of a valid Gas Safety Certificates[8] is an important consideration, but where there are gas appliances there should also be Carbon Monoxide detectors.

The Guidance asks local authorities to satisfy themselves that the landlord has taken reasonable precautions to prevent the possibility of carbon monoxide poisoning in the accommodation, where such a risk exists." Again CO and products of combustion is one of the HHSRS hazards and the operating guidance provides information on the risk factors to look out for including the presence of CO detectors.

The guidance suggest that a valid gas safety certificate and the installation of a CO alarm would constitute a reasonable precaution to prevent the possibility of carbon monoxide poisoning, where such a risk exists. So the LHA should check the certificate and if necessary check that it is valid with Gas Safe Register and also look out for CO alarms where there are combustion appliances.

[8] http://www.gassaferegister.co.uk/

8 How should local housing authorities ensure "visits" are carried out competently?

When the Housing Act 2004 (and the HHSRS) was being brought in to force the government provided free training for local authority officers. This two day training course provided initially by Warwick University, led to a certificate of basic competence in the HHSRS for successful delegate. Similar courses are now provided by other agencies such as the CIEH and RH Environmental[9]. It is therefore sensible to ensure that anyone undertaking an inspection is competent to identify deficiencies and the hazards arising from them and be alert to hazards even if it is the policy that a full HHSRS inspection should not be undertaken.

As has been pointed out many of the issues covered in the Order and the supplementary guidance are matters addressed in the HHSRS anyway, so this would be an appropriate requirement on anyone undertaking a visit to assess the suitability of the accommodation.

9 Conclusion

There are always two aspects to assessing accommodation, the physical structure and the quality of management. A poor physical state of a property demonstrates poor management, but the converse is not always true, as there are many aspects to good management.

The use of the PRS to meet the homelessness duty (and the fact that much of the increase in the PRS has been at the top and more expensive end of the market) requires local authorities to exercise care. This involves closer liaison between relevant departments within an LHA and also between LHAs were it is necessary to use accommodation outside the boundaries of the authority that is seeking to discharge its duty this way.

[9] http://www.rhenvironmental.co.uk/training and http://www.cieh.org/events.html