

## **Test, test, test. It's all about testing.**

There is only one item in the news right now. Much discussion and debate in that regard is about safety standards and testing. My focus is the same. Now, you could be forgiven for thinking that an article by a property lawyer on this topic is hardly going to advance matters. However, the testing and safety standards to which I refer concern not society at large but specifically the field of residential landlord and tenant.

I have in mind the *Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020*, SI 2020/312.

It is quite possible that these Regulations, made only days before 'lockdown', may not have received the publicity and attention they would in more ordinary times. Nonetheless, they certainly merit study, and it is important that private landlords and tenants are familiar with the Regulations which (unless a late reprieve/deferral is given) are scheduled to apply to all 'new specified tenancies' from 1 July 2020 and to all 'existing specified tenancies' from 1 April 2021.

### Tenancies affected

What is a 'specified tenancy'? The answer is a tenancy of residential premises in England by which one or more persons are given the right to occupy the premises (or part thereof) as their only or main residence and which reserves a rent (which need not be a market rent).

To this there are various exceptions listed in Sch.1 to the Regulations. In brief the exclusions are: private registered providers of social housing; tenants who share accommodation with the landlord or the landlord's family; long leases (more than 7 years), student halls of residence; hostels and refuges; care homes; hospitals and hospices; other accommodation provided by an NHS body.

It follows that standard assured shorthold tenancies are the principal, though not the only, target of the Regulations.

### New specified tenancies

These are defined as specified tenancies granted on or after the coming into force of the Regulations. The Regulations come into force on 1 June 2020: reg.1(2). However, they only apply to new specified tenancies from 1 July 2020: reg.1(3).

The definition seems to entail that existing tenancies which are renewed, or which (pursuant to Housing Act 1988, s.5) become statutory periodic tenancies on the expiry of a fixed term tenancy (and are 'deemed to have been granted'), on or after 1 June 2020 will be 'new specified tenancies'.

### Existing specified tenancies

These are specified tenancies granted before the coming into force of the Regulations, i.e. before 1 June 2020. As noted above, they will be subject to the Regulations from 1 April 2021.

### The duties imposed by the Regulations

A raft of obligations is imposed on private landlords by regulation 3.

A 'private landlord' is unhelpfully not defined in the Regulations, although it is not too hard to guess the target. Anyway, the term is defined in the Housing and Planning Act 2016, s.122(6), pursuant to which statute the Regulations are made. It means a landlord who is not within s.80(1) of the Housing Act 1985, i.e. a private sector landlord (as opposed to a body capable of granting secure tenancies).

As for the reg.3 duties, they are:

1. To ensure that the 'electrical safety standards' are met during any period when the residential premises are occupied under a specified tenancy, i.e. by a tenant as their only or main residence: reg.3(1)(a).

The relevant 'electrical safety standards' are those in the 18<sup>th</sup> edition of the Wiring Regulations, published by the Institution of Engineering and Technology and the British Standards Institution as BS 7671: 2018: reg.2.

2. To ensure every 'electrical installation' in the premises is inspected and tested at least every 5 years by a qualified person from whom a written report must be obtained by the landlord: regs.3(1)(b), 3(2) & 3(3)(a).

'Electrical installation' bears the meaning in the Building Regulations 2010: reg.2. It thus means 'fixed electrical cables or fixed electrical equipment located on the consumer's side of the electricity supply meter'. Domestic permanently connected fixed equipment will include hobs, ovens, night storage heaters, showers, extractor fans and luminaries. Portable equipment such as kettles and freestanding fridges are not so categorised. The position of some white goods (such as washing machines) is perhaps greyer.

3. To ensure the first inspection and testing is carried out:
  - a. Before the tenancy commences in relation to a new specified tenancy; or
  - b. By 1 April 2021 in relation to an existing specified tenancy.

Reg.3(1)(c).

4. To provide the inspection/testing report to:
  - a. New tenants before they occupy the property: reg.3(3)(e)(i);
  - b. Existing tenants within 28 days of the inspection and test: reg.3(3)(b);
  - c. Prospective tenants within 28 days of a written request: reg.3(3)(e)(ii);
  - d. The local housing authority within 7 days of a written request: reg.3(3)(c); and
  - e. The qualified person undertaking the next inspection and test: reg.3(3)(d).

5. To have any further or investigative work recommended by the report carried out by a qualified person within 28 days or any lesser period specified in the report, to obtain written confirmation from a qualified person that such work has been carried out and that the safety standards are met or that further work is required, and to supply that confirmation (together with the original report) to:

- a. Existing tenants within 28 days of completion of the further works; and
  - b. The local housing authority within the same period.

Regs.3(4) & (5).

6. To repeat the steps in 5 above in relation to any further investigative or remedial work required by an earlier investigative work: reg.3(6).

Most of these duties do not merit individual comment but the requirement that the first inspection and testing must be carried out before a new (post May 2020) tenancy commences deserves a note, as does the duty to ensure that the resultant report is provided to the new tenants before occupation is taken (realistically, before/when the tenancy is granted).

In general terms, these obligations are fairly clear. However, their application in relation to tenancies granted (or coming into existence) in the month of June 2020 itself is less obvious. Such tenancies are new tenancies but, as noted above, the Regulations only to apply to new tenancies from 1 July 2020. Although the drafting is not a model of clarity, presumably this 'grace period' entails that in respect of tenancies granted (or coming into existence pursuant to statute) in June itself:

- a. The first test need not have been carried out, and the report provided, before the tenancy commences in June 2020.
- b. However, the Regulations will bite from 1 July 2020 onwards, meaning that such inspection and testing must have been undertaken, and the consequential report provided, by that date. (If the position is otherwise, there is a lacuna as to when those steps must be taken by in respect of tenancies granted in June 2020.)

### Enforcement

The Regulations make detailed provision for enforcement (termed 'remedial action') of a private landlord's electrical safety standard duties.

In summary:

- a. The local housing authority must serve on a private landlord a remedial notice if it has reasonable grounds to believe that the landlord has breached the core duties under reg.3, and the most recent report does not indicate that urgent remedial action (i.e. action identified as immediately necessary to remove the danger present and risk of injury) is required: reg.4.
- b. The recipient private landlord must then take the specified remedial action (unless it has in the interim made representations to the authority which have caused the notice to be withdrawn by the authority): reg.5.
- c. If it is satisfied on the balance of probabilities that the private landlord has not complied with the remedial notice, the authority may, with the tenant's consent and on notice to

the landlord, arrange for an authorised person to undertake the relevant remedial action: reg.6.

- d. The landlord may appeal to the FTT against the authority's decision to take such action on the grounds that all reasonable steps had been taken by it to comply with the remedial notice or that reasonable progress towards compliance had been made at the time when the authority gave notice under reg.6: reg.7. An appeal suspends any remedial notice: reg.7(5).
- e. If the authority proceeds under reg.6, it may recover its reasonably incurred costs on demand from the private landlord (reg.8), although the landlord may appeal against the demand for costs on the same basis as above (reg.9).
- f. In cases where a report obtained by a private landlord under reg.3 indicates that *urgent* remedial action (as above) is required, the authority may, if satisfied on the balance of probabilities that the private landlord is in breach of its duty to undertake the requisite work within the period specified in the report, and with the tenant's consent, arrange for an authorised person to undertake the urgent remedial action: reg.10.
- g. The landlord may appeal the decision to take the urgent remedial action, although the appeal does not suspend any urgent remedial action notice: reg.10(6)(b).
- h. Again, the authority may recover its reasonably incurred costs in that regard, subject to the landlord's right of appeal: regs.8 & 9.

Finally, if the authority is satisfied *beyond reasonable doubt* that a private landlord has breached a reg.3 duty, it may impose a financial penalty of up to £30,000 per breach: reg.11. The procedure for levying penalties, and appealing against the same, is set out in detail in Sch.2 to the Regulations.

### Overview, comments and action points

The Regulations apply to short private sector residential tenancies.

They apply to all new (post May 2020) tenancies from 1 July 2020. This category will include all statutory periodic tenancies arising under the Housing Act 1988 from 1 June 2020 onwards.

The Regulations will also apply to all existing (pre June 2020) tenancies from 1 April 2021.

The Regulations impose a swathe of duties on private landlords both in substance (e.g. to ensure the electrical safety of their premises, and to procure the undertaking of regular testing) and also in matters of form (the retention and provision of reports to various persons).

The Regulations mean that for the first time it will be a legal requirement for private landlords to have undertaken periodic checks of the electrical safety of their rented properties, to have (in effect) an electrical safety certificate in place, and to ensure that standards are maintained throughout the duration of tenancies.

The far-reaching statutory duties are intended to be backed up by an enforcement process which is to be managed by local authorities, with the safeguard of rights of appeal to the FTT. It remains to be seen if authorities have the resources or inclination to get too heavily involved – although the duty (as opposed to power) imposed on them by reg.4 (service of remedial notices) should be noted.

In urgent cases the authority will be able to take remedial action into its own hands up-front, although it is doubtful whether authorities will be keen so to act if there is any likelihood of the landlord contesting the exercise of the power by the authority after the work has been undertaken and the costs incurred.

In more extreme cases the authority will be able not only to arrange for the relevant work to be undertaken and then demand reimbursement of the cost from the landlord but also (where a breach by a private landlord is proved to the criminal standard) to levy penalties (i.e. fines), again subject to protection for landlords in the form of appeals to the FTT.

Unlike the position in relation to the gas safety regulations and energy performance certification, non-compliance with the Regulations will not, however, preclude private landlords from serving a valid notice under s.21 of the Housing Act 1988 to recover possession in respect of an assured shorthold tenancy. This is because compliance with the 2020 Regulations is not a prescribed legal requirement for the purposes of the Deregulation Act 2015.

The language of the Regulations suggests that the standards of the 18<sup>th</sup> edition of the Wiring Regulations must be met, i.e. meeting e.g. the standards of the 17<sup>th</sup> edition will not suffice,

even if the electrical installations in question are not unsafe and do not require upgrading per se. If such a reading is adopted, it is possible that the definition will require every private sector rented property to be upgraded to the 18<sup>th</sup> edition standards (although these standards themselves recognise that older installations may be adequate), even if that is not necessary for safe continued use. Whether this is truly intended or realistic and achievable for landlords, in particular within the mandated timeframes, is open to question.

The need for compliance with the Regulations (in particular, the need to have inspection and testing conducted, and a report obtained) in respect of any new tenancies from 1 July 2020 onwards means that any private landlords who now expect to grant, or may reasonably anticipate granting, tenancies from 1 June onwards (including those who have fixed term tenancies scheduled to expire after the end of May) should take urgent steps to arrange inspection and testing in good time so that they are not left hamstrung by, and potentially in breach of, the Regulations (and e.g. unable lawfully to let their premises) from 1 July.

It has been questioned by some whether there are sufficient qualified electricians to implement the rollout of inspections and testing mandated by the Regulations. Moreover, in the current climate it is readily foreseeable that it may be difficult to procure inspections by qualified persons (or at least that delays may be experienced), still less carry out any necessary works. The timescale imposed by Parliament is tight. Swift action now is clearly the order of the day.

The message is: safety matters – so get testing (albeit in a socially distanced way).

The Regulations can be found [here](#).

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