



Smoking in bedrooms in shared accommodation - dealing with the risks

First the good news, writes [Bridget Spring](#) of the Supported Housing in Partnership (SHiP) Agency Management Group:¹ our managing agents have implemented the Smoke-free Regulations, meaning that residents in shared houses can no longer smoke in the communal areas.

Now the not-so-good news: unless the property is a registered care home or a hospice providing palliative care, the law does not allow for a designated smoking room in shared accommodation – even in a large hostel which has more than one lounge. The result in many properties has been an increase in smoking within bedrooms. Often, there are additional risk factors such as misuse of drugs and/or alcohol, smoking in bed, and hoarding. Surveyors carrying out Fire Risk Assessments often advise against smoking in bedrooms, therefore we sought legal advice from Trowers and Hamlins about whether this could be prohibited, and if so, how any prohibition might be enforced.

Smoking in bedrooms – the legislative position

The “smoke-free” legislation currently in force prohibits smoking in public “enclosed or substantially enclosed” spaces. It does not require “private dwellings” to be smoke-free². There are certain exceptions, for example if the dwelling is used as a place of work for more than one person, though this exception does not apply to people providing personal care or assisting with domestic work in a person’s home or personal accommodation.

In accommodation where residents have their own bedrooms and share communal areas, whether residents’ individual rooms are classified as “private dwellings” may depend on the terms of each resident’s occupancy agreement. For example, where an Assured Shorthold Tenancy is granted giving the tenant exclusive possession of their own bedroom, the bedroom is likely to be classified as a “private dwelling”. In settings such as care homes, where residents have licence agreements and are not judged to have exclusive possession of their bedrooms, it is arguable that

bedrooms should not be classed as “private dwellings”, and therefore should be subject to the smoke-free legislation. However, this is a fairly grey area, and providers would need to take advice about individual properties.

Prohibiting smoking in occupancy agreements

In the case of bedrooms which are classified as “private dwellings”, potential options might include putting a specific clause into occupancy agreements prohibiting occupiers from smoking in their

own rooms, or, after consultation with residents, including an obligation to comply with House Rules (including anti-smoking provisions) within such agreements. If existing occupancy agreements do not include such terms, existing residents would have to agree to have the terms of their occupancy agreements varied to include such provisions.

However, providers should bear in mind that, whichever approach they take, a blanket prohibition on smoking in residents' rooms could potentially be deemed an unfair contract term. Office of Fair Trading guidance does not make specific reference to smoking, but clauses absolutely banning smoking may be deemed similar to clauses imposing an absolute ban on pets, which have previously been held to be unfair.³

Providers may be able to reduce this risk by taking preventative steps such as ensuring that the clause is brought to the attention of all new residents at the point of sign-up, or making sure that prospective residents have knowledge of alternative accommodation options in the area before signing up. Such measures could help counter any suggestion that a resident had no bargaining power, and thus no option but to accept the no-smoking clause. However, there would still be a risk that any blanket prohibition on smoking could be considered unfair.

Given the ruling in the Weaver case⁴, providers also need to consider whether taking possession action against a resident for breach of a clause prohibiting smoking, or even a decision refusing a resident permission to smoke in their own flat or

room, could be challenged on judicial review or human rights grounds.

Enforcement

Providers need to be able to show that any enforcement action taken following a breach of no-smoking clauses is reasonable and proportionate, and that sufficient alternative steps to address the issue have been taken first.

Providers should have a specific policy setting out how they will deal with breaches of no-smoking rules, for example multi-disciplinary meetings involving support workers, drug agencies, etc. In addition, providers should include in the occupancy agreement an obligation to comply with the landlord's health, safety or fire advice, and not to engage in any conduct likely to endanger the tenant's own health and safety or that of any other person. In most cases, it is failure to smoke in a safe manner which causes the greatest concern, which can then be addressed as a breach of health and safety obligations.

If providers have serious concerns about the safety of other occupiers, and particularly if the behaviour of the resident concerned could be shown to have already caused damage to property or a danger to other residents, then seeking an injunction could ultimately be an option. However, the courts tend to view injunction proceedings as a draconian remedy, and an injunction is only likely to be granted where the risks are substantial.

If a tenant still continued to cause a danger through smoking, and perhaps breached the terms of an existing injunction, possession proceedings could be used as a last resort. As always, there would need to be a clear paper trail to show that the possession claim was reasonable in all the circumstances, and, even if a mandatory possession ground is used, the tenant could still ask the court to consider the proportionality of granting a possession order.

With a licensee, although a formal possession order is not always needed, providers still need to demonstrate reasonableness and proportionality, and where a possession order is not needed but the licensee is more than a bare licensee, the licensee must be given the statutory minimum of four weeks' notice, (or reasonable notice in the case of an excluded licence).

1. Legal advice has been provided by Trowers and Hamlins

2. *Health Act 2006*, s.2.

3. Office of Fair Trading, 2012. *Guidance on unfair terms in tenancy agreements*. London: Office of Fair Trading. Available at www.oftr.gov.uk/shared_oftr/reports/unfair_contract_terms/oftr356.pdf. See p.7.

4. You can access a briefing about the Court of Appeal's June 2009 decision in *Weaver v London & Quadrant Housing Trust* at www.housing.org.uk/publications/find_a_publication/legislation/weaver_v_london__quadrant_hou.aspx

5. View current fire safety law and guidance at www.communities.gov.uk/fire/firesafety/firesafetylaw/

It is failure to smoke in a safe manner which causes the greatest concern

Our recommendations

- Review each property to decide whether it may be justified to prohibit smoking in bedrooms, given the points raised above
- At the same time, providers should assess what action is required at each property to minimize the risks associated with smoking
- Work with residents to discourage smoking in bedrooms, explaining health and fire risks. If possible provide a smoking shelter outdoors which meets the regulations.
- Start from the assumption that smoking may take place within all bedrooms, (for example visitors may smoke even if the resident does not) and take action to minimize the fire risk in all rooms
- Make sure that Fire Risk Assessments are robust and regularly reviewed
- Where there is a fire panel, but the property is not staffed 24 hours, risk assess carefully before leaving the key in so that residents can re-set the alarm. The risk assessment should consider whether on-call staff can be called in to re-set the alarm, or whether it is appropriate to link the panel via Redcare to an Alarm Receiving Centre.
- Undertake regular health and safety inspections of all bedrooms, and if access is problematic, persevere
- Ensure furniture meets fire safety regulations, and provide fire-retardant bins and curtains⁵
- Ensure staff and residents are trained in fire safety and that regular fire drills are carried out and recorded
- Ensure that client risk assessments for smokers consider what measures are needed to reduce fire risk for that individual, for example address issues such as hoarding or smoking in bed
- If the behaviour of the resident concerned has caused or is threatening to cause a danger, commence enforcement action, but always bearing in mind the considerations raised above.

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