

Briefing Notes

Understanding legal compliance in the light of damp, mould and condensation issues



Monday 19 June 2023

Introduction

Victoria Jardine was the guest speaker for today's session. Victoria is a partner at Anthony Collins Solicitors (AC), specialising in corporate governance in the housing association sector, and leads the AC housing governance team. This session was hosted by Catherine Ryder, CEO, PlaceShapers. The session started with a presentation by Victoria on damp, mould and condensation (DMC) and compliance with all relevant law. It then broadened into an open discussion on several topics.

1. DMC and compliance with all relevant law

Many housing associations (HAs) are concerned about whether they can certify that they are in compliance with the regulatory framework and all relevant law when, for example, they have outstanding disrepair claims and complaints, or data showing that they are not in compliance.

Under the Governance & Financial Viability (GFV) Standard, the board has an obligation to take reasonable measures to ensure that the organisation is in compliance with all relevant law. This is an ongoing and continual obligation but is brought most into focus when the board is certifying compliance with the GFV Standard in the annual accounts.

A literal interpretation of the GFV Standard is that a HA must comply with all relevant law, no matter how inconsequential. In reality, to comply with the GFV Standard you need pragmatically to adopt a materiality threshold – the board is saying that its governance ensures that the organisation complies with all relevant

law in all material respects and no non-compliance is material based on the financial impact of DMC repairs and incidents (rarely triggered by the financial impact of a single incident; rather, it looks at whether an HA has sufficient resources and capacity to meet its investment needs) and the wider impact of an individual case of harm to a tenant arising from DMC.

Often an HA is aware of disrepair but, especially for DMC issues, it is not clear whether it is in compliance for a specific home until the relevant complaint is investigated. Even if the HA is aware of individual cases of disrepair, it will not be clear whether this reflects wider breaches. Where the board is on notice of disrepair because of, for example, stock condition surveys or a response team, it is necessary to cut through the data to identify effectively where legal breaches may exist. Executives cannot give a guarantee of absolute compliance and the law is in flux, so the question is whether the board has taken reasonable measures to assure themselves that the organisation is compliant with the law by reference to emerging good practice. The board should think about what “reasonable measures” are and how it knows that the organisation is taking them.

2. Relationship with tenants

2.1 Focusing compliance on what is important to tenants

DMC is increasingly getting special focus and treated separately from other, “routine” compliance. (However, once boards are satisfied that there are steps in place to address DMC, it may be re-absorbed into “routine” compliance.) It is important not to focus everything on DMC since focuses change over time; rather, it is necessary to think about what is coming up next and what matters to tenants. On the other hand, there are unique problems with DMC at the moment and, by focusing on DMC, HAs are uncovering a lot of problems of which they were unaware. Part of the problem more generally has been not knowing their homes and the people in them well enough, which was picked up in the Better Social Housing Review.

2.2 New approaches to data collection

The sector has been collecting or not collecting data without much thought about why that data is (not) being collected. It is necessary to think more about why and how we collect data, and adopt a more cohesive approach. For example, if an HA is aware of DMC issues in one property then it should proactively check neighbouring properties.

It is important to be pragmatic when considering the board's legal obligations. "Reasonable measures" tends to create a focus on data and procedures, i.e. it looks at how you respond to those customers that raise complaints. However, it is also important to engage with those tenants who do not raise any issues and include them in your data. This means making sure that the data and interactions you have count. Relatedly, we should adopt a broad understanding of "data" – it includes numbers but also experiential elements such as walkabouts, estate tours, etc, and it is necessary to incorporate these other kinds of "data" into reporting and board discussions.

3. Relationship with staff members

It is crucial to listen to staff members and residents. This means creating a culture within your organisation where teams and individuals take matters seriously. It is also important to listen to front line staff, since they can provide first-hand information. It is important to recognise where there is a tension between how staff members actually feel and what the executives are saying. There is not really a freedom to speak up in the housing sector, and it is not clear what the appropriate forum is for that, in contrast to the NHF's Freedom to Speak Up initiative.

4. Relationship with the executive

Boards should have a strong relationship with their executives to increase the effectiveness of their scrutiny. Asking appropriate questions should not be seen as boards not trusting executives, but because they need to be confident of, and assured on, the information provided to them. One attendee gave the example that, where data was presented to the board which identified a lack of engagement over a prolonged period with tenants in some properties, the board simply asked the executives whether they were satisfied that "there were no dead bodies behind those doors"?

5. Relationship with the regulators

5.1 Going beyond mere "compliance"

The Regulator of Social Housing (RSH) and the Ombudsman are increasingly scrutinising organisations beyond mere "compliance". Boards need to ensure that they are interrogating information rather than just assuming compliance. Boards may be worried that focusing on data and procedures and legal compliance /

legal responsibilities could look defensive to customers, but a well-run organisation complying with its legal obligation to have “reasonable measures” in place should as a result have safe and well-managed homes because it will understand what is expected of it and be complying with this. Simply following appropriate procedures may not actually resolve the problem a customer is facing, so HAs need to demonstrate compliance in ways customers experience for themselves. If you evidence compliance properly and demonstrate that you are resolving customer problems then you are probably doing everything that the Ombudsman, the RSH and the courts expect of you.

5.2 Cross-learning from the NHS

There are many things the sector can learn from the NHS where there is very strong regulation which drives behaviours and provides clarity of expectations. In the housing sector, we should not balk at greater regulation.

NHS non-executive directors are expected to visit services and talk to staff, patients, carers and families once a month and report back on that to the board, which means NHS boards get a lot of information about service standards “directly from the wards”. If a board does not have information about operational matters then it cannot decide strategy appropriately, or challenge operational decisions effectively.

Boards in the housing sector can be prone to distrust the data presented to them, and the same happens in the NHS. However, in the NHS, there are audit committees to look at the quality of data, with both internal and external audits of data and data quality is specifically audited periodically.

The NHS also has a strong freedom to speak up culture and a strong learning culture about how to improve which is less evident in the housing sector.

6. Relationship with the government and the legislature

6.1 The Social Housing Regulation Bill (SHRB)

The SHRB introduces several changes to regulation. Awaab’s Law introduces a requirement for landlords to repair properties in a specified timeframe or decant tenants if the repairs cannot be completed within that time. The SHRB also makes changes to consumer regulation by removing the serious detriment test. But

unless appropriate scaffolding or mechanisms are in place, boards may feel overwhelmed by the scale of changes introduced by the SHRB alongside other changes such as building and fire safety.

6.2 Government guidance versus peer-learning

Guidance, including government guidance, on what causes DMC and how to address it (e.g. the Housing Health and Safety Rating System) is changing frequently and there are very few authorities on it at the moment and there is a lack of consistent guidance. HAs, their industry bodies CIH and NHF and groups such as Placeshapers and HACT have to share and develop their learning together, knowing that what constitutes good practice may change from month to month.

6.3 The effects of government policy

Housing policy (official and unofficial) has made HAs distant from their tenants and there has been a pull towards development and diversification and the VFM agenda has driven down quality in favour of cost. There is also a chronic shortage of new social housing to replace that which is not fit for purpose and to address overcrowding, which can be a source of DMC issues.

Housing 2023



HACT NED Network members can obtain free tickets for Thursday at CIH Housing 2023 when there is arranged a Board Members lunch. To confirm attendance, including dietary requirements, please contact HACT, Events & Digital Communications Officer, Melanie Beverley-Hughes.

[CONFIRM ATTENDANCE](#)

Register for our next session

Exploring the relationship between complainants and the organisation, the motivations and the outcomes

Monday 10 July 16:00 - 17:00

As the Government takes complaints more seriously in social and tenant housing this session will explore the relationship between complainants and the organisation, the motivations and the outcomes. How to handle complaints, their motivation and what can the Board do to understand the situation, engender a positive approach and outcomes for both tenants and the organisations

Speaker: James Walker, Complaints Expert, Founder and Government Advisor

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