Consultation response

Department for Communities and Local Government consultation

Draft Homelessness Code of Guidance for Local Authorities

December 2017

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Shelter helps millions of people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that, one day, no one will have to turn to us for help.

We're here so no one has to fight bad housing or homelessness on their own.

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Introduction

We have expert knowledge of the homelessness legislation and guidance. Our advisers use the existing Homelessness Code of Guidance every week in advising homeless service users and negotiating with LHAs to honour their legal duties. We particularly use the guidance on:

- refusals to take homeless applications (gatekeeping)
- refusal to provide interim accommodation pending assessment of whether a rehousing duty is owed
- reasonable to continue to occupy
- suitability
- local connection

We have over 50 years of experience of helping people at risk of homelessness to keep their homes, or find a suitable alternative. In 2016/17, Shelter helped the following people through our telephone and face-to-face services in England:

- 44,000 were helped towards keeping their home, including 56% of people who were faced with eviction or repossession
- 22,000 were helped to find a new home, including 65% of homeless people looking for accommodation found somewhere to live.

The Homelessness Reduction Act has created opportunities for local authorities and third sector organisations to develop closer partnership working and solutions-focussed decision making. In some cases, this has led to co-location arrangements being established. For example, in London Borough of Southwark, Shelter staff are now located within the housing options service. Having distinctively branded Shelter staff on hand, allows for improved, more localised decision-making, more effective solutions-based challenges and more efficient use of resources on both sides. Such arrangements also provide valuable insights for the challenges the new legislation will bring.

The DCLG-funded National Homelessness Advice Service (NHAS) makes our housing expertise and experience available to Citizens Advice, local authorities and other national organisations. We've been providing free expert advice, training and support to professionals across England for over 26 years. We have a consultancy line and webchat service which supports frontline workers to explore and consider all practical options for their client. NHAS staff are already training local authority and other advisers on the Homelessness Reduction Act and this consultation response has been informed by their comments on areas where the Code of Guidance needs to provide clarity.

We have been liaising closely with our colleagues at Shelter Cymru to assess the impact of the Housing (Wales) Act 2014, which introduced similar homelessness legislation in Wales over two years ago. They have made recommendations for improvements to the Welsh Code of Guidance.[1] This has helped us to develop a better understanding of the guidance that is likely to be needed in England.

In summer 2017, supported by the Longleigh Foundation, we worked with an expert panel of Shelter homelessness service users to develop a briefing[2] on how local authorities should approach their new duties to assess applicants and develop a personalised plan. A number of the recommendations in this response were originally put forward by our expert panel.

We were represented on the DCLG Local Authority Review Group for the reformation of the Homelessness Code of Guidance, which met during spring and summer 2017, working with local authority homelessness service managers and DCLG officials to developing ideas for the new Homelessness Code of Guidance.

We recently gave evidence to the House of Commons DCLG Select Committee as part of its inquiry into the Homelessness Reduction Act where we outlined our priorities for the changes to the draft Code.[3]

[1] *Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness 2016*

[2] Garvie, D. *"It's a personal thing" What service users need from assessments and personalised housing plans - Homelessness Reduction Act 2017*, Shelter, November 2017

[3] Communities and Local Government Committee: Homelessness Reduction Act inquiry

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Summary

Our priority recommendations are bolded.

Format of the Homelessness Code of Guidance

- We're pleased that the draft Code retains much of the detail of the existing Code. Without this, there would be greater need for the courts to interpret the legislation. This would be against the spirit of the new legislation.

- It's important that all statutory guidance relating to homelessness legislation should be incorporated into one, complete 2018 Code. Important aspects of the supplementary guidance should be retained. We strongly recommend that paragraph 14 (on private rented sector offers) and paragraphs 20-22 (on 'reasonable to accept') of the supplementary guidance on the Localism Act 2011 and 2012 Suitability Regulations incorporated.

- We generally feel that the style and tone of the draft guidance strikes the right balance. There are places where the tone could be more positive in emphasising the importance of local authorities helping all those at risk of homelessness in order to encourage a culture-shift in the treatment of homeless people. Reference to 'victims' of domestic abuse, trafficking and modern slavery should be amended to 'survivors'.

- We would like the tone of the guidance amended to emphasise the importance of local authorities seeking to understand an applicant's preferences, and – as a starting point – seeking to meet these preferences wherever possible. Our recent work with homeless service users has illustrated that people have very humble expectations of the help they expect.

- **We strongly recommend that the tone is amended in relation to 'deliberate and unreasonable refusal to cooperate'. There is some reference to 'lack of cooperation' or 'failure to cooperate'. During the passage of the legislation, Shelter supported the Bill on the basis that duties could only be discharged for non-cooperation if the bar was very high, hence the use of the term 'deliberate or unreasonable refusal'[4] rather than failure or lack of cooperation. The Code should not suggest a lower bar. It's important that the review regulations and guidance make clear that discharging duty for this reason should be a last resort and that there are clear procedures in place for ensuring cooperative working and warning applicants of the consequences of refusing to do so.**

Content of the Homelessness Code of Guidance

- We are disappointed that the Homelessness Reduction Act does not specifically require advisory services to meet the needs of Equality Act protected groups, such as BAME households, women or people with disabilities. The guidance could recommend the needs of these groups are taken into account in paragraph 3.5 and in other areas through the Code.

Chapter 2: Homelessness strategies and reviews

[4] Policy Fact Sheet 7: Non-Cooperation, DCLG, February 2017 states: 'the bar is set at *'unreasonably refusing to co-operate' so that it does not penalise those who have difficulty co-operating, for example because of poor mental health or complex needs'.*

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- The guidance in this chapter (paragraph 2.45) suggests that housing authorities have complete discretion over access to their housing allocation scheme. This is incorrect. Housing authorities must not apply qualification criteria which would exclude from their allocation schemes persons who would be entitled to reasonable preference in the allocation of housing.

- To ensure that homelessness reviews and strategies are living documents, they should be used to identify 'any other groups that the authority identify as being at particular risk of homelessness in their district' and local advisors should be able to report where the strategy is not meeting their needs.

Chapter 3: Advice and information about homelessness and the prevention of homelessness

- Local authorities should be expected to provide advice and information to people who have no recourse to public funds as a result of their immigration status. Although they will not be eligible for assistance under the Act, they should be given advice under the general section 179 duty in obtaining accommodation pending resolution of their immigration problem.

Chapter 4: The duty to refer cases in England to housing authorities

- The guidance on the duty to refer should be much stronger in order to ensure that people at risk of homelessness receive meaningful help upon referral. In our view, a referral by a public body should usually constitute an application for assistance, although it may be decided that no duty is owed. The new guidance should suggest that the referring authority cooperates with the housing authority receiving the referral.

Chapter 6: Homeless or threatened with homelessness

- Guidance on people asked to leave by family and friends needs to be strengthened. In our view, where an applicant has been excluded from their home and the host is adamant they cannot return, they should be regarded as homeless.

- In our view, it is incorrect.to state statutory overcrowding 'may not by itself be sufficient to determine reasonableness' [to continue to occupy]. Reference to this should be deleted.

- We support the draft guidance on whether it is reasonable to occupy beyond the expiry of a valid section 21 notice, issue of an order for possession and when eviction is warranted. To make the policy intention absolutely clear, we recommend that the guidance on all three should be tightened still further.

- **If housing authorities continue to flout this strengthened guidance post-implementation, and advise families to wait for court possession and eviction, the Government should commit to statutory regulations on whether it is reasonable to occupy beyond the service of a valid Section 21 notice.**

Chapter 7: Eligibility for assistance

- Our main concern in relation to this chapter is the disappearance of annexes 8 to 12 of the current Code, which contain essential information without which local authority officers will not be equipped to make legally accurate decisions on eligibility. We recommend that annexes 8 to 12 are preserved, by being pulled into Chapter 7, otherwise the exercise of streamlining the Code will have removed essential guidance.

Chapter 8: Priority need

- **We recommend stronger clarification on the definition of 'vulnerable' for the purposes of priority need decisions. This follows the recent case of *Panayiotou v London Borough of Waltham Forest* (2017) EWCA Civ 1624, which – in turn – built on the important test case of**

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***Hotak v Southwark LBC* (2015) UKSC 30, [2016] AC 811, in which Shelter successfully intervened. The *Panayiotou* case determined that 'significantly more vulnerable' should be a qualitative rather than a quantitative test. The definition of 'vulnerable' is very important for the implementation of the Act. If the new guidance makes clear which applicants are likely to be vulnerable and in priority need, authorities might be incentivised to provide more meaningful help at prevention and relief stages to avoid the need for temporary accommodation under the full rehousing duty.**

- Special consideration is needed in relation vulnerability as a result of violence. We recommend the Code is strengthened to clarify that where an applicant was compelled to leave his/her previous home because of violence, and is still subject to violence or threats of violence that are serious enough to render the current accommodation unsafe, s/he must be deemed vulnerable for that reason, since the ordinary person is not subject to those experiences.

Chapter 9: Intentional homelessness

- We recommend that further guidance is needed in relation to whether an assured shorthold tenancy (AST) is sufficient to break the chain of causation from an earlier intentional homelessness decision. We recommend that an AST of six months or more should normally be regarded as settled accommodation, unless it is clear from the outset that the accommodation will be available only for the fixed term of six months and no longer.

- There needs to be more clarity on the surrender of accommodation for the purposes of intentional homelessness (paragraphs 9.26-9.27). Using surrender of a tenancy in the face of possession proceedings with no scope for defence, as an example of as an act or omission in good faith is fraught with difficulties. We recommend that where a tenant surrenders the property in these circumstances, this is more likely to be 'unreasonable to continue to occupy' (paragraph 6.16) or an 'intervening event' (paragraph 9.14), namely the landlord's possession action.

Chapter 10: Local connection and referrals to another housing authority

- **We recommend the guidance is strengthened so that there is an expectation that the authority to which the applicant applies should still carry out an assessment and provide a brief, initial plan detailing this and what steps will be taken next, before referring back to the authority where there is a local connection. If the receiving authority does not provide a plan, but only refers back to the local connection authority, the applicant may be unclear as to what will happen next, or how they might cooperate, and risk being passed from pillar-to-post. This approach would require cooperation between the receiving, local connection authority and the applicant.**

- The new guidance should also draw attention to the passage of time where there is a local connection referral, and especially where the referral is disputed, during which applicants who are not in priority need and are not in interim accommodation might not get any help with the relief of homelessness.

Chapter 11: Assessments and personalised plans

- **To ensure that Chapter 11 reflects the findings and recommendations of homelessness service users, we strongly recommend that DCLG give consideration to the recent Shelter briefing[5], based on the recommendations of an expert panel of Shelter service users, outlining how housing authorities should approach assessments and personalised plans.**

- We recommend that the tone of this chapter is amended to ensure that the new guidance emphasises a meaningful culture-shift in line with the spirit of the legislation. In particular, housing authorities should be encouraged to: treat applicants with empathy, dignity and respect; centre assessment and

[5] Garvie, D. *"It's a personal thing" What service users need from assessments and personalised housing plans - Homelessness Reduction Act 2017*, Shelter, November 2017

personalised plans on the applicant's preferences: consult with an expert panel of people with lived-experience when planning implementation of these duties; and provide advice and assistance if found ineligible for assistance or not homeless or threatened with homelessness.

- We strongly recommend that paragraph 11.5 should refer to the definition of homeless, as well as threatened with homelessness.

- We recommend that assessments should include a much fuller housing history (paragraph 11.8) than simply the cause of the current homelessness, to ensure that the personalised plan contains an appropriate response. For example, families who have experienced frequent repeat homelessness could be prioritised for stable social housing.

- We recommend that the guidance on reasonable steps (11.18) is strengthened to ensure steps include specific, personalised housing advice and support, based as much as reasonably practicable on the applicant's preferences.

- The most important factor for most of our expert panel of service users is the location of a home. While we support the view (paragraph 11.20) that personalised housing plans should be realistic, the guidance should explicitly recommend that housing authorities assess the prospects finding suitable social housing in the desired area, and provide information on this within the plan. Otherwise, there is a risk that authorities will only assess the prospects of finding affordable private rented housing.

- At the very least, the guidance should highlight the 2012 Suitability Regulations[6] and associated guidance, which clearly set out what is deemed suitable in terms of location of accommodation, along with the outcome of the *Nzolameso* judgment[7] on location of accommodation. Where an out-of-area move to a suitable location is considered to be a reasonable step the guidance should require authorities to include help with this[8] within the plan.

- There should be more emphasis (paragraph 11.31) on the importance of recommended, but not required, steps, in order to persuade authorities to take this part of the personalised housing plan seriously. The attitude of most officers we train is that it is meaningless to include non-mandatory steps – they will either 'impose' or not put something in the plan at all.

- **We strongly recommend that the guidance (11.31) must stress that reasonable steps required of the applicant must meaningful and achievable. DCLG has previously set out that '*there will be a small number of key steps the individual would be required to take. These steps would be tailored to their needs and be those most relevant to securing and keeping accommodation. These actions must be reasonable and achievable.'*[9] We know of at least one authority which intends to give the applicant a long list of steps and end the duty if they are not happy with the progress made. The Code needs to be unequivocal in stating that this is not acceptable.**

Chapters 12 and 13: Prevention and Relief Duties

- The information and guidance in chapters 12 (prevention duty) and 13 (relief duty) is fairly generalised and not very practical, with few, if any, examples of steps that could be taken. We assume that more practical guidance, along the lines of previous practice guidance[10], together with information in Annex 7 of the current Code, will be provided by DCLG in a forthcoming code of practice and practice hub.

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[6] The Homelessness (Suitability of Accommodation) (England) Order 2012
[7] *Nzolameso v City of Westminster*, [2015] UKSC 22 (Supreme Court, 2 April 2015). See Garvey, K., *Offering temporary accommodation out of area*, Shelter, 2015
[8] Garvey, K. and Pennington, P. *Home and Away: the rise in homeless families moved away from their local area*, Shelter, 2015
[9] *Policy Fact Sheet 3: Duty to assess all eligible applicants' cases and agree a plan*, DCLG, 2016
[10] *Homelessness Prevention: a Guide to Good Practice*, DCLG, 2006

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- **We recommend the guidance should be much clearer in this regard as most homelessness officers we train are unaccustomed to giving prevention advice, e.g. on managing income, dealing with debt etc.**

Chapter 14: Ending the prevention and relief duties

- We find paragraphs 14.28 -14.29 difficult to understand. We are seriously concerned that, without amendment, paragraph 14.29 encourages local authorities to close off the s.193 duty by finding applicants intentionally homeless from temporary or transient accommodation, rather than settled. If accommodation has a reasonable prospect of being available for at least six months, the prevention/relief duties end and subsequent loss of that accommodation would give rise to a fresh application for homelessness assistance. We recommend paragraph 14.29 is deleted.

- **We strongly recommend the guidance (paragraph 14.41) is amended to expressly state that bringing the duties to an end for refusal to cooperate should be an action of last resort. In our view, it would only be appropriate to use this way of terminating duties in an exceptional or extreme situation, in which the applicant had demonstrated a wilful overall refusal to engage with the authority in the assessment, prevention and relief process. Shelter supported the new legislation on this basis.**

- We recommend that examples of deliberate and unreasonable refusal to cooperate are given (paragraph 14.48) and there is a refocus of the reasons it might be difficult to manage communications (paragraph 14.50), such as inability to access email, phone or transport because of lack of money to top up a phone or pay for a bus.

- **The example given of whether a refusal to cooperate is unreasonable (paragraph 14.51(d)) is extremely worrying. It suggests that it might be unreasonable to prioritise a medical or jobcentre appointment, when to do either could have serious consequences for health or finances. This example must be removed as it does not illustrate the policy intention of a high bar. In fact, DCLG has previously indicated that**

Chapter 15: Accommodation duties and powers

- The guidance on the duty to provide interim accommodation coming to an end by notification of a decision (paragraphs 15.8 and 15.10) should be amended to explain when it is likely that the duty will be 'not owed', rather than simply repeating the opaque statutory wording.

- The guidance on discretionary powers to secure accommodation (paragraph 15.24) should include the vital qualification that the exclusion of people without recourse to public funds does not apply where there would otherwise be a breach of a person's ECHR rights or EU Treaty rights.

Chapter 16: Securing accommodation

- The guidance suggests (paragraph 16.21) that Discretionary Housing Payments (DHPs) should not be expected to cover shortfalls in the longer term. However, DWP Guidance[11] states that it may be appropriate to award DHPs for an indefinite period where an individual needs further assistance with housing costs and their circumstances are unlikely to change. It should therefore be amended to reflect this.

- We suggest that the sub-heading on 'annexe' accommodation is deleted and the guidance on this (paragraph 16.31) is amended. The Code should discourage the practice, often spurious, of making rooms or flats available on a 'nightly' basis, as an 'annexe' which is often a sham where the accommodation is not a hotel. The guidance should also address the growing problem of local

[11] Discretionary Housing Payments Guidance Manual - Including Local Authority Good Practice Guide, DWP, December 20116

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authorities developing their own B&B/hostel-style accommodation, where families have to live in one room, and sometimes share facilities. This type of accommodation is not covered by the B&B regulations, which means families to be legally accommodated in it for more than six weeks. This is a flaw in the regulations, which the guidance should address.

Chapter 17: Suitability of accommodation

- **Our biggest area of concern is the draft guidance on affordability, which is relevant not only to suitability, but also to reasonableness to continue to occupy. In our view, it is woefully inadequate. The draft guidance does not retain a critically important paragraph (17.40) in the existing Code, which clarifies the definition of affordability for the purposes of the Affordability Regulations[12], in relation to rent shortfalls and other accommodation costs. It would have the effect of eroding the principle that subsistence benefits should not be expected to cover housing costs, and would shift decisions on this to local authorities. An overly low residual income will make it harder for people to sustain tenancies and avoid repeat homelessness. Existing paragraph 17.40 must be retained.**

- The guidance on location (paragraphs 17.46-17.58) provides a helpful summary of the main elements of the judgment of the Supreme Court in ***Nzolameso v City of Westminster*** [2015] UKSC 22, an important test case, in which Shelter's Children's Legal Service successfully intervened. But it does not adequately reflect all the court's recommendations. We would like to see it significantly strengthened, including in relation to the time given to decide whether to accept accommodation out-of-area (we see cases where applicants are expected to make such decisions on the spot or within 24 hours) and to avoid breaches of the Children Act 2004, section 11 in relation to schooling.

- It is essential that the guidance on suitability retains the current supplementary guidance (paragraphs 20-22) on 'reasonable to accept' accommodation, which should be inserted after paragraph 17.60 of the draft Code. If they are not retained, there is a grave danger that authorities will argue that the concept of 'reasonable to accept' has disappeared, and that the case law based on it is therefore obsolete. This is important for applicants who cannot accept accommodation because of fears of racial harassment or violence in the neighbourhood.

Chapter 18: Applications, decisions and notifications

- The guidance (paragraph 18.4) should be strengthened to emphasise that authorities must make their contact details clear and obvious on their website. It is a familiar experience that on their websites local authorities do not give a telephone number or even an address of the office where people should go to apply for homelessness assistance.

- We strongly recommend that the guidance should stress that it is not satisfactory for an authority to restrict access to its homelessness services, for example, by making such access dependent on the use of an online portal. We recommend that the guidance requires that a face-to-face service for applications is always available, or at the very least a telephone service.

- The guidance should stress services should not involve lengthy waits to speak to an adviser. In our recent briefing, the London-based members of our expert panel of service users reported that they had to wait unreasonable amounts of time at the local authority's office, even when they had nowhere to stay that night and children in tow. This was stressful for the families involved.

- The guidance on further applications (paragraph 18.13) should be amended to give a more appropriate example of a factual change of circumstances, or deleted. It is misleading to give 'intervening settled accommodation' as an example of a factual change. It is a substantial change in circumstances which breaks the chain of causation from an earlier intentional homelessness decision. Where there has been intervening settled accommodation, authorities should consider the application as a fresh incidence of homelessness. An example of factual change is relationship breakdown.

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[12] Homelessness (Suitability of Accommodation) Order 1996 (SI 1996 No.3204)

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Chapter 21: Domestic abuse

- The guidance in respect of women's refuges (paragraphs 21.34-21.35) should be strengthened. In our experience, where a woman applies as homeless from a refuge, the local authority insists that its section188 duty is satisfied by staying in the refuge. However, it is quite clear from the House of Lords' judgment in ***Moran v Manchester City Council*** [2009] UKHL 36 that refuge accommodation should only be used in the short term.

Chapter 25: Modern slavery ad trafficking

- We strongly welcome this chapter of the guidance. We have based our comments on the advice of the Anti-Trafficking and Labour Exploitation Unit (ATLEU).[13] The introductory paragraphs should draw attention to the UK's domestic and international obligations to survivors of trafficking and modern slavery.

- The guidance on assessing vulnerability and priority need for survivors of trafficking or modern slavery (paragraph 25.11) should be strengthened to advise authorities that they should accept as 'vulnerable' those who have received a Conclusive Grounds Decision that they are a survivor of trafficking or modern slavery. It should suggest officers use the BASW competent authority guidance[14] in assessing characteristics and behavioural responses of survivors of trafficking and modern slavery.

- We strongly support the guidance (paragraphs 25.12 - 25.14) that housing authorities should take account of the specific needs of survivors of trafficking and/or modern slavery when considering whether accommodation is suitable. Accommodation of a type that might trigger post-traumatic stress should be avoided. We recommend that the guidance suggests accommodation needs should be considered in the local authority's homelessness review and addressed in its strategy, for example the homelessness review should track any National Referral Mechanism safe house accommodation that is provided in the area, from which victims will eventually need assistance to move on to suitable alternative accommodation.

[13] http://atleu.org.uk/

[14] *Victims of Modern Slavery - Competent Authority Guidance* – version 3, March 2016, British Association of Social Workers

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Response to specific questions

Personal Information

Question 1: Are you responding as (please tick one):
☐ A private individual?
☑ On behalf of an organisation?

Question 2: If you are responding as a private individual, is your main interest as:
☐ A individual with experience of homelessness?
☐ An individual who delivers a homeless service?
☐ Other? (Please specify)

Not applicable

Question 3: If you are responding on behalf of an organisation, is the interest of your organisation as (tick all that apply):
☐ A local authority?
☐ A private registered provider?
☑ A homelessness charity?
☐ A private landlord or organisation representing private landlords?
☐ An organisation providing legal services?
☐ A supplier of management and/or other services to local authorities?
☐ A health agency?
☐ A social care agency?
☐ A children's service?
☐ A criminal justice agency?
☐ Other (please specify)?

Question 4: Please enter the first part of the postcode in England in which your activities (or your members' activities) are principally located (or specify areas in the box provided):

EC1V

Format of the Homelessness Code of Guidance

Question 5: Do you agree that annexes should be removed from the guidance? If not, is there any specific information that you would suggest keeping in an annex and why?
☐ Yes
☑ No

Comment:

We recommend that the specific information in annexes 8 to 12 of the current 2006 Code, which contain essential information without which local authority officers will not be equipped to make decisions on eligibility, needs to be preserved, perhaps by being pulled into Chapter 7.

Otherwise, the exercise of streamlining the Code will have deprived the guidance of essential material to guide local authorities in making legally accurate decisions.

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Question 6: Do you agree with the recommendations for withdrawal of existing supplementary guidance documents? Are there specific, essential elements of current guidance material that should in your view be retained and considered for inclusion in the revised guidance?

Comment:

Yes, we agree that it would make sense to withdraw existing supplementary guidance documents and for their contents to be incorporated within a new, complete 2018 guidance.

However, important aspects of the supplementary guidance should be retained. Paragraphs 14, 21 and 22 of the supplementary guidance on the Localism Act 2011 and 2012 Suitability Regulations into the new 2018 guidance must be incorporated into the new Code.

Paragraph 14
Authorities are reminded that the discretion to arrange a private rented sector offer is a power, not a duty, and as such, authorities should not seek to rely on the power in all cases. Authorities should consider whether to arrange a private rented sector based on the individual circumstances of the household and undertake to develop clear policies around its use.

This guidance is essential to remind local housing authorities that a private rental sector offer should not be seen as the default means to discharge the main (s.193) rehousing duty, or indeed the new prevention and relief duties. It should be one type of tenancy to be considered, depending on the needs of the household and the local housing conditions. In fact, in localities where an allocation of suitable social housing is likely to be available relatively quickly, this should generally be considered more appropriate for households who are likely to struggle to compete in the housing market and/or benefit from more stable accommodation.

We recommend that paragraph 14 above is incorporated in Chapter 16 (Securing accommodation) of the new guidance and that the most suitable place is following paragraph 16.18 of the draft Code.

20. 193(7F) and (8) of the 1996 Act are amended, such that local housing authorities shall not make a final offer of accommodation under Part 6 or approve a private rented sector offer unless they are satisfied that: (a) the accommodation is suitable for the applicant, and that (b) if the applicant is under contractual or other obligations in respect of the applicant’s existing accommodation, the applicant is able to bring those obligations to an end before being required to take up the offer.

21.The previous requirement (in section 193(7F)) that authorities must be satisfied that it is reasonable for the applicant to accept the offer has been amended so that no factors, other than contractual or other obligations in respect of existing accommodation, are to be taken into account in determining whether it is reasonable to accept the offer. Where an applicant has contractual or other obligations in respect of their existing accommodation (e.g. a tenancy agreement or lease), the housing authority can reasonably expect the offer to be taken up only if the applicant is able to bring those obligations to an end before he is required to take up the offer.

22.This change **does not mean** that those subjective suitability issues which have become associated with ‘reasonable to accept’, such as those discussed in *Ravichandran and another v LB Lewisham***1** or *Slater v LB Lewisham***2** are not to be taken into account. The intention is that these factors as already highlighted in paragraph 17.6 of the Homelessness Code of Guidance for Local Authorities (for example, fear of racial harassment; risk of violence from ex-partner's associates) continue to be part of those factors/elements an authority consider in determining suitability of accommodation.

These paragraphs are essential to the legal definition of suitability and to retain the legal principle of ‘reasonable to accept’. It is essential that the new 2018 guidance clarifies that, in determining whether accommodation is suitable, local authorities should not only refer to the suitability regulations, but consider whether it is reasonable for the applicant to accept the accommodation. For example,

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accommodation might be suitable in terms of size, location, affordability etc. but it may not be reasonable to accept because it is in the same neighbourhood as a violent ex-partner.

During the passage of the Localism Act, which removed the requirement that it must be reasonable for the applicant to accept an offer, DCLG made assurances that this would not remove the principle of 'reasonable to accept' because this aspect would form part of the determination of suitability. The result was paragraph 22 of the supplementary guidance.

See our comments on Chapter 17 for further explanation.

Question 7: Do you agree that the revised Homelessness Code of Guidance should incorporate the additional supplementary guidance documents? If not, what other method or format would you suggest and why?

☑Yes

☐ No

Comment:

It's important that all statutory guidance relating to homelessness legislation, including changes made by the Localism Act 2011, should be incorporated into one, complete 2018 Code.

Question 8: Are there any other relevant caselaw updates that you think should be considered for inclusion in the revised guidance? If so, detail the case and which chapter of the Homelessness Code of Guidance the update should be included within.

Comment:

Yes, we would like a number of recent test case judgments included within the new guidance:

Vulnerable applicants and priority need

We would like to see clarification on the definition of 'vulnerable' for the purposes of priority need decisions. This follows the recent case of *Panayiotou v London Borough of Waltham Forest* (2017) EWCA Civ 1624, which – in turn – built on the important test case of *Hotak v Southwark LBC* (2015) UKSC 30, [2016] AC 811, in which Shelter successfully intervened. The *Panayiotou* case determined that 'significantly more vulnerable' should be a qualitative rather than a quantitative test. The definition of 'vulnerable' is very important for the implementation of the Homelessness Reduction Act. The Act requires local authorities to assist all eligible applicants who are threatened with homelessness. While this is a potentially huge improvement for 'single homeless' applicants, they could still remain or become street homeless at the end of the prevention or relief stages because these stages are time-limited and there is no ultimate rehousing duty. If the new guidance made it clear which of these applicants was likely to fall onto the main rehousing duty because of their vulnerability, it could incentivise local authorities to provide more meaningful help at the prevention and relief stages to avoid the need for temporary accommodation under the full rehousing duty.

Accommodation out-of-area

Paragraphs 17.46-17.58 provide a helpful summary of the main elements of the judgment of the Supreme Court *Nzolameso vs Westminster City Council [2015] UKSC 22*[15] in which Shelter's Children's Legal Service successfully intervened. However, we recommend that the guidance is strengthened to more fully reflect the full effect of the *Nzolameso* judgment.

See our comments on:

- Chapter 11, paragraph 11.20

[15] Garvey, K., *Offering temporary accommodation out of area*, Shelter, 2015

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- Chapter 17; paragraphs 17.46-17.59

Intentionality
See our comments on chapter 9, specifically paragraph 9.15, on the importance of reflecting the following caselaw when considering intentionality:

- ***Haile v Waltham Forest LBC*** [2015] UKSC 34
- ***R v Harrow LBC ex parte Fahia*** (1998) 30 HLR 1124
- ***Knight v Vale Royal DC*** [2003] EWCA Civ 1258

Discretionary housing payments
See our comments on chapter 16, specifically paragraph 16.21, on the importance of reflecting ***R (on the application of Halvai) v Hammersmith and Fulham LBC*** [2017] EWHC 802 (Admin) when considering the use of discretionary housing payments to secure accommodation.

People fleeing harassment
See our comments on chapter 6, specifically paragraph 6.40(c), on the importance of reflecting ***Yemshaw v Hounslow LBC*** *[2011] UKSC 3* and ***Waltham Forest LBC v Hussain*** **[2015]** EWCA Civ 14 in relation to the definition of 'other violence'.

Priority need – medical reports
See out comments on chapter 8 on the importance of incorporating the detailed guidance on medical reports in ***Birmingham CC v Shala*** and ***Thomas v Lambeth LBC*** into paragraph 8.24 and other relevant paragraphs of the new Code.

Question 9: Do you have any comments on the drafting style and tone in the revised guidance, and are there some chapters that you find easier to understand than others?

Comment:

We're pleased that the draft Code retains much of the detail of the existing Code. Without this, there would be greater need for the courts to interpret the legislation. This would be against the spirit of the new legislation.

We generally feel that the style and tone of the draft guidance strikes the right balance, considering that the purpose of the guidance is to help local authorities and, in the cases of challenge, the courts to interpret the primary and secondary legislation in the way that DCLG and Parliament intended.

There are places were the tone of the revised guidance could be more positive in emphasising the importance of local authorities helping all those who are homeless or threatened with homelessness in order to encourage a culture-shift in the treatment of homeless people. For example, the guidance around eligibility (Chapter 7) focuses on applicants who are not eligible for assistance. It would be helpful if the tone could be amended to suggest that even where there is reason to believe that an applicant does not meet eligibility criteria under homelessness legislation, they may still be entitled to social services support (for example, under Children Act duties to children in need or Care Act duties), and, even if this is not the case, that the local authority should still offer help under the general duty to provide advice and assistance (see Comment (ii) below).

We would like the tone of the guidance throughout to emphasise the importance of local authorities seeking to understand an applicant's preferences, and – as a starting point – seeking to meet these preferences wherever possible. Our recent work with homeless service users has illustrated that people have very humble expectations of the help they expect: usually kindness, support and appropriate advice at a very stressful time. For most families with school-age children, the need to remain living in the same locality, close to schools and support networks, is of great importance and it would help if local

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authorities are specifically encouraged to recognise this need (even where it's not easy to meet) rather than suggesting that applicants in this position have unrealistic expectations.

We strongly recommend that the tone is amended in relation to 'deliberate and unreasonable refusal to cooperate'. There is some reference to 'lack of cooperation' (e.g. paragraph 14.48) or 'failure to cooperate' (paragraph 14.50). During the passage of the legislation, Shelter supported the Bill on the basis that duties could only be discharged for non-cooperation if the bar was very high, hence the use of the term 'deliberate or unreasonable refusal' rather than failure or lack of cooperation, which suggests it might not be deliberate. This should be a general refusal to cooperate, rather than refusing to take one particular step in the plan on a particular occasion. The Code should not suggest a lower bar.

Finally, we think it would be helpful if the guidance could replace references to 'victims' of domestic abuse, trafficking and modern slavery with 'survivors'.

Content of the Homelessness Code of Guidance

The following questions are specific questions on the content of the Homelessness Code of Guidance.

Question 10: To inform our public sector equality analysis further we are interested in your views on the likely impacts of the Homelessness Code of Guidance on groups with protected characteristics? Please let us have any examples, case studies, research or other types of evidence to support your views.

Comment:

Analysis of the DCLG homelessness statistics shows that black, Asian and minority ethnic (BAME) households are disproportionately affected by homelessness and that BAME homelessness is disproportionately increasing.[16] So the guidance will disproportionately impact BAME households. It would therefore be helpful if paragraph 3.5 (advice and information about homelessness) of the draft guidance indicated that services should address any specific needs of BAME households, such as advice to challenge the practices of landlords under equalities legislation or advice in dealing with racial harassment that might lead to homelessness. Chapter 17 (suitability of accommodation) should clarify that accommodation may not be 'reasonable to accept' if there is a fear of racial, or religious, harassment in the neighbourhood.

The homelessness statistics also show that 57% of households who are currently accepted for homelessness assistance are headed by lone women, mainly lone mothers (47%) combined with lone women (10%). So the guidance will disproportionately impact women, and particularly lone mothers. We would therefore like it to remind local authorities, in appropriate sections – such as meaning of deliberate and unreasonable refusal (paragraphs 14.47 – 14.54) and location of accommodation (paragraphs 17.46 – 17.59) – to take into account the additional challenges faced by homeless lone mothers in arranging alternative childcare or relocating to a locality where they have no support network to provide alternative childcare.

We are disappointed that the Homelessness Reduction Act (Section 2(2)) does not require advisory services to specifically meet the needs of protected groups, such as BAME households, women or people with disabilities. Some BAME households, such as refugees, may feel particularly uncomfortable in approaching government officials for assistance, people with disabilities may have specific needs to access advice, whereas lone mothers may have a narrow window in which to seek face-to-face advice without the need for alternative childcare. The guidance could recommend the needs of these groups are taken into account in paragraph 3.5.

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[16] Garvie, D. *BAME homelessness matters and is disproportionately rising – time for the government to act*, October 2017

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Question 11: Taking chapters 1-5 of the Homelessness Code of Guidance which describe strategic functions consider the following questions:

a) Having read these chapters are you clear what local authorities' responsibilities are?

☑ Yes
☐ No
If no, please provide further information:

b) Would you suggest any additions, deletions or changes to these chapters?

☑ Yes
☐ No

If yes, please use the form below to detail the chapter and paragraph number of the Homelessness Code of Guidance where relevant. Please expand this table as required.

Chapter	Page and paragraph number	Change/add/ remove	Comment
Overview	Page 9, paragraph 18	Add reference to B&B being unsuitable for 16-17-year-olds	See Comment (i)
Chapter 1	Pages 12-14, paragraphs 1.10-1.18	Add more useful detail	See Comment (ii)
Chapter 2	Page 16, paragraph 2.5	Amend to specifically mention local planning documents	See comment (iii)
Chapter 2	Page 20, paragraph 2.22	Insert a new paragraph after 2.22.	See comment (iv)
Chapter 2	Page 24, paragraph 2.45	Add reference to the need to give reasonable preference to homeless persons.	See comment (v)
Chapter 3	Page 30, paragraph 3.4	Insert a new paragraph between 3.4 and 3.5.	See comment (vi)
Chapter 3	Page 30, paragraph 3.4	Insert a new paragraph between 3.4 and 3.5.	See comment (vii)
Chapter 3	Page 31, paragraph 3.5	Insert a new sentence to the start of paragraph 3.5.	See comment (viii)
Chapter 4	Page 34, paragraph 4.11 – 4.12	Amend paragraph 4.11 and delete paragraph 4.12.	See comment (vix)
Chapter 4	Page 34, paragraph 4.11	Insert new sentences into paragraph 4.11 or as a new paragraph 4.12	See comment (x)

Overview of the homelessness legislation

(i) Suitable accommodation

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We recommend that paragraph 18 is amended to state that B&B type accommodation is never suitable for 16-17-year-olds, as set out in paragraph 16.30.

Chapter 1: Introduction

(ii) Equality

Front-line local authority staff would benefit from more background information in these paragraphs, rather than simply the overarching outline of legal duties set out. Some summaries of caselaw (such as *Pieretti, Hotak*, *Haque*, *Poshteh*) might be useful, plus some examples of how staff might avoid breaching equality legislation in paragraph 1.16.

Chapter 2: Homelessness strategies and reviews

(iii) Duty to formulate a homelessness strategy

We strongly recommend the guidance at paragraph 2.5 specifically mentions the need to link to Local Plans. Local planning authorities are required to conduct Strategic Market Housing Assessments and to meet objectively assessed need, so Local Plans should be developed with a view to strategically meeting housing needs and tackling homelessness.

(iv) Formulating the strategy

It would be helpful if the new guidance suggests that strategies should be living, working tools, as well as aspirational strategic planning documents. For example, they should be used by advisers highlighting services provided in the area for those at risk of homelessness, as required by section 179(1)(d) and in. paragraph 3.2(d) of the draft guidance. The Code should advocate that authorities ensure that their advisers are able to feed back to strategy departments on how effective their strategy is in practice, especially if they are aware of gaps in provision.

We therefore recommend that the paragraph below is inserted after paragraph 2.22 of the draft guidance:

Homelessness strategies should be used as tools for pre-crisis intervention of homelessness, for example they should be used by advisers highlighting services provided in the area for those at risk of homelessness, as required by section 179(1)(d). Advisers should be encouraged to report back to strategy departments on how effective the homelessness strategy is in practice.

(v) Access to social housing

Paragraph 2.45 of the draft guidance suggests that housing authorities have complete discretion over access to their housing allocation scheme. This is incorrect.

We recommend the sentences below are inserted after the first sentence of paragraph 2.45.

Housing authorities must not apply qualification criteria which would exclude from their allocation schemes persons who would be entitled to reasonable preference in the allocation of housing (*R (Jakimavicute) v Hammersmith and Fulham LBC*). Authorities may adopt policies which provide for different levels of priority according to local criteria, provided that a reasonable preference is given to homeless persons and others in the classes of housing need set out in s.166A of the 1996 Act.

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Chapter 3: Advice and information

(vi) Emphasis on advice and information to all those who are at risk of homelessness

As set out in response to Question 9 above, we recommend the guidance is amended to specifically set out that local authorities should provide assistance to all those who are at risk of homelessness, including people who may be deemed ineligible under the specific statutory duties. This will ensure there is an adequate shift in culture.

We therefore recommend the insertion of the bolded paragraph below between paragraphs 3.4 and 3.5:

Local authorities should also provide advice and information to persons who have no recourse to public funds as a result of their immigration status. Although such persons will not be eligible for assistance under the Act, they should be given specific advice under this duty as to what they should do, and what agencies may be able to assist them, in obtaining accommodation pending resolution of their immigration problem.

(vii) Designing advisory services to meet the needs of groups most at risk of homelessness, particular those in protected categories

We are disappointed that the Homelessness Reduction Act (Section 2(2)) does not require advisory services to specifically meet the needs of protected groups, such as BAME households, women or people with disabilities, even though they are over-represented in homelessness statistics.

We recommend the new guidance addresses this by the insertion of the bolded paragraph below between paragraphs 3.4 and 3.5:

Housing authorities should also design advice and information services to meet the needs of any protected groups who are overrepresented in homelessness data, for example BAME households, women and people with disabilities.

(viii) Link between homelessness strategies and provision of advisory services

The new guidance should be used as an opportunity to stress the link between homelessness reviews, homelessness strategies and the advice and information services provided under the amended s.179 (duty to provide advisory services). The objective of s.179 is to provide advice services to specific groups of people including ‘any other group the authority identifies…’ There should be the potential for the authority to identify other groups through its homelessness review.

We therefore recommend that the following bolded sentence is inserted at the start of paragraph 3.5:

The homelessness review and strategy should be used to identify ‘any other groups that the authority identify as being at particular risk of homelessness in their district’, as required by s.179(2)(g).

Chapter 4: The duty to refer cases

(ix) Action upon the receipt of a referral – referral likely to be application for assistance

In our view, the draft guidance on the duty to refer should be much stronger in order to ensure that the individual deemed to be at risk of homelessness receives meaningful help upon referral.

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Paragraph 4.11 of the draft guidance states that ‘a referral made by a public authority under section 213B will not in itself constitute an application for assistance under Part 7’. We disagree. In our view, a referral to a local housing authority by a public body should in general constitute an application for homelessness assistance under Part 7. The referral is made with the consent of the person concerned, and the referral therefore serves the same purpose as an approach by the individual in person.

Case law has consistently recognised that it is for the local authority to recognise when it has ‘reason to believe’ that a person may be homeless or threatened with homelessness according to the presenting circumstances. It is not necessary for the individual to express a wish to make a homeless application. They will often have approached the council to ask for some assistance with their housing problem (e.g. to apply for the housing allocation scheme), and may not be aware of what form that assistance can take, but the council will identify from the circumstances that the individual is homeless or threatened with homelessness.

Paragraph 4.12 acknowledges this situation, but it is not clear why the homelessness application should be triggered only through the authority’s subsequent contact following receipt of the referral. Where the referral contains at least an outline of the person’s housing circumstances, this should be sufficient to generate a homelessness application. There should be a cross-reference to paragraphs 18.5-18.7.

We therefore recommend that paragraph 4.11 is amended as follows:

A referral made by a public authority to the housing authority under section 213B ~~will not in itself~~ is likely to constitute an application for assistance under Part 7, ~~but~~ and so housing authorities should always respond to any referral received. The housing authority ~~may wish to~~ should contact the individual via a phone-call, email or letter in accordance to the contact details provided in the referral. If direct contact is not made after a reasonable number of attempts the authority should provide information on accessing advice and assistance including the housing authority’s website, opening hours, address and 24-hour contact details, and inform the referring public authority that direct contact has not been possible.
And paragraph 4.12 should be deleted.

(x) Action upon the receipt of a referral – referring authority should cooperate

We are disappointed that the Homelessness Reduction Act was amended to water down the original requirement for public authorities to cooperate to a lesser duty to refer. We understand that this was because of a desire not to jeopardise the successful passage of the Bill by any delays caused by consultation with other Government departments responsible for the public authorities in question. But it should be possible for the new guidance to suggest that the referring authority should cooperate with the housing authority receiving the referral. Otherwise, there is a risk that a public authority could make a referral but then not respond when the housing authority is proactive in wanting to contact and assess the application, for example by not responding to requests to provide up-to-date contact details or other key pieces of information, with the applicant’s consent.

We therefore recommend that paragraph 4.11 is amended by inserting the sentences in bold below either at the end or in a new paragraph 4.12:

The referring authority should cooperate with the housing authority to which it made the referral to enable the housing authority to contact and assess the individual. For example, the referring authority should cooperate with requests by the housing authority for further contact information or other key pieces of information about the individual, with the individual’s consent.

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Question 12: Taking chapters 6-10 of the Homelessness Code of Guidance which provide guidance on definitions to help inform decisions on the areas of statutory duty.

a) Having read these chapters are you clear what local authorities' responsibilities are?
☑ Yes
☐ No

If no, please provide further information:

b) Would you suggest any additions, deletions or changes to these chapters?

☑ Yes
☐ No

If yes, please use the form below to detail the chapter and paragraph number of the Homelessness Code of Guidance where relevant. Please expand this table as required.

Chapter	Page and paragraph number	Change/add/ remove	Comment
Chapter 6	Page 39, paragraph 6.3	Amend to clarify that relief duty is triggered when s.21 notice has expired	See comment (xi)
Chapter 6	Page 40, paragraph 6.9	Amend to clarify residence orders should not be expected	See comment (xii)
Chapter 6	Page 41, paragraph 6.12	Delete and replace with a new paragraph to confirm a person is homeless is host refuses to accept return	See comment (xiii)
Chapter 6	Page 42, paragraph 6.18	Amend to be compatible with paragraphs 6.34 and 6.38-6.39	See comment (xiv)
Chapter 6	Page 42, paragraph 6.21	Amend to strengthen the advice that should be given	See comment (xv)
Chapter 6	Page 44, paragraph 6.28	Delete paragraph	See comment (xvi)
Chapter 6	Page 44, paragraph 6.29	Cross-reference to amended paragraph 17.45	See comment (xvii)
Chapter 6	Page 45, paragraphs 6.32	Amend to be legally correct	See comment (xviii)
Chapter 6	Pages 45-46, paragraph 6.36, 6.38 and 6.39	Amend to strengthen	See comment (xviii)
Chapter 6	Page 46, paragraph 6.40(b)	Cross-reference to	See comment (xviii)
Chapter 6	Page 46, paragraph	Amend to reflect	See comment (xix)

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	6.40(c)	caselaw on ‘other violence’	
Chapter 7	Pages 48-54	Retain detail in annexes 8 to 12	See comment (xx)
Chapter 7	Page 48, paragraph 7.4	Cross-reference to 7.19–7.20	See comment (xx)
Chapter 7	Pages 51-53, paragraphs 7.13-7.21	Retain the content of Annex 12	See comment (xxi)
Chapter 7	Page 52, paragraph 7.17	Delete this paragraph	See comment (xxii)
Chapter 8	Page 58, paragraphs 8.14, 8.15 and 8.16	Amend to reflect case law on vulnerability	See comment (xxiii)
Chapter 8	Page 59, paragraph 8.21	Amend to ensure 16-17-year-olds are supported	See comment (xxiv)
Chapter 8	Page 60, paragraph 8.24	Amend to reflect caselaw on medical reports	See comment (xxv)
Chapter 8	Page 62, paragraph 8.35	Amend to reflect caselaw on vulnerability due to risk of harm in relation to violence	See comment (xxvi)
Chapter 8	Page 62, paragraph 8.39	Amend to acknowledge potentially wider scope	See comment (xxvii)
Chapter 8	Page 63, paragraph 8.40	Insert existing paragraph 10.35 following paragraph 8.40	See comment (xxvii)
Chapter 9	Page 64, paragraph 9.4	Strengthen the guidance to give reasonable time	See comment (xxviii)
Chapter 9	Page 66, paragraph 9.15	Amend to clarify the meaning of ‘settled accommodation	See comment (xix)
Chapter 9	Page 69, paragraph 9.27	Amend to clarify the legal position on surrender	See comment (xxx)
Chapter 10	Page 72, paragraph 10.12	Cross-reference to paragraphs 8.35 and 8.41	See comment (xxxi)
Chapter 10	Page 74, paragraph 10.25	Replace ‘any’ with ‘the’ (also in 11.28) and amend to encourage expedience	See comment (xxxii)

c) When considering ‘*Chapter 6: Homelessness and Threatened with Homelessness’* is the guidance on whether it is ‘reasonable to occupy’ helpful? We are particularly interested in your views on how the

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guidance should help housing authorities assess when it is no longer reasonable for a tenant to occupy following expiry of a valid section 21 notice
☐ Yes
☑ No

Chapter 6: Homeless or threatened with homelessness

(xi) Threatened with homelessness

In paragraph 6.3, we recommend the guidance provides more clarity on the legal position where an applicant approaches the authority with a section 21 notice that has already expired. The applicant does not then fall within the class of person in s.175(5) who is to be regarded as threatened with homelessness because s/he has received a section 21 notice which will expire within 56 days. So, legally, no prevention duty will be owed because there is nothing for section 195(6) to operate on – since the prevention duty will not have arisen in the first place, s.195(6) cannot prolong that duty beyond 56 days.

Our expectation is that, at this point, the applicant should be considered as statutorily homeless because it is unreasonable for him/her to continue to occupy. The last section of paragraph 6.36 of the draft guidance confirms that it would be 'unlikely to be reasonable to continue to occupy beyond the expiry of a valid section 21 notice'. If considered statutorily homeless, the relief duty would then be owed, although – in our view – the authority should still be attempting to help the applicant to remain in their current home if this is their preference.

The Code should therefore actively draw attention to this point, in both 6.3 and 6.33, and urge authorities, in the spirit of the legislation, to accept that an applicant statutorily homeless in these circumstances.

We therefore recommend that the following sentence is added to the end of paragraph 6.3:

If a person approaches the local authority once a valid section 21 notice has expired, the authority should accept that it is unreasonable for them to continue to occupy and therefore the relief duty under section 189B (initial duty owed to all eligible persons who are homeless) should be triggered.

(xii) Available for occupation

Although the last sentence of paragraph 6.9 indicates that residence orders may not have been obtained, we think it is important that the draft guidance is strengthened in this regard.

We therefore recommend that paragraph 6.9 is amended by inserting the following sentences at the end of the paragraph:

It should be emphasised that authorities should not look for a residence order as evidence either of the children's normal residence with one parent or of the fact that they may reasonably be expected to reside with that parent. Residence orders will be obtained in only a minority of cases.

(xiii) People asked to leave accommodation by family or friends

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In our view, paragraph 6.12 needs to be strengthened. As currently drafted, it suggests that housing authorities should take a view on whether a licence to occupy has been revoked when, in our view, where an applicant has been excluded from their home and the host is adamant they cannot return, they should be regarded as homeless.

We therefore recommend that the second sentence of paragraph 6.12 should be deleted and replaced with the following sentences:

Housing authorities are reminded that applicants who have been living with family or friends can be lawfully evicted on reasonable notice, and a court order is not required. What is reasonable notice varies according to the circumstances. Where there has been a breakdown of the relationship with the host, authorities should not fail to regard an applicant as homeless when they have been excluded from the home, even where reasonable notice has not been given, if the host is adamant that they cannot return to see out a notice period.

(xiv) Tenant given notice

Paragraph 6.18 has the potential to cause a great deal of confusion as it contradicts or undermines other paragraphs of the guidance, and requires amendment to ensure consistency. It suggests that whether a tenant should be expected to wait for a bailiff eviction depends on the authority's assessment of whether it is reasonable for them to continue to occupy, whereas 6.19 states that authorities should not consider it reasonable for an applicant to remain in occupation until eviction by a bailiff where it is the landlord's lender who is bringing the possession claim. There is no basis for this distinction. It makes no difference whether the claimant is the landlord or the landlord's lender. Also, paragraph 6.18 is completely out of kilter with paragraphs 6.38-6.39, which state that housing authorities should not consider it reasonable for an applicant to remain in occupation up until the point at which the court issues a warrant or writ' for eviction.

The guidance must be unequivocal about this: it should make it clear that it is never reasonable for an authority to expect an applicant to wait for a bailiffs' warrant to be issued and/or enforced before being considered homeless.

Furthermore, paragraph 6.18 should be cross-referenced with paragraph 6.34. Among the factors which authorities should consider as making it unreasonable for the applicant to continue to occupy are:

- court costs of several hundred pounds, which will be awarded against the tenant and deducted from the deposit
- the potential impact on the attitude of the private landlord involved, since they are likely to be reluctant in future to take on tenants who they perceive might present a homelessness risk or otherwise to trust or co-operate with the authority.

These factors are more fully treated in relation to s.21 notices in paragraph 6.34, and there should therefore be a cross-reference to that paragraph.

We therefore recommend that paragraph 6.18 is amended as follows:

Housing authorities should note that the fact that a tenant has a right to remain in occupation does not necessarily mean that they are not homeless. In assessing whether an applicant is homeless in cases where they are a tenant who has a right to remain in occupation pending execution of a warrant for possession, the housing authority will also need to consider whether it would be reasonable for them to continue to occupy the accommodation (section 175(3), 1996 Act) by having regard to the factors set out in paragraph 6.34. Housing authorities are reminded

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that it is always unreasonable to require an applicant to remain in occupation until the point at which a court issues a warrant or writ to enforce an order for possession, as set out in paragraphs 6.38 and 6.39.

(xv) Inability to secure entry to accommodation

In our view, paragraph 6.21 does not go far enough to ensure local authorities provide adequate advice on such a traumatic and all-too-common event as illegal eviction or exclusion from the home. It is important that authorities first discuss the tenant's preferences and the circumstances of the illegal eviction or displacement, because the tenant may not feel safe returning to his/her home. At the very least paragraph 6.21 should refer to tenants' remedies for illegal eviction.

Eventually, when these provisions of the Housing and Planning Act 2016 come into force, there should be advice on referring the matter to the housing enforcement team for consideration of a possible banning order and rent repayment order.

We therefore recommend that paragraph 6.21 is amended as follows:

In the case of landlord harassment, illegal eviction or other exclusion from the home, housing authorities should ascertain the applicant's preferences in how to relieve homelessness, for example whether the applicant would feel safe in returning to his/her home. Where an applicant would prefer to return, housing authorities ~~will want to~~ should support applicants to pursue the legal remedies available to them to regain possession of their accommodation, perhaps by joint working with its housing enforcement or tenancy relations functions. However, an authority cannot refuse to assist an applicant who is homeless and eligible for assistance under Part 7 simply because such remedies are available.

(xvi) General circumstances in the district

Paragraph 6.28 states that statutory overcrowding 'may not by itself be sufficient to determine reasonableness' [to continue to occupy]. In our view, this is incorrect.

Where a household is statutorily overcrowded under sections 325-327 Housing Act 1985, that will be the case on the basis that every room, including a living room, is in use as a bedroom, according to the room standard. That is a severe degree of overcrowding, and the new guidance should not regard this as merely a 'contributory factor'. There should be at least a presumption that statutory overcrowding denotes unreasonable to continue to occupy, unless there are other factors which suggest to the contrary, and it is difficult to think of what those other factors might be.

We therefore recommend that paragraph 6.28 is deleted.

(xvii) Affordability

Paragraph 6.29 should be cross-referenced to an amended paragraph 17.45. Please see our comment on a new paragraph 17.45.

(xviii) Tenant given notice to recover possession

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The first sentence of paragraph 6.32 states that ‘an authority should give notice to end the section195 prevention duty when an applicant has become homeless, triggering a s.189B relief duty.’

To ensure that the guidance is legally correct, we recommend the following sentence is inserted after the first sentence of paragraph 6.32.

Where the applicant is in priority need and becomes homeless, the prevention duty comes to an end automatically, and there is no need for a notice to bring the relief duty into operation.

We strongly support the draft guidance in paragraph 6.36 in confirming that ‘it is unlikely to be reasonable for the applicant to continue to occupy beyond the expiry of a valid section 21 notice’, unless for a reasonable period to provide an opportunity for alternative accommodation to be found.

This would not necessarily mean that the authority would have to provide alternative accommodation at this point. The applicant could quite properly be asked to remain ‘homeless at home’, with the accommodation treated as temporary accommodation, while the authority and that applicant are taking steps to relieve the homelessness.

We recommend that the guidance should be strengthened, with the final part of paragraph 6.36 amended as follows

then it is ~~unlikely to be~~ unreasonable for the applicant to continue to occupy beyond the expiry of a valid section 21 notice, unless the housing authority is taking steps to persuade the landlord to allow the tenant to continue to occupy the accommodation for a reasonable period to provide an opportunity for alternative accommodation to be found, in which case the authority should take reasonable steps to avoid costly court action.

We strongly support the draft guidance in paragraph 6.37 that ‘it is highly unlikely to be reasonable for the applicant to continue to occupy once a court has issued an order for possession’. In our view, this is the latest point at which applicants should be offered emergency accommodation if no suitable alternative is available.

Paragraphs 6.38 and 6.39 are marginally stronger than the current 2006 guidance, but bearing in mind that the current guidance is routinely honoured in the breach by local authorities, which insist on waiting until the day of eviction before they will accept a homelessness application, we are concerned that they still allow local authorities to maintain that they have ‘had regard’ to the Code, but decided not to follow it. In fact, paragraph 6.38 appears weaker than 6.37, so that authorities which decide to ignore 6.37 and fail to accept an applicant as homeless even where a possession order is made will not find it difficult to hold out until the landlord has obtained a warrant or writ of possession.

It should be mentioned that where a possession order is being enforced through the High Court, eviction is likely to happen quickly and without notice, since High Court enforcement officers are not obliged to give notice of eviction. Our advisers report that High Court eviction is becoming more commonly used by both housing association and private landlords. This makes it all the more imperative that the applicant should be accepted as homeless before there is any question of enforcement. That is not to suggest that it is more acceptable to wait upon enforcement where this will be carried out by county court bailiff.

We therefore recommend that paragraph 6.38 is amended as follows:

~~Housing authorities~~ The Secretary of State considers that it is ~~should not consider it~~ unreasonable for an applicant to remain in occupation up until the point at which a court issues a warrant or writ to enforce an order for possession. Housing authorities should be aware that

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where a possession order is being enforced through the High Court, eviction is likely to happen quickly and without notice, since High Court enforcement officers are not obliged to give notice of eviction.

We strongly recommend that 6.39 is significantly strengthened. After all, an authority which gets to the point of 6.39 will already have flouted the guidance in the three preceding paragraphs, so the advice in 6.39 needs to be far more direct. The draft guidance in this paragraph is too loose and not effective to achieve its objective.

Firstly, it refers to people who are 'owed a section 188 interim accommodation duty or s.193(2) main housing duty'. But an authority which wishes to hold out until eviction will argue that the family is not actually owed the s.188 duty until they are evicted, because that is when the authority considers them to have become homeless.

The second part of the sentence again begs the question of whether there has been a failure by the authority to make suitable accommodation available: the authority may claim that there is no such failure because there is no such duty to make accommodation available until eviction.

We strongly recommend that paragraph 6.39 is amended as follows:

Housing authorities must never require applicants likely to be in priority need to remain in possession until the day of eviction and should ensure that suitable accommodation is made available well before the execution of a warrant or writ.

Finally, we recommend that paragraph 6.40(b) is amended to cross-reference paragraphs 21.34-21.35.

If housing authorities continue to flout this strengthened guidance post-implementation, the Government should commit to statutory regulations on whether it is reasonable to occupy beyond the service of a valid Section 21 notice.

(xix) Other relevant factors – people fleeing harassment

Paragraph 6.40(c) does not fully reflect the decisions in ***Yemshaw v Hounslow LBC*** *[2011] UKSC 3* **and *Waltham Forest LBC v Hussain* [2015]** EWCA Civ 14**,** in which it was held that 'other violence' in s177(1) Housing Act 1996 covered not only physical violence (actual or threatened) but other threatening or intimidating behaviour or abuse, if it was of such seriousness that it might give rise to psychological harm. So verbal abuse or damage to property can equally be regarded as violence, and it is irrelevant that they "fall short of actual violence or threats of violence likely to be carried out".

We therefore recommend that the first part of paragraph 6.40(c) is amended as follows:

People fleeing harassment: in some cases severe harassment may fall short of actual violence or threats of violence likely to be carried out. 'Other violence' in s177(1) Housing Act 1996 covers not only physical violence (actual or threatened) but other threatening or intimidating behaviour or abuse, if it is of such seriousness that it might give rise to psychological harm. So, housing authorities should consider carefully whether it would be, or would have been, reasonable for an applicant to continue to occupy accommodation in circumstances where they have fled, or are seeking to leave, their home because of non-violent forms of harassment, for example verbal abuse or damage to property.

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Chapter 7: Eligibility

While the chapter helpfully sets out the basic framework underlying eligibility, there is not enough detail to enable officers accurately to analyse an applicant's immigration status

Our main concern in relation to this chapter is the disappearance of annexes 8 to 12 of the current 2006 Code, which contain essential information without which local authority officers will not be equipped to make decisions on eligibility.

(xx) We therefore recommend that annexes 8 to 12 are preserved, by being pulled into Chapter 7, otherwise the exercise of streamlining the Code will have deprived the guidance of essential material to guide local authorities in making legally accurate decisions.

In addition, as stated above in response to Question 9, this chapter would benefit from a change in tone aimed at encouraging a culture change in local authorities by reminding them at all those at risk of homelessness should be offered some form of help, even if this is under the general (section 179) duty to provide advice and information.

Paragraph 7.4 does not mention the exemption from Schedule 3 of persons whose rights under the ECHR or under EU treaties would be breached if they were treated as ineligible.

We therefore recommend that paragraph 7.4 cross-references to paragraphs 7.19–7.20.

(xxi) Other persons from abroad who should may be ineligible for assistance

Paragraphs 7.13-7.21 are particularly complex and technical, and will not be understood unless the officer assessing an applicant's eligibility has had detailed training in EEA rights of residence etc.

Consequently, we recommend that the content of Annex 12 in the current 2006 guidance is retained.

(xxii) The habitual residence test

Paragraph 7.17 states that 'it is likely that applicants who have been resident in the UK, Channel Islands, the Isle of Man or the Republic of Ireland continuously during the 2-year period prior to their housing application will be habitually resident'.

The period of two years as a threshold test for habitual residence is too long. While the period is only the basis for a presumption of habitual residence, and the paragraph states that the authority will need to conduct further enquiries in other cases, the reference to two years nevertheless creates an impression that a much shorter period, such as three months, is unlikely to be sufficient.

The combination of factors relevant to habitual residence, together with case law, may well result in three months being quite sufficient to establish habitual residence. This accords with DWP practice, and indeed that of housing benefit departments of local authorities. There will be some cases, such as some returning UK nationals, in which the person is to be regarded as habitually resident from the day of their arrival in the UK.

We therefore recommend that paragraph 7.17 is deleted.

Chapter 8: Priority need

(xxiii) Vulnerability

Paragraph 8.14 refers to the applicant being 'significantly more vulnerable than an ordinary person would be if they became homeless'. This is obviously taken from Lord Neuberger's judgment in the Supreme Court cases of ***Hotak v Southwark LBC; Johnson v Solihull MBC; Kanu v LB Southwark*** [2015] UKSC 30.

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It would be very helpful if the Government could use the opportunity of the new 2018 guidance to confirm how housing authorities should determine priority need as a result of vulnerability.

The question of what is meant by 'significantly more vulnerable' has troubled local authorities and applicants' representatives ever since the *Hotak* judgment. Some light has been cast on the issue by the Court of Appeal in the recent combined cases of ***Panayiotou v Waltham Forest LBC; Smith v Haringey LBC*** [2017] EWCA Civ 1624 (19 October 2017).

In *Panayiotou,* the Court noted that, in assessing whether a person is vulnerable, the local authority's focus will be on whether there is an impairment of that person's ability to find accommodation or to deal with the lack of accommodation. The impairment may have the effect of causing the person's physical or mental health to deteriorate; or it may result in exposure to some external risk, such as the risk of exploitation by others.

In relation to the phrase 'significantly more vulnerable', the Court held that the Supreme Court had not intended by the use of the word 'significantly' to introduce a *quantitative* test – that is, to require a person to show that s/he is substantially more vulnerable than the average person. The Court's intention had been to use the term 'significantly' in a *qualitative* sense. So the question to be asked is whether, when compared with an ordinary person if made homeless, the applicant would be at risk of suffering harm which the ordinary person would not suffer; or whether the applicant would be at risk of suffering such harm as would make a noticeable difference to his/her ability to deal with the consequences of homelessness. To put it another way, an applicant would be vulnerable if s/he is 'at risk of more harm in a significant way'. Whether the test is met in relation in a particular case is a question of the Council's judgment.

Although the Court's explanation that the term 'significantly more vulnerable' is to be applied in a qualitative, and not quantitative, sense creates its own problems of understanding, it does represent a helpful analysis of the meaning of 'vulnerable' in this context. It is clear of course that the applicant must be more vulnerable than average, and as Lady Hale said in *Hotak*, 'it is easy to understand how rapidly even the strongest person is likely to decline if left without anywhere to live.' But beyond that, the applicant is not required to be 'significantly more vulnerable' in a measurable sense, somewhere along a spectrum from the slightly vulnerable to the extremely vulnerable. The test does not involve a contest between one applicant and another, or between different degrees of vulnerability.

The authority must consider whether the applicant is likely to suffer more harm in an appreciable or noticeable sense, or whether (as the Court put it) s/he is at risk of greater harm in a significant way. It is enough for the applicant to bring him/herself within the formulation adopted by the reviewing officer in Mr Panayiotou's case, i.e. that s/he is at more risk of harm from being without accommodation than an ordinary person would be.[17]

We recommend that paragraph 8.14 is amended to as follows:

It is a matter of judgement whether the applicant's circumstances make them vulnerable. When determining whether an applicant in any of the categories set out in paragraph 8.12 is vulnerable, the housing authority should determine whether, if homeless, the applicant would be significantly more vulnerable than an ordinary person would be if they became homeless. The assessment must be a composite one taking into account all of the relevant facts and circumstances, and involves a consideration of the impact of homelessness on the applicant when compared to an ordinary person. <u>The authority must consider whether the applicant is likely to suffer more harm in an appreciable or noticeable sense, or is at risk of greater harm in a significant way. It is enough that the applicant is at more risk of harm from being without accommodation than an ordinary person would be.</u>

[17] See paras 66-67 of *Panayiotou*

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The last sentence of paragraph 8.15 states that 'the housing authority must be satisfied that the third party will provide the support on a consistent and predictable basis'. This does not go far enough in reflecting the legal position as set out in *Hotak*, where Lord Neuberger stated[18]:

'…the fact that there may [be] very substantial support does not of itself necessarily mean that the applicant will not be vulnerable. Thus, in some cases, the support may be every bit as good as the applicant would receive if he were housed, but it would still not prevent him from being vulnerable. Accordingly, the reviewing officer must always consider very carefully whether the applicant would be vulnerable, after taking into account any support which would be available.'

Thus, support that is sufficient to sustain the applicant when housed may not be sufficient to remove the vulnerability when the applicant is homeless.

We therefore recommend that paragraph 8.15 is amended by inserting an additional sentence at the end as follows:

When assessing an applicant's vulnerability, a housing authority may take into account the services and support available to them from a third party, including their family. This would involve considering the needs of the applicant, the level of support being provided to them, and whether with such support they would or would not be significantly more vulnerable than an ordinary person if homeless. In order to reach a decision that a person is not vulnerable because of the support they receive the housing authority must be satisfied that the third party will provide the support on a consistent and predictable basis. It must also consider that support that is sufficient to sustain the applicant when housed may not be sufficient to remove the vulnerability when the applicant is homeless.

Furthermore, to reflect the intense degree of examination of the extent and effects of the disability which an authority must exercise in order to be Equality Act compliant, according to the *Hotak* judgement, we recommend that the final sentence of paragraph 8.16 is amended as follows:

If the applicant has a disability (or another relevant protected characteristic) the authority should ~~assess~~ focus sharply on the extent of such disability, the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and decide whether the applicant is vulnerable as a result.

(xxiv) 16 and 17 year olds

To ensure that 16 and 17-year olds are not left without interim accommodation while they await a social services assessment, we recommend that the following sentence is added to the end of paragraph 8.21:

If there is any doubt that the children's services authority will provide accommodation for a homeless and eligible 16 or 17-year-old pending their 'child in need' assessment, the housing authority must always provide interim accommodation under s.188 rather than depend on joint protocols between the departments.

(xxv) Mental illness or learning disability or physical disability – medical reports

Paragraph 8.24 states that, when assessing vulnerability, local authorities may consider seeking a clinical opinion. This is a convenient place to highlight a more general point.

It is of course open to authorities to seek their own medical advice. But (as the Court of Appeal stated in ***Birmingham CC v Shala*** [2007] EWCA Civ 624), guidance should advise them to be careful as to how

[18] Paragraph 70

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much weight they place on such reports, bearing in mind that the external medical advisers (a) will not have met the applicant or carried out a first-hand examination; and (b) will be commenting second-hand on medical reports prepared by the applicant's GP or other doctors who know the applicant well. The Court gave further guidance in *Shala,* notably:

- Although an authority may take specialist advice about medical evidence, care must be taken not to appear to be using professional medical advisers simply to provide or shore up reasons for a negative decision.
- The authority's adviser has the function of enabling it to understand the medical issues and to evaluate the expert evidence for itself. In the absence of an examination of the patient, the advice of the authority's medical adviser cannot itself constitute expert evidence of an applicant's condition. The authority needs to take any absence of an examination of the applicant into account.
- Where an authority's medical adviser does not examine an applicant, he or she may speak to the applicant's doctor about any matter which needs discussion. The discussion should be informal, and only an agreed note of it should form part of the case materials.

In this context, it is also worth drawing attention to the county court case of ***Thomas v Lambeth LBC*** in which HHJ Parfitt held that:

- It is not for the external medical assessors to address the ultimate question of whether a person is significantly more vulnerable than an ordinary person: this is a matter for the authority; and
- It is unhelpful for the assessors to focus on what the individual is *not* suffering from rather than what they are suffering from. As a consequence, the assessors in the ***Thomas*** case had not addressed the applicant's particular circumstances. Their approach was to refer to what the applicant's doctors said about her depression and suicidal ideation; to note that what the applicant was suffering from was *not* serious psychotic episodes or inability to have rational or cogent thought; and then to conclude that because the applicant did not meet that test, she was not more vulnerable than an ordinary person. That was not a proper approach to the assessor's function.

Although the *Thomas* case is a county court judgment only, we consider that the observations above are well made.

We therefore recommend that the detailed guidance on medical reports in ***Birmingham CC v Shala*** and ***Thomas v Lambeth LBC*** is incorporated into paragraph 8.24 and other relevant paragraphs of the new Code.

(xxvi) Having left accommodation because of violence

Paragraph 8.35 relates to vulnerability as a result of having to leave accommodation because of violence or threats of violence which are likely to be carried out.

Special consideration is needed in relation to this limb of vulnerability. Clearly, it is not enough for the applicant to be subject to violence or the threat of violence: he or she must be 'vulnerable' as a result of the external actions. But because the cause of the vulnerability arises directly from the agency of another person or persons, this limb is qualitatively different from the other limbs of vulnerability.

In *Panayiotou* (above), the Court of Appeal said that an applicant would be vulnerable if s/he is 'at risk of more harm in a significant way'. Where the applicant was compelled to leave his/her previous home because of violence, and is still subject to violence or threats of violence that are serious enough to render the current accommodation unsafe, it must follow that s/he is vulnerable for that reason, since

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the ordinary person is not subject to those experiences. In that particular situation, it is less a question of how badly the applicant has been affected in medical or psychological terms, or what treatment they are receiving, than of securing that the applicant is safe from further harm.

We therefore recommend that paragraph 8.35 is amended as follows:

A person has a priority need if they are vulnerable as a result of having to leave accommodation because of violence from another person, or threats of violence from another person that are likely to be carried out. It will usually be apparent from the assessment of the reason for homelessness whether the applicant has had to leave accommodation because of violence or threats of violence. If the applicant is still subject to violence or threats of violence that are serious enough to render the current accommodation unsafe, s/he should be considered vulnerable for that reason, since the ordinary person is not subject to those experiences. In cases involving violence, the safety of the applicant and ensuring confidentiality must be of paramount concern.

(xxvii) Other special reason

In paragraph 8.39 (young people), we recommend the retention of a sentence from paragraph 10.33 of the existing guidance, which has been omitted from the draft guidance (see below). Bearing in mind that paragraph 8.39 is concerned with 'other special reason', this sentence serves an important purpose and should be retained. In addition, the descriptions of young people who are subjected to violence or sexual abuse in paragraph 8.39 suggest that these are cases of vulnerability as a result of fleeing violence rather than 'other special reason', so we suggest they are removed from this section.

We therefore recommend that paragraph 8.39 is amended as follows:

Young people. The 2002 Order makes specific provision for certain categories of young homeless people. However, there are many other young people who fall outside these categories who could be vulnerable if homeless. When assessing applications from young people under 25 who do not fall within any of the specific categories of priority need, housing authorities should give careful consideration to the possibility of vulnerability. Most young people can expect a degree of support from families, friends or an institution (e.g. a college or university) with the practicalities and costs of finding, establishing, and managing a home for the first time. But some young people~~, particularly those who are forced to leave the parental home or who cannot remain there because they are being subjected to violence or sexual abuse,~~ may lack this back-up network and be less able than others to establish and maintain a home for themselves. Moreover, a young person who is homeless without adequate financial resources to live independently may be at risk of abuse or exploitation.

Finally, paragraph 10.35 in the current guidance, relating to former asylum seekers, has inexplicably disappeared. This is an important class of applicants whose interests should be considered under "other special reason", for all the reasons described in the existing paragraph 10.35.

We therefore recommend that paragraph 10.35 of the existing Code is retained and inserted following paragraph 8.40.

Chapter 9: Intentional Homelessness

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Paragraph 9.4 relates to accommodation, and advice and practical assistance (such as a deposit and rent in advance in order to obtain private rented accommodation), provided under section 190 to give an intentionally homeless applicant a reasonable opportunity to find their own accommodation.

(xxviii) We recommend that paragraph 9.4 is amended as follows:

Where a housing authority finds an eligible applicant has a priority need but is homeless intentionally and the relief duty has come to an end, they have a duty under section 190 to secure accommodation which is available to the applicant to provide reasonable opportunity for them to find their own accommodation. In assessing for how long they should secure accommodation for this purpose local authorities should be guided by their original assessment of the applicant's circumstances, their needs and any problems they may have in sustaining rented accommodation. The authority must also provide advice and assistance in any attempts the applicant might make to secure accommodation. For further guidance on the accommodation duty owed to intentionally homeless applicants see Chapter 15, and particularly paragraph 15.15.

(xxix) Ceasing to be intentionally homeless

The last sentence of paragraph 9.15 correctly states that 'a period in settled accommodation is not necessarily the only way in which a link with the earlier intentional homelessness may be broken'.

In its judgment in ***Haile v Waltham Forest LBC*** [2015] UKSC 34, the Supreme Court noted that case law had provided examples of a variety of events capable of interrupting the causal connection between the deliberate act which gave rise to the initial homelessness and the homelessness existing at the date of the inquiry. In these situations, a later event which amounts to an involuntary cause of homelessness may be regarded as superseding the applicant's earlier deliberate conduct. Such events might include marital breakdown, a cut in housing benefit and the breakdown of an arrangement for the payment of rent.

There may be other factors which break the 'chain of causation' and give rise to a fresh incidence of homelessness. This could include situations where something unexpected has happened to cause the applicant to leave accommodation which, even if not settled, s/he had every prospect of continuing to occupy for the foreseeable future. An example would be the case of ***R v Harrow LBC ex parte Fahia*** (1998) 30 HLR 1124, in which Ms Fahia came to an arrangement to remain in the guest house which had been her temporary accommodation following a finding of intentional homelessness, since housing benefit was sufficient to cover the charges for the accommodation. However, a year later, her housing benefit entitlement was reviewed and was restricted to half the actual rent, so that the guest house became unaffordable. The case was decided in the House of Lords on the narrow grounds that, because there had been a change in facts, Ms Fahia was entitled to make a fresh homeless application, but the Court of Appeal accepted that the 'chain of causation' could be broken in circumstances other than intervening settled accommodation.

The second sentence of paragraph 9.15 states 'whether accommodation is settled will depend on the circumstances of the case, with factors such as security of tenure and length of residence being relevant'.

We recommend that further guidance is called for in relation to whether an assured shorthold tenancy (AST) is sufficient to break the chain of causation from an earlier intentional homelessness decision. In ***Knight v Vale Royal DC*** [2003] EWCA Civ 1258, the Court of Appeal rejected the proposition that because an AST is the normal or default private sector tenancy, an AST must always count as settled accommodation which breaks the causative link. The question arises: how can an applicant rid him/herself of the taint of intentionality if not by obtaining an AST? We would urge the Code to address this point, which causes much difficulty in practice.

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We recommend that paragraph 9.15 is amended as follows:

The causal link between a deliberate act or omission and intentional homelessness is more typically broken by a period in settled accommodation which follows the intentional homelessness. Whether accommodation is settled will depend on the circumstances of the case, with factors such as security of tenure and length of residence being relevant. An assured shorthold tenancy of six months or more is normally to be regarded as settled accommodation, unless it is clear from the outset that the accommodation will be available *only* for the fixed term of six months and no longer. Occupation of accommodation that was merely temporary rather than settled, for example, staying with friends on an insecure basis, may not be sufficient to break the link with the earlier intentional homelessness. However, a period in settled accommodation is not necessarily the only way in which a link with the earlier intentional homelessness may be broken: some other event, such as the break-up of a marriage, may be sufficient.

(xxx) Act or omissions in good faith

Example (c) in 9.26, relating to surrendering of a tenancy in the face of possession proceedings with no scope for defence, is fraught with difficulties if considered as an instance of an act or omission in good faith.

We recommend that paragraph 9.27 is amended as follows:

In (c) although the housing authority may consider that it would have been reasonable for the tenant to continue to occupy the accommodation, the act should not be regarded as deliberate if the tenant made the decision to leave the accommodation in ignorance of relevant facts. Furthermore, where a tenant surrenders the property in these circumstances, this is more likely to be a situation in which (a) it is not reasonable to continue to occupy the property: see paragraph 6.16; and/or (b) as a matter of causation the tenant would have lost his/her home in any event through an intervening act, namely, the landlord's possession proceedings, by the time of the s.184 decision or s.202 review decision: see paragraph 9.14.

d) When considering '*Chapter 10: Local Connection'* does the guidance provide sufficient clarity about when and how a referral can be made? Please note if there is anything more you think could be provided to help housing authorities interpret the legislation

☐ Yes

☑ No

Chapter 10: Local connection and referrals to another housing authority

(xxxi) Assessing local connection

We recommended that paragraph 10.12 is amended as follows to ensure adequate cross-referencing:

The test regarding local connection, as set out in section 199(1) should be applied, and the additional provisions for Care Leavers (see paragraph 10.35) and Asylum Seekers (see paragraph 10.41) where relevant, in order to establish whether the applicant has the required local connection. The fact that an applicant may satisfy one of these grounds will not necessarily mean that they have been able to establish a local connection.

(xxxii) Referrals to another housing authority

Paragraph 10.25 states that if the referral is made at the relief stage, the notifying authority must also give the notified authority a copy of the applicant's assessment and any revisions made to it, and should also (with consent) provide <u>any</u> personalised housing plan agreed with the applicant where this remains relevant, and with the applicant's consent.

In our view, the use of the word 'any' is an inaccurate reading of what should happen at both the prevention and relief stages.

We therefore recommend that in paragraph 10.25 the word 'any' should be replaced by the word 'the'. A similar amendment should be made to paragraph 11.28.

This is because:

- Prevention assistance is intended to be blind to local connection. Where the applicant (with no local connection) has approached the receiving authority threatened with homelessness, the authority will have conducted an assessment <u>and prepared a personal housing plan</u> to honour its prevention duties. It could be a reasonable step to refer back to the local connection authority to provide locally-applicable advice or assistance, e.g. discretionary housing payments, to save the home. Where prevention proves unsuccessful, the applicant becomes homeless, and a referral is made under s.1988(A1), the authority should be able to give the notified authority a copy of its assessment <u>and plan</u>.

- Where the applicant is already homeless when s/he approaches the authority, and on an initial assessment it appears that s/he has no local connection with the authority, we recommend the receiving authority should still carry out a full assessment and provide a brief, initial plan detailing this assessment and what steps will be taken next, before referring the applicant to the local connection authority.

In most scenarios where an applicant applies to an authority where they have no local connection, this will be because they are temporarily residing in that area. For example, an applicant may have been living in the south east of England but have been temporarily staying with family back in the north following a sudden relationship breakdown. It would be easier to present in person to, and be assessed by, the nearest authority. They may, in fact, prefer to return to their original locality with assistance offered to help them find a suitable home. While this help is being arranged and cooperated with, their preference may be to continue living temporarily with family elsewhere.

The assessment is not only to ascertain accommodation needs, but also support needs, which, if urgent (such as urgent mental health support or urgent debt advice), could start to be met in their current temporary locality. So it would make sense for the first authority to make the assessment and provide a personalised plan. If the first authority does not undertake an assessment, then the applicant would have to return to where they have a local connection for this to be fully undertaken, even though they may have nowhere to stay in the area.

However, in terms of meeting accommodation needs, it would be a reasonable step for the plan to briefly state that the first authority will refer the applicant back to the authority to which they have a local connection, so that the second (local connection) authority can start to provide advice to the applicant on securing suitable accommodation. The authority receiving the referral would then need to put together its own plan, but may not need to conduct a fresh assessment.

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If the first authority does not provide a plan, but only refers back to the local connection authority, the applicant may be unclear as to what will happen next, or how they might cooperate with this. Or indeed, they may be unclear about which authority should be helping them and feel passed from pillar-to-post. The provision of a brief plan would be a sensible way to provide clarity.

This approach would require cooperation between the first and second authority and the applicant. It could result in a more person-centred service, providing clarity to the homeless person. It could also lead to savings in the provision of interim accommodation to those in priority need, while allowing urgent support needs to start to be met where the applicant is temporarily residing.

The new guidance should also draw attention to the passage of time where there is a local connection referral, and especially where the referral is disputed, during which applicants who are not in priority need and are not in interim accommodation are not getting any help with the relief of homelessness.

We therefore suggest that the following sentence is added to the end of paragraph 10.25:

Housing authorities are encouraged to make their decisions and issue notifications expeditiously, and to consider providing some interim relief assistance to the applicant, without prejudice to the question of whether they have a legal duty to do so.

Question 13: Taking chapters 11-14 of the Homelessness Code of Guidance which focus on the prevention and relief duties consider the following questions:

a) Having read these chapters are you clear what local authorities' responsibilities are?
☑ Yes
☐ No

If no, please provide further information:

b) Would you suggest any additions, deletions or changes to these chapters?

☑ Yes
☐ No

If yes, please use the form below to detail the chapter and paragraph number of the Homelessness Code of Guidance where relevant. Please expand this table as required.

Chapter	Page and paragraph number	Change/add/ remove	Comment
Chapter 11	Page 81, paragraph 11.2	Amend to strengthen need to treat applicants with empathy, dignity and respect, and for their preferences to be taken into account	See comment (xxxiii)
Chapter 11	Page 81, paragraphs 11.3 and 11.5	Amend to confirm both need for advice (11.3) and definition of homeless (11,5)	See comment (xxxiv)
Chapter 11	Page 82, paragraph 11.8	Amend to encourage a fuller housing history to be considered	See comment (xxxv)

Chapter 11	Page 84, paragraph 11.18	Amend to provide clarity on personalisation	See comment (xxxvi)
Chapter 11	Page 84, following paragraph 11.18	Insert existing paragraph 14.7	See comment (xxxvi)
Chapter 11	Page 84, paragraph 11.20	Amend to include availability of social housing in the locality	See comment (xxxvi)
Chapter 11	Page 86, paragraph 11.31	Amend to strengthen on advised steps	See comment (xxxvii)
Chapter 11	Page 86, following paragraph 11.31	Insert an additional paragraph to reflect policy intent	See comment (xxxvii)
Chapters 12 and 13	Pages 88-92, paragraphs 12.1-13.12	Both chapters need to be reinforced with duties to provide information and advice	See comment (xxxviii)
Chapter 12	Page 88, paragraph 12.6	Amend to address the difficulties in preventing homelessness in an area many miles away	See comment (xxxviii)
Chapter 13	Page 90, paragraph 13.7	Cross-reference to paragraphs 15.34-15.35.	See comment (xxxix)
Chapter 14	Page 94, paragraph 14.8	Amend to clarify	See comment (xli)
Chapter 14	Page 96, paragraph 14.25	Amend to clarify	See comment (xli)
Chapter 14	Page 97, paragraphs 14.28-14.29	Very confused reference to intentionality. Delete paragraph 14.29	See comment (xli)
Chapter 14	Page 99, paragraph 14.41	Amend to make clear that discharging duty for refusal to cooperate should be a last resort	See comment (xlii)
Chapter 14	Page 100, paragraph 14.48	Amend to give examples of 'deliberate and unreasonable refusal'	See comment (xliii)
Chapter 14	Page 100, paragraph 14.50	Amend to focus on reasons for being unable to manage communication	See comment (xliii)
Chapter 14	Page 100, paragraph 14.51(d)	Delete example in this sub-section to avoid confusions	See comment (xliii)
Chapter 14	Page 101, paragraph	Amend to define	See comment (xliv)

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	14.54	‘reasonable period’ of warning	

c) When considering *‘Chapter 11: Assessments and Personalised Plans’* do you consider the guidance on ‘reasonable steps’ is sufficient, and is helpful?
☐ Yes
☑ No

Comments:

Chapter 11: Assessments and personalised plans

We have recently published a briefing[19], based on the recommendations of an expert panel of Shelter service users, outlining how housing authorities should approach assessments and personalised plans. This includes a suggested template for assessment.

We strongly recommend that DCLG give consideration to this Shelter briefing before finalising the Code to ensure that Chapter 11 reflects the findings and recommendations of homelessness service users.

We recommend that the tone of this chapter is amended to ensure that the new guidance emphasises a meaningful culture-shift in line with the spirit of the legislation. In particular, housing authorities should be expected to:

- When conducting assessments, to treat applicants with empathy, dignity and respect. Housing authority staff should avoid compounding inevitable feelings of failure and shame.
- Centre assessment and personalised plans on the applicant’s wishes and preferences, including on possible trade-offs, with the help offered aimed at achieving an outcome as close to this as possible. If applicants’ preferences are taken into account, they are far more likely to agree to their personalised housing plan, and this will improve the likelihood that the plan will be successful in preventing or relieving homelessness, as recognised by the proposed guidance at paragraph 11.29.
- Consult with an expert panel of local people with lived-experience of seeking homelessness assistance in their area when planning how to implement their new duties to assess and provide a personalised plan.

(xxxiii) Overview: assessments and personalised plans

We recommend that the second sentence of paragraph 11.2 is amended as follows:

In performing these duties, the Secretary of State considers that housing authorities should adopt a positive and collaborative approach toward applicants, <u>treating them with empathy, dignity and respect,</u> taking account of their particular needs <u>and preferences</u> and making all reasonable efforts to engage their cooperation.

[19] Garvie, D. *"It's a personal thing" What service users need from assessments and personalised housing plans - Homelessness Reduction Act 2017*, Shelter, November 2017

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(xxxiv) Initial assessments

Paragraph 11.3 should be amended to encourage housing authorities to provide advice and assistance if found ineligible for assistance or not homeless or threatened with homelessness.

We therefore recommend that the following sentence is added before the final sentence of paragraph 11.3:

They should also be referred to information and advice under section 179 (duty to provide advisory services).

Paragraph 11.5 should refer to the definition of homeless, as well as threatened with homelessness.

We therefore recommend that the following sentence is added at the end of paragraph 11.5:

And, once a valid section 21 notice has expired, they are homeless, although it may be reasonable for them to remain in occupation as temporary accommodation for a reasonable period of time.

(xxxv) Assessment of circumstances and needs

Assessments should include a much fuller housing history than simply the cause of the current homelessness, to ensure that the personalised plan contains an appropriate response. For example, families who have experienced frequent repeat homelessness could be prioritised for stable social housing.

We therefore recommend that the following sentence is added to the end of paragraph 11.8:

Housing authorities should consider enquiring into a fuller housing history in order to formulate an appropriate response in the personalised plan. For example, it may not be appropriate to assist homeless families with children who have experienced frequent repeat homelessness into anything less than a stable, five-year tenancy.

(xxxvi) Reasonable steps

We recommend that paragraph 11.18 is amended as follows:

Housing authorities should work alongside applicants to identify practical and reasonable steps for the housing authority and the applicant to take to help the applicant retain or secure suitable accommodation. Housing authorities should not use too rigid a template when setting out reasonable steps. ~~These steps should be tailored to the household.~~ Steps should be tailored to include specific, personalised housing advice and support, based as much as reasonably practicable on the applicant's preferences, ~~and~~ following the findings of the assessment and must be provided to the applicant in writing as their personalised housing plan.

We are disappointed that no examples of potential reasonable steps are provided, as they are in paragraph 14.7 of the current guidance.

We therefore recommend that paragraph 14.7 of the current guidance is retained and inserted following paragraph 11.18 of the draft Code.

The most important factor for most of our expert panel of service users is the location of a home. While we support the view in paragraph 11.20 that personalised housing plans should be realistic, we would like to see this guidance amended to explicitly recommend that housing authorities specifically assess

the prospects of the applicant finding suitable social housing in their desired area, and provide information on this within the plan. Otherwise, there is a risk that housing authorities will only assess the prospects of finding affordable private rented housing in the area.

If the freeze to local housing allowance continues, over four-fifths of local authority areas will be unaffordable to LHA claimants by 2020[20]. Therefore, steps to improve access to social housing will be an important part of personalised plans.

At the very least, the guidance should highlight the 2012 Suitability Regulations[21] and associated guidance, which clearly set out what is deemed suitable in terms of location of accommodation, along with the outcome of the *Nzolameso* judgment[22] on location of accommodation, and – where an out-of-area move to a suitable location is considered to be a reasonable step – require authorities to include help with this[23] within the plan.

We therefore strongly recommend that paragraph 11.20 is amended as follows:

Personalised housing plans should take into account the applicant's individual needs and wishes. They will also need to be realistic, taking account of the availability of social housing in the district, local housing markets and the availability of relevant support services~~, as well as the applicant's individual needs and wishes~~. For example, a plan which limited the search for accommodation to a small geographic area where the applicant would like to live may not ~~would be unlikely to~~ be reasonable if there was little prospect of ~~finding housing~~ securing either suitable private or social rented housing there that they could afford. The plan might instead enable the applicant to review accommodation prices, and set out the likely prospects of being allocated suitable social housing, in their preferred areas as well as extending their home search to a wider range of suitable locations ~~more affordable areas~~ and property types. In their interactions with applicants, housing authorities are encouraged to provide sufficient information and advice on access to both social and private rented housing to encourage informed and realistic choices to be identified and agreed for inclusion in the plan. If applicants are likely to have to consider an out-of-area move to a suitable location, then housing authorities should include within the plan help with this.

Finally, we recommend that paragraph 11.28 is amended to reflect our suggestion on paragraph 10.25 above.

(xxxviii) Reaching agreement and reviewing the plan

Paragraph 11.31 should place more emphasis on the importance of recommended, but not required, steps, in order to persuade authorities to take this part of the personalised housing plan seriously. The attitude of most housing officers whom we train is that it is meaningless to include non-mandatory steps – they will either 'impose' or not put something in the plan at all.

We therefore recommend that the first sentence of paragraph 11.31 is amended as follows:

The personalised housing plan ~~may~~ should include steps that the housing authority considers advisable for the applicant to take ('recommended steps'), but which the applicant is not required to take if they choose not to do so (section 189A(7)).

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[20] Spurr, H. *Shut out: the barriers low income households face in private renting*, Shelter, 2017, page 4
[21] *The Homelessness (Suitability of Accommodation) (England) Order 2012*
[22] *Nzolameso v City of Westminster*, [2015] UKSC 22 (Supreme Court, 2 April 2015). See Garvey, K., *Offering temporary accommodation out of area*, Shelter, 2015
[23] Garvey, K. and Pennington, P. *Home and Away: the rise in homeless families moved away from their local area*, Shelter, 2015

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It should be emphasised in this section that reasonable steps required of the applicant must be meaningful and achievable. DCLG has previously set out that '*there will be a small number of key steps the individual would be required to take. These steps would be tailored to their needs and be those most relevant to securing and keeping accommodation. These actions must be reasonable and achievable.*'[24]

One authority we have trained took the view that they will give the applicant a long list of steps to perform and that their job will be to monitor what the applicant is doing and end the duty if they are not happy with the progress s/he is making – the Code needs to be unequivocal in stating that this is not acceptable.

We therefore recommend that the following paragraph is inserted following paragraph 11.31:

Where setting out reasonable steps that the applicant is required to take (section 189A(4)(a)), the housing authority should require only a small number of key steps most relevant to retaining or securing accommodation. Authorities must ensure that these steps are meaningful, tailored to the applicant's needs and preferences, and the applicant has a realistic chance of achieving them within the given timeframe. Housing authorities must guard against setting up applicants to fail.

Chapters 12: Duty in cases of threatened homelessness (the Prevention Duty)

The information and guidance in chapters 12 (prevention duty) and 13 (relief duty) is fairly generalised and not very practical, with few, if any, examples of steps that could be taken. We assume that more practical guidance, along the lines of the guidance contained in *Homelessness Prevention: a Guide to Good Practice* (June 2006), together with information in the Annex 7 of the current Code, will be provided by DCLG in a forthcoming code of practice and practice hub.

(xxxix) We recommend that both chapters need to be reinforced by reminding authorities that:

- Their staff must be fully aware of the five matters about which they must provide advice and information in the amended s.179(1) HA 1996;
- They must have an up to date, and practical homelessness review, identifying all sources of help that is available in the district to people who are homeless/threatened with homelessness and how to access that help (s.179(1)(d) HA 1996)
- They must ensure that this information is up to date, and the people delivering advice and information are fully aware of it.

Paragraph 12.6 should address the difficulties which a local authority may face in attempting to prevent homelessness in another area many miles away. We recommend that, where the applicant wishes to remain in their current home, or move to a suitable alternative in the area in which they've been previously residing, a reasonable step would be to establish co-operative working arrangements with the second authority, since prevention is more likely to be successful where that authority lends its active assistance.

Chapter 13: Relief duty

(xl) Paragraph 13.7(b) should be **c**ross-referenced to paragraphs 15.34-15.35.

[24] *Policy Fact Sheet 3: Duty to assess all eligible applicants' cases and agree a plan*, DCLG, 2016

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This important reference to the power to provide accommodation in the course of the prevention and relief duties needs a precise cross-reference rather than a general reference to chapter 15, because the exact reference is hard to find.

d) When considering *'Chapter 14:' Ending the Prevention and Relief duty'* would any additional information on applicants who deliberately and unreasonable refuse to cooperate be helpful?
☑ Yes
☐ No

Comments:

Chapter 14: Ending the prevention and relief duties

(xli) Circumstances in which both Prevention and Relief duties may end

Paragraph 14.8 need further clarification. It refers to leaving the existing tenancy running, with the section 21 notice in place until it expires. This requires further clarification. Does this mean that the fixed-term of the tenancy ends and the tenancy runs on as a statutory periodic tenancy, which is a frequent occurrence? If so, the section 21 notice will have expired after two months. If the reference to 'expiry' relates to the fact that, in respect of tenancies which began on or after 1 October 2015, the section 21 notice ceases to be valid after six months from the date of service (s.21(4D), Housing Act 1988), then this should be clarified.

In our view, paragraph 14.25 – and the section D of which it forms part – is problematic for two reasons:

(a) First, there is no attempt to explain the difference between a refusal of an offer of suitable accommodation under s.189B(7)(c) at relief stage, which does not preclude an applicant in priority need moving on to the main s.193(2) duty; and a final accommodation offer under s.189B(9)(a), which does have the effect of closing off the s.193 duty (s.193A(3)). How is an applicant to distinguish between two offers, refusal of which will have radically different consequences? Is it only where the authority informs the applicant of the consequences of refusal and his/her right to request a review of suitability, in accordance with s.193A(1)(b) that the offer will be a final accommodation offer and refusal will carry the more serious consequences?

We recommend that the guidance is amended to make this differentiation explicit, and the Code should insist that an offer should not count as a final accommodation offer unless the offer letter spells out the full consequences of refusal very clearly, so that the applicant is in no doubt that refusing the offer will close off all other housing duties.

(b) Secondly, not enough attention is given to the consequences of refusing a final accommodation offer or final Part 6 offer under s.193A. The brief allusion to s.193A in paragraph 14.25 seems to be the only direct reference to what is a matter of the greatest importance, namely, the potential for authorities to use the refusal of an offer under s.193A in order to discharge their relief duty and close off access to the main s.193(2) housing duty. The paragraph refers to further guidance on the refusal of a final accommodation offer in Chapter 15, but we cannot find any such guidance in that chapter, apart from a brief mention (without reference to s.193A) in para 15.39. Section 193A and its implications warrant much more prominence.

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We recommend that the guidance is strengthened to give more attention to the consequences of refusing a final accommodation offer or final Part 6 offer under s.193A. There should also be a cross-reference in 14.25 to paragraphs 17.11-17.16 relating to the enhanced suitability criteria under article 3 of the Homelessness (Suitability of Accommodation) (England) Order 2012.

We find paragraphs 14.28 -14.29 difficult to understand. We are seriously concerned that, without amendment, paragraph 14.29 encourages local authorities to close off the s.193 duty by finding applicants intentionally homeless from accommodation which was temporary or transient rather than settled. If accommodation has a reasonable prospect of being available for at least 6 months, the prevention/relief duties would have ended under Section A on page 93, and subsequent loss of that accommodation would give rise to a fresh application for homelessness assistance.

Paragraph 14.29 is therefore surely wrong in stating that the main housing duty will not apply in these circumstances, and that the applicant will be left only with the s.190 duty. It may be that the drafters of the Act envisaged some exceptional circumstances whereby the loss of accommodation made available under 'reasonable steps' might amount to intentional homelessness, but we cannot think of any circumstances in which this would be the case.

It may be that the Code could find a way of explaining s.195(8)(e) and s.189B(7)(d) on the basis that where an applicant is held to have lost accommodation through their own fault, they may be considered intentionally homeless only in so far as the prevention/relief duties are concerned – i.e., the relevant duty will come to an end, but where it is the relief duty that ends, the applicant in priority need can still proceed to the main duty unless s/he was intentionally homeless from his/her last settled accommodation.

However, unless this is possible, we strongly recommend that paragraph 14.29 should be deleted.

(xlii) Deliberate and unreasonable refusal to cooperate (sections 193B and 193C)

We strongly recommend that paragraph 14.41 is amended to expressly state that bringing the duties to an end for refusal to cooperate should be an action of last resort. In our view, it would only be appropriate to use this way of terminating duties in an exceptional or extreme situation, in which the applicant had demonstrated a wilful overall refusal to engage with the authority in the assessment, prevention and relief process. In our experience, it will be a relatively rare occurrence that an applicant will refuse to engage with the steps that s/he has either agreed to take or that the authority consider it reasonable for him/her to take.

In the latter instance, where the steps are not agreed, it is no doubt possible that some applicants will be reluctant or unwilling to comply, but the authority should still need to consider whether it is appropriate to invoke the sanction involved in a section 193B decision, rather than leave the opportunity open for the applicant to engage at some later point during the period of the relevant duty. Housing authorities have indicated that, for applicants not likely to be in priority need it would be easier to allow time-limits for the new duties to elapse, rather than formally discharge duty for refusal to cooperate. For those in priority need, there remains a duty to rehouse and so there is less incentive to end the duty for non-cooperation.

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We therefore recommend that the following an additional sentence is added to the end of paragraph 14.41:

However, this should be an action of last resort.

(xliii) Meaning of deliberate and unreasonable refusal

We recommend that it would be helpful for paragraph 14.48 to give examples of deliberate and unreasonable refusal to cooperate. The example given by Bob Blackman MP throughout the passage of the legislation was that of an applicant folding their arms, sitting back and insisting that the housing authority should find them suitable accommodation – at outright refusal to cooperate – rather than an applicant who fails to carry out a reasonable step.

In paragraph 14.50, we recommend that the emphasis is changed. It is not strictly a person's housing situation that might make it appear they are refusing to cooperate. It could also be personal circumstances, such as inability to access the internet, phone, l or transport, perhaps as a result of poverty or caring responsibilities. For example, an applicant might have difficulty in receiving emails or making calls because they have no money to top-up the credit on their phone, or because they are in hospital with a very child. Furthermore, a person who is sofa-surfing should be regarded as homeless, rather than 'insecurely housed'. Finally, even where the nature of the accommodation might make it appear the applicant has refused to cooperate, this could happen in hostel or B&B accommodation (or other houses in multiple occupation), where there is often no internet access and mail can go missing.

We therefore recommend that paragraph 14.50 is amended as follows:

~~If the applicant is 'street homeless' or insecurely housed ('sofa surfing')~~ The housing authority should take into account any particular difficulties they may have in managing communications and appointments when considering if failure to co-operate is deliberate and unreasonable, particularly where they are street homeless or living in accommodation which makes communication difficult.

We are strongly opposed to the example given in paragraph 14.51 (d) and strongly recommend it is removed. Refusal to cooperate should be a high bar. It is not acceptable, or indeed in the spirit of the legislation, that prioritising a Jobcentre or medical appointment, or fulfilling a caring responsibility, above viewing a property should ever be regarded as a refusal to cooperate. In this context, the applicant would not be refusing, but would be unable to make a particular date and/or time. The very fact that the applicant has a valid reason of any kind for his/her actions, and has put some thought into prioritising that commitment, indicates that the choice involved cannot possibly be seen as a refusal to co-operate.

The local authority may consider that a particular choice is unreasonable, but the question is whether it constitutes a 'refusal' (not merely a failure) to co-operate. This must be assessed across the entire spectrum of the authority's dealings with the applicant, not only in relation to one or two specific omissions or decisions. As stated above, a refusal to co-operate denotes a **wilful refusal to engage overall**, and the example given does not come anywhere near that threshold. To retain the example would be to give authorities the impression that the bar for deliberate and unreasonable refusal to co-operate is far lower than it actually is.

We therefore strongly recommended that paragraph 14.51(d) is amended as follows:

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The applicant's refusal to co-operate ~~with any step~~ was unreasonable in the context of their particular circumstances and needs. ~~For example, if they prioritised attending a Jobcentre or medical appointment, or fulfilling a caring responsibility, above viewing a property, did they inform the housing authority and was their decision unreasonable given the relative consequences of failing to undertake one or the other action.~~

(xliv) Notices in cases of an applicant's deliberate and unreasonable refusal to co-operate (Section 193B(2))

We recommend that a timeframe for a 'reasonable period of time' is indicated in paragraph 14.54 to ensure that an applicant has a meaningful amount of time to seek advice and support having been served with a warning.

We therefore recommend that the first paragraph 14.54 is amended as follows:

Before serving this notice, the housing authority must have given a relevant warning to the applicant after which a reasonable period of time, of at least 14 days, has elapsed.

Question 14: Taking chapters 15-17 of the Homelessness Code of Guidance which focus on accommodation duties and powers consider the following questions:

a) Having read these chapters are you clear what local authorities' responsibilities are?
☐ Yes
☑ No

If no please provide further information:

b) Would you suggest any additions, deletions or changes to these chapters?

☑ Yes
☐ No

If yes, please use the form below to detail the chapter and paragraph number of the Homelessness Code of Guidance where relevant. Please expand this table as required.

Chapter	Page and paragraph number	Change/add/ remove	Comment
Chapter 15	Page 102, paragraph 15.5	Amend the reference to chapter 18	See comment (xlv)
Chapter 15	Page 103, paragraphs 15.8 and 15.10	Amend to clarify the meaning of s.188(1ZA)(a) and s.188(1ZB)(a)	See comment (xlvi)
Chapter 15	Page 103, paragraph 15.10(c)	Add reference to s.188(2A) and paragraph 19.23	See comment (xlvi)
Chapter 15	Page 106, paragraph 15.24	Add reference to ECHR and EU Treaties rights	See comment (xlvii)
Chapter 15	Page 108, paragraphs 15.34-15.35	Refer to these paragraphs elsewhere in the Code	See comment (xlviii)
Chapter 15	Pages 108-109,	Cross-reference to	See comment (xlix)

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	paragraphs 15.37 and 15.41	paragraphs 17.11-17.16	
Chapter 16	Page 114, following paragraph 16.18	Retain paragraph 14 of existing supplementary guidance	See comment (l)
Chapter 16	Page 115, paragraph 16.20	Cross-reference to paragraphs 17.11-17.16	See comment (l)
Chapter 16	Page 115, paragraph 16.21	Remove third sentence on sustainable use of DHPs	See comment (l)
Chapter 16	Page 117, paragraph 16.31	Remove and replace with two new paragraphs that deal with suitability of hostel/B&B accommodation provided by social housing provider and discouraging use of nightly rates	See comment (li)
Chapter 16	Page 118, paragraph 16.40-16.41	Cross-reference to paragraphs 21.34-21.35	See comment (lii)
Chapter 17	Page 122, paragraph 17.13(e)	Retain guidance in paragraph 72 of supplementary guidance	See comment (liii)
Chapter 17	Page 128, paragraph 17.45	Remove and replace with paragraph 17.40 in current 2006 Code.	See comment (liv)
Chapter 17	Page 130, paragraphs 17.47, 17.48, 17.50-17.51 and 17.57	Amend to ensure more accurate summary of *Nzolameso* judgment and to avoid breaches of Children Act 2004, s.11 in relation to schooling	See comment (lv)
Chapter 17	Page 131	Add new sub-head and three new paragraphs to retain paragraphs 20-22 of supplementary guidance on the Localism Act 2011 changes	See Comment (lvi) below and in response to Q.6

Chapter 15: Accommodation duties and powers

(xlv) Section 188 interim duty to accommodate

Paragraph 15.5 indicates that chapter 18 offers further guidance on the ‘reason to believe’ test, but we cannot find any such guidance, other than a brief reference to ‘reason to believe’ in para 18.27.

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(xlvi) Ending the section 188 interim duty

Paragraphs 15.8 (a) and 15.10(b) concern the section 188(1) duty to provide interim accommodation coming to an end by notification of a decision, and relate to the meaning of s.188(1ZA) and (1ZB).

The Act provides that the s.188(1) duty will end where the authority decide that they do not owe the applicant the relief duty (s.188(1ZA)(a) and s.188(1ZB)(a)). These complex subsections have created a great deal of confusion, and there is uncertainty about what the Act means when it refers to the authority not owing the applicant the section 189B(2) duty. The guidance should seek to clarify this.

Since there are only two conditions for the s.189B(2) relief duty – namely homeless/threatened with homelessness and eligible – we assume that the reference to the duty being 'not owed' denotes a situation where the authority decides that the applicant is not after all homeless and eligible for assistance, despite the fact that it was 'satisfied' of both these conditions when it embarked upon the relief exercise:

- In reality, it is most unlikely that the authority would reverse its decision that the applicant is not homeless – this is of course not the same as ending the duty because the applicant has accommodation available and a reasonable prospect that it will last for six months.

- So the only circumstances in which an authority is likely to decide that the relief duty is 'not owed' is where the applicant has ceased to be eligible for assistance because of a change in his/her immigration status.

We therefore recommend that paragraphs 15.8 and 15.10 are amended to address this question directly and explain when it is likely that the duty will be 'not owed', rather than simply repeating the opaque statutory wording.

We recommend that paragraph 15.10(c) should be amended to include a reference to s.188(2A), and a cross-reference to paragraph 19.23.

(xlvii) Discretionary powers to secure accommodation

Paragraph 15.24 should include the vital qualification that the Schedule 3 exclusion of people without recourse to public funds does not apply where there would otherwise be a breach of a person's Convention rights or EU Treaty rights. This should be cross referenced to paragraphs 7.19-7.20.

We therefore recommend that paragraph 15.24 is amended as follows:

The fact that a housing authority has decided that an applicant is not eligible for housing assistance under Part 7 does not preclude it from exercising its powers to secure accommodation pending a review or appeal. However, housing authorities should note that section 54 of, and Schedule 3 to, the Nationality, Immigration and Asylum Act 2002 prevent them from exercising their powers to accommodate an applicant pending a review or appeal to the county court, where the applicant is a person who falls within one of a number of classes of person specified in Schedule 3 <u>unless there would otherwise be a breach of the person's rights under the ECHR or rights under EU Treaties (see paragraph 7.20)</u>. For further guidance on eligibility see Chapter 7.

(xlviii) Powers to secure accommodation to prevent or relieve homelessness

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The guidance in paragraphs 15.34-15.35 reminds authorities that they have a power under section 205(3) to provide accommodation under the relief duty to those who are not in priority need, for example where the authority considers a victim of domestic violence or a care leaver is not vulnerable, or in order to prevent an applicant from becoming street homeless.

We recommend that this guidance should be cross-referenced throughout the Code, particularly in Chapter 8 and each of Chapters 21-25.

(xlix) Section 193C94): Duty to accommodate applicants who have deliberately and unreasonably refused to co-operate pending final offer

We recommend that in paragraph 15.37, paragraph 15.41 (c), and where there is any reference in the Code to a final accommodation offer, there should be a cross reference to paragraphs 17.11–17.16, dealing with the Article 3 enhanced suitability criteria.

c) When considering *Chapter 16: Helping to secure and securing accommodation* are you clear what local authorities' responsibilities are in helping to secure or securing accommodation?
☐ Yes
☐ No

Comments:

Chapter 16: Securing accommodation

(l) Private rented sector offers

As set out above in response to question 6, we recommend that paragraph 14 of the supplementary guidance on the Localism Act is retained by inserting the following paragraph after paragraph 16.18 of the Code.

Authorities are reminded that the discretion to arrange a private rented sector offer is a power, not a duty, and as such, authorities should not seek to rely on the power in all cases. Authorities should consider whether to arrange a private rented sector based on the individual circumstances of the household and undertake to develop clear policies around its use.

We recommend that paragraph 16.20 specifically cross-references paragraphs 17.11–17.16 as well as Chapter 17 generally.

Paragraph 16.21 suggests that Discretionary Housing Payments (DHPs) should not be expected to cover shortfalls in the longer term. However, DWP Guidance[25] states that it may be appropriate to award DHPs for an indefinite period where an individual needs further assistance with housing costs and their circumstances are unlikely to change. Guidance also states that local authorities should consider making an award where a disabled person has had significant adaptations made to their property, or where they are living in a property particularly suited to their needs.

The Administrative Court has recently affirmed that DHPs may be awarded on a long-term basis (***R (on the application of Halvai) v Hammersmith and Fulham LBC*** [2017] EWHC 802 (Admin)).

We therefore recommend that paragraph 16.21 is amended as follows:

[25] Discretionary Housing Payments Guidance Manual - Including Local Authority Good Practice Guide, DWP, December 20116

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Housing authorities may make Discretionary Housing Payments (DHP) to help an applicant secure accommodation and to meet a shortfall between the rent and the amount of housing benefit or Universal Credit payable to them. However, housing authorities should take into account how sustainable any arrangement will be in the longer term if DHP were to be withdrawn, when considering suitability of accommodation. ~~**Whilst it would be acceptable to help secure a private sector tenancy through an offer of DHP for a specific period to assist with a shortfall, housing authorities will need to be satisfied that there is a reasonable prospect that the tenancy will be sustainable in the longer term.**~~ **Payments of DHP are governed by the Discretionary Financial Assistance Regulations 2001.**

(Ii) Privately owned nightly paid annexe accommodation

In the above sub-head, and paragraph 16.31 which follows, we suggest that the use of the term 'annexe' accommodation should be removed. The term has no actual meaning, but appears to be used to give an impression of accommodation which is part of a hotel, which in almost all cases it is not.

This paragraph also contains misleading statements by referring to 'self-contained' accommodation, which 'typically involves family members sharing a large room with one another'. 'Annexes' can be studio flats with their own kitchenette and shower room. But they can also be larger flats with separate living rooms, or rooms in houses or hostel-type buildings where a number of residents share facilities such as kitchens and bathrooms.

We also strongly recommend that the Code discourages the practice, often spurious, of making rooms or flats available on a 'nightly' basis, which, when examined, is often a sham or a pretence where the accommodation is not a hotel or a guest house.

There is also a growing problem, whereby local authorities are developing their own B&B/hostel-style accommodation (sometimes converted former residential care homes for older people or children in care), where families have to live in one room, and sometimes have to share facilities, such as kitchens and bathrooms. Because this type of accommodation is not privately owned, it is not covered by the B&B regulations, which allows families to be legally accommodated in such accommodation for no more than 6 weeks.

We therefore recommend that the sub-head is deleted and paragraph 16.31 is amended as follows:

Any accommodation where families with children must share facilities, whether procured from the private sector, a social housing provider or owned by the local authority, is unlikely to be suitable unless it is used for a period not exceeding 6 weeks.

We also recommend that a further paragraph is added as follows:

Housing authorities are discouraged from paying nightly rates for any accommodation which is not contained within an established hotel, guest house or B&B. They should guard against the use of sham B&B 'annexes'.

(Iii) Refuges for victims of domestic abuse

We recommend that paragraphs 16.40–16.41 should be cross-references to paragraphs 21.34- 21.35.

d) When considering *Chapter 17: Suitability of Accommodation* are you clear what local authorities' responsibilities are? Is there any further guidance required to help housing authorities assess affordability of accommodation, or the suitability of accommodation out of district?

☐ Yes

☑ No, we are not clear what local authorities' responsibilities are.

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Comments:

Chapter 17: Suitability of accommodation

(liii) Suitability of private rented accommodation

We recommend paragraph 17.13 (e) is amended to retain helpful information contained in paragraph 72 of the current supplementary guidance on the Localism Act changes:

the landlord has not provided a written tenancy agreement to the housing authority which the landlord proposes to use for the purposes of a private rented sector offer, and which the local housing authority considers to be adequate. It is expected that the local authority should review the tenancy agreement to ensure that it sets out, ideally in a clear and comprehensible way, the tenant's obligations, for example a clear statement of the rent and other charges, and the responsibilities of the landlord, but does not contain unfair or unreasonable terms, such as call-out charges for repairs or professional cleaning at the end of the tenancy.

(liv) Affordability

Paragraphs 17.44–17.45 on affordability are relevant not only to suitability, but also to reasonableness to continue to occupy. In our view, they are woefully inadequate.

We are very concerned that the draft guidance does not retain a critically important paragraph in the existing Code, which clarifies the definition of affordability for the purposes of the Affordability Regulations[26], in relation to rent shortfalls and other accommodation costs. It states:

> 17.40. In considering an applicant's residual income after meeting the costs of the accommodation, the Secretary of State recommends that housing authorities regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based jobseekers allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit. This amount will vary from case to case, according to the circumstances and composition of the applicant's household. A current tariff of applicable amounts in respect of such benefits should be available within the authority's housing benefit section. Housing authorities will need to consider whether the applicant can afford the housing costs without being deprived of basic essentials such as food, clothing, heating, transport and other essentials. The Secretary of State recommends that housing authorities avoid placing applicants who are in low paid employment in accommodation where they would need to resort to claiming benefit to meet the costs of that accommodation, and to consider opportunities to secure accommodation at affordable rent levels where this is likely to reduce perceived or actual disincentives to work.

Paragraph 17.44 of the draft guidance merely sets out the terms of the Homelessness (Suitability of Accommodation) Order 1996, which is couched in the form of a financial statement and is not especially helpful.

Then, paragraph 17.45 has been inserted:

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[26] Homelessness (Suitability of Accommodation) Order 1996 (SI 1996 No.3204)

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17.45 Housing authorities will need to consider whether the applicant can afford the housing costs without being deprived of basic essentials such as food, clothing, heating, transport and other essentials specific to their circumstances.

Paragraph 17.45 is based on the well-known words of Kennedy J. in ***R v Hillingdon LBC ex parte Tinn*** (1988). But these words are all that survive in the draft Code of the guidance in paragraph 17.40 of the current Code. The clear purpose the current 17.40 is to lay down a marker that accommodation cannot be regarded as affordable if, in order to pay housing costs, a person has to draw on money which the state has provided for basic subsistence according to a means test, such as income support, jobseeker's allowance and employment and support allowance, and similar levels of support under the universal credit scheme.

The draft Code has dispensed with this vital piece of guidance. It represents the practical application of the test in 17.45, but it is essential to make this explicit.

Without the retention of current paragraph 17.40, there is a risk of undermining an important principle that – to be affordable – accommodation must not leave households without a subsistence level of income. The state itself has set minimum levels of subsistence income, and anything less than that is by definition unaffordable. Although there will very often be a shortfall between the Local Housing Allowance and the contractual rent on a tenancy, the authority can discharge its duty to provide suitable and affordable accommodation, if necessary, with the assistance of a Discretionary Housing Payment.

Otherwise, it could have the effect that so long as a household is not actually destitute (i.e. deprived of basic essentials) they can be allowed to live in abject poverty, below recognised subsistence levels, in the long-term.

It also creates risks for local authorities, taking the responsibility for deciding a level of residual income from a figure defined by government, to a figure defined by the local authority. It will be for each local authority to make sense of 17.45 and set its own standards for about what constitutes absolute poverty. Where a family has to pay a rent shortfall, how is an authority to decide what they can afford to pay out of subsistence level benefits? The inconsistency between authorities which is bound to result cannot be acceptable.

It could result in a race to the bottom, where a local authority which sets a more decent standard for residual income will be at a competitive disadvantage in seeking accommodation in the private rental market compared to a local authority which is more ruthless. It could result in intrusive and detailed questioning of expenditure, such as why an applicant has purchased wholemeal bread rather than white for their children. Some LHAs already question every amount of household spending (i.e. questioning where people shop or what items they purchase).

If decisions on affordability are governed only by the broad statement of principle in 17.45, local authorities will be without any effective guidance and applicants will be at the mercy of unchallengeable decisions, except in the extreme instances of *Wednesbury* unreasonableness.

We acknowledge the judgment of the Court of Appeal in ***Samuels v Birmingham City Council*** [2015] EWCA Civ 1051, in which it was held that, contrary to para 17.40, when assessing affordability, benefits income had no special status in the assessment. The Court considered that, although housing benefit was specifically related to the costs of accommodation, it did not follow that no other benefits were ever intended to be used for the purpose of assisting with housing costs.

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We are strongly of the view that that the Court in the *Samuels* case misunderstood the nature of income support, child tax credits and child benefit, which Ms Samuels received, in finding that part of these benefits is intended to cover housing costs, when this is clearly the purpose of housing benefit or the housing element of universal credit. It may be that such benefits sometimes have to stretch to support a modest or short-term shortfall in rent in order to sustain a tenancy. But to claim that anything more than a modest contribution is affordable is unsustainable. Rent is an on-going expenditure. It is likely that *Samuels* could be distinguished in argument in a different case. But if the guidance in paragraph 17.40 of the current Code disappears, local authorities will argue that it has been removed because it is no longer good law, and that would be a travesty.

We strongly recommend that the existing paragraph 17.40 be reinstated in its entirety. Without it, the Code has virtually nothing to say on the all-important subject of affordability.

We accordingly recommend that draft paragraph 17.45 is deleted, as it forms part of existing 17.40.

(Iv) Location of accommodation

Paragraphs 17.46-17.58 provide a helpful summary of the main elements of the judgment of the Supreme Court in ***Nzolameso v City of Westminster*** [2015] UKSC 22. In this important test case, in which Shelter's Children's Legal Service successfully intervened, the Supreme Court recommended that:

- If accommodation cannot be procured in area, then attempts must be made to find a suitable alternative as close as possible to where the household were previously living. The search for accommodation must be evidenced.
- The principal needs of the individual household must be acknowledged, including adults and children, and assessed both individually and collectively when determining the location of accommodation.
- Written evidence and explanation should be recorded and given on a case-by-case basis when making out of area placements, acknowledging each household's collective and individual needs.
- Households must be given sufficient time to make a decision on an out of area offer, when no alternatives are available, and thorough information regarding the proposed area must be provided.

While paragraph 17.47 of the draft guidance attempts to deal with the *Nzolameso* judgment, it does not adequately reflect the court's recommendations. We would like to see paragraph 17.47 significantly strengthened as follows:

Where it is not ~~possible~~ reasonably practicable to secure accommodation within district ~~and an authority has secured accommodation outside their district, the housing authority is required to take into account the distance of that accommodation from the district of the authority~~ then attempts must be made to find a suitable alternative as close as possible to where the household were previously living. The search for accommodation must be evidenced. Where accommodation which is otherwise suitable and affordable is available nearer to the authority's district than the accommodation which it has secured, the accommodation which it has secured ~~is not likely to be~~ will not be suitable unless the applicant has specified a preference.

We would also like to see the inclusion of additional paragraphs covering the further recommendations of the Supreme Court, as set out above, particularly in relation to the time given to decide whether to accept accommodation out-of-area. We see cases where applicants are expected to make such decisions on the spot or within 24 hours. Therefore, stronger guidance is clearly needed in this respect.

We recommend that paragraph 17.48 is amended as follows:

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Generally, where possible, housing authorities should try to secure accommodation that is as close as possible to where an applicant was previously living. Securing accommodation for an applicant in a different location ~~can~~ will inevitably cause difficulties for some applicants. Where possible the authority should seek to retain established links with schools, doctors, social workers and other key services and support. Applicants should be given a reasonable amount of time to decide whether to accept accommodation out-of-area and should not be expected to make such decisions on the day it is offered.

Furthermore, while paragraphs 17.50 and 17.51 attempt to include the judgment in the recent case of *E, R (on the application of) v London Borough of Islington* [2017] EWHC 1440 (Admin), they again do not go far enough in reflecting this judgment [paragraph 120] to advise authorities on how to avoid a breach of the Children Act 2004, s.11.

We therefore recommend that paragraphs 17.50 and 17.51 are amended as follows:

When securing accommodation for families with children housing authorities should be mindful of their duties under section 11 of the Children Act 2004 to discharge their functions with regard to the need to safeguard and promote the welfare of children. This would include minimising the disruption to the education of children and young people, particularly (but not solely) at critical points in time such as leading up to taking GCSE (or their equivalent) examinations. The authority should keep contemporary records of its decision-making and its reasons, capable of explaining clearly how it evaluated the likely impact of the transfer on the educational welfare of the child.

Before a family that includes a school age child is placed out of district, the housing authority should liaise with the receiving authority and make every reasonable effort to ensure arrangements are or will be put in place to meet the child's educational needs. The housing authority's contemporary records must be able to demonstrate the specific process by which it reached the decision that the receiving authority would secure the child's educational welfare, either through making appropriate arrangements for school admission, or by making available alternative educational provision.

We also recommend that the guidance on policies for the procurement and allocation of temporary accommodation could be strengthened.

We therefore recommend that paragraph 17.57 is amended by adding the following sentences:

Where there is an anticipated shortfall of suitable accommodation within the authority's district, the authority's policy should explain the factors that would be taken into account in allocating available properties. The authority should be able to explain, by reference to the policy, why it has decided to place one family in accommodation in a different area and to offer another family accommodation in its own district. It should never be a case of offering applicants the next property that it has available, whether within or out of area, without assessing the suitability of that property, bearing in mind all the factors outlined in paras 17.47-17.56, for that particular household.

(lvi) Suitability: reasonable to accept a final offer under s.193

We recommend that paragraphs 20-22 of the current supplementary guidance are inserted under the above sub-heading after paragraph 17.60.

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As set out in our response to question 6, while much of the supplementary Guidance on the homelessness changes in the Localism Act 2011 has been taken into the draft Code, we are very concerned that chapter 17 has not retained paragraphs 20-22 of the supplementary guidance:

The reason for the inclusion of the above paragraphs is that under the pre-Localism Act law, section 193(7F) provided that a final offer from the allocation scheme could only discharge the section 193 duty if the housing authority was satisfied not only that the accommodation was suitable, but also that it was ***reasonable to accept***.

In ***Slater v Lewisham LBC*** [2006] EWCA Civ 394, the Court of Appeal held that 'reasonable to accept' was a very different concept from whether accommodation was suitable:

'In judging whether it was unreasonable to refuse such an offer, the decision−maker must have regard to all the personal characteristics of the applicant, her needs, her hopes and her fears and then taking account of those individual aspects, the subjective factors, ask whether it is reasonable, an objective test, for the applicant to accept. The test is whether a right−thinking local housing authority would conclude that it was reasonable that this applicant should have accepted the offer of this accommodation.'

In this way, the test of 'reasonable to accept' made a significant difference.

The Localism Act 2011 removed the requirement that it should be 'reasonable to accept' the accommodation. In its place, it inserted a far more limited requirement that the authority's duty is not discharged if the applicant had existing contractual obligations which s/he could not end before being required take up the final or private rented sector offer (s.193(8)). This is obviously the origin of the new s.193C(10).

The reasoning behind the removal of 'reasonable to accept' was that the DCLG believed that the concept of suitability included all the factors that were relevant to 'reasonable to accept'. We were assured that guidance would confirm that this was the case and that the case law under 'reasonable to accept' would be subsumed under the head of suitability.

This explains the purpose of paragraphs 20-22 of the supplementary guidance. At the time, Liz Davies, of Garden Court Chambers, wrote in *Legal Action*:

"The test of whether accommodation was reasonable for a particular applicant to accept took into account the applicant's subjective reasons for refusing the accommodation, to be considered objectively by the local housing authority. Once the homelessness amendments are in force, everything will need to be addressed through the prism of suitability alone."

For the above reasons, the above provisions in the supplementary guidance must be retained, in order to give effect to the expanded meaning of suitability, to ensure that the line of case law cited in paragraph 22 is still binding, and to keep faith with the assurances given at the time of the Localism Act.

If they are not retained, there is a grave danger that authorities will argue that the concept of 'reasonable to accept' has disappeared, and that the case law based on it is therefore obsolete. The guidance is the only record of the intention that the case law survives as a factor of suitability.

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Question 15: Taking chapters 18-20 of the Homelessness Code of Guidance which focus on casework administration consider the following questions:

a) Having read these chapters are you clear what local authorities responsibilities are?
☑ Yes
☐ No
If no please provide further information:

b) Would you suggest any additions, deletions or changes to these chapters?

☑ Yes
☐ No

If yes please use the form below to detail the chapter and paragraph number of the Homelessness Code of Guidance where relevant. Please expand this table as required.

Chapter	**Page and paragraph number**	**Change/add/ remove**	**Comment**
Chapter 18	Page 132, paragraph 18.4	Amend to emphasise that a telephone number should always be publicised	See comment (lvii)
Chapter 18	Page 132, paragraph 18.4	Insert two additional paragraphs to clarify that services should not be restricted via web portals and that applicants should not be kept waiting for unreasonable amounts of time	See Comment (lvii)
Chapter 18	Page 133, paragraph 18.7	Amend to state that a referral from a public body is likely to constitute an application for assistance	See comment (lviii)
Chapter 18	Page 134, paragraph 18.13	Either amend or delete paragraph 18.13	See comment (lix)
Chapter 19	Page 141, paragraphs 19.13-19.14	Strengthen to reflect caselaw	See comment (lx)

c) When considering *Chapter 18: Applications, inquiries, decisions and notifications* would any additional information on issuing notifications and decisions be helpful?
☑Yes
☐ No

Comments:

Chapter 18: Applications, decisions and notifications

(lvii) Applications – Service provision

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Paragraph 18.4 should be strengthened to emphasise that authorities must make their contact details clear and obvious on their website and in their advice and information materials. It is a familiar experience that in the 'Contact Us' section of their websites local authorities do not give a telephone number or even an address of the office where people should go to apply for homelessness assistance.

We therefore recommend that paragraph 18.4 is amended as follows:

Housing authorities ~~should~~ must publicise their opening hours, address, and telephone number ~~and~~ including the 24-hour contact details. For example, they should ensure that this information is clearly accessible on their website. Translated information and interpreting services should be made available to applicants for who English is not a first language, and the availability of these services publicised to residents and community organisations.

We strongly recommend that the guidance should stress that it is not satisfactory for an authority to restrict access to its homelessness services, for example, by making such access dependent on the use of an online portal. Where these are used to triage applicants, they may not record important information about the applicant's case, for example because they do not provide scope for the applicant to submit this information, because the applicant is not aware of its importance or because the applicant feels uncomfortable submitting very personal information online.

As set out in paragraph 11.14, in most circumstances, the applicant will require at least one face-to-face interview. We recommend that a face-to-face service for applications is always available.

In our recent briefing on assessment and personalised plans, the London-based members of our expert panel of service users reported that they had to wait unreasonable amounts of time at the local authority's office, even when they had nowhere to stay that night and children in tow, or who needed to be collected from school. This was stressful for the families involved.

We therefore strongly recommend that the following additional paragraphs are inserted following paragraph 18.4:

It is not acceptable for an authority to restrict or prioritise access to homelessness services via use of an online portal. Applicants should always have the opportunity to speak to an adviser, at the very least by telephone, and face-to-face where this is the preference of the applicant.

Services should not involve lengthy waits to speak to an adviser. Applicants should, wherever possible, be given appointments. In busy localities, people should not have to wait for lengthy periods at the local authority's offices but instead be contacted by phone or email to let them know when help is available. They should always be interviewed in a private space where they cannot be overheard.

(lviii) Form of an application

In paragraph 18.7, see our comments on 4.11-4.12. The statement that a referral by a public body does not constitute an application is inconsistent with 18.5, where the authority receives information which gives it reason to believe that the person referred may be homeless or threatened with homelessness.

We therefore recommend that paragraph 18.7 is amended as follows:

A referral of a case made by a public authority to the housing authority under section 213B of the 1996 Act, the duty to refer, ~~will not in itself~~ is likely to constitute an application~~.~~ and so

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~~However,~~ **housing authorities should make contact with the person referred and determine whether they have reason to believe that the applicant may be homeless or threatened with homelessness. For further guidance on the duty to refer please see Chapter 4.**

(lix) Further applications

In paragraph 18.13, it is misleading to give 'intervening settled accommodation' as an example of a factual change where an authority should 'accept and determine a fresh application' (the threshold test which derives from ***Rikha Begum v Tower Hamlets LBC***). Intervening settled accommodation is clearly an example of a substantial change in circumstances which breaks the chain of causation from an earlier intentional homelessness decision. Therefore where there has been intervening settled accommodation, authorities should consider the application as a fresh incidence of homelessness rather than simply a fresh application for assistance.

Intervening settled accommodation is not a typical scenario of when a change in facts requires the authority to accept a fresh application. A factual change may be nothing like as substantial as intervening settled accommodation. It would usually cover examples such as the birth of a child or relationship breakdown.

We therefore recommend that paragraph 18.13 is either amended to give a more appropriate example of a factual change of circumstances, or deleted.

Chapter 19: Reviews and appeals

(lx) Oral hearings

We recommend that 19.13–19.14 are strengthened to reflect caselaw. Paragraph 19.14 provides a more accessible explanation of what triggers the regulation 8 procedure, in its reference to 'something lacking', a phrase used in case law. The list of deficiencies or irregularities in 19.13 is couched solely in terms of points of law and procedural unfairness. This is restrictive when case law indicates that where the section184 decision has not taken account of the full factual background, even if facts emerge which were not known at the time of the decision, the regulation 8 process applies and it is necessary to send a 'minded to' letter.

Question 16: Taking chapters 21-25 of the Homelessness Code of Guidance which focus on particular client groups consider the following questions:

a) Having read these chapters are you clear what local authorities responsibilities are?
☑ Yes
☐ No

If no please provide further information:

b) Would you suggest any additions, deletions or changes to these chapters?

☑ Yes
☐ No

If yes please use the form below to detail the chapter and paragraph number of the Homelessness Code of Guidance where relevant. Please expand this table as required.

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Chapter	Page and paragraph number	Change/add/ remove	Comment
Chapter 21	Page 151, paragraph 21.19	Omit the words 'The Secretary of State considers that'	See comment (lxi)
Chapter 21	Page 152, paragraph 21.27	Strengthen the wording as indicated	See comment (lxii)
Chapter 21	Page 154, paragraph 21.35	Strengthen the wording as indicated	See comment (lxiii)
Chapter 21	Page 155, following paragraph 21.40	Add an additional paragraph and cross-reference to paragraphs 7.19-7.20	See comment (lxiv)
Chapter 24	Page 168, paragraph 24.9	Add an additional sub-section on age at joining the armed forces	See comment (lxv)
Chapter 25	Page 169, paragraph 25.4	Add an additional paragraph following paragraph 25.4	See comment (lxvi)
Chapter 25	Page 170, paragraphs 25.10 – 25.11	Amend both paragraphs as indicated	See comment (lxvii)
Chapter 25	Page 170, paragraph 25.12	Amend as indicated	See comment (lxviii)

Chapter 21: Domestic abuse

(lxi) Duties to those homeless or threatened with homelessness

In paragraph 21.19, reference is made to the meaning of 'violence'. The Supreme Court accepted, in ***Yemshaw v LB Hounslow*** [2011] UKSC 3 that 'violence' was not limited to physical violence, and this is therefore a matter of law rather than the Secretary of State's view. As Baroness Hale said in *Yemshaw*:

Housing lawyers should interpret "domestic violence" in the same way that family lawyers did, by reference to the Practice Direction (Residence and Contact Orders: Domestic Violence) (No 2) *[2009] 1 WLR 251 (at [28]).*
Thus, "domestic violence":

" . . . includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm."

We therefore recommend that the words 'The Secretary of State considers that' are omitted from paragraph 21.19.

(lxii) Prevention and Relief Duties

We recommend that paragraph 21.27 is strengthened as follows:

Housing authorities may wish to inform applicants of the option of seeking an injunction against the perpetrator. Where applicants wish to pursue this option, <u>or need assistance in finding a family law solicitor,</u> authorities <u>should offer to provide details of local solicitors or other agencies</u> ~~should inform them that they should seek legal advice~~ and <u>inform applicants</u> that they

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may be eligible for legal aid. Such information should be given as part of the advice and information duty, taking special account of the needs of survivors of domestic abuse (s.179(2)(d)).

(lxiii) Providing suitable accommodation

The guidance in paragraphs 21.34-21.35 needs strengthening in respect of women's refuges. In our experience, where a woman applies as homeless from a refuge, the local authority insist that its s.188 duty is satisfied by the woman staying in the refuge pending the decision on her homeless application, even though the room is needed for others. The same may happen on acceptance of s.193 main housing duty, where the authority state that she should stay in the refuge pending an offer of suitable accommodation.

However, it is quite clear from the House of Lords' judgment in ***Moran v Manchester City Council*** [2009] UKHL 36 that refuge accommodation should only be used in the short term. As Baroness Hale said:

" *… The important principle established here is that in most cases a woman who has left her home because of domestic (or other) violence within it remains homeless even if she has found a temporary haven in a women's refuge [para 65]."*

We therefore recommend that paragraph 21.35 is amended as follows:

For some victims, such as those at risk from highly dangerous perpetrators, refuges will usually be the most appropriate choice of emergency accommodation to ~~Refuges~~ provide key short term, intensive support ~~for those who flee from abuse~~. But refuges are not likely to be suitable for more than a few weeks. ~~Given the intensity of the support and the vulnerability of the victims, attention should be paid to the length of time they spend in a refuge. Refuges~~ and ~~are not simply~~ must not be seen by authorities as a substitute for other forms of temporary accommodation. The housing authority should work with the refuge provider to consider how long a person needs to stay before the provision of other accommodation (which may be temporary in the absence of settled accommodation) may be more appropriate, potentially with floating support if needed.

(lxiv) Eligibility

Reference should be made to the fact that those who have no recourse to public funds will still be entitled to help under the general duty to provide information and advice, and may be able to seek assistance from the social services authority, under the Children Act 1989 (if there are children in the household) or under the Care Act 2014 if the homeless person has a need for care and support.

We therefore recommend that an additional paragraph to this effect is inserted following 21.40 and cross-referenced to paragraph 7.19-7.20.

Chapter 24: Former members of the armed forces

(lxv) Priority need

Young people who signed up to the armed forces in their teens may be less able to cope with civilian life. We therefore recommend that paragraph 24.9 is amended to add a further relevant factor after sub-section, preferably after (a):

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at what age the applicant joined the armed forces (this could be an indicator of ability to cope with civilian life)

Chapter 25: Modern slavery and trafficking

We have based our comments on the helpful advice of the Anti-Trafficking and Labour Exploitation Unit (ATLEU).[27]

(lxvi) What is Modern Slavery and Trafficking?

In these introductory paragraphs, the guidance should draw attention to the UK's domestic and international obligations to survivors of trafficking and modern slavery.

We therefore recommend that the following additional paragraph is inserted after paragraph 25.4:

Housing authorities should be aware that there are legal obligations to support survivors of trafficking and modern slavery, including under: Article 4 of the European Convention on Human Rights (prohibition of slavery and forced labour); Council of Europe Convention on Action against Trafficking in Human Beings (particularly especially article 12(1)); Directive 2011/36/EU (Trafficking Directive) and the Modern Slavery Act 2015.

(lxvii) Applications and inquiries

The guidance in paragraph 25.11 on assessing vulnerability and priority need for survivors of trafficking or modern slavery should be strengthened to advise authorities that they should accept as 'vulnerable' those who have received a Conclusive Grounds Decision that they are a survivor of trafficking or modern slavery.

The extensive process of questioning and consideration of the experiences which the applicant has suffered are such that an authority does not need to embark afresh on the same line of investigation, which is distressing for applicants. A Conclusive Grounds Decision carries a status which reflects the rigour of the statutory process in identifying survivors, and it would be good practice for authorities to accept a decision as amounting to a presumption of vulnerability.

The BASW competent authority guidance[28] provides helpful assistance in assessing characteristics and behavioural responses of survivors of trafficking and modern slavery. These may include: delayed disclosure, mistrust of new people, difficulty recalling facts, fear of authority, difficulties in seeking support, feelings of shame and difficulty in responding to questions.

We therefore recommend that paragraphs 25.10 and 25.11 are amended as follows:

25.10 In many cases involving modern slavery or trafficking, the applicant may be in considerable distress. ~~and~~ Officers should use relevant modern slavery and trafficking assessment guidance when assessing the behavioural responses of applicants and would benefit from appropriate training to enable them to conduct such interviews. Applicants should be given the option of being interviewed by an officer of the same sex if they wish.

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[27] http://atleu.org.uk/

[28] Victims of Modern Slavery - Competent Authority Guidance – version 3, March 2016, British Association of Social Workers

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25.11 A person who has been a victim of trafficking or modern slavery should be considered in priority need for accommodation may have a 'priority need' for accommodation if they have a Conclusive Grounds Decision. They may have a priority need if they are assessed as being 'vulnerable' according to section 189(1)(c) of the 1996 Act. In assessing whether they are 'vulnerable' a housing authority should take into account any advice from specialist agencies providing services to the applicant, and be particularly aware of the risk of their being exposed to further abuse if they are threatened with homelessness or are homeless. For further guidance on priority need see Chapter 8.

(lxviii) Suitability of accommodation

We strongly support the guidance in paragraphs 25.12 - 25.14 that housing authorities should take account of the specific needs of survivors of trafficking and/or modern slavery when considering whether accommodation is suitable.

Securing suitable accommodation for victims of trafficking and modern slavery can be difficult, and it is therefore essential for an authority's homelessness strategy to reflect the need to procure sufficient suitable accommodation. Factors which may be relevant in particular cases include the need for longer term accommodation; the provision of single sex accommodation; and the need to avoid offering accommodation which in some way triggers flashbacks to the applicant's trafficking situation. Victims should .be given time to consider an offer of accommodation, with the assistance of a support worker or adviser where possible.

We therefore recommend that paragraph 25.12 is amended as follows:

There will be a number of accommodation options for victims of modern slavery or trafficking. These should be considered in the local authority's homelessness review and address in its strategy. The homelessness review should track any National Referral Mechanism safe house accommodation that is provided in the area, from which victims will eventually need assistance to move on to suitable alternative accommodation. Housing authorities should consider which are most appropriate for each person on a case by case basis taking into account their specific circumstances and needs. Accommodation of a type that might trigger post-traumatic stress should be avoided.

Question 17: Are there any other comments that you would like to make on the Homelessness Code of Guidance?

No

Comments:

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