Consultation Response

Code of guidance for local housing authorities - allocation of accommodation

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Overview

We welcome the fact that the new legislative framework is sufficiently flexible to enable local authorities to develop choice based approaches to lettings. However in providing more permissive statute for local authorities there are a number of key areas where the Code of guidance needs to be more comprehensive.

Local authorities will need guidance on implementing the new framework in a way that is consistent with the Government's policy intentions. Yet there are some parts of the allocations framework that have been substantially changed by the Homelessness Act where the Code simply restates what is on the face of the Act and therefore provides no guidance at all. The Code of guidance needs to be made much more comprehensive in the following key areas:

- Unacceptable behaviour and eligibility
- Reasonable preference
- Determining priority
- Reviews

We look forward to the publication of good practice guidance on choice based lettings. However this will not be available until well after local authorities have reviewed and updated their allocations schemes to comply with the new legislation and therefore the statutory guidance available now must be more comprehensive.

We would particularly like to draw attention to areas where we feel that the Code has not made good on commitments made by Ministers to address matters in guidance during the passage of the of the Homes and Homelessness Bills though Parliament. In particular in relation to eligibility and the removal of preference, determining priorities and the length of time available to consider an offer of accommodation.

Allocations schemes and lettings policies are of very significant strategic significance. Housing authorities will need to consider the development of their scheme and policies in the context of their homelessness strategy. It will be particularly important that decisions are taken with regard to the level and likely future levels of homelessness in the district and the general availability of accommodation (both temporary and permanent) in the district.

Chapter 1

1.6:

Insert:
Consideration should also be given to the contribution that the allocations scheme and policies can make to meeting objectives that the authority has identified in its homelessness strategy. Section 1(5) of the 2002 Act requires that local housing authorities take their homelessness strategies into account in the exercise of their functions. It is essential therefore that the allocations scheme, and in particular its provisions on eligibility and reasonable preference, is consistent with the homelessness strategy as a whole. It is likely that the allocations scheme will be a key element of a housing authority's strategy to tackle homelessness through the prevention of homelessness and the provision of accommodation and support.

Chapter 3: Local housing strategy

3.2:

Section 1(7) of the Act requires authorities to take their homelessness strategy into account in their other functions. It will be particularly important that an authority's allocations scheme is consistent with their strategy. The following should be added to paragraph 3.2:

The local housing authority must take its homelessness strategy into account in the exercise of its allocations functions.

Partnership working

3.3:

Add
'Authorities should take advantage of the partnership working arrangements that they have developed through the process of developing their homelessness strategy.'

Joint tenants

3.6:

provides welcome encouragement to grant joint tenancies to household members with long-term commitments to the home. However, where there is no joint tenancy, surviving occupants without succession rights will rely on the guidance in paragraph 3.8.

Applicants with succession rights do not need to demonstrate that their continued occupation of the same or a suitable alternative home is good use of the housing stock or that they would have priority under the allocation scheme.

It is possible, for example, that a bereaved lesbian or gay partner would have very little priority under a scheme, whereas a bereaved heterosexual partner would not need to demonstrate any priority to succeed. The case of Fitzpatrick v Sterling Housing Association, (1999) 32 HLR 178, HL, has established that a lesbian or gay partner can be a member of the family in order to have succession rights in a Rent Act 1977 protected tenancy.

To give greater protection to household members without succession rights we recommend that the following words are deleted from the last sentence of paragraph 3.8:

'provided the allocation has no adverse implications for the good use of the housing stock and has sufficient priority under the allocation scheme.'

Period for considering an offer of accommodation

3.9:

Giving homeless applicants a reasonable period of time to consider an offer of accommodation is an important aspect of increasing choice in lettings schemes and making the process of accessing social housing more customer oriented.

During the passage of the Homes and Homelessness Bills there was considerable debate on this issue. The Government resisted amendments that would have created a statutory minimum for the period of time to consider an offer. However Ministers made it clear that short periods of time would not be reasonable. For example Rt Hon Nick Raynsford MP, Minister for Housing and Planning said that:

> *"in the overwhelming majority of cases, three days is too short a period in which to expect a person to decide on a final offer" (Official Report, 30 January 2001, col. 356).*

On this basis the guidance should give local authorities an indication of the time period that would be reasonable.

The Guidance should also suggest factors that authorities should take into account in determining what is a reasonable period of time. While it already states that consideration should be given to the personal circumstances some examples here would be helpful.

We recommend the following addition to Paragraph 3.9 -

In the majority of cases, a period of less than three days to consider an offer of accommodation would be not reasonable. Particular personal circumstances that the authority should take into account include:

1. *Difficulty for an applicant who is working or has child or other care commitments to make arrangements to view the property*
2. *The property's distance from the applicant's current accommodation and/or*
3. *Where acceptance of the offer would involve a child changing schools or create difficulties for members of the household maintaining work or training.*

Chapter 4

4.1:

The obligation to consider all applications for social housing in section 166 (3) is a key element of the new approach brought in by the new legislation. This should be explicit and should be placed in the policy context behind the legislation. The following sentence should be inserted at line 3:

Local authorities will no longer be able to apply blanket exclusions to people applying for social housing and they will have to consider applications from people currently living outside the authority's own area.

The habitual residence test

4.3:

The reference to 2 years residence creates a presumption that it takes 2 years to establish habitual residence. This is not supported by the case law on the test. The test comes from social security law and the 2-year trigger for making enquiries comes from a recommendation from the Social Security Advisory Committee. After 2 years there is a presumption that the applicant is habitually resident.

Detailed commentary in Social Security Legislation 2001 (Bonner and Mesher) paras 2.100 - 2.113 states: 'There is no time limit after which habitual residence is established, but the longer the length of stay the more likely the person is to be habitually resident. On the other hand, a person may be habitually resident shortly after arriving in a country depending on the circumstances.' (p280)

The House of Lords considered the question in Nessa and approved the Court of Appeal view that in order to establish habitual residence it was necessary for a claimant not only to have been in the UK voluntarily, and for settled purposes, but also to have fulfilled those conditions for an appreciable period of time. This period need not be very long. There might be special cases (for example where a person is resuming a previous habitual residence) when it is established on arrival. The period is not fixed, it may be longer where there are doubts or it may be short. The case cites and approves a view in

an earlier case (Re F (A Minor) (Child Abduction)) that 'a month can be ... an appreciable period of time'.

Add, before (see annex 11)
Whilst habitual residence requires an appreciable period of residence, there is no minimum time limit set for an appreciable period. Case law suggests 'a month can be ... an appreciable period of time'. In addition, an applicant who was previously habitually resident can establish this again on arrival. Each case must be decided after taking account of all the relevant circumstances.

Para 4.4

The degree of permanence of residence

Add:
Authorities should note that it is possible to have an intention to reside in the CTA for an appreciable fixed period; it does not need to be permanent or indefinite.

Para 4.6 & 4.7:

Employment and benefits issues.

These paragraphs place additional emphasis on employment and family ties and suggest an additional test similar to 'no recourse to public funds'. This test is not part of the habitual residence test. These are all relevant factors to be considered but none are mandatory requirements. As they are factors drawn out in the guidelines of annex 11 their purpose within chapter 4 is unclear.

Delete paragraphs 4.6 and 4.7

Eligible categories

Paragraphs 4.23 and 4.24 - eligibility and reviews

Paragraph 4.23

In order to reflect that section 166(2) places a duty on authorities to inform applicants that they have the right to request a review,

Add, after "based firmly on the relevant facts of the case"

'And must inform the applicant of his right to request a review of the decision.'

4.24:

Add:
Authorities should draw up a fair procedure for carrying out reviews and have regard to the guidance in Chapters 5 and 6.

Unacceptable behaviour

In presentations that Shelter has made to local authorities about the new allocations provisions (in a series of conferences on the new Act) considerable concern was expressed about applying the new test. Local authority officers that attended felt that the test was complex and that it would be very difficult for them to posit what a court might have determined if the applicant was already a tenant of the authority. This is an area where local authorities will need very clear guidance on how to apply the new scheme.

During the Homelessness Bill's passage through the House of Lords the Minister set out some important principles to govern the way in which local authorities interpret the new unacceptable behaviour test for determining eligibility (House of Lords Official Report, 15 January 2002, Column 1007). The draft Guidance on unacceptable behaviour crucially lacks clarity, especially on matters relating to applying the test in cases of rent arrears. We suggest paragraphs 4.19 to 4.21 are reworded as follows to better reflect the Minister's statement:

4.19

Where a housing authority has reason to believe that s.160A(7) may apply, there are three aspects that will need to be established:

1. They will need to satisfy themselves that there has been unacceptable behaviour which falls within the definition in s.160A (8):

- *Grounds for possession*

In considering whether a possession order would be granted in the circumstances of a particular case, the housing authority must first ask itself whether one of the grounds for possession would have been established. This would require the housing authority proving to the court on the balance of probabilities (i.e. it is more likely than not) that, for example, the property was used for immoral or illegal purposes, or the tenant caused a nuisance or annoyance to neighbours. If the housing authority are not satisfied that , on the information it has about the applicant (or a member of the applicant's household), it would have been able to prove one of the grounds for possession, the applicant cannot be guilty of unacceptable behaviour as per s.160A(7).

- *Reasonableness*

If the housing authority is satisfied that, on the information it has about the applicant (or a member of the applicant's household), it would have been able to prove one of the grounds for possession, it then has to consider whether the court would have decided that it was reasonable to grant a possession order. The court can only grant a possession order if it considers it reasonable to do so. In deciding whether it is reasonable to grant possession, the court must have regard to the interests and circumstances of the tenant (and their household), the housing authority and the wider public. If the housing authority is not satisfied that the court would decide it was reasonable to grant a possession order, the applicant cannot be guilty of unacceptable behaviour as per s.160A(7).

- *In practice, courts are unlikely to grant possession orders in cases which have not been properly considered and are not supported by thorough and convincing evidence. It is acknowledged that in cases involving serious noise problems, domestic violence, racial harassment, intimidation and drug dealing, courts are likely to grant a possession order.*

2. Having concluded that there would entitlement to an order, the housing authority will need to satisfy itself that the behaviour is serious enough to make the person unsuitable to be a tenant of theirs. In order to do this, the housing authority must be satisfied that, if a possession order were granted (as set out in paragraph i) above), it would have been an outright order. If the housing authority has reason believe that the court would have suspended the possession order, then such behaviour cannot be considered serious enough to make the applicant unsuitable to be a tenant. Rent arrears may lead to a possession order but in most cases it will be suspended to give the tenant an opportunity to pay the arrears. This will be particularly true where:

- *The arrears are relatively modest, and/or*
- *They have been caused by delays in housing benefit, and/or*
- *The tenant does not have a history of persistently defaulting on paying the rent; and/or*
- *The applicant was not in control of the household's finances or was unaware that rent arrears were accruing or is being held liable for a partner's debts; and/or*
- *The housing authority has failed to take steps or provide practical advice to help the tenant pay their rent.*

Similarly, the court will be inclined to suspend a possession order in respect of anti-social behaviour where:

- *The allegations of nuisance are relatively minor; and/or*
- *The nuisance was caused by a member of the household who has since left; and/or*

- *The court is satisfied that the imposition of a suspended order will serve to control the tenant's future behaviour.*

Where the possession order is likely to be suspended, the applicant's behaviour should not be considered serious enough to make her/him unsuitable to be a tenant.

3. Finally, if satisfied that the applicant is unsuitable to be a tenant by reason of the unacceptable behaviour in question, the housing authority must have regard to the circumstances at the time the application is considered. Previous unacceptable behaviour may not justify a decision to treat the applicant as ineligible where that behaviour can be shown to have improved.

4.20:

Only if satisfied on all three aspects can the housing authority consider exercising its discretion to decide that the applicant is to be treated as ineligible for an allocation. In reaching a decision on whether or not to treat an applicant as ineligible, the housing authority must act reasonably. That means it must consider each application on it's own merits. It must have regard for each applicants own personal circumstances (and the personal circumstances of the applicant's household), including health and medical needs, dependants and any other factors relevant to the application. Any doubt should be decided in the applicant's favour.

4.21:

If an applicant, who has, in the past, been deemed by the housing authority to be ineligible, considers his unacceptable behaviour should no longer be held against him as a result of changed circumstances, he can make a fresh application. Unless there has been a considerable lapse of time it will be for the applicant to show that his circumstances or behaviour has changed. What constitutes a considerable lapse of time, will depend upon the individual circumstances of the case and in particular the nature of the unacceptable behaviour.

Appeals relating to decisions on eligibility

4.23:

Add
In conducting a review of a decision on eligibility it is important that the circumstances of the applicant at the time of the review, not just at the time of the original decision, are taken into account. This is to allow for a change in circumstances since the original decision to be taken into account (the paying off of arrears or establishing a payment agreement, or departure of a member of the household responsible for anti-social behaviour).

Chapter 5 Allocation scheme

Choice and preference options

5.4:

There is a certain amount of anxiety amongst local authorities, including some of those piloting choice based lettings schemes as well as those that have not developed a choice based scheme yet, as to how to ensure that they are comply with the reasonable preference requirements within a choice based approach.

Add

In order to ensure that systems adopted comply with the reasonable preference requirements (see paragraph 5.7) in determining the operation of a 'banding scheme' or 'priority card' approach authorities must ensure that they are sensitive enough, given local demand, to provide those with the most urgent housing needs priority for rehousing opportunities. For example if priority status is time limited, it must allow sufficiently long a period for applicants with that status to have a reasonable number of rehousing opportunities and as far as possible exercise choice in the same way as other applicants.

It is also the case that in complying with the reasonable preference provisions, as the categories can be cumulative, that any scheme must be capable of giving greater priority to those with a multiplicity of needs (see paragraph 5.18).

5.6:

In this paragraph it would be worth referring to the requirements in the new Regulatory Code and Guidance for housing associations.

Section 3.5.1 of the Regulatory Code states that housing associations are expected to provide good quality housing services for residents and prospective residents 'by seeking to offer a choice of home, while giving reasonable preference to those in priority housing need'.

Section 3.6 of the Regulatory Code requires that housing associations work with local authorities to enable them to fulfil their statutory duties. The guidance supporting this section of the code refers to the need for housing associations to consult local authorities on their lettings criteria, adopt letting policies that are consistent with those set out in Part 6 of the 1996 Act (as amended) and adopt lettings policies that are responsive to local authority housing duties.

Reasonable preference

The Code could provide more guidance for local authorities on the interpretation and application of the reasonable preference criteria, and should set out the policy intention behind the amendments to the categories that the new Act makes.

The Guidance should make it clear that authorities are now required to give reasonable preference to all people who are homeless within the meaning of Part VII of the Act, not just those to whom the authority owes a duty to provide accommodation.

The explanations of the 'medical and welfare' and 'hardship' grounds are welcome.

Unacceptable behaviour

This section of the code needs further clarity. Alternative wording for paragraph 5.17 is suggested following the approach suggested for the Guidance on unacceptable behaviour in the context of eligibility (see above):

5.17:

When considering whether to give no preference to an applicant because he is guilty of unacceptable behaviour serious enough to make him unsuitable to be a tenant or when determining whether, at the time the case is considered, the applicant deserves not to be treated as a person to whom reasonable preference should be given, the housing authority must act reasonably. Chapter 4, paragraphs 4.18, to 4.20 provide guidance, for the purposes of determining eligibility under section 160A(7), on what constitutes unacceptable behaviour serious enough to make an applicant unsuitable to be a tenant, sets out the steps which a housing authority should take to satisfy themselves in this regard and the approach to be taken in making decisions. This guidance applies equally to decisions under sections 167 (2B) and (2C).

Determining priorities

The provisions of section 167 (2A) give housing authorities a very wide discretion to adjust the priority of applicants falling into the reasonable preference categories. In areas where the demand for housing is high, a decision by the housing authority to adjust an applicant's priority can have a very significant impact on their access to social housing.

The wording of section 167 (2A)(b) gives particularly wide discretion to take into account an applicant's 'behaviour'. This was an issue about which there was considerable debate during the passage of the Homelessness Bill through Parliament. Concerns were raised that the provision on behaviour was too vague and that the legislation should include a definition of the kinds of behaviour that an authority could take into account in determining priorities. Ministers argued that this was a matter where local authorities should be allowed a wide discretion, they agreed however that this matter should be addressed in

guidance (see Sally Keeble MP, Parliamentary Under-Secretary of State for Transport, Local Government and the Regions - Standing Committee A, Official Report, 12 July 2001, col. 93). It was also made clear that any decision to reduce priority on the grounds of behaviour would have to be balanced against the applicant's housing needs (Rt Hon Nick Raynsford MP, Minster for Housing and Planning, Standing Committee D, Official Report, 1 February 2001, col. 414)

The Code as currently drafted clearly does not meet the commitment to address these questions through guidance. It also will not ensure that the Government's policy intentions on access to lettings are met. Paragraphs 9.15 and 9.16 of the Housing Green Paper clearly set out the Government's policy intentions in the allocation of social housing:

> *"Any decisions to suspend applications would need to take account of the circumstances of the household in order to safeguard vulnerable groups such as those with mental or behavioural problems, or the children of the families concerned. We would expect suspensions to be exceptional and that other ways of managing problems or risk may be more appropriate in many cases."*
> *"Meeting housing need remains the priority for lettings and transfer policies"*

The guidance should specify the types of behaviour that may be taken into account in adjusting priority. The current wording is far too vague and subjective. Paragraph 5.19 (b) should be reworded as follows:

(b): any behaviour of the applicant (or a member of his household) which affects his suitability to be a tenant. This allows housing authorities to take account of both good and bad behaviour. In taking a decision to reduce an applicant's priority the authority should only take into account behaviour that is relevant to their application and is deliberate, wilful or negligent. For example

- *Anti-social, threatening or violent behaviour*
- *Wilfully refusing to pay rent in the past*
- *Deliberately causing damage to their own or others' property*

Low levels of rent arrears, particularly where these have arisen due to delays in housing benefit, and non-housing debts, should not be considered as behaviour serious enough to affect an applicant's suitability to be a tenant. In determining whether to reduce an applicant's priority housing authorities must act reasonably and take into account the seriousness of their housing needs as well as their behaviour.

Specific groups 5.24 to 5.48

The Code of Guidance refers to a range of specific groups whose housing needs should be given particular consideration in the development of an allocations scheme. We would recommend the inclusion of former asylum seekers within those groups. We hope that the ODPM can liaise with colleagues in the Home Office and NASS on this issue.

Where people who receive a positive decision on their asylum claim they will move on from the NASS system of accommodation and support. Until recently, asylum seekers who received a positive decision from NASS lost support after 14 days, but since April 2002 this has been increased to 28 days. While the extension is welcome, 28 days remains a very short amount of time for a refugee family to sort out a range of issues, such as applying for benefits, seeking work and looking for alternative accommodation.

Perhaps the most pressing issue for refugees once they receive a positive notification of their status will be finding somewhere to live. The very short time households have to do this places them at high risk of homelessness. Shelter has assisted many households in this situation where they have been homeless at the point where they lose their NASS accommodation.

In many areas, it is difficult to find private rented housing, because of financial barriers such as finding a deposit and rent in advance, and providing references for landlords in addition to claiming housing benefit to meet the rent. People may turn to a local authority for help and be able to register for housing, but depending on where they apply for housing may be unlikely to be offered a home very quickly. In practice, many refugees who are to lose their NASS accommodation within four weeks, will need to seek emergency assistance because of impending homelessness from a local authority. Liaison between NASS and local authorities may be able to prevent the need for families receiving a positive decision on their asylum claim having to make a homelessness application and move from one form of temporary accommodation to another.

Reviews

The new provisions on reviews are far less prescriptive than those under the 1996 Act. It is likely that many applicants will want to seek a review of a decision of ineligibility given the potential difficulties that will arise from applying such a subjective test in determining eligibility. It is essential that in, the absence of regulations governing procedures for reviews, the Code provides sufficient guidance for local authorities to develop appropriate reviews procedures, particularly given that this the allocations function is human rights sensitive. The Code should offer guidance on how reviews should be conducted and by whom in order to ensure that they comply with Article 6 of the Human Rights Act 1998.

The Code of Guidance includes more or less the same information on reviews in two places. It might make the Code of Guidance more user friendly if all the material on reviews is in one place. It may be clearer to consolidate these paragraphs and para 6.7 and place them within Chapter 5

The suggested sequence is:

Advice and assistance about making an application
The duty to inform an applicant of his right to information and to ask for a review
The right to request general information
The right to be notified of particular decision
The right to request a review of certain decisions

Chapter 6: Advice and information

6.7:

Add - Housing authorities should consider making information available in appropriate languages and formats.

The right to information about decisions and the right to a review of a decision

6.10:

Add - Authorities should consider how to make sure this information is available for all applicants when an application is made and when any decision is notified.

Contracting out the allocations scheme

Many local authorities, in particular those that have transferred their housing stock to a registered social landlord, have contracted out their current allocations scheme. Contracting out is governed by an order (The Local Authorities (Contracting Out of Housing and Homelessness Functions) Order 1996) made under the Deregulation and Contracting Out Act 1994. Shelter has found that the ability of some authorities to meet their statutory housing responsibilities post-transfer has been adversely affected by poorly drafted agreements with contracted agencies (see Out of Stock, 2001). This is an area where housing authorities would be benefit from guidance.

The Order states that any function under part 6 of the Housing Act 1996 can be contracted out apart from the following:

a) Section 161(4) (classes of persons qualifying for allocations);
b) Section 162 (the housing register) so far as they relate to any decision about the form of the register;

c) Section 167 (allocation in accordance with allocation scheme) so far as they relate to adopting or altering an allocation scheme (including decisions on what principles the scheme is to be framed) and to the functions in subsection (7) of that section;

d) Section 168(2) (information about allocation scheme) so far as they relate to making the allocation scheme available for inspection at the authority's principal office.

The first two points have been repealed by the Homelessness Act 2002. Although the Homelessness Act repeals the requirement to have a housing register a duty for housing authorities to have an allocation scheme remains, authorities can still contract out their allocations scheme but the ultimate responsibility for Part VI duties remains with the local authority, as it always has.

The provisions of s 167, which cannot be contracted out, give local authorities responsibility for altering their scheme and taking decisions about the principles framing their scheme. This means that local authorities that have contracted out their Part 6 functions cannot leave it to the contracted agency to change the scheme to make it comply with the new Act. The local authority must take decisions about how it will revise its scheme and then amend or agree a new contract with its agency in order to comply with the new legislation.

Housing authorities that are reviewing or agreeing contracts should ensure that their agreement includes:

- *Arrangements for monitoring and performance targets;*
- *Requirements to provide the housing authority with information it needs to carry out it strategic housing function;*
- *Provisions to review and amend the scheme in the light of changing circumstances (eg changes in demand or legislation)*
- *Requirement to mange the allocations scheme in accordance with this Code of Guidance and the authority's homelessness strategy*

Annex 5: Eligibility pathway: model questions & procedures

If the questions are asked in the order set out in the annex, questions 7 - 10 inclusive (on exceptional leave to remain, leave to remain and ECSMA citizenship) will be missed. Questions 1 - 6 result in either a conclusive finding on eligibility or an eventual direction to question 11.

Q9 The list of countries that have ratified the ECSMA or ESC should include Malta and Turkey.

Annex 11: Habitual residence test

Layout

We suggest that the definition and the general principles follow 'Who the HRT does not apply to' in order to set the factors to consider in some context. Follow with a definition of worker and then go to 'action on receipt of an application' with the various factors to consider.

General principles

Bullet point 4

'Intention as it appears from all the circumstances' (see Swaddling) is a relevant factor to be considered, it is not clear why this is downgraded here.

Reword as

- *The length, continuity and general nature of actual residence can provide important evidence of an applicant's intention*

Bullet point 5

The 'practicality of a person's arrangements for residence' may be interpreted so to exclude people who are dependent on benefits.

Add

however, the fact that an applicant is dependent on welfare benefits is not a sufficient reason to decide that he is not habitually resident.

Length of residence in another country

These considerations do not appear relevant to why a person is now habitually resident in the UK. They draw the focus away from nature of the residence in the UK and intention of the person now they are resident.

Delete first sentence and bullet points

Add second paragraph to the centre of interest factor, as it is more helpful in that context. Replace 'would normally' in second sentence with 'may'.