

Consultation response

## **Department for Communities and Local Government consultation**

### **Draft Homelessness Code of Guidance for Local Authorities**

## **Executive Summary**

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.

## 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-focused 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.<sup>1</sup> 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<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> [Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness 2016](#)

<sup>2</sup> Garvie, D. ["It's a personal thing" What service users need from assessments and personalised housing plans - Homelessness Reduction Act 2017](#), Shelter, November 2017

<sup>3</sup> Communities and Local Government Committee: [Homelessness Reduction Act inquiry](#)

# 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'<sup>4</sup> 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

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<sup>4</sup> [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'.

- 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**

***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 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<sup>5</sup>, 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

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<sup>5</sup> 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<sup>6</sup> 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<sup>7</sup> 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<sup>8</sup> 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 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.*'<sup>9</sup> 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<sup>10</sup>, together with information in Annex 7 of the current Code, will be provided by DCLG in a forthcoming code of practice and practice hub.

<sup>6</sup> The Homelessness (Suitability of Accommodation) (England) Order 2012

<sup>7</sup> *Nzolameso v City of Westminster*, [2015] UKSC 22 (Supreme Court, 2 April 2015). See Garvey, K., *Offering temporary accommodation out of area*, Shelter, 2015

<sup>8</sup> Garvey, K. and Pennington, P. *Home and Away: the rise in homeless families moved away from their local area*, Shelter, 2015

<sup>9</sup> [Policy Fact Sheet 3: Duty to assess all eligible applicants' cases and agree a plan](#), DCLG, 2016

<sup>10</sup> [Homelessness Prevention: a Guide to Good Practice](#), DCLG, 2006



- **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<sup>11</sup> 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

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<sup>11</sup> [Discretionary Housing Payments Guidance Manual - Including Local Authority Good Practice Guide](#), DWP, December 20116



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<sup>12</sup>, 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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<sup>12</sup> Homelessness (Suitability of Accommodation) Order 1996 (SI 1996 No.3204)

## 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 section 188 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 and 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).<sup>13</sup> 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<sup>14</sup> 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.

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<sup>13</sup> <http://atleu.org.uk/>

<sup>14</sup> [Victims of Modern Slavery - Competent Authority Guidance](#) – version 3, March 2016, British Association of Social Workers