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Dear Ms Walker

Consultation - Allocation of Accommodation: Choice Based Lettings: Code of Guidance for Local Housing Authorities

We enclose our response to the consultation on the draft Code of Guidance. This is being sent as an attachment by email and a hard copy put in the post to you.

Yours sincerely

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ALLOCATION OF ACCOMMODATION: CHOICE BASED LETTINGS

DRAFT CODE OF GUIDANCE

A response to the Consultation Draft from:

**The Housing Team
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Barristers

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Introduction

(1) The Authors

Garden Court Chambers has one of the largest specialist teams of housing law barristers in the country and has a reputation for excellence. We cover all aspects of housing law including: homelessness, allocation of social housing, security of tenure, unlawful eviction, disrepair and housing benefit. We are particularly committed to representing tenants, other occupiers, homeless people and those seeking to secure access to social housing. Our housing law team provides a full range of services, covering cases from the lowest to the highest courts, as well as undertaking advisory work. According to the trade directory *Chambers and Partners 2007*:

“Garden Court Chambers is considered by sources to be one of the best applicant sets in the country for housing...The 16-strong specialist housing team in London covers all areas of the subject and contains some “excellent practitioners.”

Our work is not confined to the courtroom. We also spend time training, advising and writing on housing issues. We were the first chambers to serve as a LSC Specialist Support Service provider in Housing Law, and since 2004 we have been offering specialist support and training under contract direct from the Legal Services Commission. We regularly contribute articles and case reports to professional publications. The team members responsible for the present document have also written *Housing Allocation and Homelessness* (Jordans), The *Homelessness Act 2002: A Special Bulletin* (Jordans) and *Housing and the Human Rights Act: A Special Bulletin* (Jordans).

(2) Our Approach

We welcome the opportunity to comment on this draft Code of Guidance on *Choice Based Lettings* (“CBL”). We use the *present* statutory Code of Guidance in our daily professional practices and regularly refer to it in our advisory and litigation work.

In common with local authorities and housing applicants, we have been waiting anxiously for the appearance of this further statutory guidance since it was first announced in November 2002. In its absence, local authorities have been actively encouraged to press ahead with the development of CBL schemes in the absence of essential statutory guidance. That should not have occurred.

We have taken an unashamedly “consumer” orientated approach to the draft. We have been anxious to test whether it is legally accurate but more importantly to review its usefulness and workability in the hands of local government officers, applicants (and their advisers) and lawyers.

The commentary we provide follows the chapter sequence of the draft Code.

CHAPTER ONE

Purpose of the Code

Introduction

1. The avowed purpose of the draft Code is to assist local authorities in exercising their functions under sections 167(1A) and 167 (2E) of the Housing Act 1996 (“the 1996 Act”).
2. The draft Code is intended to provide information about the factors that local authorities *should* take into account - and other factors that they *may* wish to consider - when framing an allocation scheme so as to offer a choice of accommodation. In what follows, the draft Code will be referred to as the ‘Choice Code’.
3. We are concerned that those responsible for the present draft – in seeking to provide guidance of real assistance - have failed to address experience on the ground since the introduction of the current statutory framework in January 2003. There has been much published research on what has – and as importantly what has not – been happening and the statutory provisions have had repeated scrutiny in Court.
4. For example, there have been three important studies of local housing authorities’ practices in the allocation of accommodation in the last two years.
5. First, *A Question of Choice: Good Practice and issues in choice-based lettings* (Shelter, June 2005, www.England.shelter.org.uk) found:
 - (a) The perception of fairness and transparency in the distribution of social housing is improved in areas operating CBL schemes;
 - (b) CBL is being used as a vehicle to shift housing priority away from those in housing need, in particular homeless applicants had less choice and were forced to bid more often, and more quickly;
 - (c) Vulnerable applicants, who may struggle with the bidding process, were at a disadvantage;
 - (d) CBL was not yet enabling mobility between areas and regions and there were “significant barriers” to housing associations participating in the scheme.
6. Second, *Housing Allocations & Homelessness* (Public Services Ombudsman in Wales, February 2006, www.wales.gov.uk) found:

- (a) a significant number of Welsh local housing authorities had yet to adopt allocation policies that fully complied with the law and took account of the statutory guidance;
- (b) in particular the changes introduced by the Homelessness Act 2002 had still not been sufficiently introduced, some three years after those changes had come into force;
- (c) as a result, the lawfulness of each allocation decision since January 2003 is potentially questionable;
- (d) some local housing authorities continued to operate unlawful policies of blanket exclusions; and
- (e) some local housing authorities were failing to implement the categories of groups entitled to a reasonable preference.

Local housing authorities were asked to take expert legal advice and review their allocation schemes as a matter of urgency.

7. Third, *Exclusions in Tyne & Wear* (Shelter NEHAC, April 2006, www.England.shelter.org.uk) found:

- (a) Blanket exclusions were continuing;
- (b) Many people were being excluded for low levels of rent arrears (which would not have resulted in an outright possession order);
- (c) Homeless families who were unlawfully excluded could be trapped in temporary accommodation with detrimental effects particularly for any children in the household;
- (d) The exclusions go against the government's target of reducing the use of temporary accommodation by one half by 2010;
- (e) Young people were particularly subject to unfair exclusions;
- (f) People with criminal records were unfairly excluded;
- (g) In the vast majority of cases, the behaviour for which applicants were excluded had occurred at least a year earlier and no attempt was being made to apply the second limb of the behaviour test for eligibility;
- (h) Failure to inform applicants of decisions in writing and therefore to allow them access to reviews;
- (i) Where applicants were assisted by independent advisers on appeals, their appeals were successful.

8. The report recommended that:

- (1) Allocation schemes should provide realistic routes back into social rented housing;
- (2) Where applicants are excluded, they should be informed of the reasons for the decision and also what action they are expected to take so as to lift the exclusion in the future;
- (3) Anyone who is positively engaging with a recognised agency that provides support (in order to address the reasons for the behaviour that might lead to an exclusion decision) and will continue to provide support if the

applicant is housed should be allowed onto an allocation scheme;

- (4) All housing staff involved in allocation decisions should be fully trained in the behaviour test;
 - (5) Local housing authorities and RSLs should adopt a code of good practice involving assistance in applying for an allocation, referrals to independent advice, clear information about the test, written decisions and information about appeals;
 - (6) There should be regular audits to ensure that blanket exclusions are not being applied in practice;
 - (7) A decision to exclude an applicant should be made by more than one officer, on undisputed and not hearsay evidence, with the applicant being given an opportunity to explain or provide evidence, and applying actual court practice “*in the round*”.
9. It is important that the new guidance on Choice Based Lettings acknowledges some of the failures of local housing authorities identified above and provides realistic and authoritative guidance to deal with those failures.

The need for a single comprehensive Code

10. **Paragraph 1.3** of the draft Choice Code states that:

“This guidance is therefore supplementary to the Allocation of Accommodation Code of Guidance for Local Housing Authorities issued in November 2002 (referred to in this guidance as the ‘Allocations Code’).”

But there are several problems with stating that the Choice Code is supplementary to the Allocation Code.

11. When there is both an Allocation Code and a Choice Code, there are two sources of information as to how an allocation scheme (based on choice) is to be framed, in circumstances where the information contained in each code may overlap, diverge, and only partially reflect the proper list of factors that each local housing authority needs to consider when framing an allocation scheme.
12. As the intention is that all local housing authorities should have a choice based allocation scheme by 2010 (and no longer simply, an “element” of choice in their schemes) it would be more sensible for there to be a *single* Allocation Code that made reference to factors concerning Choice Based Lettings where material. In this way, there would be a *single* source of statutory guidance that avoids the risk that a person - seeking to ascertain how a choice based allocation scheme ought to be framed - may become confused.

13. In the event, the current Allocation Code (issued in 2002) is not presently a complete, accurate or reliable guide to the state of the law in relation to framing an allocation scheme. For example, it does not contain any reference to the current eligibility provisions to be found in the *Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006* SI 1294/2006 but relies on the old eligibility provisions found in the *Allocation of Housing (England) Regulations 2002* SI 3264/2002.
14. Moreover, the current Allocation Code makes no reference to the new requirement contained in section 167(2)(d) of the 1996 Act to frame a scheme so as secure that reasonable preference is given to “people who need to move on medical or welfare grounds (including grounds relating to a disability)”. The reference to disability was added by section 223 Housing Act 2004. It has been in force in England since 27 April 2005. But there is still no statutory guidance on its application incorporated into the Code.
15. The danger in making the Choice Code *supplementary* to, or parasitic upon, the Allocation Code is that inaccurate and misleading information may be obtained from the latter and relied upon in considering whether a particular allocation scheme complies with current legal requirements. Put simply, the Allocation Code is out of date and should not be relied upon as if it had been re-endorsed as an accurate guide to the legal requirements necessary to establish an allocation scheme in 2007. The Allocation Code was issued in November 2002. It is showing its age.
16. We **recommend** that the content of the Choice Code be issued as part of a revised and re-vamped single Allocation Code.

Potential users

17. **Paras 1.4 to 1.5:** If the Choice Code is relevant to registered social landlords, social services departments, health authorities and so on, it should state clearly in detail how, and for what express purpose, the Choice Code needs to be considered by these bodies. For example, if there is a medical and/or welfare panel to be set up under an allocation scheme in order to decide whether to award ‘reasonable preference’ to an applicant on medical and/or welfare grounds, and if employees of social services departments and/or health authorities are to sit as members of such a panel and participate thereby in an allocation scheme, then it should be made clear that the Choice Code, and indeed the Allocation Code, must be considered by them when participating in setting-up such panels under an allocation scheme and in operating the panels under the scheme.
18. Our experience is that there are widespread difficulties in practice in relation to local authority nominations made to RSLs under existing allocation schemes. Nominating authorities are treating themselves as bound to apply the

law and the statutory guidance in relation to nominations but RSLs are treating themselves as free to apply their own criteria and policies irrespective of their consistency (or otherwise) with the nominating council's allocation scheme. If RSLs are expected to comply with the statutory guidance issued by the Secretary of State, the legal or policy basis for that expectation must be made clear. See our comments on Chapter 6 below.

Relevant Legislation

19. **Paras 1.6 to 1.8:** There is only a *partial* and incomplete list of legislation, set out from paragraph 1.6 onwards, to which it is said that local authorities must have regard in framing an allocation scheme. Section 71 Race Relations Act 1976 and Section 49A Disability Discrimination Act 1995 (in force 4 December 2006) are mentioned. However, there is an equivalent provision imposing a general statutory duty on public authorities in respect of sex discrimination. Section 84 of the Equality Act 2006 inserts section 76A into the Sex Discrimination Act 1975. It is in force from 6 April 2007. No mention of it is made in the Choice Code - which is due to come into force *after* the date section 76A Sex Discrimination Act 1975 comes into force. This is a serious omission. In addition, there is a further serious omission in the failure to make reference to the Equality Act (Sexual Orientation) Regulations 2007. These will make it unlawful for a public authority exercising a public function to do any act which constitutes discrimination (Regulation 8) and unlawful for a person to discriminate against another in connection with a list of persons requiring premises (Regulation 5). They extend protection to those at risk of discrimination on grounds of sexual orientation. The Regulations are due to come into force on 30 April 2007.
20. The Choice Code provides little concrete assistance for local housing authorities as to how they may frame an allocation scheme in a manner consistent with their obligations under race, disability, sex and sexual orientation discrimination legislation. Reference needs to be made to other sources of information. For example the Disability Rights Commission ("DRC") has published '*Housing and the Disability Equality Duty – A guide to the Disability Equality Duty and Disability Discrimination Act 2005 for the social housing sector*' This contains invaluable information for local housing authorities in respect of the new Disability Equality Duty, information on preparing a Disability Equality Scheme, and a section on 'lettings and allocations' that specifically considers choice based allocation schemes (pp. 54-57). There is also no reference in the Choice Code to the DRC publication '*The Duty to Promote Disability Equality: Statutory Code of Practice*'.
21. In addition, there is no reference to other sources of important duties contained in legislation. Taking disability again as an example, the *Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005* SI 2966/2005 impose an obligation on a local authority to publish a Disability Equality Scheme showing how it intends to fulfil its duties under section

49A(1) of the Disability Discrimination Act 1995. In England, London borough councils and district councils were required to have such a scheme by 4 December 2006. A local authority must review its Disability Equality Scheme and publish a revised scheme no later than three years beginning with the date of publication of its first scheme. A Disability Equality Scheme is a tool to identify action to ensure that disabled people are treated fairly in, among other things, the allocation of social housing.

22. Whilst the Choice Code does make reference to ‘Providing choice for disabled people with access needs’ (at **paras 4.56-4.62**) and to the need to comply with the ‘disability equality duty’ when monitoring (at **para 5.27**), there is no information provided as what a Disability Equality Duty is, the legislative source of that duty, the obligations under that duty and how that duty interacts with the Choice Code in framing an allocation scheme and reviewing an allocation scheme thereafter.
23. Turning away from general public law duties arising under discrimination legislation, there is also no reference in the Choice Code to the need to frame an allocation scheme so that due account is taken of an individual’s right not to be discriminated against in relation to housing lists. An individual may have a cause of action in the county court in relation to such discrimination. Taking disability discrimination again as an example, section 22(1)(c) Disability Discrimination Act 1995 makes it unlawful for a person with the power to dispose of any premises to discriminate against a disabled person in the treatment of that disabled person in relation to any list of people in need of premises. The DRC “*Code of Practice Rights of Access: services to the public, public authority functions, private clubs and premises*” makes it clear that this includes the allocation of housing (p. 236).
24. We **recommend** that this whole section of the Choice Code is re-written to ensure that it is both comprehensive and relevant. Statutory guidance should go beyond simply listing or summarising other statutes. To be useful it should show, perhaps by illustration and examples, how the legislation actually or potentially impacts on the process of framing an allocation scheme.
25. **Paras 1.10 to 1.11:** If the provisions of an allocation scheme made under the Choice Code are to be compatible with the local authority’s housing strategy and relevant regional (and sub-regional) housing strategy, the Choice Code should provide that any allocation scheme identifies the strategies that have in fact been considered and states whether that scheme is compatible with those strategies and what steps, if any, have been taken to make it so.
26. If the provisions of an allocation scheme made under the Choice Code are to be considered to see how they interact with other programmes of care and support for vulnerable people, the Choice Code should provide that any allocation scheme states whether that scheme has been so considered and what steps, if any, have been taken to provide a coherent and integrated service to vulnerable people in need of housing, care and support as a result.

CHAPTER TWO

Overview of legislation & policy

Overview

27. This Chapter rehearses the present government's policy objectives in terms of "choice" and seeks to place them in a statutory context. We make no comment on the merits or otherwise of that policy although we doubt the usefulness – in statutory guidance – of simply restating a summary (at **paras 2.8 - 2.9**) of what the policy is. What local authorities, applicants and their advisers need to know is what practical guidance the Secretary of State is giving about how to give effect to that policy in framing allocation schemes and making individual allocation decisions.
28. The real difficulty in doing that properly arises from a mismatch between the underlying policy and the statutory framework. It might have been expected that the current aim of having all allocation schemes infused by notions of "choice" by 2010 would have some statutory underpinning. The legislation contains no such legal foundations. The whole present scheme for "choice" in allocation rests on two small statutory "stepping stones" of marginal relevance.
29. First, section 167(1A) of the 1996 Act requires that any local allocation scheme shall include a statement of that authority's policies on offering choice and opportunities to express preferences. It is entirely limited to what an allocation scheme must *say* about those matters. It expressly does *not* require any such schemes to have any element of either choice or preference. It could be sufficiently met by a statement to the effect that the authority has "*decided to allocate available dwellings based on its assessment of most pressing housing need and therefore offers applicants neither choice nor opportunities to express a preference*". That is hardly a firm statutory platform from which to drive all local housing authorities to not only include an element of choice in their policies but to move wholesale to Choice Based Letting by 2010. The draft Choice code (at **para 2.3**) would be more accurate if it explained that there was *no* statutory requirement to adopt a policy of "choice" or a scheme reflecting such a policy but that the present government would prefer that to happen.
30. Our own experience (and that of the Welsh Ombudsman – para 6 above) is that very many authorities have failed to grasp even the most explicit requirements of the current statutory scheme. Those drafting the Choice Code would do well to examine a range of allocation schemes adopted since 2003 to see to what extent there has been non-compliance with the requirements of section 167(1A) and, if it finds examples of "good practice", use them to give concrete guidance on how to comply with the provision.

31. We are troubled by the draft Choice Code’s treatment of “preferences” (**para 2.4**). Again, the guidance fails to grasp the practical realities. What authorities need to know is the extent to which they must take account of and/or give effect to statements of preference (e.g. “*I would like a bungalow*”, “*I would prefer to live in area A rather than area B*”, “*I want a place with a garden*”). The Choice Code must spell out that the local published scheme should make clear:
- (a) how such preferences can be expressed;
 - (b) what notice will be taken of them (if any); and
 - (c) how and by whom decisions about “preference” matters will be taken.

The present draft (**para 2.4**), rather than addressing those matters, says simply “*Wherever possible such preferences should be taken into account..*”. That not only fails to explain “how” but suggests that an authority may decide not to take into account a preference which has been expressed. That may expose an authority to the criticism that it has failed to have regard to a relevant consideration in making an allocation decision

32. The second statutory stepping stone (“pebble” would perhaps be more accurate) is contained in section 167(2E) of the 1996 Act. That provides that a local scheme may contain provision about the allocation of particular housing to a person who specifically applies for that particular housing. The first point to be made (and not made in the draft Choice Code) about that statutory provision is that it gives authorities an *option*. They may, or if they prefer may not, include such a facility in their scheme. Again, hardly a firm statutory underpinning to a drive to a mandatory national system of CBL.
33. But in any event, the statutory provision has a more “homely” function. It allows for the common circumstance of an applicant who finds an empty dwelling (or one that is about to be vacated) to say to an authority “why can’t I please be allocated that one?”. It is how to frame a scheme to deal with matters of that nature that the guidance should be addressing because it represents the reality of life on the housing office “front desk”.
34. Even if this tiny statutory provision is seen as the legal underpin for Choice Based Letting, it could and should be more fully addressed. For example, the “advertising” and “bidding” processes for individual properties can be clearly explained in the scheme. But our experience suggests that authorities balk at the notion that the “top-bidder” automatically gets allocated the subject property. Most reserve some final “shortlisting” or “scrutiny for suitability” at that stage. If that is lawful at all, it can only be so if facility for it is spelled-out in the allocation scheme – how such decisions are taken, by whom and applying what criteria. The only statutory scope for it is the very provision here in issue and this is the place in the current draft Choice Code (**para 2.6**) for some guidance about it. The present draft is silent.

Defining Choice Based Letting

35. Precisely because it has no statutory foundation, there is no statutory definition of Choice Based Letting. **Para 2.7** of the draft should make that clear.

36. We are troubled that the draft Choice Code deals so sparsely with the legal basis for Choice Based Letting schemes at local level. We are very worried that a move is being encouraged to regional and sub-regional schemes (for which there is no foundation whatever in the 1996 Act) without explaining – in this draft Choice Code or elsewhere – how such developments fit with the requirement of the 1996 Act for each authority to have its own local scheme and the prohibition from making any allocation otherwise than in keeping with that scheme (section 167(8)).

CHAPTER THREE

Choice based lettings: general

37. **Para 3.1** makes the important point that any opportunities for “choice” should be made available to “all”. However, it does not explain (but should do so) whether the “choice” approach should be extended to the many and various types of letting excluded from the current local housing allocation regime by both statute (section 160 of the 1996 Act) and the regulations made under it. For example, do those asked to make “management transfers” have an expectation of choice?
38. We have observed instances where – even when an avowedly “choice” based scheme is operating – some groups of applicants are told that they will not get a choice but a “direct-let”. If that is permissible, the Code should indicate when and in what circumstances.
39. **Paras 3.2 – 3.5** contain useful advice on help in making an application for an allocation, and a useful reminder that all applications must be considered. The lessons from the *Exclusions in Tyne & Wear* study (see para 7 above) suggest that many potential applicants are turned away before they are given the chance to make an application and told that the local housing authority will not accept people on rent arrears or with criminal records. They are not told by the Choice Code that, even if such a policy were to exist and be lawfully implemented, the applicant still has the right to make a written application and to have his or her circumstances at the time of the making of the application considered (section 160A(7)(b)). The Code should address that.
40. The Choice Code should give guidance to the effect that everyone should have the right to make an application and not be turned away, and that all decisions must be in writing (section 167(4A)(b)). Where those decisions are to exclude the applicant, an applicant must be informed of his or her statutory right to a review of that decision (section 167(4A)(d)).
41. Where local housing authorities are operating the statutory ‘unacceptable behaviour test’, their standard housing application forms should make it clear:
 - (a) what the parameters of the policy are; and
 - (b) that the applicant has the right to make a case why, in the circumstances at the time his or her application is being considered, he or she should not be considered unsuitable.
42. Local housing authorities should also be reminded that a completed application form for an allocation might contain information that would trigger the local housing authority’s other statutory responsibilities, such as information leading an authority to have reason to believe that the applicant is, or might be, homeless or information leading the authority to believe that the applicant requires social services assessment and assistance under the

Children Act 1989, National Assistance Act 1948 or the National Health Service and Community Care Act 1990.

43. **Para 3.9** proposes that the eligibility tests at sections 160A(3), (5) and (7) operate on two occasions:

- (a) at the date of the application; and
- (b) at a subsequent date when an allocation is to be made to the applicant.

Although one might see the sense of that, it does not accurately reflect the current statutory regime under which the regulations direct attention to the determination of eligibility as at the date an *application* for allocation was made (e.g. regulation 8(a) of the 2006 Regulations).

44. **Para 3.11** of the draft Choice Code deals with the imposition of “penalties” on applicants who successfully bid but then decline offers. The Code could usefully make it clear that the present statutory framework does not envisage a system of penalising applicants and that any authorities with schemes which include “penalty” provisions may wish to revise them urgently.

45. **Para 3.13** gives guidance as to the “reasonable period” in which to make a decision about an allocation of accommodation. We believe that a minimum period should be specified and that, even under a Choice Based Lettings Scheme, the minimum period should be at least a week. Local housing authorities should also be reminded that a minimum period of a week should be extended to a longer period if an applicant requires additional assistance or has particular needs.

CHAPTER FOUR

Choice based lettings: policy content and scheme design

46. The decisions of the courts of R (A) v Lambeth LBC¹ and R (Cali & others) v Waltham Forest LBC² suggest that local housing authorities have great difficulty in devising systems to identify and give effect to “composite need”. We believe that the guidance emphasising composite or cumulative need should be strengthened.
47. In addition, the decision in Cali shows the difficulties of broad bands, in which relative priority within the bands is determined only by waiting time. Waltham Forest had three of the four broad bands identified by the draft Choice Code (at **para 4.14**) and was unable, within those bands, to identify composite need. As the draft Code acknowledges, either there needs to be some points system within each band identifying relative housing need, or there need to be more bands (**para 4.18**). Either system is complex but the complexities cannot, in our view, be avoided if the statutory emphasis on housing need and reasonable preference for certain groups is to be complied with. Local housing authorities should be reminded that apparently simple allocation schemes are unlikely to comply with the Housing Act’s emphasis on meeting housing “need”.
48. Case-law has established that those with a “legitimate expectation” of an allocation of a secure or assured tenancy should also be provided-for within an allocation scheme (R (Bibi & Al-Nashed) v Newham LBC³). The Choice Code should address that.
49. **Para 4.7(a)**: It should be emphasised that the reasonable preference to be afforded to people who are homeless does *not* depend on their having made an application for homelessness assistance (under Part 7 of the Act), let alone having had such an application determined. The broad definition of “homeless” at sections 175 – 177 of the 1996 Act should be emphasised. In particular, it should be made clear that “homeless” includes those people who have a property that they are legally entitled to occupy but which is not reasonable for them, or members of their household, to continue to occupy.
50. **Para 4.7(d)**: It should be emphasised that the need to move on medical or welfare grounds, including grounds relating to a disability, does not require the *applicant* to have such a need to move. If a member of the applicant’s household has such a need to move, the reasonable preference category will be satisfied. The Welsh Code advises that this category should include those people whose need to move arises as a result of recovering from alcohol or substance drug and we agree with that approach. It should be incorporated in the new Code.

¹ [2002] EWCA Civ 1084, [2002] HLR 57, CA

² [2006] EWHC 302, [2007] HLR 1, Admin Ct

³ [2001] EWCA Civ 495 & 607, (2001) 33 HLR 84, CA

51. **Paras 4.41 – 4.42:** local housing authorities should be reminded that “local connection” has a specific statutory meaning (at section 199 Housing Act 1996) and should be applied accordingly. An applicant who has family associations with, or is employed in, a local housing authority’s district will therefore have a local connection with it, even if he or she does not live there. We are concerned that local housing authorities which operate a “local connection” policy may end up turning away applicants (which would be unlawful as “local connection” refers to the priority between applicants, does not refer to eligibility to join the allocation scheme).
52. **Paras 4.47 – 4.54:** we welcome the guidance on choice for homeless applicants. As practitioners, it is our experience that homeless applicants are rarely given a choice and the practice of giving a homeless applicant his or her “final offer” as his or her first offer is all too common. This is confirmed by Shelter’s findings in 2005 that ‘homeless applicants had less choice and were forced to bid more often, and more quickly’. We don’t have any reason to believe that this has changed.

CHAPTER FIVE

Managing a Choice based lettings scheme

53. **Paras 5.1 – 5.4:** homeless people should be consulted on changes to the allocation scheme. This includes rough sleepers, as well as those people given temporary accommodation by the local housing authority.
54. Whilst the draft Code is right to warn against the publication of the local housing authority's allocation scheme solely on the web, we would urge that local housing authorities are encouraged to put the whole of their allocation schemes on the web, and to update their web-sites regularly, in addition to the more conventional means of publication. We would also suggest that pro-forma application forms should always be made available on the web.
55. In 2005, Robert Latham, barrister, conducted an exercise in which he tried to obtain print copies of allocation schemes from 12 London local housing authorities. Only 4 replied within 14 days, 5 within a further 14 days, and the remaining three only after he complained to the monitoring officer and/or threatened legal proceedings⁴. The draft Code should make it clear that this sort of dilatory response to statutory obligations is unacceptable.

⁴ Robert Latham, "Allocating accommodation: reconciling choice and need" Legal Action March & May 2005

CHAPTER SIX

Delivering choice in Partnership with RSLs and private sector landlords

56. **Paras 6.6 – 6.15:** The criteria adopted by RSLs for acceptance onto their own allocation schemes is frequently different to the statutory criteria set out in Part 6 Housing Act 1996 (s.160A(7)). The criteria operated by RSLs are often more restrictive than the statutory criteria. A common example is that RSLs will not allocate to anyone with rent arrears, whether or not the statutory test at s.160A(8) is met.
57. It is not uncommon, in our experience, for local housing authorities to nominate to a RSL an applicant who has been accepted as eligible pursuant to the statutory criteria. However, if the applicant does not qualify as eligible under the RSL's own criteria for allocation, the RSL will refuse the nomination. This occurs even where the nomination is in accordance with the agreement between the RSL and local housing authority whereby the RSL will accept a certain number of local housing authority nominations.
58. It is our view that the Department, in association with the Housing Corporation, should provide explicit guidance to RSLs to the effect that RSLs must accept all nominations made by the local housing authority. If an applicant has been found to be eligible under the statutory criteria, we see no reason why he or she should then have to face a non-statutory bar imposed by the RSL to which the local housing authority nominates.
59. This situation applies to all local housing authorities, as nowadays all have nomination agreements with RSLs, but is particularly acute where the local housing authority is no longer owner of any stock, it all having been transferred (**paras 6.18 – 6.22**).
60. The Department will also be aware that the question of whether or not RSLs are public authorities, and therefore open to challenge through judicial review, is very uncertain⁵. The absence of judicial review means that an applicant who has been unlawfully refused an allocation by a RSL has no direct remedy against the RSL.
61. We welcome the guidance at **para 6.7** that advises RSLs to publish their nomination schemes.

⁵ The RSL in Donoghue v Poplar HARCA ((2001) 33 H.L.R. 73, [2001] EWCA Civ 595, CA) was considered to be a public authority and subject to the Human Rights Act 1998 as well as judicial review. Analogous organisations, such as care homes, have been held not to be public authorities (R (Heather) v Leonard Cheshire Foundation ([2002] 2 All ER 936, CA) and Johnson & others v London Borough of Havering ([2007] EWCA Civ 26, CA).

62. **Para 6.23:** we note that the guidance advises local housing authorities to advise applicants of the limited security of tenure implications of accepting assured shorthold tenancies from private landlords.
63. We have been consulted in cases where local housing authorities have nominated an applicant to an RSL and s/he has been offered an assured shorthold tenancy by the RSL, in accordance with the RSL's policy. Sometimes the initial tenancy is for a fixed term of one year, with the indication that an assured tenancy would be granted at the end of the fixed term (dependent on good behaviour). In those circumstances, the assured shorthold tenancy is akin to an introductory tenancy. We have also been consulted where the offer of an assured shorthold tenancy is not to be replaced by an assured tenancy.
64. We believe that the guidance should specify that assured shorthold tenants should not fall within the definition of "assured tenant" at s.159(1)(c) and that the offer of an assured shorthold tenancy does not constitute an allocation for the purposes of Part 6.

CHAPTER SEVEN

Regional and sub-Regional Schemes

65. **Paras 7.1-7.17:** The Government has a policy objective for Choice Based Lettings schemes to be developed on a sub-regional and/or regional basis. It considers that such schemes are the best way to achieve the greatest choice and flexibility in meeting applicants' housing needs.
66. However, there are problems with setting-up such schemes on a firm statutory footing (see our observations on Chapter 2 above). There are important legal differences between a local authority:
- (i) co-ordinating an allocation function with another local authority,
 - (ii) having an identical allocation scheme to that of another local authority,
 - (iii) having a common allocation scheme *with* another local authority, and
 - (iv) having a single housing register.
67. In the various scenarios outlined in Chapter 7, the Choice Code does not deal adequately with the issue of "who decides what" in the allocation *process*. Nor with the issue of "who" makes the actual decision to allocate a property and "how" do they make it? An applicant may enter a scheme via an application made to local authority 'A'. Thereafter, his place on the housing register is determined under the scheme that is run jointly or in common with local authority 'B'. There comes a point when he is able to bid for a property. The property is owned by local authority 'B'. In this scenario it is unclear whether it is local authority 'A' or local authority 'B' who makes the actual allocation decision.
68. Whilst it may be permissible to administer a common allocation scheme for applicants from more than one local authority, and to delegate the administration to a single body, 'C', there comes a point when an applicant from local authority 'A' may consider that he has an entitlement to bid, and succeed in so doing, for a property owned by local authority 'B'. The question of who makes the allocation under Part 6 is a matter of law and determines the rights and obligations between an individual and a specific local housing authority. The Choice Code needs to be explicit as to the need for any regional letting scheme to state clearly which body will have the statutory responsibility for the allocation of housing stock owned by a particular local authority.