RESPONSE TO THE CONSULTATION
ON THE
HOUSING (WALES) BILL

BY

GARDEN COURT CHAMBERS
HOUSING TEAM

RESPONSE TO PART 2: HOMELESSNESS

Garden Court Chambers Housing Team

1. The Housing Team at Garden Court Chambers is one of the largest specialist housing law teams of barristers in England and Wales (with over 20 barristers) and has an established reputation in this area. We cover all aspects of housing law including security of tenure, unlawful eviction, homelessness, allocation of social housing, disrepair and housing benefit law. We are particularly committed to representing tenants, other occupiers and homeless people. We work across England and Wales.

2. We also provide training, and write articles for legal journals on housing issues. We were the first chambers to serve as a Legal Services Commission (LSC) Specialist Support Service provider in housing law, and from 2004-2008 we offered specialist support and training under contract direct from the LSC.

General observations on Part 2 of the draft Bill

3. We welcome the draft Bill in that it aims to provide homelessness prevention, assistance and relief for a wider group of people who might be homeless or threatened with homelessness than the current statutory framework at Part 7 Housing Act 1996.

4. However, we note that the Welsh Government chose not to implement the "housing solutions" option in the 2012 White Paper. We had supported the admittedly ambitious goals in the White Paper of giving local housing authorities the option of not applying the "becoming homeless intentionally" test and a long-term aim of abolishing the priority need test. We do welcome the exemption of certain priority need groups from the intentional homelessness test and the prospect of other vulnerable groups being exempt from this test if Ministers and

local authorities use the powers set out in the Bill as an improvement from the current position but we hope that the Welsh Government will reconsider and revert to the original goal in the White Paper.

5. We note that the Scottish Government has been able to remove the priority need test in the *Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012* and that both the Scottish Federation of Housing Associations and Shelter (Scotland) welcomed this achievement. We believe that the Welsh Government could have provided for the same result – the abolition of priority need – in the draft Bill.

6. We note that the draft Bill introduces the concept of private rented sector offers, by which the main housing duty owed to applicants who have a priority need, can come to an end if an applicant accepts or refuses such an offer. This is an additional reason, in our view, for the Welsh Government to work towards goals of abolishing the priority need and the "becoming homeless intentionally" tests. Since acceptance of the main housing duty will no longer necessarily result in an offer of Part 6 accommodation (secure, assured or introductory tenancies), and use of the private rented sector will mean that local housing authorities will have more resources available to them, we believe that the distinctions between applicants who do, or do not, have a priority need, and between applicants who have, or have not, become homeless intentionally become less significant.

7. That said, we note that the draft Bill, if passed in its current form, will result in significantly more people being assisted into secure accommodation than is currently the position and we of course welcome that. We would urge the Welsh Government to regard the extended duties and exemption of some vulnerable groups from the intentional homelessness test as a first start, and to continue to aim towards a long-term goal of abolishing priority need and "become homeless intentionally".

8. We also note that the draft Bill retains the test of eligibility, and that the duties to help prevent an applicant from becoming homeless (clause 52), to help to secure suitable accommodation (clause 56) or to secure accommodation for applicants in priority need (clause 58) only arise where an applicant is eligible for help. We consider that the duty to help prevent an applicant from becoming homeless need not be restricted on the basis of eligibility. Provisions as to eligibility are complex (Schedule 2 of the draft Bill). However, a person may not be eligible for help, but may still be residing lawfully in the UK and require assistance with finding accommodation. Consideration could be given to the clause 52 duty being available to all applicants, regardless of eligibility.

9. We welcome that the draft Bill proposes (at clause 78) stronger duties of co-operation between local authorizes and other bodies, namely, social services, RSLs and other registered providers.

10. We welcome the definition of "threatened with homelessness" as extended to 56 from 28 days (clause 41(4)). We also welcome the broad definition, consistent

with the Supreme Court's decision in *Yemshaw v Hounslow LBC*[1], of "abuse" (clause 41(2)). We are particularly pleased that the broad definition extends to non-domestic abuse as well as domestic abuse, an issue left unresolved by the Supreme Court.

Other comments on specific clauses in Part 2 of the draft Bill

Duties to help applicants – clauses 50 – 62: the need for greater clarity as to the structure of this part of the Bill

11. The scheme of the different housing duties as set out in this chapter of Part 2 is quite complex. It may assist in understanding the scheme if the main housing duties were more readily identifiable in the chapter. At present the clauses containing the main duties to secure or help to secure suitable accommodation have the following titles:
    - "Interim duty to accommodate applicants in priority need" (clause 54)
    - "Duty to help to secure suitable accommodation for a homeless applicant" (clause 56)
    - "Duty to secure accommodation for applicants in priority need when the duty in section 56 ends" (clause 58)

12. The above are inconsistent as to whether "suitable" appears (whereas the requirement of suitability applies to all duties), as to whether applicants are referred to in the singular or plural and as to whether the duty is described as a duty to accommodate or a duty to secure accommodation. All three duties are duties to secure or to help to secure that suitable accommodation is available for applicants. There would be greater consistency (and therefore clarity) if the titles to clauses 54 and 56 were replaced with "Interim duty to secure accommodation for applicants in priority need"; and "Duty to help to secure accommodation for homeless applicants" respectively, making the different duties easier to identify and the structure of the chapter clearer. Any other means of simplifying this part of the Bill so as to make it more accessible to the reader would be most welcome.

Clause 48(8): local authority's ability to review its assessment

13. Clause 48(8) provides "*A local housing authority must keep its assessment under review during the period which the authority considers it may owe a duty to the applicant under the following provisions of this Chapter*". We suggest that the possibility of revising the assessment should not extend to revoking a duty that has been accepted. The housing duty, once accepted, should end, we suggest, only in accordance with the other specific provisions in this chapter which define when the duties end.

14. By clause 48(8), it appears that a decision on an assessment that it is accepted that a duty is owed could be reversed for any reason that the local authority has for taking a different view of the application, including a change of circumstances after the decision was made, for example the end of a pregnancy before childbirth

[1] [2011] UKSC 3, [2011] 1 WLR 433, SC

or loss of priority need for some other reason. There may be a need for exceptions (e.g. where an applicant has deliberately misled the authority as to his/her circumstances) but otherwise it would, we suggest, be fairer to applicants if once an assessment has led to a decision to accept a duty, there should not be a review of that assessment with the result of revoking the decision to accept the duty. Otherwise applicants face uncertainty up to the point that the duty is finally discharged.

15. This area is discussed in respect of the position under Housing Act 1996 in *Housing Allocation and Homelessness Law and Practice, Luba and Davies, Third Edition at 10.91*, which refers to the fact that there are only very limited bases upon which a decision accepting a duty under Housing Act 1996, Part 7 might be withdrawn.

Clause 57(2): termination of the duty under clause 56 (duty to help to secure accommodation) after 56 days

16. Clause 57 sets out the circumstances in which the duty in clause 56 (duty to help to secure accommodation for a homeless applicant) comes to an end. This covers the criteria of refusal of an offer that is suitable, ceasing to occupy interim accommodation, and having suitable accommodation available for occupation for at least 6 months. It also includes the case where, before the end of 56 days, "*the local housing authority is satisfied that reasonable steps have been taken to help to secure that suitable accommodation is available for occupation by the applicant*" (clause 57(3)) and as a separate basis "*the end of a period of 56 days, starting on the day the applicant is notified under s 49*" (clause 57(2)). The last mentioned sub-clause appears to bring the duty to an end even if the local authority is not satisfied that reasonable steps have been taken to help to secure that suitable accommodation is available for occupation by the applicant. The duty under clause 56 is defined in clause 51 as requiring it to take reasonable steps to help, having regard (among other things) to the need to make the best use of the authority's resources (it is not required to secure an offer under Part 6 Housing Act 1996 or otherwise to provide accommodation). The rights of review in respect of the decision that the clause 56 duty is at an end contemplate that the local authority should have taken reasonable steps (not just that 56 days have passed) (clauses 67(2) and 68(2)). However, under the draft Bill, it appears that, as the duty automatically ends after 56 days even if reasonable steps have not been taken, it would only be if the applicant sought a review of the decision that the duty is at an end that the duty would be extended or revived after expiry of the 56 days (clause 70).

17. It would appear therefore to be more coherent if the scheme were to provide that the duty ends after 56 days only if the local authority is satisfied that within that period reasonable steps have been taken to help to secure that suitable accommodation is available in accordance with clauses 50 and 51 (which set out what the duty involves).

Clause 62(4): termination of duties on grounds of failing to co-operate with the local authority in the exercise of its functions (s 62(4))

18. The draft Bill refers at clause 57(10) to clause 62 for further circumstances in which the clause 56 duty to help to secure accommodation ends. This includes at clause 62(4) that the local authority is satisfied that the applicant is unreasonably failing to co-operate with the authority in connection with the exercise of its functions. This basis for treating a duty as at an end is potentially very wide. One can anticipate that a decision to end a duty on this ground would give rise to a great deal of factual dispute and dispute over what constitutes unreasonable failure; there would be issues as to what evidence there is to adequately support the local authority's decision and whether public law requirements of fairness had been met in giving applicants a sufficient opportunity to deal with allegations of non- co-operation before adverse conclusions were drawn. We question whether it is necessary to include this criterion at all.

19. If help is offered under clause 56 and the applicant has not responded to the help in a reasonable way, the question for the local authority would be whether it has done enough to comply with what is required under clause 56: the duty requires the local authority to take reasonable steps; it is not an absolute duty. Therefore the question of the applicant's own behaviour in relation to offers of help or requests for information (and so on) would form part of the picture when taking an overall view of whether the local authority has done enough to comply with this duty.

20. The same point can be made in relation to the applicability of clause 62(4) to the clause 52 duty (the duty to help to prevent an applicant from becoming homeless): the duty is to take reasonable steps (clause 51).

21. In respect of the interim duty to secure accommodation (clause 54) and the full housing duty (clause 58), these duties are clearly defined with specific criteria as to when they end: when offers have been made and either accepted or not accepted or one of the other specified criteria in clauses 56 or 59 apply. The local authority can perform its duty and identify when the duty has come to an end, whether or not the particular applicant is co-operative with the process.

22. In sum, we do not think it is necessary to the operation of the scheme in the draft Bill to include clause 62(4). Its effect would be to potentially deny homelessness assistance to people who are likely to be vulnerable, on grounds of their behaviour being interpreted as unco-operative, when their behaviour does not in fact stand in the way of the local authority preforming its duties or bringing them to an end under the other specified criteria in the draft Bill. Further, decisions by the local authority to terminate assistance on this basis would be likely to give rise to a great deal of dispute over whether the non-co-operation occurred, and whether it was unreasonable, and to administratively onerous review processes.

Clauses 63-66 (referral to another housing authority)

23. Clauses 63-66 deal with the referral of cases to another housing authority. These are the rules governing the transfer of an individual's case to another housing authority where that individual has a local connection with the latter area.

24. In most respects the provisions do not differ materially from ss198-201 Housing Act 1996. However, we would observe that the relevant part of the draft Bill provides an opportunity to further improve the scheme of the legislation and so we would ask that consideration is given to the amendment of clauses 64(5)-(6) as explained below.

25. Clauses 64(5)-(6) mirror s199(6)-(7) Housing Act 1996. The effect of these provisions is to deem that a person shall have a local connection with any place where they have been accommodated under s95 Immigration and Asylum Act 1999. This was an amendment to the original legislation to reverse the effect of the decision in *Al-Ameri v Kensington and Chelsea LBC* [2004] 2 AC 159. That case decided that individuals accommodated under s95 would not build up a local connection since they were not resident by their own choice. The amendment reversing the effect of the decision was introduced by the Asylum and Immigration (Treatment of Claimants) Act 2004. Such individuals are now taken to have an automatic connection even if they are only accommodated in s95 accommodation for a single night.

26. We would suggest that consideration should be given to returning to the position as set out in the *Al-Ameri* case, namely that persons residing in s95 Immigration and Asylum Act 1999 accommodation should not be deemed to have a local connection. This could be achieved by omitting clause 64(5)-(6). The reason for this is that these provisions can result in individuals being referred to areas where they have only resided, in s95 accommodation, for a few days or weeks. This has a human cost in that it diverts individuals away from places where they may be in the process of building up a support network[2], and which they regard as home. By the same token, it has an economic cost. Such individuals are more likely to end up placing a burden on the state in other ways if they lack local support networks in the area to which they are referred. In our view this undermines the purpose of the local connection provisions and consideration should be given to amending the clauses accordingly.

27. In addition, we consider that "family associations" at clause 64(2)(c) should be broadly defined, so that an applicant who perhaps has no parents, children or siblings alive in the UK could still be considered to have "family associations" with members of his/her family who are slightly more distant relatives (cousins, uncles, aunts etc). As Sedley LJ observed in *Ozbek v Ipswich Borough Council [2006] EWCA 534*, "*the character of the family association must be at least as relevant –probably more relevant – than the degree of consanguinity*" [64]. This approach is reflected in the Secretary of State's guidance to local housing authorities in England, but is not contained in the Welsh Code of Guidance. In our

[2] We say "in the process of building up a support network" as the individuals affected would be likely to have resided in the area of the notifying authority for less than six months (the usual period required in order to be regarded as normally resident).

experiences, local housing authorities are very reluctant indeed to consider the character of family association and are inclined not to find that a more distant relative could, in the circumstances of a particular applicant, have a relationship that can be considered to be "family association". The Welsh Government could take the opportunity – either in the Bill or in any new Code of Guidance – to reiterate the law as handed down by the Court of Appeal in Ozbek.

Clause 67 (notice)

28. This clause reflects the existing rule as to notice contained in the Housing Act 1996: that an individual should be taken to have been notified of a decision if the notice is made available at the local authority's office for a reasonable period for collection by the applicant or on the applicant's behalf. The principal change here is that the rule is now given a more prominent place within the statutory scheme in the form of a stand-alone clause.

29. In our experience this provision in the current legislation is rarely relied on. Where an individual has not received a decision under the Act, local housing authorities can often be relied on to act fairly, provide a further copy in due course and then agree an extension of time to seek a review or bring an appeal where necessary. Our concern is that by giving this provision increased prominence, this practice may change. In our view, the passage of the draft Bill therefore provides a convenient opportunity to revisit the rule and consider whether it is necessary and appropriate.

30. The effect of the rule is that an individual who has not been notified of a decision as a matter of fact, may be deemed to have been notified as matter of law. This "starts the clock" for seeking a review or an appeal, with the consequence that an individual may end up losing their right to review or appeal without ever knowing that a decision had been made against them. Plainly this may result in significant unfairness. Homeless people are, as we know, among the most vulnerable in society. There are any number of reasons why an individual may not receive a decision or be unable to visit their local office to collect the decision letter. For example, a decision letter may go missing in the post, or may not be sent out owing to a clerical error. The applicant may not be able to go into their local office because they have mobility problems or cannot afford the bus fare. The clause as currently drafted does not take account of such matters. Whatever the individual's reasons or circumstances they are be deemed to have received the decision letter. This runs counter to the principle of public law fairness that a decision should not take effect against an individual until they have received it, see *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604. For these reasons we would suggest that consideration be given to omitting this clause entirely.

Garden Court Chambers Housing Team
17 January 2014