



# *Local decisions: a fairer future for social housing*

A response from the  
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**Garden Court Chambers**

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# Contents

	<i>Page</i>
<b>The Authors</b>	<b>2</b>
<b>Section 1 Introduction</b>	<b>4</b>
<b>Section 2 Tenure reform</b>	<b>5</b>
<b>Section 3 Empty homes</b>	<b>21</b>
<b>Section 4 Allocating social housing</b>	<b>29</b>
<b>Section 5 Mobility</b>	<b>34</b>
<b>Section 6 Homelessness</b>	<b>36</b>
<b>Section 7 Overcrowding</b>	<b>42</b>
<b>Section 8 Reform of social housing regulation</b>	<b>43</b>
<b>Summary</b>	<b>47</b>

## The Authors

This response to the Communities & Local Government Consultation Paper *Local decisions: a fairer future for social housing* ("the Consultation Paper") is made by the team of specialist Housing Barristers based at Garden Court Chambers in London.

The Garden Court Housing Team contains more than 20 practising barristers including two QCs (Jan Luba and Stephen Knafler). All the members of the team have contributed to this response.

Our response is informed by our day-to-day experience in: advising and representing consumers of social housing; running homelessness cases; helping with disputes over social housing allocation; addressing overcrowding and mobility issues; and advising social housing providers on issues such as the framing of allocation schemes. In short, our daily work engages almost all the subject areas covered by the Consultation Paper.

The Housing Team has a reputation for excellence in this field and is highly ranked for Social Housing work in the independent directories:

"Best known for representing tenants, Garden Court is home to a wealth of intelligent and passionate barristers who are 'extremely committed to their work and always willing to go that extra mile.' Clients appreciate the set's strength and depth in a range of disciplines, such as immigration and civil liberties, which naturally complements its housing expertise. The full spectrum of housing law is catered for here, particularly homelessness, unlawful eviction and disrepair issues."

**Chambers UK - The Bar: A Client's Guide 2011**

"Garden Court Chambers has a large specialist housing law team that is particularly committed to representing tenants, other occupiers and the homeless."

**The Legal 500, 2010 Edition**

The Housing Team produces a free weekly *Housing Law E-Bulletin* for over 1000 subscribers and contributes articles and case reports to professional publications such as *Legal Action*.

Members of the team have also written or co-written the following important practitioner text books: *Defending Possession Proceedings* (LAG); *Repairs: Tenants' Rights* (LAG); *Remedies for Disrepair and Other Building Defects* (Sweet & Maxwell), *Support for Asylum Seekers* (LAG), *Using the Housing Act 2004* (Jordans), *Housing Allocation and Homelessness* (Jordans), the *Housing Law Handbook* (Law Society), *The Homelessness Act 2002: A Special Bulletin* (Jordans) and *Housing and the Human Rights Act: A Special Bulletin* (Jordans).

Between them the members of the Housing Team have decades of experience of dealing with the sharp end of issues relating to social housing. The team comprises:

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## Section 1: Introduction

### 1. Introduction

- 1.1. We welcome this opportunity to respond to the Government's proposals for the future of Social Housing. Our response has been informed by the recent publication of the Localism Bill which indicates (in Part 6) how legislative effect would be given to many of the proposals. We not only respond to the specific proposals and questions outlined in the Consultation Paper but we also supply additional and alternative suggestions as to how the law can be best adapted to meet the aspirations of both the providers and consumers of social housing. We hope they will be taken up by Government and introduced as amendments to the Bill.
- 1.2. As will become plain from the detail of our specific responses, we do not share the Government's analysis of present 'problem(s)' with social housing (offered in Section 1 of the Consultation Paper). The essential problem is one of under-supply which the Consultation Paper hardly touches upon.
- 1.3. Nor do we support the majority of the proposed solutions to the Government's perceived problems. However, where possible, we have identified how real and necessary improvements can be made where they are needed.
- 1.4. This response does not cover all issues raised by the Consultation Paper. In particular, we have no comment to make on Section 9 (*Reform of Council Housing Finance*). Our response to the content of Section 1 (*Introduction – the case for reform*) is included in our responses to other Sections. We have not treated our response as fettered by the way in which some questions have been framed but nor have we sought to address them all.
- 1.5. It is particularly unfortunate that no Impact Assessments have been produced on the proposals, despite the commitment given at page 7 of the Consultation Paper that they would be published "for introduction of the Localism Bill" (which took place in mid-December 2010). This has made the task of providing an informed response within a tight deadline all the harder.

## Section 2: Tenure Reform

### 2. Tenure Reform

#### **(A) Affordable Rent Tenancies**

##### **Response in summary**

- 2.1. In summary, our response to the proposed introduction of affordable rent tenancies is that:
- the proposed changes will do little to address the chronic shortage in social housing;
  - any strategy for providing more social housing should not be discretionary. This will only increase the post-code lottery in social housing provision;
  - affordable tenancies will, far from being affordable, be prohibitively expensive for many prospective tenants;
  - the inaccessibility of this type of tenancy to many of the most needy people will inevitably lead to a greater reliance on homelessness provision and more strain on local authority housing;
  - these proposals will provide a powerful disincentive for people on welfare benefits to gain employment;
  - the proposals will prevent many people acquiring security of tenure, thereby removing any incentive for them to invest in their property in the long term and thus reducing the standard of housing stock;
  - these proposals will force tenants to enter into tenancies which are too costly for them; and
  - it is difficult to see how these proposals will open the social housing sector to a more diverse section of the population as has been claimed by the Government.

##### **Response in detail**

###### **Introduction**

- 2.2. The proposals for the introduction of Affordable Rent Tenancies appear to be intended to stimulate the housing association sector and lead to the provision of more accommodation. It is our view that these proposals, and indeed other proposals contained within this Consultation Paper, will do little to meet the current shortage of social housing. The proposed scheme is discretionary and would therefore be dependent upon housing associations participating in the scheme in a particular area. This will lead to variable provision in different areas. The shortage of housing stock is more acute in some areas than others and there is nothing in these proposals which would lead to additional provision being targeted in the areas where it is most needed. It is our view that the only solution is for there to be targeted development based upon local need. This can only be achieved by targeted house building and property acquisition. As the current proposals contain no such initiatives, it is our view that they do not address the chronic shortage of social housing caused by the removal of hundreds of thousands of properties from the sector over the last 30 years.

### Affordability

- 2.3. It is our view that these tenancies, rather than being affordable are in fact likely to be unaffordable and inaccessible to many of the people they are ostensibly intended to assist. In many areas, particularly in the South East of England, a rent of 80% of the current market rent is entirely unaffordable to the majority of people on low earned incomes.
- 2.4. Grant Shapps MP is reported in *Public Finance* (10 December 2010) as stating that '*the system would be aimed at a more diverse section of the population than the households that currently qualify for social housing.*' It is very difficult to see how diversity will be increased at this level of rent unless the intention is to achieve a policy shift towards provision of social housing for those amply able to meet virtually the full cost of open market private sector rents.
- 2.5. If Affordable Rent tenants find that the level of rent they are expected to pay becomes beyond their means and they are evicted for rent arrears an increased burden will fall on local housing authorities. That is because in many cases the relevant local authority will be required to provide them with accommodation under the homelessness provisions. If they could not afford to meet their housing costs as well as the ordinary necessities of life they will be unintentionally homeless. Those with priority needs (e.g. dependent children) will need to be accommodated. This will transfer a heavier and more costly burden to local authorities at additional cost to the taxpayer.

- 2.6. We understand that the rent for non-working households will be fully covered by housing benefit, although it is by no means clear whether this will remain the case in the future. Plainly, if some or all of the rent is not covered by housing benefit, many tenants will be in a position where they are unable to pay all of the rent due, making eviction inevitable.

### Security

- 2.7. It is our view that making such tenancies “fixed term” assured shortholds is not the correct approach. It will simply replicate the problems that already exist in the private rented sector. Tenants are unlikely to invest in a property if they have no guarantee that they will be able to remain long-term, thus making it almost inevitable that the standard of the properties will reduce over time.
- 2.8. The right of someone to know that they will not be required to leave their home as long as they comply with the rules has been a fundamental cornerstone of the social housing sector in this country. These proposals, and others in the Consultation Paper, will remove this security from a large group of people. In our view, the only solution to the chronic lack of social housing is to build and acquire more houses to replace those which have been removed from the sector over the last 30 years. Increasing rents and reducing security of tenure in social housing do nothing to secure improved supply.

### Disincentive to employment

- 2.9. These proposals would provide a powerful disincentive to work. If an Affordable Rent tenant’s rental is being fully covered by housing benefit the tenant would be ill-advised to gain employment which would prevent him or her from receiving 100% housing benefit and mean they would have to pay a near-market rent out of their own earnings. As stated above, in many areas this is likely to be at an unaffordable level for those on low earned incomes. This appears counter to the Government’s other proposals intended to remove such disincentives.

### Compulsion

- 2.10. It is difficult to identify the potential applicant group to which an Affordable Rent tenancy of social housing would be attractive. The rent will be higher - and the security of tenure lesser - than for ordinary social housing. We suspect that the truth is that Affordable Rent tenancies are not intended to offer choice or opportunity at all. Rather, as the Consultation Paper confirms (paragraph 2.6), they will be presented as a ‘no-choice’ option to homeless households owed the main homelessness duty. In this

way “temporary accommodation” will become integral to the social housing sector itself with Government paying significant near-market rents by way of housing benefit - not to private landlords but to social landlords.

## **(B) The proposal to introduce local authority ‘flexible’ tenancies**

### **Response in summary**

2.11. We do not support this proposal because it will remove security of tenure (one of the most important aspects of social housing) and:

- the case for such change is not made out;
- it will be detrimental to building cohesive communities;
- it will be administratively burdensome; and
- it will make the law on tenure even more complex.

### **Response in detail**

#### ***The case for the change to fixed term tenancies is not made out***

2.12. Council housing, where scarce, is already being allocated to those in the greatest need and in very many cases the need is likely to be long term (households with young children, people with a disability or who are elderly). We question whether there will be any significant greater targeting of resources to those in greatest need by virtue of removing security of tenure. There are other more proportionate means of reducing the extent of under-occupation, far short of the fundamental change to tenure that is being proposed. Moreover, any perceived gain in terms of efficient use of resources resulting from moving one household out of their home in order to house another must be slight indeed and will come at great cost, both socially and in terms of the amount of administration involved.

2.13. As part of the argument for reform, the Consultation Paper states that “*the security and subsidised rent that social housing provides do not appear to help tenants to independence and self-sufficiency*” (paragraphs 1.5 – 1.6) and reference is made to the difference in the percentage of social rented tenants of working age who were in work in 1981 when secure tenancies were introduced (71%) and in 2008/9 (49%). Further, the comparison is made with the numbers of home owners who are in work (89%) and private tenants (75%). The Consultation Paper also points out that more social tenants depend on housing benefit

than private sector tenants. We do not consider that these figures can be used to make out a case for reform of social housing tenure.

- 2.14. Contrary to what the Consultation Paper seems to seek to suggest, the figures do not provide a meaningful indication of the impact or lack of impact of social housing on worklessness and dependence on benefits. The proportion of the council tenant population in work will have reduced since 1981 by virtue of the fact that many working tenants have exercised the 'right to buy', and also a smaller stock means a greater concentration on housing people with the highest needs, who, for a variety of reasons, will find accessing the job market more difficult or impossible. In sum, the social make up of the tenant population relevant to each percentage figure is different, so the comparison the Consultation Paper makes does not tell us anything meaningful about the impact of security and subsidised rents on people's ability to become independent and self-sufficient.
- 2.15. Absent any evidence to establish that the position is otherwise, the common sense view must be that a stable and secure home at a relatively low rent is likely to provide a comparatively good basis for individuals to take up opportunities of improving their circumstances, and lower rents mean that those who work are less likely to have to remain on housing benefit.

*The adverse effect of flexible tenancies on tenants and communities*

- 2.16. For many people who cannot afford to own their own homes the possibility of having long term security of tenure and control over decisions on whether and when to move home will be lost. Those who qualify for council housing and who are granted only a flexible tenancy will face uncertainty over how long they will be able to stay in their homes and the prospect of an intrusive examination of their personal circumstances at the end of the fixed term, when the decision is made as to whether they can stay. We anticipate that decisions by local authorities not to renew fixed term tenancies, requiring tenants to move out of their homes (not due to any fault on their part), will generate feelings of injustice and resentment in neighbourhoods and towards local decision-makers.
- 2.17. The higher turnover of tenants in areas of local authority housing, which flexible tenancies will create, will make those communities less stable and cohesive. Further, requiring those tenants whose financial or other circumstances have improved to move out will be detrimental to creating healthy mixed communities.

*Flexible tenancies will penalise those whose circumstances improve*

- 2.18. If flexible tenancies will not be renewed in circumstances where tenants' financial circumstances have improved (as appears to be envisaged in the Consultation Paper), they will act as a powerful disincentive for tenants to improve their financial circumstances.
- 2.19. The point applies to other improvements in household circumstances too - because it is inherent in the scheme that if the need has ceased the tenancy will not be renewed. An improvement in a person's health or the fact of they have become better able to cope with a disability or physical impairment could mean the loss of their home.

*Decision-making on the grant of flexible tenancies - and on whether to renew them - will be administratively very burdensome for local authorities.*

- 2.20. The introduction of flexible tenancies will mean that the certainty of the current law defining tenure will be replaced by local policy and discretion. The grant of each tenancy will require decision-making not only on whether allocation criteria are met but also on whether to grant a fixed term tenancy and, if so, for what length of term. When the fixed term has ended there will be a further examination of the tenant's circumstances and a further decision on whether the household should move out of their home. These are decisions that will be highly fact sensitive and will matter a great deal to the individuals concerned. Local authorities have to act in accordance with public law principles requiring that all relevant facts are taken into account and their policies correctly applied. Tenants will have the right to a review of decisions at both stages (at the stage of grant of the tenancy and when a decision is made not to renew) and decisions may be further challenged for error of law in the courts.
- 2.21. The additional two tiers of decision-making in relation to every fixed term tenancy that is not renewed indefinitely is likely to be time consuming and expensive, and a disproportionate burden on local authorities given that all that will be achieved is one family/household being newly housed at the expense of another which will be having its home taken away..

*The law will be made even more complex*

- 2.22. The proposed changes will mean that there will be no less than seven types of residential tenancy in the local authority sector alone. We consider that if there is to be reform of housing law it should be to simplify the law rather than complicate it. A model

was provided in the proposals for simplification of the law on residential tenure recommended in the *Law Commission Report "Renting Homes" (2006)*. That model should be adopted in place of the proposed 'flexible' tenancies.

*Flexible tenancies will be a hindrance to mobility*

2.23. Whilst the Government is seeking to encourage greater mobility of social tenants, flexible tenancies give rise to a problem for mutual exchanges. Tenants on fixed terms will not have terms of the same length (either because they will have been granted terms of different lengths or because they will have different unexpired periods left on their tenancies). In order for a mutual exchange to go ahead one of the local authority landlords would have to be agreeable to taking on a longer tenancy than the remaining term of its existing tenant or the tenant would have to accept a reduced term after the exchange.

*The Right to Buy and flexible tenancies*

2.24. The aim of introducing flexible tenancies is the greater targeting of a scarce resource, yet the 'right to buy', one of the main causes of the shortage of social housing stock, and a right which is of benefit only to better off tenants, is to be retained. Under flexible tenancies, tenants may be required to move out after the fixed term has expired in the name of greater targeting of a scarce resource, yet if the tenant is able to buy the property they can thwart that aim entirely. We suggest that, consistently with government policy to devolve decision making to local authorities, local authorities should be allowed to decide for themselves whether to retain the 'right to buy' in their own areas.

*Suggested means of mitigating the effects of the proposed scheme of flexible tenancies, if it should go ahead*

2.25. We urge the Government to avoid creating homelessness by this new scheme, by legislating to require that (or by making it a requirement in the Tenancy Standard that) a household whose flexible tenancy has not been renewed should not be required to leave their home unless:

- suitable alternative rental accommodation for that household has been identified and is available for it to occupy at the point when required to move, or
- it has been clearly established that the tenant can afford to buy suitable alternative accommodation and that it is reasonable to expect him/her to do so.

- 2.26. The Consultation Paper proposes only that the Tenancy Standard should include a requirement on local authorities to provide advice and assistance to help tenants facing eviction to find suitable accommodation. This is a wholly inadequate safeguard against homelessness. Our experience of working with homeless clients is that assistance provided by local authority housing options services is frequently not enough to safeguard against homelessness.

*The prescription of the appropriate fixed term (Consultation Questions 7, 9 and 10)*

- 2.27. We consider that, in the absence of greater prescription in the Tenancy Standard, local authorities may well be inclined to routinely grant the minimum period currently being proposed of only two years. Flexible tenancies could readily perform the function of extended introductory/probationary tenancies, whereby local authorities grant short term tenancies that enable them to respond to breaches of the tenancy in a way that bypasses the checks and balances in the Housing Act 1985. It is clear from the Consultation Paper that this is not what is intended by the new scheme.
- 2.28. If the scheme goes ahead, we strongly urge that the minimum fixed term should be much greater than two years and that it is made clear that the minimum period should not be routinely granted across the board.

*Review process for flexible tenancies*

- 2.29. We urge that reviews of local authority decisions should be carried out by an independent body rather than the local authority itself. Our experience of review procedures for introductory tenancies and homelessness applicants leads us to believe that this will lead to less suspicion of rubber-stamping of decisions and greater public confidence in decision making.

**Question 8: What opportunities as a tenant would you expect to have to influence the landlord's policy?**

- 2.30. Tenants and people on housing waiting lists should be consulted as to the adoption and content of their council's policy on: to whom to grant indefinite tenancies; to whom to grant flexible tenancies; the length of fixed terms; and on any substantial changes to those policies.

***Review of decisions relating to flexible tenancies (Localism Bill clause 130 - new section 107B Housing Act 1985)***

- 2.31. The proposed new section would allow for reviews of whether the length of the term offered in a flexible tenancy accords with the landlord's policy. It does not include a right of review as to whether a flexible tenancy should be granted at all, as opposed to a normal secure tenancy of indefinite duration. It is clear that it is envisaged that not all tenants will be granted flexible tenancies: some will be granted normal periodic secure tenancies and that local authorities should have policies as to when the alternative of a flexible tenancy will or will not be granted (clause 126). It follows that there should be a right of review on the issue of whether the person concerned should be granted a flexible tenancy at all as opposed to a periodic secure tenancy. Clause 130 requires amendment to reflect this.
- 2.32. We consider that the proposed new section 107B(3) should be omitted. Local authorities are bound to act in accordance with public law principles when making their decisions, which require them to take all relevant circumstances into account and to look again at decisions when relevant facts are brought to their attention, to consider cases in the light of their policies and indeed to consider exceptional cases that may fall outside a policy but may warrant exceptional treatment. We do not imagine that it can be the Government's intention to attempt to remove the requirement for local authorities to act in accordance with public law principles. Therefore, the restriction stated in proposed new section 107B(3) is inappropriate.

***Termination of flexible tenancy by tenant (Localism Bill clause 130 - new section 107C(5) Housing Act 1985)***

- 2.33. As currently drafted, the Bill provides that a tenant cannot terminate the tenancy if he/she is in arrears of rent or materially in breach of the tenancy. This would mean that despite the tenant wanting to give up possession he/she would be tied into a fixed term with ongoing rent liability. It leaves it entirely to the discretion of the local authority whether to release the tenant from the tenancy obligations. We cannot see any useful purpose to this provision. If the tenant moves out, he/she will still owe a debt for past arrears. If he/she moves out in breach of tenancy the landlord would have to mitigate its loss by re-letting the premises in any event, so could not sue for future rent. Moreover, the effect of the provision - preventing tenants who have served notice to quit from moving out when they wish to do so - is oppressive. It will also produce considerable uncertainty as to whether or not (and if so, when) a flexible tenancy has actually been terminated by a tenant's notice.

*The removal of succession rights for 'flexible' tenants and other new secure tenants (paragraph 2.36)*

- 2.34. We consider that the current law strikes a fair balance between the competing interests of: (1) protecting people whose homes are at stake when the tenant dies and allowing a secure tenant to provide for his or her family to some degree after their death; and (2) enabling landlords to allocate their stock in accord with need. The current law allows for one single succession only (whether to spouse or family member). In order to qualify as a successor the family member has to be living in the dwelling as their home. The tenancy may have been granted at the outset with the aim of providing a home for the family member just as much as for the tenant.
- 2.35. Under the current law, if a successor tenant is under-occupying the accommodation the local authority landlord can require a move to suitable alternative accommodation (Ground 16, Schedule 2, Housing Act 1985). The Government proposes from April 2013 to reduce housing benefit entitlement for working age people in the social sector to reflect family size (thereby increasing pressure on people to move to smaller accommodation in cases of under-occupation).
- 2.36. We consider that the removal of succession rights for all those other than spouses/civil partners will discourage family members from moving-in to live with and care for tenants with disabilities or those who are elderly and in need of support. As pointed out in the *Law Commission report "Renting Homes" (2006)*, many carers find it impossible to maintain their own home if they assume the role of caring for other family members. That report proposed that the carers' role should be acknowledged by extending succession rights to them as a distinct group.
- 2.37. If succession rights of secure tenants are to be reduced we urge that it is made clear in the Tenancy Standard that social landlords should have policies on succession which at the very least provide protection from homelessness for people for whom the dwelling has provided their long term home and for carers, as an addition to the statutory rights of succession for spouses/civil partners (and people co-habiting as such).

**Question 11: Do you think that older people and those with long term illness or disability should continue to be provided with a guarantee of social homes for life through the Tenancy Standard?**

**Question 12: Are there other types of household where we should always require landlords to guarantee a social home for life?**

- 2.38. A scheme that grants different types of tenancy on the kind of basis being proposed we believe will lead to arbitrary distinctions and unfairness. A single disabled person, for example, may acquire the means to accommodate his or herself, while an able bodied self-employed construction worker with children may be in and out of insecure employment, may well experience unavoidable stops and starts with housing benefit and never be in a good position to sustain a stable home in the private sector without dependence on benefits.
- 2.39. Moreover, the singling-out of certain groups for indefinite tenancies and not others will cause social housing to become the preserve of the very vulnerable and disadvantaged, increasingly isolating them from the rest of society as tenants living around them come and go, and compounding their marginalisation.
- 2.40. It is important to note that a periodic secure tenancy does not provide what is being referred to in the Consultation Paper as a “*guarantee of a social home for life*”. The tenancy carries obligations on both sides. If the tenant defaults he/she loses the tenancy and is unlikely to be re-housed in social housing. No-one is given a guarantee of social housing for life. We consider that a normal periodic secure tenancy is the appropriate tenure for all council tenants.

**Question 13: Do you agree that we should require landlords to offer existing secure and assured tenants who move to another social rent property a lifetime tenancy in their new home?**

- 2.41. We agree with this proposal and consider it essential in order to enable people to make sensible decisions about moving home within the social rented sector.

**Question 14: Do you agree that landlords should have the freedom to decide whether new secure and assured tenants should continue to receive a lifetime tenancy when they move?**

- 2.42. We do not agree. People will be dissuaded from moving if it means loss of a secure home. The Government’s aim is to promote mobility. This proposal will allow local authorities to act in a way which has the opposite effect to what the Government wishes to achieve.

## **(C) Existing tenants of Social Housing**

### **Response in summary**

2.43. The central thrust of the Consultation Paper is to demonize security of tenure for social housing tenants as ‘a broken, centrally-controlled system’ (paragraph 1.3) with ‘inflexible, centrally-determined rules’ producing ‘lifetime tenancies’ (both paragraph 1.9) from ‘a one-size-fits-all model’ (paragraph 1.11). The fallacy of this description is recognised by the fact that it is not proposed to abolish the security of tenure system already applicable to millions of existing social housing tenants. If the system is as deficient as is suggested one would expect the improved system to be available to all. The true analysis is that the proposed replacement is so unattractive that none of those presently in or seeking social housing would really want to have the alternatives now envisaged in the Consultation Paper.

### **Response in detail**

#### **The present law**

2.44. We do not consider that the term ‘lifetime tenancy’ is helpful. The regime for secure tenancies introduced and consolidated by the Housing Acts 1980 and 1985 does indeed give security of tenure. A landlord can, however, bring a tenancy to an end in two ways: (a) if the conditions for being a secure tenancy cease to be met, the tenancy is no longer a secure tenancy and can be determined (b) the statute lays down specific grounds on which a court either must or may make a possession order (Schedule 2, Housing Act 1985).

2.45. It is, however, correct that a tenancy granted by a local housing authority of its housing stock will be a secure tenancy, unless one of the exceptions apply.

2.46. It is also correct that a tenancy granted by a housing association will ordinarily be an assured tenancy under the Housing Act 1988. It is the regulatory regime which constrains housing associations from generally granting the sub-species called assured shorthold tenancies which have no security of tenure; there is no such prohibition in the Housing Act 1988.

#### **Maintaining security of tenure**

2.47. If the proposed changes are enacted, we regard it as essential to maintain the existing level of security of tenure for current tenants as a matter of basic fairness. The Consultation Paper also rightly recognises that an essential consequence of this is that existing secure and assured tenancies must be able to take that status to

a new tenancy on transfer, or they will remain where they are (thus reducing mobility). The Consultation Paper proposes that this is done by provisions in a new Tenancy Standard. In our view, this is unlikely to be a sufficient guarantee and is unnecessary. It would be better to provide such a guarantee by legislation. Given that the Localism Bill primarily operates by amending existing legislation, it is logical that similar provisions would be enacted amending the Housing Act 1985 and Housing Act 1988 to provide that existing secure and assured tenants who move within the social housing stock will be granted, as the case may be, a secure tenancy which is not a flexible tenancy or an assured tenancy which is not an assured shorthold tenancy. A model for this can be found in section 34 of the Housing Act 1988.

- 2.48. It is similarly a matter of basic fairness that those who have a form of tenancy with a right to convert to a secure tenancy or assured tenancy should retain that right i.e. introductory tenancies, starter tenancies (in legal terms a scheme under which assured shorthold tenancies are granted), family intervention tenancies and those subject to demotion orders. We are therefore disappointed to note that clauses 130 and 131 of the Localism Bill do not appear to have this effect, but instead allow a local authority to convert to a flexible tenancy by the service of a notice.

### Succession

- 2.49. The Consultation Paper proposes not to change succession rights for *existing* tenancies but for *new* secure tenancies the proposal is to reduce the succession rights to the highly limited rights available to assured tenants, i.e. succession only by a spouse or spousal partner. If enacted, this will create a sharp legal distinction between the succession rights of secure tenants depending on precisely when the tenancy was granted. There is no significant justification for this. It will deter tenants from moving in-and-out of the social housing sector and will act contrary to the goal of increasing mobility within the social housing stock.
- 2.50. The Consultation Paper recognises that landlords would have freedom to grant a new secure tenancy with additional *contractual* rights to succession. In practice, that has been the position for assured tenants of social landlords and it has not produced consistent or fair decision-making in the experience of those advising tenants. If the Government's proposal is enacted we consider that, at a minimum, legislation should require that social landlords consult upon and then adopt published policies on succession rights. However, a more practical response would be to simply give those resident in a property on the death of a

new style secure tenant a statutory right to apply to the landlord to succeed to the tenancy with a right of appeal to the county court from an adverse decision.

### Stock transfers

- 2.51. We note that the Consultation Paper does little to consider tenants who have already been the subject of a stock transfer. In recent years, large numbers of local authority tenants have found that the landlord's interest in their home has transferred from their local authority to a different social landlord. In many cases, that transfer was accompanied by specific promises being made to existing tenants, including, for example, specific rights for people to succeed to the tenancy on the tenant's death.
- 2.52. In our view, it is important that legislation should make clear that such promises are binding and that the regulator should have the power to order social landlords to comply with them.

### Transfers

- 2.53. In section 4, the Consultation Paper suggests that there has been a decline in the number of lettings to existing tenants because transfers were brought within the statutory regulation of housing allocation in 2002. We respectfully doubt that is the reason for the decline. Given that demand for social housing accommodation exceeds supply, any rational social landlord would decide on the allocation of any available property – whether to a new applicant or a transferring tenant – on basis of respective housing need.
- 2.54. For this reason, we believe that removing existing tenants is unlikely to achieve anything helpful for them. The example given of a chain letting can be achieved under existing legislation. Further, given that there is an unspecified proposal to preserve the priority of existing social tenants with 'reasonable preference', it is difficult to see what this proposed change will actually achieve.
- 2.55. We further doubt that a national home swap scheme is likely to add anything significantly to the existing swap schemes. Such schemes suffer the primary problem of an excess of demand over the quality, quantity and location of available supply.

### **(D) Strategic Policy on Tenancies**

- 2.56. The main objective of the proposed new strategic policy is to grant social landlords "very substantial freedoms on the types of tenancy they provide". That objective is tempered by requiring

social landlords to take into account “broad objectives”, to consult, to publish and to keep under review.

- 2.57. We agree that consultation, publication and periodic reviews are important checks and balances and also that social landlords should have freedom to “respond creatively and sensibly to the particular needs of local communities”.
- 2.58. Our concerns, however, are that:
- The consultation, publication and review provisions are insufficiently robust;
  - The “broad objectives” in the Localism Bill are too broad to provide sufficient guidance and risk local freedom degenerating into a postcode lottery;
  - The Bill does not contain mechanisms that allow central government to provide fine tuning, should that become necessary.
- 2.59. The duty at clause 126 of the Bill is merely to publish a document that “summarises” the local housing authority’s policies on the grant of tenancies, or explains where “they may be found”. It would be more transparent and concentrate local housing authority minds if there was a simple duty to publish a tenancy strategy that contained a complete statement of the new strategic policy. The tenancy strategy would then be a conventional policy document – like the allocation scheme, for example. Further, we would suggest that when it is amended, the whole strategy should be re-published: for the sake of transparency.
- 2.60. Also, clause 126 of the Bill does not specify the periodicity of the reviews. We would suggest that the review of these policies is linked to the review periods for allocation schemes and homelessness strategies. There are practical considerations which make it sensible for all of these policies to be reviewed and published at the same time.
- 2.61. We would also suggest that local authorities be required (under clause 126(7) of the Localism Bill) to publish their tenancy strategy on the internet, ideally on their websites, in addition to making the tenancy strategy available for inspection or supplying copies for a fee. The internet remains the cheapest and easiest way of publishing and accessing policy documents.
- 2.62. To a large extent, our concerns overlap the Government’s proposals relating to there being a common framework on tenancies, which provides for greater flexibilities. Our main

concern is the lack of parameters in the proposed primary legislation.

- 2.63. Contrary to the assurance in the Consultation Paper, the Localism Bill does not in fact contain any broad objectives that local housing authorities are to follow, or have regard to, when drawing up their strategic policies. Nor does it contain any provision whereby central government can provide or modify broad objectives, or provide guidance.
- 2.64. This approach runs counter to the approach in adult social care provision, where disparate social care provision, based on divergent local policies, has been replaced with a nationally applicable eligibility framework, providing for more limited local freedoms. Nearer to home, this approach also runs counter to the Government's approach to allocation schemes, which still contains, in primary legislation, supplemented by guidance, a clear framework of national priorities that local authorities are required to broadly speaking comply with.
- 2.65. We would suggest that in order to afford reasonable levels of protection to the vulnerable, to provide helpful guidance to local authorities (who are being asked to draft new policies, significantly different in type from existing housing authority policies and for which, therefore, no precedents exist), to avoid a postcode lottery and to fend off charges that the government lacks any clear vision as to how these new freedoms are to operate, the Bill should define groups of persons to whom secure or assured tenancies must be granted or who, at least, should receive special consideration. Central government should also provide guidance, for the purposes of fine tuning, which local housing authorities are to "act under" or "take into account" – either through the Tenancy Standard, or elsewhere.
- 2.66. Providing the additional guidance described above will also help local authorities understand and define what constitutes a "major change of policy" (clause 127(1) of the Localism Bill), i.e. understand when they have to consult. Changes of policy in relation to matters specified in the guidance will constitute a benchmark for what is a "major change of policy," providing some certainty as to when consultation will be legally required.

### **(E) New Tenancy Standards**

- 2.67. We address the proposals in relation to a revised tenancy standard (Consultation Paper paragraphs 2.41-2.44) in Section 8 of this response.

## Section 3: Empty Homes

### 3. Empty Homes

#### Response in summary

- 3.1. We are pleased to note that the Government is committed to bringing empty housing back into use in a time of shortage of affordable housing. Empty housing represents an unacceptable waste of resources and an obvious source of new homes for those in need of them. However, we are disappointed to note that the Consultation Paper:
- underestimates the true scale of the problem;
  - fails to address the scandal of empty housing in the social housing sector itself;
  - ignores the failure of existing mechanisms to address the problem; and
  - omits the obvious requirement for a statutory duty on local authorities to identify and address long-term empty housing in each local authority area.

#### Response in detail

- 3.2. There is no consultation question posed in Section 3 of the Consultation Paper but it appears that the Government is simply asking (at paragraph 3.4) whether there is agreement with the policy proposal that bringing empty homes back into use should count as provision of new homes under the *New Homes Bonus* and thus act as an incentive for Local Authorities to tackle empty housing in the private sector alone.<sup>1</sup>
- 3.3. Beyond that measure, the Consultation Paper only refers (at paragraph 3.5) to the Homes & Communities Agency's programme for supporting housing associations to refurbish about 3,000 empty properties and to manage them at an affordable rent for up to 10 years. This is by the provision of £100 million funding. However, this is a wholly inadequate investment

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<sup>1</sup> See also "New Incentives to tackle the blight of empty homes" (10/01/2011) where Communities Minister Andrew Stunell urged local communities to identify empty homes to their Local Council and provides the incentive of a pledge to match the council tax raised by bringing the empty property back into use using the New Homes Bonus. (<http://www.communities.gov.uk/news/corporate/1813446>)

given the number of empty properties potentially available and the urgent need for affordable housing in England.

- 3.4. Beyond these two proposals, the Consultation Paper fails to offer any overall vision for Government policy in respect of tackling empty homes. There is no mention at all of empty housing in the *public* sector. The Consultation Paper gives no indication as to how many of the empty homes in the *private* sector could be brought back into use or what legal mechanisms a Local Authority should use to achieve that. Nor is there an explicit commitment to increasing the number of public sector homes by taking control of empty private sector housing in addition to building new public sector homes. It is our view that this Government's policy is unclear and insufficient to deal with the shortage of affordable accommodation in England and does not deal effectively with the problem of bringing empty homes back into use.
- 3.5. We agree that making better use of empty homes should be part of the debate on the future of social housing in England. However, it seems to us that these policy proposals are inadequate and ill-conceived. The Consultation Paper does not clearly address the portfolio of mechanisms to be used and whether there may be a need for legislative change to make a policy to tackle empty homes effective (for example a change in the regime for obtaining Empty Dwelling Management Orders and limiting the costs of such applications). Further, there is no specific reference to dealing with empty dwellings in the Localism Bill. However, on the 7 January 2011 the Secretary of State indicated that it was the Government's intention to restrict the use of Empty Dwelling Management Orders by introducing secondary legislation on the grounds of protecting the civil liberties of home owners.<sup>2</sup> Nevertheless, this policy change has already been subject to stringent criticism.<sup>3</sup>
- 3.6. David Ireland, Chief Executive of the *Empty Homes Agency*, said only 44 Empty Dwelling Management Orders had been made since the law had come into effect in 2006 and said the examples quoted by Mr Pickles were "more theoretical problems than actual problems because, in each case, an order wasn't made".
- 3.7. Mr Ireland said he was "pleased" that the Secretary of State had decided not to scrap Empty Dwelling Management Orders altogether as some Conservatives had threatened when they were in opposition.<sup>4</sup>

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<sup>2</sup> "Pickles acts to protect the rights of home owners", available on line at <http://www.communities.gov.uk/news/newsroom/1812648>.

<sup>3</sup> "Eric Pickles curbs councils' empty home seizure powers" <http://www.bbc.co.uk/news/uk-politics-12127328>.

<sup>4</sup> "Tories attack home seizure plans" [http://news.bbc.co.uk/1/hi/uk\\_politics/5090612.stm](http://news.bbc.co.uk/1/hi/uk_politics/5090612.stm).

- 3.8. He stated there were 750,000 empty homes in the UK and the powers could be used to seize control of "blocks of flats built speculatively but where none of the properties has been let" rather than run-down or vandalised properties as represented by the Secretary of State.
- 3.9. Further Campbell Robb, Chief Executive of Shelter, also urged local authorities to use the legislation to bring properties back into use.

"With homelessness on the rise, millions priced out of the housing market and increasing numbers of people forced into an insecure private rented sector, tackling empty homes represents one small step in addressing our chronic lack of affordable housing..."

Local authorities must do all they can to bring long-term empty homes back into use, and the Empty Dwelling Management Order legislation provides them with a vital tool...

However, this won't avert the need for a substantial increase in the number of new affordable homes we build to meet demand."

### ***The Scale of the Problem***

- 3.10. This is described in detail in the statistical appendix to House of Commons Library standard note SN/SP/3012 (26 November 2010). It shows that in 2009 there were 651,993 empty homes in England alone with there being 34,555 empty Local Authority homes. No data is provided for other social landlords or for the private rented sector but a figure of an additional 5,735 'other' public sector homes are identified as empty in 2009.
- 3.11. Statistics for 2008 identify that there were 613,270 empty homes in the private sector and 42,039 empty homes held by social landlords with a further 36,944 empty Local Authority homes. The annual statistics show that for over 10 years there have been between 650,000 and 750,000 empty homes in England each year with between 70,000 – 90,000 being in the public sector alone.
- 3.12. Nearly 30,000 social homes were left empty for more than six months in 2007, according to figures obtained by the Liberal Democrats. Figures from April 2008 were given in response to a question from Liberal Democrat housing spokesperson Sarah Teather, which showed there were 12,895 empty local authority homes and 16,741 empty housing association homes.<sup>5</sup> The greatest number were in London, where there were 5,010 local authority and 2,962 housing association homes empty for more than six months.

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<sup>5</sup> "Figures reveal 'scandal' of empty social homes" Inside Housing 8 June 2009.

- 3.13. Ms Teather said the figures were ‘nothing short of a scandal’ when there are 1.77 million people on the social housing waiting list. She also said:

‘The cost of bringing these homes back into use is just a fraction of the cost of new build yet the government is sitting idly by while they fall into disrepair...With repossessions on the rise, we urgently need much more social housing. Reducing VAT on repairs is one big step the government could take to cut the cost of bringing these houses back into use and provide thousands of families with a home.’<sup>6</sup>

- 3.14. Unfortunately, the Consultation Paper refers only to 300,000 properties being empty for over 6 months in the private sector and this number does not appear to match published statistics.

- 3.15. An article in ‘*Inside Housing*’ on the 22 November 2010 (“*Public asked to identify empty homes*”) based on research and data compiled by the campaign group *Empty Homes* has shown the number of empty homes has reached 726,000 in England. The number of empty homes was up 20,000 on 2009 figures, and was thought to be one million across the United Kingdom. The article encouraged the public to report empty homes on the *Empty Homes* website so that details of all reported properties could be sent to the relevant local council. *Empty Homes* chief executive David Ireland said:

‘House building is at an all time low, housing need at an all time high, and yet still the numbers of empty homes are rising. It is clear market forces alone will not turn empty property into homes, we need people to help...We are asking people to tell us about neglected properties and local eyesores that they want to see lived in again. The government has announced it will make £100 million available to help get empty homes into use. We want people to have a say where it needs to be spent. Getting homes into use is a cost-effective way of creating more housing. But we want to see this money spent where it will provide homes and make a real difference to people.’

- 3.16. It is our view that the Government’s proposals appear inadequate to deal with the need for affordable housing and fail to address the need to deal with empty social housing as well as empty housing in the private sector.

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<sup>6</sup> A previous written answer by the Labour Government identified that as of the 12 October 2009 27 Interim Empty Dwelling Management Orders (EDMOs) have been approved by the Residential Property Tribunal Service (RPTS) since the legislation came into effect in April 2006. However, local authorities claim that in many cases the threat of an EDMO has been sufficient to make owners take action to bring long-term empty homes back into use (Citation: HC Deb, 12 October 2009, c315W).

### ***The failure of existing Local Authority powers concerning empty dwellings in the private sector***

- 3.17. We here review some of the powers that are available to Local Authorities to put empty dwellings in the private sector into use. The available statistics demonstrate that Local Authorities are either unwilling or unable to put existing powers to effective use to bring empty dwellings in the private sector back into use and occupation. What is required is a statutory duty to take action coupled with the supply of financial resources and incentives.

### ***Compulsory Purchase***

- 3.18. Serving compulsory purchase orders (CPOs) on empty properties may be justified where there appears to be no other chance of a suitable property being used as a home. Before a CPO is confirmed, a Local Authority will have to show that they have taken steps to encourage the owner to bring the property into acceptable use. The Local Authority will also need to show their reasons for making a CPO justify interfering with the owner's human rights or those of anyone else with an interest in the property.

### ***Housing Act 1985, section 17***

- 3.19. This provision gives a Local Authority power to take over land, houses or other properties to increase the number of homes available or improve the quality of the housing stock. The main uses of this power are to secure more housing locally. This includes bringing empty properties back into use as homes and improving substandard ones. Where a local authority gets control of a property through this power, they will usually sell it to either a private-sector developer, a prospective owner-occupier or another social landlord.

### ***Town and Country Planning Act 1990, section 226***

- 3.20. The powers in section 226 are intended to help local authorities which have planning powers to take control of the land they need to put in place their community strategies and local development plans. These planning powers are wide enough to allow them to take over land (including empty properties) for redevelopment.

### ***Enforced sales procedures***

- 3.21. Where a Local Authority has issued and enforced a charge against a property (e.g. to recover a debt) they have all the legal rights of a mortgage lender under the Law & Property Act 1925. This power could be more widely used to force sale of empty housing or to install tenants.

### ***Empty dwelling management orders***

3.22. The Housing Act 2004 allows a Local Authority to take out an empty dwelling management order (EDMO) to make sure that a privately owned empty property is used for housing. An EDMO can be made on properties that have been empty for at least six months. There are two types of EDMO – interim and final. An interim EDMO lasts 12 months but a final EDMO can last up to seven, 14 or 21 years.

3.23. An EDMO allows the Local Authority to 'step into the shoes' of the owner of an unoccupied building and make sure that an empty property is occupied and managed properly.

3.24. EDMOs were initially viewed as *the* mechanism for dealing with the problem of empty housing:

“It is the Government’s ambition that no one should have to live in a neighbourhood scarred by the blight which empty properties can cause. A great deal of progress towards meeting this has been made in recent years. Overall, the number of empty residential properties has reduced by 10 per cent since 1997. But still nearly 600,000 privately owned residential properties in England are empty and half of these have been out of use for longer than six months.”<sup>7</sup>

3.25. The EDMO system would thus seem to be the most obvious mechanism for enforcing any policy of reducing the number of empty homes. However, it appears that EDMOs have not been used effectively by Local Authorities given the high numbers of empty dwellings which have persisted in the private sector and as reflected in the written answers to questions raised in Parliament.

3.26. On 14 October 2010 Joan Walley MP asked the Secretary of State for Communities and Local Government

“how many (a) interim and (b) final empty dwelling management orders have been (i) applied for and (ii) made to date.” [HC 17083]

3.27. For the Government, Andrew Stunell MP replied:

“To date, 43 applications for interim empty dwelling management orders have been made to the Residential Property Tribunal Service, of which 36 have been approved. Local authorities do not need any further approval to make final empty dwelling management orders and data is not collected on them.”

3.28. Although the problem of empty dwellings in the private sector has been an issue for Government for many years these statistics demonstrate that even the most obvious enforcement procedures

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<sup>7</sup> “Empty Dwelling Management Orders: Guidance for residential property owners”, p 2, 23 October 2006.

have been put to only very limited use and the number of empty dwellings in the private sector has not been reduced effectively.

### ***A new approach***

- 3.29. It is our view that without clear guidance and/or legislative changes concerning methods of enforcement - such as a shorter period of three months without occupation to trigger a EDMO application or an extension of an interim order beyond 12 months - the proposals in the Consultation Paper are likely to fail to make any impact on the problem of empty housing. It is our view that the Secretary of State's further proposal to restrict the use of EDMOs is ill conceived and based on flawed reasoning and evidence which seems to represent the past policy of the Conservative Party when in opposition. The evidence produced by the Government in Commons Library standard note SN/SP/3012 and written answers in Parliament identifies the scale of the problem, the under use of EDMOs and failure of successive Governments to tackle this national scandal. It is noteworthy that in September 2008 the Labour Government was pressed on this failure to cut empty homes and on the use of EDMOs where the then shadow housing minister, Grant Shapps, said the Labour Government was not doing enough:

"The fact that there are over three quarters of a million empty properties in this country, yet at the same time 130,000 children will be homeless this Christmas, should make ministers think very carefully about how their housing policies have failed an entire generation...

Rather than coming up with a myriad of complex schemes, which often contradict each other, it's time for the government to take decisive action to solve this housing crisis,"<sup>8</sup>

- 3.30. It is our view that the Secretary of State's proposals on further restricting the use of EDMOs are fundamentally flawed, exacerbate past failures and indicate that the Coalition Government has no coherent policy to solve the problem of empty homes. We suggest that it is not taking seriously the scandal of empty homes amid a housing crisis.
- 3.31. As we have indicated, what is needed is a decisive comprehensive approach to tackling empty housing across all sectors underpinned by a new statutory duty on local councils to act to address empty housing in their areas. That duty can only achieve what is needed if local authorities have the resources to comply with it. Those resources can take the form of receipts from forced sales, rental income from premises brought back into use, and the levying of charges for council action (with the right to payment secured against the title to the premises).

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<sup>8</sup> "Ministers pressed on empty homes" <http://news.bbc.co.uk/1/hi/uk/7794864.stm>

### **Conclusions**

- 3.32. Although we support a broad policy that empty dwellings should be brought back into use to meet the high level of housing need in the England, it is our view that the limited policy changes proposed in this Consultation Paper are highly unlikely to be effective. Any coherent and comprehensive policy has to clearly address mechanisms and strategies for bringing empty homes in *both* the private and public sectors back into use. The current proposals, including the Secretary of State's announcement on 7 January 2011, are simply inadequate and incoherent.
- 3.33. The issue of meeting housing need requires investment in building of new affordable social housing and only such a policy *in association with* an effective policy of reducing the number of empty dwellings will meet the need for affordable social housing.

## **Section 4: Allocating Social Housing**

### **4. Allocating Social Housing**

#### **Response in summary**

4.1. In summary, our response to the proposals on allocation of social housing is that:

- we welcome the Government's commitment to retaining the current statutory scheme for the allocation of social housing and the current reasonable preference categories for applicants;
- we consider that the proposals for "open waiting lists" and the lack of guidance as to how to prioritise between applicants who have housing need mean that, in practice, those entitled to reasonable preference are unlikely to receive a "reasonable headstart";
- we support the retention of Choice-Based Lettings Schemes;
- we request Government guidance on the proportions of allocations to be given to those who have a reasonable preference and those who do not, and on prioritising between applicants who have a reasonable preference;
- we consider that Government guidance should advise local housing authorities to recognise those who have a greater need for housing over those who have fewer needs (cumulative preference);
- we propose an additional category of persons entitled to a reasonable preference;
- any decisions that people are not entitled to apply for social housing should be in writing, with reasons, and should be accompanied by a right to request a review;
- we consider that the real problem is the lack of supply of affordable social housing.

#### **Response in detail**

4.2. We welcome the Government's commitment to retaining the current statutory scheme for allocation of social housing and the

retention, within that, of the existing categories of 'reasonable preference' for applicants in the greatest housing need. However, we doubt whether those applicants will in reality continue to receive the "reasonable headstart"<sup>9</sup> required by the reasonable preference categories if local housing authorities take up the proposed options set out in the Consultation Paper. We believe that allocation schemes should be required by statute to give the greatest priority to those in greatest need.

- 4.3. Contrary to the position taken in the Consultation Paper, we support "open waiting lists". We believe that anyone who wants to have the chance of obtaining a secure or assured tenancy should be able to put their name forward for consideration in an allocation scheme. Within an allocation scheme those in lesser need or with no housing need at all will, in areas of high demand, stand little realistic prospect of being allocated a property. However, we believe that the figure of 1.8 million households on allocation schemes in England<sup>10</sup> shows that huge numbers of people believe that they would be better housed through a secure or assured tenancy, with a social landlord, rather than in the private rented sector.
- 4.4. Whilst Choice-Based Letting (CBL) is not an answer to the problem of lack of housing supply, it has at least given applicants a realistic view of their prospects of success. They are no longer dependent on waiting to receive a direct offer from the local authority, and wondering when that direct offer is to come. CBL schemes also mean that applicants themselves are better informed as to the lack of housing supply.
- 4.5. If access to the waiting list is to be restricted, over and above those categories currently provided for at section 160A Housing Act 1996, we would recommend that a decision not to allow a potential applicant onto the waiting list must be in writing, with clear reasons given and with the opportunity for a review of that decision.
- 4.6. We consider that the real problem is the lack of supply of affordable social housing. We welcomed the previous government's commitment made in 2007 to building a further three million affordable social homes by 2020. It is plain that those homes will not now be built. We believe that the supply of affordable homes needs to be urgently and immediately tackled, not least by deploying measures to take empty homes out of private ownership and into the social housing sector (see our response to Section 3 *Empty Homes*).

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9 *R v Wolverhampton Borough Council ex parte Watters* (1997) 29 HLR 931, CA

10 Shelter, quoting CLG statistics

**Questions 17 – 19: As a local authority, how would you expect to use the new flexibilities to decide who should qualify to go on the waiting list? What sort of outcomes would you hope to achieve? In making use of the new flexibilities, what savings or other benefits would you expect to achieve? What opportunities as a tenant or resident would you expect to have to influence the local authority's qualification criteria?**

- 4.7. We understand the importance of certain aspects of any particular allocation scheme being determined locally. However, we believe that national government should set and emphasise the principle that social housing should be allocated to those in greatest need. If that principle is to be applied – as is envisaged by the proposed retention of the principle of reasonable preference and of the existing categories – guidance needs to be issued on the following.

***(i) The proportion of allocations to be given annually to those who have reasonable preference and those who do not***

- 4.8. Recent cases, notably *R (Ahmad) v Newham LBC*<sup>11</sup>, have held that local housing authorities may allocate to applicants who do not have a reasonable preference, provided that, overall, those allocations do not dominate the scheme. There is no government guidance or case-law as to what percentage of allocations to those not entitled to a reasonable preference would or would not unreasonably dominate the scheme. We believe that central government should provide that guidance.

***(ii) How local authorities should prioritise between applicants who have a reasonable preference***

- 4.9. The Consultation Paper does not offer any guidance as to how local housing authorities should prioritise *between* applicants who have housing needs. It simply proposes to preserve the power to provide such by way of regulation. Use of that power and the production of guidance would foster greater clarity and fairness.
- 4.10. We are also concerned that emphasis on 'local flexibility' prioritises those groups who are most effective at lobbying local councils. These tend to be existing tenants, rather than applicants for homelessness assistance or other people in housing need who are not social housing tenants. Clear guidance from central government as to what proportion of

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11 [2009] UKHL 14, [2009] HLR 31, HL

allocations should go to those with a reasonable preference, and what proportion need not, would assist local councils.

***(iii) The importance of cumulative preference***

- 4.11. It is central to the concept that those with the greatest need should be given the greatest priority that ‘cumulative’ preference should be recognised. We note that the judgement in *Ahmad* held that it was up to each local authority to decide whether to recognise cumulative preference. It did *not* hold that cumulative preference was unlawful.
- 4.12. We strongly believe that, because cumulative preference enables a local housing authority to identify those in greatest housing need and to prioritise accordingly, it should be a feature of all allocation schemes in areas where demand exceeds supply.

**Questions 20 and 21: Do you agree that current statutory reasonable preference categories should remain unchanged? Or do you consider that there is scope to clarify the current categories? Do you think that the existing reasonable preference categories should be expanded to include other categories of people in housing need? If so what additional categories would you include and what is the rationale for doing so?**

- 4.13. The current statutory reasonable preference categories should remain in place. In particular, we believe that the category of “people who are homeless within the meaning of Part” (s.167(2)(a) HA 1996) should be retained. It is important to recognise that not all homeless people will be entitled to an accommodation duty under the homelessness provisions at Part 7 HA 1996. This category requires local housing authorities to recognise the housing needs of those who are homeless but do not have a priority need.
- 4.14. We propose one additional category: “a 16 to 18 year old child who is a child with a housing need within the meaning of s17 and s20 of the Children Act 1989”. Recent case-law has emphasised that housing and social services departments or authorities should be working together to meet the housing needs of homeless young people (*R (M) v Hammersmith & Fulham LBC*<sup>12</sup>, *R (G) v Southwark LBC*<sup>13</sup>). A child who has been homeless, and subsequently accommodated by social services pursuant to s.20 Children Act 1989, would not fall into any of the existing reasonable preference categories. He or she is no longer

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<sup>12</sup> [2008] UKHL 14, [2008] 1 WLR 535, HL

<sup>13</sup> [2009] UKHL 26, [2009] 1 WLR 1299, HL

homeless, is not owed a homelessness duty under Part 7 HA 1996 and is unlikely to fall within the remaining three categories. However, any child who has been homeless has a very real need for secure, long-term and affordable accommodation. It would be appropriate for that need to be recognised in the reasonable preference categories.

**Question 22: As a landlord, how would you expect to use the new flexibility created by taking social tenants seeking a transfer who are not in housing need out of the allocation framework? What sort of outcomes would you hope to achieve?**

- 4.15. One unified local allocation scheme is a simple, clear and transparent mechanism for allocating social housing. Dividing applicants for an allocation into two or more waiting lists does not increase the numbers of properties available for allocation, nor does it decrease the numbers of applicants waiting for an allocation.
- 4.16. If there is to be more than one waiting list, then guidance from Government as to the proportions of allocations to be given each year between the waiting lists is even more necessary.
- 4.17. The Consultation Paper proposes that tenants wishing to transfer who are entitled to a reasonable preference (because they are occupying overcrowded accommodation, or have medical or welfare needs to move) would remain on the allocation scheme. In effect, therefore, the separate waiting list for transferring tenants would simply be for those tenants who wish to move, but have no need to do so. We do not see why one single allocation scheme and waiting list cannot include a band or category for those tenants, as was the case in *Ahmad*.
- 4.18. Given the huge pressures on social housing, we consider it extraordinary that the Government should be giving any emphasis at all to modifying arrangements so as to enable priority to be given to current social housing tenants who have no need to move.

## Section 5: Mobility

### 5. Mobility

- 5.1. The Consultation Paper proposes to remove, from the current statutory allocation framework, many existing social housing tenants (both local authority and housing association tenants) who seeking alternative homes. The proposal would largely produce a return to the position before the Homelessness Act 2002 came into force. The reason given for the proposed reform is that it is perceived that only around five per cent of tenants are moving within social housing each year. From this it is inferred that the current arrangements for supporting moves are inadequate. The motivation for the reform is that the Government wants to assist those trapped in unsuitable accommodation who are unable to take advantage of opportunities to improve the quality of their lives, such as employment offers. The purpose is to increase mobility within social housing and to provide opportunities for tenants who wish to move. It is also to be noted that Clause 148 of the Localism Bill proposes amendment to section 197(2) of the Housing and Regeneration Act 2008 to enable the Secretary of State to issue directions to the Regulator in relation to assisting tenants with exchanges.
- 5.2. Guidance from the Regulator to social providers may then be expected to set out the Government's intention to "ensure there is a social home swap programme which will mean that social tenants wishing to move by exchanging their tenancy with that of another household can maximise their chances of securing a suitable match. Efficient home swap arrangements should enable tenants seeking a move to have access to the complete list of other tenants similarly interested in an exchange." (paragraph 5.3 of the Consultation Paper).
- 5.3. Key to an understanding of the intended legislative change is the Government's intention to overcome the fear that those with secure and assured tenancies might have (that a move will result in loss of security) by using the Tenancy Standard to place on landlords an obligation to grant the exchanging secure or assured tenant a secure or assured tenancy on their new property.
- 5.4. Increasing the ability to obtain a transfer has to be seen in the context of the size of waiting lists under existing housing allocation schemes indicating the shortage of supply over demand for social housing. This context coupled with the difficulty for first time buyers to find affordable housing means

that the real issue in relation to mobility in terms of transfers is the shortage of available housing which can only be addressed by the availability of more mixed tenure housing.

- 5.5. That said, the Homelessness Act 2002 reform - of mainstreaming transfers into allocation schemes - has been largely affected by the housing shortage rather than being wrong in principle. The policy of trying to achieve an equal footing for those seeking a move within social housing was sound and proposals designed to facilitate exchanges or swaps do not supply grounds for taking transfers out of the allocation system, when the real target is to facilitate exchanges.
- 5.6. Until the draft directions/guidance to be issued under section 197(2) of the Housing and Regeneration Act 2008 are published it will not be possible to judge the effectiveness of present proposals.
- 5.7. On 20 February 2007 Professor John Hills published: "*Ends and Means: the Future of Social Housing in England*" (Research Centre for Analysis of Social Exclusion: ISSN 1465-3001), in which he talked of a more varied menu for social tenants. The concept of greater choice to facilitate movement is relevant.
- 5.8. We would urge the Government to implement the Law Commission's *Rented Homes Bill* proposals for a single social tenure.<sup>14</sup> This is the means to achieve the stated aim of facilitating exchanges. It would also simplify the Government's task in formulating the necessary guidance and would overcome the factor which is said to discourage mobility. There would then be no need for the intended guidance and directions requiring landlords to grant the exchanging secure or assured tenant a secure or assured tenancy on their new property because there would only be one sort of social tenure. This is a simple solution which the Government is asked to adopt.

**Question 24: As a tenant, this national scheme will increase the number of possible matches you might find through your web-based provider but what other services might you find helpful in arranging your mutual exchange as well as IT-based access?**

- 5.9. We feel that it would facilitate mutual exchanges if everyone had the same sort of tenancy.

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<sup>14</sup> 'Renting Homes: The Final Report' (Law Com No 297), published 5 May 2006.

## Section 6: Homelessness

### 6. Homelessness

#### Response in summary

6.1. Our response, in summary, to the proposed changes is set out below:

- The proposal to give local authorities greater flexibility in bringing the homelessness duty to an end with offers of accommodation in the private rented sector has a potentially serious, negative impact on applicants and particular local authorities.
- There is, at present, a duty on local authorities to ensure that accommodation is within its own district so far as reasonably practicable. In many areas it is very easy for a local authority to say that they have no suitable accommodation available and must house applicants temporarily elsewhere e.g. as frequently happens to applicants to London local authorities who are placed in temporary accommodation in the Midlands. If local authorities can bring the full homelessness duty to an end with an offer of accommodation in the private sector, many will make such offers outside their district.
- Local authorities may be keen on moving applicants out of their area as this means that there is no continuing responsibility under Housing Act 1996 Part 7 (*homelessness*) and also one less applicant under Part 6 (*housing allocation*).
- The safeguard that the location must be suitable for the applicant and that it must be reasonable for the applicant to accept the offer is unlikely to provide applicants with much protection as can be currently seen in the context of temporary accommodation.
- The scale of this redistribution is likely to be exacerbated due to proposed changes in housing benefit payments. These mean that a number of local authorities will soon be able to assert that they have almost no suitable private rented accommodation in their district as they cannot house applicants in properties where they cannot afford to meet the shortfall between rent and housing benefit.
- Shifting applicants out of the district where they make their application has a potentially negative and large-scale impact

on receiving local authorities and in particular social services departments and schools, in addition to having a significant impact on applicants and their families.

- The safeguard of allowing an application to recur within two years is insufficient. Applicants should have a right to revive an application to the same authority within four years or for the authority where the accommodation is provided to be able to refer back within four years.
- None of the safeguards proposed are sufficient to prevent the sort of geographical redistribution of applicants, in particular from Central London authorities, that is envisaged.

### **Response in detail**

- 6.2. The analysis of the problem with homelessness applicants having to wait long periods before obtaining permanent social housing under Part 6 of the Housing Act 1996 is fully accepted. The concept of priority need is based on the need for housing and not a specific need for social housing. In our experience applicants apply as homeless as a last resort and will quickly be made aware that this will not passport them to permanent social housing under Part 6 of the 1996 Act. Many take up offers made by authorities through their Housing Options teams to consider alternatives to pursuing their homelessness application, normally through their being assisted in finding affordable private rented accommodation with assistance being provided in paying the requisite deposit. Some authorities have been criticised for using such alternatives as a “gate keeping” mechanism to limit the numbers of those accepted as homeless. However, there is no embargo on an applicant pursuing such alternatives in tandem with their homelessness application being considered. The number of persons provided with accommodation through such schemes (normally in the private sector) would not be included in the figures cited at paragraph 6.7 of the Consultation Paper.
- 6.3. Under paragraph 6.9 of the Consultation Paper it is suggested that many applicants with children may not need social housing. Rather they face street homelessness and simply need “suitable accommodation” in terms of size, affordability and location. The difficulty with categorising a need for *social housing* as in some way imposing additional requirements to a need for *suitable accommodation* is not defining the additional requirements in a way that can be objectively identified. Would they be based on a need to have accommodation that would remain affordable in the foreseeable future or a need of accommodation that would mean that the family were likely to be able to stay there for a longer period (in contrast to what could be expected in private rented accommodation)? For example to ensure that children with

special needs could maintain their education at a particular school or children with serious medical conditions could stay close to where they were treated? The concern is that many Authorities with large numbers of applicants awaiting permanent social housing under Part 6 would find it very tempting to treat all new entrants as persons who do not need social housing. With no sanction against such a policy, it could be seen as a means to improve statistics and lessen the demand for the provision of temporary accommodation.

- 6.4. The practical implications of what is proposed must be fully considered. In terms of the current provision of temporary accommodation as identified at paragraph 6.12 of the Consultation Paper there is, at present, a duty on local authorities to ensure that accommodation is within its own district so far as reasonably practicable. In many areas it is very easy for a local authority to say that they have no suitable accommodation available and must house applicants temporarily elsewhere. It is commonplace for London local authorities to provide temporary accommodation in the Midlands and many have out of London placement policies. It is also commonplace for central London local authorities such as Westminster, to provide the majority of their temporary accommodation in less expensive boroughs such as Hackney and Haringey. They can cite lack of affordable accommodation in their district as a justification and argue that families can use public transport to keep in contact with relatives and friends.
- 6.5. The protection offered under paragraph 6.13 of the Consultation Paper requiring “careful consideration to whether the location was suitable for the applicant and whether it was reasonable for the applicant to accept the offer” will not be sufficient to protect applicants from being farmed out to another district. The following matters arise:
- 6.5.1. The protection is similar to that which already exists in terms of temporary accommodation. However case law has established that out of London placements policies are lawful, and that cheaper accommodation outside the district can render the provision of more expensive accommodation within the district not reasonably practical: *R (Calgin) v Enfield London Borough Council*.<sup>15</sup> Where final offers are made applicants are expected to move schools and doctors: *R v South Holland District Council ex p Baxter*<sup>16</sup> and *Williams v Birmingham City Council*.<sup>17</sup> It is only in exceptional cases that a challenge based

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<sup>15</sup> [2006] HLR 4, 58 (QBD).

<sup>16</sup> (1998) 30 HLR, 1069 (QBD).

<sup>17</sup> [2008] HLR 4, 59 (CA).

on location can be sustained. In the context of temporary accommodation families are expected to travel to maintain links and children move schools. Provided local authorities have taken into account matters raised, the courts will not intervene and families can be moved away from family and support networks. If the same approach were to be taken to the discharge of the full homelessness duty under Part 7 of the 1996 Act there would be significant and damaging implications for families, children, communities and receiving local authorities.

- 6.5.2. Local authorities who move applicants to the Midlands have had such policies sanctioned by the courts on the basis of scarce accommodation in the Greater London Area.
- 6.5.3. It is easy for local authorities to point to the strains on their Part 6 schemes to justify extensions of the current policies to source 12 month tenancies in less expensive districts.
- 6.5.4. The benefit to the authority when it removes an applicant from their area is twofold: no continuing responsibility under Part 7 but also one less local applicant for permanent accommodation under Part 6.
- 6.5.5. The proposed changes in housing benefit payments, namely the absolute cap on the amount of local housing allowance that can be paid to claimants in the private sector and the 30<sup>th</sup> percentile restriction, both effective from April 2011 for new claimants and for all claimants following a transitional period of nine months,<sup>18</sup> mean that a number of local authorities will soon be able to assert that they have almost no suitable private rented accommodation in their district as they cannot house applicants in properties where they cannot afford to meet the shortfall between rent and housing benefit.<sup>19</sup>
- 6.5.6. The scheme is likely to result in the local authorities who currently benefit from being able to place

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<sup>18</sup> The Officers (Housing Benefit Functions) Amendment Order 2010 (SI.No.2836/2010) in force from 18 March 2010 which amends the Rent Officers (Housing Benefit Functions) Order 1997 and the Housing Benefit (Amendment) Regulations 2010 (SI.No.2835/2010).

<sup>19</sup> According to the DWP 's Impact Assessment looking at the effect of the LHA cap, the removal of the £15 excess, and setting LHA rates at the 30th percentile in each local authority, the average loss will be £12 a week, and £22 in London. London Councils estimate 18, 645 households will be affected by the LHA cap.

applicants in temporary accommodation out of district using the scheme to shift them permanently out of the area. If a 12 months tenancy is available the argument to say that children can move schools and medical treatment can be switched, is made stronger. They will have at least a year at the new school.

- 6.6. The increased use of private rented accommodation is an attractive option, however the unintended consequences of this proposal is that it will result in a number of local authorities sourcing (as they do now with temporary accommodation) relatively cheap accommodation out of their areas, and moving families out of the borough in the expectation and hope that they will settle there and not be referred back within 2 years. No doubt they will encourage agents they deal with to encourage landlords to keep such tenants for the 2 year period. This, combined with the changes in housing benefit referred to above, will create a situation where certain local authorities will in the next few years be hugely overburdened by an influx of homelessness applicants from other areas. This is unfair for them and for the families moved. It will impact on local authorities' ability to provide for the educational needs of those shifted and will undoubtedly burden social services in the receiving local authorities.

**Question 26: As a local authority, do you think there will be private rented sector housing available in your area that could provide suitable and affordable accommodation for people owed the main homelessness duty?**

- 6.7. Local authorities already have a duty to seek out temporary accommodation in their area and often provide section 193 accommodation ('to persons with priority need who are not homeless intentionally') through private landlords on assured shorthold tenancies. It would therefore be surprising if they had available a fresh crop of accommodation for discharging their homelessness duty, which would be less rather than more attractive to landlords (requiring them to agree to 12 month tenancies). The actuality is that it is sourcing accommodation out of the borough that would be looked at.
- 6.8. Under paragraph 6.17 of the Consultation Paper the safeguard of allowing an application to recur within 2 years is helpful. It would be much stronger to have a right to revive an application to the same authority within 4 years or for the authority where the accommodation was provided to be able to refer back within 4 years. Section 125(6) of the Localism Bill proposes a referral back within 2 years. In our view none of the safeguards proposed are sufficient to prevent the sort of geographical redistribution of applicants (in particular from that the Central London authorities)

that is envisaged. This amendment will undermine the principle (subject to the referral provisions section 198) that a homelessness applicant is able to pursue an application in their area of choice.

## Section 7: Overcrowding

### 7. Overcrowding

- 7.1. We agree that overcrowding in housing is a serious problem. As the Government is hopefully aware, this issue was also the subject of consultation by the Department for Communities and Local Government in 2006: *'Tackling Overcrowding in England - a discussion paper'* July 2006 (06HD04036).
- 7.2. The prevalence and effect of overcrowding across all sectors of the housing market were graphically described at paras 1.1-1.3 and 2.9 of that paper. We agree with those statements. They are confirmed by our own experience as practitioners.
- 7.3. A member of Garden Court Chambers coordinated a response to that consultation on behalf of the HLPAs (Housing Law Practitioners Association). It is not known what consideration was given to the responses to the DCLG paper received from the wide variety of organizations who were specifically consulted or others from whom responses were received and what, if any, conclusions were come to as a result. We respectfully suggest that the Government may wish to have that researched if not already done.
- 7.4. We welcome the commitment given at paragraph 7.4 of the current Consultation Paper.
- 7.5. As to the proposals at paragraph 7.5 of the Consultation Paper, no further comments are made as they have appeared in other parts of this response. In addition, in our view (contrary to that at paragraph 7.7) their implementation, should that occur, is unlikely to make a serious impact on the problems identified. First of all, none (apart from 4th bullet in paragraph 7.5 of the Consultation Paper) help to ease the situation in the private sector where, according to the figures at paragraph 7.2 of the Consultation Paper, the bulk of overcrowding is to be found. Second, the effect of proposals at the first two bullet points depends on future public tenants wishing to move (having recently been granted tenancies) applying and their applications being accepted. The effect is difficult, if not impossible to assess. The 3<sup>rd</sup> and 5<sup>th</sup> bullet points do not make tackling overcrowding a priority. The 4<sup>th</sup> bullet point is welcome, and will include applicants from the private sector, but does not alter the current position.

## Section 8: Reform of Social Housing Regulation

### 8. Reform of Social Housing Regulation

#### **Question 5: Do you agree that the Tenancy Standard should focus on key principles? If so, what should those be?**

- 8.1. Currently the Tenant Services Authority's Tenancy Standard regarding 'Tenure' is expressed in the following terms:

"Tenure

Required outcomes

Registered providers shall offer and issue the most secure form of tenure compatible with the purpose of the housing and the sustainability of the community. They shall meet all applicable statutory and legal requirements in relation to the form and use of tenancy agreements.

Specific expectations

Registered providers shall publish clear and accessible policies which outline their approach to tenancy management. They shall develop and provide services that will support tenants to maintain their tenancy and prevent unnecessary evictions. The approach should set out how registered providers will make sure that the home continues to be occupied by the tenant they let the home to."

- 8.2. We agree that a revised Tenancy Standard should focus on key principles, as exemplified by the current Tenancy Standard. The revised principles will need to take account of the altered environment as regards legislation and policy. They will need to protect tenants and prospective tenants (hereafter referred to as 'consumers') as 'consumers' of local authority and housing association housing services.
- 8.3. The legislative authority for the regulator to set standards for local authorities and housing associations as regards the Tenancy Standard is section 193 of the Housing and Regeneration Act 2008. By schedule 17, paragraph 3 (enabled by clause 151) of the Localism Bill, the heading for section 193 of the 2008 Act is to change from 'Provision of Social Housing' to 'Standards relating to consumer matters'. If an 'Affordable Rent' model and 'flexible tenancies' are to be introduced, along side the 'Social Rent' model and secure tenancies, then it is critical that a revised Tenancy Standard protects individual consumers from an arbitrary or inappropriate restriction as to:

- the rent model (social/affordable) imposed when accommodation is offered to them;
  - the type of tenancy (social/flexible) offered to them; and
  - the terms on which any flexible tenancy is offered.
- 8.4. Regarding the current Tenancy Standard, there is nothing objectionable in carrying over the 'Specific expectations' (as far as they go) into a revised Tenancy Standard. As regards 'Required outcomes' (there is nothing objectionable about maintaining the principle that "Registered providers shall offer and issue the most secure form of tenure compatible with the purpose of the housing and the sustainability of the community", (see extract from current Tenancy Standard cited at paragraph 8.1 above) albeit that what constitutes compatibility "with the purpose of the housing and the sustainability of the community" will have substantially altered in the environment of the proposed policy and legislative changes.
- 8.5. However, on the assumption that the Secretary of State may wish to issue a Direction (under section 197 of the Housing and Regeneration Act 2008), to the regulator which is setting the revised Tenancy Standard under section 193 of the same, that *reflects and furthers* the objectives of the proposed policy and legislative changes, we suggest that the Direction directs that any revised Tenancy Standard requires registered providers to protect vulnerable 'consumers' through ensuring that such flexibility as is available in the choice of rent model, type of tenancy and the terms of any tenancy is consistent with the needs of persons who are vulnerable by reason of age, illness, disability, domestic violence, etc.
- 8.6. For example, any Direction and/or revised Tenancy Standard might include provision for requiring that the social rent model be used for consumers who have been incapacitated since youth and who have never worked in consequence. Or it might require the provision of a social tenancy as opposed to a flexible tenancy to a person who is vulnerable on account of old age. Or, if a flexible tenancy is to be offered to a pregnant female consumer, it might require a minimum term, say four years, to be offered to allow the mother to enjoy security of tenure throughout pregnancy and the pre-school years of her child, thus ensuring the welfare and best interests of the child. Such standard setting would remove the potential for arbitrary decisions that distort the policy objective of local flexibility by imposing outcomes that are inconsistent with basic human dignity, rational decision making and the Convention rights protected by the Human Rights Act 1998.

- 8.7. Any Direction issued by the Secretary of State and any revised Tenancy Standard, should also be consistent with the private law and public sector equality duties contained in the Equality Act 2010.
- 8.8. We do not consider that a revised Tenancy Standard should address whether starter tenancies “should be extended to provide housing association landlords more flexibility to extend probationary periods for tenants where there are ongoing concerns about anti-social behaviour ” (paragraph 2.44 of the Consultation Paper). There is no need for a *national* standard of this type, which is best addressed locally.

**Question 6: Do you have any concerns that these proposals could restrict current flexibilities enjoyed by landlords? If so, how can we best mitigate that risk?**

- 8.9. It is hard to see how the proposals would ‘restrict’ the current flexibilities enjoyed by landlords. However, we suggest that some of the proposals allow latitude to landlords, which is inconsistent with protecting consumer interests. As regards consumer protection, there is no need to restrict the role of the regulator to “setting clear service standards and investigating and addressing *serious* failures against those standards” (paragraph 8.8 of the Consultation Paper). This has no benefit to the consumer, as it simply makes it harder for the consumer to advance his or her interests directly. In the Localism Bill, Schedule 17 (enabled by clause 151), paragraph 8 is to insert section 198A into the Housing and Regeneration Act 2008. Section 198A(2) will restrict the regulator’s powers of intervention to cases where it thinks there are reasonable grounds to suspect that the failure has resulted in a serious detriment to the registered provider’s tenants or potential tenants, or there is a significant risk that, if no action is taken by the regulator, the failure will result in a serious detriment to the registered provider’s tenants or potential tenants. There is no basis to consider that raising the bar and thereby excluding material failures that are not judged serious advances consumer interests. It anything it clearly facilitates tolerance of certain material failings and creates an ‘acceptable’ margin of failure based on inadequate service provision.
- 8.10. Further, we disagree with the proposal to create “an enhanced role for elected councillors, MPs and tenant panels in the complaints process” (paragraph 8.10 of the Consultation Paper) in the terms set out in draft legislation. In the Localism Bill, clause 153, what is proposed is an amendment to Schedule 2 of the Housing Act 1996, inserting paragraph 7A, so that a complaint is not duly made to a housing ombudsman under an approved scheme unless made in writing to the ombudsman by a designated person by way of a referral of a complaint made to

the designated person; a designated person being a member of the House of Commons, a member of the local housing authority for the district where the property concerned is located or a designated tenancy panel for the social landlord. While this may promote local dispute resolution, it plainly also makes it harder for the consumer to pursue a remedy to an ombudsman. The consumer will have no direct route to the ombudsman. Why the consumer should lose the 'flexibility' to complain to the ombudsman directly is not at all clear. To *require* a consumer to complain via a professional intermediary is not in consumer interests. The existing requirement for a referral to the Parliamentary Ombudsman to be made via an MP is not efficient and delays effective resolution of a complaint. Further, in other contexts, the consumer (or even the 'citizen') has a direct route of complaint to an ombudsman as part of a package of democratic rights where direct accountability is valued, see for example the right of the European Union citizen to apply directly to the European Ombudsman, article 20(2)(d) Treaty on the Functioning of the European Union (in force 1 December 2009).

- 8.11. As regards the Government's proposal to disband the Tenant Services Authority and transfer its consumer regulation functions to the Homes and Communities Agency, see paragraph 8.12 of the Consultation Paper and the Localism Bill, clause 150 and Schedule 16, we suggest that the benefit to the consumer is not apparent. A statutory committee for regulation within the HCA may be independent but it is not visible to the consumer as it is subsumed within the HCA (which also has investment functions) and may not be widely understood as a consumer body in consequence. A separate regulatory identity is clearly in consumer interests and would be possible even if back-office functions were otherwise merged in the interests of efficiency.

## **Summary**

The Localism Bill provides a superb opportunity for the Government to do much to address what is wrong with the present legal framework for social housing allocation, management, homelessness provision and the like.

Sadly, the main proposals in this Consultation Paper would simply add additional layers of complexity and uncertainty to an already labyrinthine set of statutory schemes and achieve only minimal (if any) positive change. The core proposals on social housing security of tenure would do nothing to address the real needs of social housing providers and consumers.

While we share the sentiment expressed by the Minister for Housing in his Foreword that

“It is time to change the social housing system. To ensure that the system is more obviously fair; that good, affordable housing is available for those who genuinely need it; and that we get the best from our four million rented homes.”

we consider that such change can be achieved by increasing the supply of social housing, simplifying the applicable laws and procedures, improving consumer protection and encouraging best practice by providers.

In short, for the reasons given in the preceding text we urge a radically different approach which builds upon the best aspects of existing schemes, moves towards simplification and the eradication of complexity and delivers real benefits. Our detailed responses have sought to demonstrate how that can be achieved.

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