



**A Response to the
Communities and Local
Government Consultation
Paper:**

***“Local Decisions: a fairer
future for social housing”***

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About HPLA

The Housing Law Practitioners Association (HPLA) is an organisation of solicitors, barristers, advice workers, independent environmental health officers and others who work in the field of housing law. Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. HPLA has existed for over 20 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area, almost invariably members themselves.

The Association is regularly consulted on proposed changes in housing law (whether by primary and subordinate legislation or statutory guidance. HPLA's Responses are available at www.hlpa.org.uk.

Over the past year, HPLA has responded to: (i) the Tenant Services Authority Discussion Paper "Building a New Regulatory Framework" (Sept 2009); (ii) Communities and Local Government Consultations: (a) The Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2009 (October 2009); (b) "Fair and Flexible: draft statutory guidance on social housing allocations for local authorities in England" (Oct 2009); (c) "The Government Response to the Rugg Review (Aug 2009) (d) "Lender repossession of residential property: protection of tenants" (Oct 2009); (iii) "The Mayor's Housing Strategy" (Jan 2010); (iv) the Legal Services Commissions consultation papers (a) "Phase 1: Civil Fee Schemes Review" (May 2009) and (b) Legal Aid: Refocusing on Priority Cases (October 2009) ; and (c) the "Review of Civil Litigation Costs: Preliminary Report- the "Jackson Report"(July 2009) (v) Ministry of Justice : Orders for Sale Consultation February 2010 , and "Mortgages : Power of Sale and Residential Property March 2010 (vi) FSA "Mortgage Market Review January 2010 (vii) Government Equalities Office Consultations "Equality Bill: Making it Work" (Sept 2009) and "Equality Act 2010 : The public sector equality duty" (Nov 2010).;

HPLA made a communication to the Committee of Ministers of the Council of Europe on the execution of the judgment of the European Court of Human Rights in *McCann v UK* under Rule 9 of the Committee of Ministers Rules (March 2009).

Membership of HPLA is on the basis of a commitment to HPLA's objectives. These objectives are:

- To promote, foster and develop equal access to the legal system.
- To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
- To foster the role of the legal process in the protection of tenants and other residential occupiers.

- To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.
- To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

The HLP Law Reform Group has prepared this communication. This group meets regularly to discuss law reform issues as it affects housing law practitioners. The Convenor of the group reports back to the Executive Committee and to members at the main meetings which take place every two months. The main meetings are regularly attended by about 100 practitioners.

NB: all page or paragraph references in this response are to the Consultation paper unless otherwise stated

Introduction and Preliminary Comments

1. We welcome the opportunity to respond to this paper. However, we are concerned at the shortening of the consultation period from 12 to 8 weeks (Consultation criteria, page 57). This is of particular concern for two reasons. First, the consultation proposes the most significant changes in relation to secure tenancies since they were enacted in the Housing Act 1980. Secondly the period includes national holidays during which potential consultees are not available. We are also concerned that no impact assessments have been published to accompany this consultation.

2. The intention to incorporate the proposals in the Localism Bill cannot justify the shortening of the consultation period. We note that the Localism Bill was read for the first time in Parliament on 13 December 2010. Had the consultation period concluded in February, there would still have been sufficient time to incorporate the results into the Bill by amendment, before it completed its Parliamentary process. Alternatively, it could have been delayed to enable this to be done.

3. We note that proposals upon which we are being consulted have been included in the Bill (i.e. removing transfers from allocation (clause 121), discharge of homelessness duty

by “private rented sector offer” (clause 124 and 125 (4)) and flexible tenancies (clause 130). We are engaging in the consultation in the expectation that the Government will approach the responses it receives with an open mind and be ready to amend the Bill having considered them. We would have real concerns were the consultation not intended to be real and effective.

4. The avowed aim of the proposals is to increase the quantity of affordable and suitable social housing to those in need of it. We support this aim. However, the main way in which this can be achieved is by the construction and provision of more such housing. These proposals do not create a single new dwelling. Public investment in social housing declined by two thirds during the 1980’s and has not been restored.

5. We note the Minister’s announcement (9 December 2010) that the Government is investing £4.5bn to deliver “up to 150,000 new affordable homes over the next 4 years” that is a long way from meeting the needs of the “five million people languishing on waiting lists” (same announcement). The Government has cut the budget for new homes from £8.4bn to £4.5bn. In future, there will be no direct government grant for new social housing. Housing associations will rather have to borrow from the private money markets, financed by higher rents. The National Housing Federation estimate that in order to finance these 150,000 new homes, housing associations will have to charge all these new tenants the higher rents, together with one in four tenants who move into their existing stock of social housing. The overall effect will be 307,000 less tenants paying social rents. We also note that this is likely to add £1.5bn to the housing benefit bill by the end of the spending review period¹.

6. Housing law is already unduly complex. There are now some twelve forms of residential tenancy². The Encyclopedia of Housing Law contains statutes, regulations, government circulars which deal with security of tenure, repairing obligations, service

¹ See the report of the Building and Social Housing Foundation (Inside Housing, 17 January 2011).

² assured, assured shorthold, “starter”, secure, introductory, demoted, family intervention, non-secure, Rent Act regulated (protected, statutory and housing association); social tenancies may either be at “social rents” or “intermediate rents”.

charges, anti-social behaviour, homelessness and allocations. Its six volumes take up twenty-two inches and weigh almost thirty pounds. It is now intended to further add to this complexity. Yet again, HLPAs urge the government to implement the Law Commission's "*Renting Homes Bill*" (Law Com No 297, May 2006) particularly the proposal for two new types of occupation agreement (Type 1 with full security and Type 2 with less security). There should normally be a single occupation agreement with security for the social housing sector (including housing associations).

7. Reducing the complexity of the law would remove a burden on both landlords and tenants. It is a major cause of the expense of legal proceedings as was noted by Lord Woolf in his report "Access to Justice" (1996). If housing law is to be made yet more complex, the DCLG must recognise the consequences that this will have for the courts and the legal aid budget. HLPAs estimate that there are potential savings of some £5m pa to the MoJ were housing law to be simplified.

8. We take issue with the persistent reference to the status of a secure tenant as "lifetime tenure" (Ministerial foreword 1.9, 2.1, 2.51). This does not give an accurate impression. Secure tenancies are subject to grounds for possession (as set out in Schedule 2 of the Housing Act (HA) 1985 - 16 Grounds) and assured tenancies likewise (under Schedule 2 Housing Act (HA) 1988 - 17 Grounds). The most frequently used are those relating to rent arrears (an assured tenant can be subject to a mandatory possession order if 2 months in arrears – Ground 8) and nuisance and annoyance to neighbours. The DCLG has access to the Judicial Statistics which show that possession orders are made in their thousands each year in the social sector. It is not the case that a secure tenant is guaranteed a lifetime's occupancy. It is not simply the existence of the secure tenancy status that has restricted the availability of social housing as seems to be suggested. Allied to the reduction in investment is the effect of the "right to buy" legislation (approx 2m sold since 1980) and large scale voluntary transfers, mostly to housing associations (again approx 2m sold).

9. HPLA regrets that the government has not taken a more strategic approach to the provision of social housing in England. On 1 April 2010, the following homes fell within the remit of the Tenants Services Authority (TSA)³ under the new regulatory framework provided by The Housing and Regeneration Act (H&RA) 2008:

<u>Provider</u>	<u>Homes Managed (approx)</u>
Housing Associations (PRPs)	1,900,000
LHAs (retained stock)	1,300,000
Arms Length Management Organisations	800,000

10. As a result of government policies over the last thirty years, housing associations are now allocating more social housing in England than local housing authorities (LHAs). Only 180 out of 326 LHAs retain a stock of social housing⁴. Every LHA shall adopt an allocation scheme (s.167(1)) Housing Act (HA) 1996. 146 LHAs are now only able to allocate accommodation by nominating applicants to accommodation held by housing associations.

11. If a level playing field is to be achieved between tenants of housing associations and LHAs and if there is to be greater equality and transparency for applicants seeking access to social housing, the following issues need to be addressed:

(i) There should be a common statutory framework for the allocation of social housing. Part 6 HA 1996 provides strict rules within which LHAs allocate accommodation. Registered providers (namely housing associations and 180 of the 326 LHAs) are subject to the standards issued by the TSA within the statutory framework provided by the H&RA 2008.

(ii) The current practice whereby the DCLG issues guidance to LHAs on the allocation of social housing pursuant to s.169 HA 1996, whilst the TSA issues standards pursuant to s.193 H&RA 2008 is not satisfactory. Joint guidance should be issued.

³ statistics are taken from the Cave Report (June 2007)

⁴ Statistics taken from the Explanatory Memorandum to SI 2010 No.844.

(iii) Tenants of social landlords should occupy their homes under a common statutory framework. LHA tenants are secure tenants within Part 4 HA 1985; whilst housing association tenants occupy under assured or assured shorthold tenancies within Part 1 HA 1988. These statutes make different provision for (i) security of tenure (many housing associations granting assured shorthold tenancies or using Ground 8); (ii) rights of succession; (iii) rights to assign and (iv) the right to buy.

(v) Primary legislation should resolve the uncertainty and expressly provide that housing associations (PRPs) are public authorities for the purposes of the Human Rights Act 1998 and the public sector equality duties.

12. We note that the TSA is to be disbanded and replaced by a statutory committee of the Homes and Communities Agency (HCA). However, Chapter 6 does not address the issue of allocations of social housing by housing associations. We note that clause 126 of the Localism Bill will require a LHA to prepare and publish “tenancy strategy” in consultation with every housing association (PRP) in their district. We suggest that this should be extended to include a requirement on a LHA to agree a common housing register and allocation scheme in respect of the allocation of all social housing in their district.

13. HLPAs welcome and agree with the following commitments on the part of the Government, namely that:-

(i) the proposals will not change the security of tenure or other rights of *existing* secure tenants of local authorities or assured tenancies of housing associations (para 2.14);

(ii) the current reasonable preference categories for allocation in s 167 HA 1996 are to remain (4.15);

(iii) the priority need criteria and the criteria for a duty to secure accommodation for the homeless are to remain (6.10)

14. HLPAs are not in a position to deal with every question. Indeed, many of the questions are specifically directed to landlords or local authorities. We have therefore restricted ourselves to those questions to which we feel we are able to make a constructive response.

HLPAs's Response to the Consultation

Security of Tenure - Section 2

15. We address this proposal which we summarise as follows:-

Local authorities are to have the power to grant to new tenants a "local authority flexible tenancy" which would be for a minimum term of 2 years, with equivalent rights to an introductory tenancy. Before the end of the fixed term there would be an assessment of options (stay, move to another social tenancy, move to private sector) in accordance with the local authority's strategic tenancy policy, taking into account tenant's level of need, work incentives and local pressures for social housing. The tenant would have a right of internal review in respect of a decision not to renew the tenancy. Any possession proceedings could be defended on basis of error of law or material error of fact (paras 2.23, 2.25-7, 2.30-2.32, 2.47-8).

16. We note that this last sentence must now be read in the light of the judgment of the Supreme Court in *Manchester CC v Pinnock [2010] UKSC 45* (3 November 2010). Article 8 of the European Convention on Human Rights (right to private and family life and the home) may now afford a non-secure occupier a "proportionality defence".

17. A similar, although not precisely the same, scheme is proposed for housing associations (para 2.39).

18. Should this scheme be implemented, we consider that the assessment and review provisions outlined at pars 2.30-32 are not merely desirable, but essential.

19. We do not agree with this proposal. It will amount to making the introductory tenancy scheme, which currently provides for an introductory tenancy to convert to a secure after one year, the norm for tenancies across the social sector. It represents a considerable reduction in the rights associated with a secure tenancy for a gain which it is not possible to calculate.

20. We highlight the following:

(i) Grants of tenancies of social housing will have been made as a result of homelessness or an assessment of an applicant's long term housing needs. To grant a tenancy for a fixed term, merely prolongs the uncertainty and lack of security from which the households has come. Tenants will have no incentive to invest in their new homes or to establish roots in their local communities. They will be denied of the security that they need to pursue their careers, to establish their children in local schools, or to participate in places of worship or local community groups. Uncertainty about their future will create an unnecessary element of stress within the family. Secure and settled accommodation is one of the most basic human needs of a family. It provides a stable environment within which the family can grow. It also enables the family to establish themselves as valued members of their local community. It is a matter of grave regret that the adverse social consequences of this proposal are not properly addressed, particularly from a Government that espouses the value of promoting stable families.

(ii) The proposal may lead to less flexibility not more. It seems to us unlikely that during the fixed term, a household which applies to move (e.g. because it needs

less space) will have that application granted as the local authority will have in mind that it may not be accommodating them beyond the fixed term

(iii) The creation of a further status with associated procedures puts a further management burden on local authorities

(iv) Unless the decision not to renew was because of the tenant's behaviour, a tenant who became homeless at the end of the fixed term would be "unintentionally homeless" (para 2.54). That household could apply for accommodation under the homelessness provisions and the local authority would be obliged to accept a duty. This creates unnecessary uncertainty and instability for the family, and an unnecessary administrative burden for the local housing authority.

21. Finally, we note that there is no consultation question directed at the merits of this proposal. The nearest to that is Question 9 on page 28 which asks whether 2 years is an appropriate minimum term and associated questions. It is recognised that two-year tenancies may not be appropriate for families with children (para 2.49). We suggest that it would never be appropriate. Families, in particular, are entitled to a stable and secure home.

Empty Homes- Section 3

22. We note that paras 1.15 and 3.1 of the Consultation Paper point out that at a time of housing need, there are over 300,000 privately owned homes which have been empty for over 6 months. However, the proposals seem to relate to encouraging local authorities and housing association to bring their empty homes back into use by financial incentives (paras 3.4/3.5). There appears to be no consideration of using enforcement powers to bring those empty homes in the private sector into use, including compulsory acquisition, either permanent or temporary. We suggest there should be.

23. We note there was no consultation question on this issue.

Allocating Social Housing – Section 4

Open Waiting Lists

24. We summarise this proposal as:-

(1) Local authorities are to have the power to end “open waiting lists”, i.e. to have the ability to restrict applicants on grounds of no local connection, residency, behaviour, financial criteria etc (para 4.9/4.10);

(2) Those tenants seeking transfers to be taken out of the allocation framework – presumably that means that the reasonable preference criteria would not apply – the aim being to make transfers easier and free up under occupied property ((4.19-4.22).

25. We note that the consultation questions (17, 18, 19 and 22) are directed to local authorities and tenants and residents on the basis that the proposals are to be implemented. Views are not sought on their merits.

26. We support allocation on the basis of need and do not object to the proposal that waiting list be restricted to those in housing need, provided that there is a system of assessment to determine need based on s 167 of the Housing Act 1996.

27. We object to blanket restrictions or exclusions. None of the lessons of the past seem to have been learnt. We refer you to Shelter’s Report “Access Denied: The Exclusion of People in Need from Social Housing” (June 1998) which considered the policies adopted by LHAs under the HA 1996 before the amendments introduced by the Homelessness Act 2002. We highlight the following:

(i) Local authorities have a vested interest in excluding applicants who do not live in their areas, thereby restricting social mobility. The current economic climate demands housing policies that facilitate such mobility to enable applicants to take up opportunities for employment.

(ii) One authority in their survey reported that between 25% and 33% of all applicants did not meet their residence requirements;

(iii) Such residential requirements may have significant adverse equality implications.

(iv) The total number of exclusions and suspensions was almost four times as many in 1997/8 as in 1996/7.

(v) Although exclusion policies are were often justified as part of strategies to tackle anti-social behaviour, this reason accounted for only 3% of exclusions monitored.

(vi) Those excluded may be the most vulnerable and have support needs. They may be disabled persons within the Equality Act 2010. Exclusions from social housing make it much harder for their needs to be met.

(vii) Exclusions can conflict with the aims and responsibilities of other agencies such as social services departments or the probation service and can undermine community care policy, the rehabilitation of offender and multi-agency working.

(viii) Exclusion from social housing can undermine initiatives to tackle social exclusion by denying social housing to those who need it.

(ix) Some applicants were being excluded on the basis of subjective judgments or unproven allegations.

(x) Some applicants were being excluded for relatively small rent arrears, little account being taken for the reasons why they fell into debt.

(xi) Some policies permitted exclusions on the basis on non-housing debts or because the applicant had received a notice seeking possession for any reason.

(xii) Exclusions could be for unlimited periods.

(xiii) Blanket exclusions were being operated without any consideration of the personal circumstances of the applicant.

(xiv) The fate of those excluded was often unmonitored and unknown.

28. The DCLG must remind LHAs of their duty to carry out rigorous equality impact assessments before implementing any such exclusions. HLPAs also suggest that if such criteria are included in the allocation scheme, there must also be a review process so that an exclusion can be challenged. However, we do not believe that this change is required. A local authority is already able to take into account such criteria, including financial, in determining priority (s.167(2A) HA 1996). A review process already exists for those who are the subject of a decision to be given no preference because of anti-social behaviour (s.167(2C) and (4A) (b)-(d)).

29. We recognise that different criteria should apply to applicants seeking a transfer. However, we see no reason why provision should not be made for this within an allocation scheme. Most authorities already give a high priority to under occupying households. It may be that the s.167(2) reasonable preference criteria should be amended to reflect the housing management grounds that a social landlord would wish to reflect in their allocation scheme. Good administration and procedural fairness require that LDHAs should adopt written rules providing for the circumstances in which applicants can secure

a transfer. This is best achieved by keeping transfer applicants within the overall allocation framework.

Reasonable Preference

Question 20: “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?”

30. We suggest that the current category of living in “overcrowded, unsatisfactory or insanitary conditions” (s167(2)(c)) should be clarified. We refer to our response in relation to overcrowding. Otherwise, we are satisfied that the categories adequately cater for the various categories of housing need. Were transfer applicants to remain within the allocation framework, it may be that further categories are required (see para 22 above).

Mobility – Section 5

31. HLPAs have no comments to make, save that we support any measures to improve mobility through mutual exchanges.

Homelessness – section 6

32. We summarise this proposal as follows: Local authorities to have the discretion to discharge the full duty by an offer of accommodation in the private sector – if their needs could be met that way, depending on the homeless person’s circumstances, availability of accommodation and pressure on social housing. The offer would have to meet the suitability criteria. It would be for a minimum of 12 months. The homeless person would have no right to refuse subject to review on the issue of suitability (paras 6.11 - 6.16).

33. On the basis that this summary is correct, we question the practicability of the proposal. Supposing the homeless person accepts the offer, pending review, to be

determined in 8 weeks unless longer agreed, or outcome of county court appeal, as is currently the case with offers made by the local authority. Suppose the review concludes the offer is not suitable so that another has to be made and the tenancy terminated. Would a private landlord be prepared to offer of accommodation on the basis that the tenancy would have to be terminated in that event, most likely before the fixed term is up? This scenario cannot occur under the present system because the homeless person has the right to reject the offer if s/he considers it to be unsuitable.

34. This proposal removes from the homeless applicant the right to refuse an offer to discharge the local authority's duty by an offer of an assured shorthold tenancy in the private sector. We do not agree with this proposal. Again we note that there is no consultation question specifically directed to the merits of this proposal, except possibly Question 8 which is about whether 12 months is the right period for discharge.

35. We suggest that the aim of a homelessness policy should be to bring the applicant's homelessness or a cycle of homelessness to an end. This proposal will not do so. We note that the duty would revive if the applicant became homeless again within a period of two years through no fault of his own (para 6.17). Since the discharge is by fixed term, it appears that will occur in many cases. Indeed, the duty would recur in that even whenever homelessness recurred.

36. We highlight the following passage from HLPAs' response to the National Housing Federations Consultation on Fairer Access to Social Housing (September 2010):

“We are also surprised at the consultation paper's apparent surprise at the reluctance of homeless households to accept accommodation in the private sector in discharge of duty (page 5 under 2.1). As already pointed out, security of tenure is now virtually absent from the private sector. In addition, it is in the private rented sector that the property is in the worst condition. The most recent report to highlight this aspect is “The Private Rented Sector; its contribution and potential” [2008] by Julie Rugg and David Rhodes commissioned by the DCLG- page vii of the Executive summary refer and the main text and the negative aspects of the private rented sector so far as discharge of homelessness duty is concerned is dealt with at pages ix and x. Until these aspects of security and condition are remedied, the private rented sector should not be a compulsory means of meeting the homelessness duty (as the consultation paper itself

appears to acknowledge in the closing paragraphs of 2.2, page 8 and under 6.1 at page 20).”

37. In that response, we also took issue with the suggestion at para 6.8 that some households are encouraged to apply as homeless in order to secure reasonable preference and a guarantee of being offered social housing. We wrote

“It is not our members’ experience that their clients plan to become homeless with the consequent loss of where they and their families have made their homes, and the communities in which they have lived. If they see any result of that, it is loss of security, life on the street, or at least an undefined period in insecure, inadequate accommodation, and the breaking of links with family, friends and support networks such as medical facilities and schools-and not as desirable passport to settled accommodation. If 21% of social lets are to those owed the main homelessness duty, we think that is a welcome feature, not one requiring change.”

38. Again, the government does not seem to have learnt the lessons of history. The HA 1996 initially imposed a limited two year temporary housing duty (s.193 (3)). In reality most applicants were still in their temporary housing after the two year period expired. Strictly, the authority was then obliged to review whether to continue the provision of that accommodation for a further period of up to two years (s.194). In practice, this provision was more honoured in the breach than the observance. No reviews were carried out; the accommodation was rather continued automatically until the duty was discharged, normally by the provision of permanent accommodation.

39. This proposal will condemn homeless applicants to a cycle of uncertainty, with the potential for a homeless family to be transferred from one private sector unit of accommodation to another every year. This may be in different areas, thereby causing disruption to education, causing families to register with a new GP and denying the family the opportunity to establish community ties. This is not consistent with the government stated objective of supporting the family as a stable unit.

Overcrowding – Section 7

40. We agree that overcrowding in housing is a serious and deteriorating problem. This issue was the subject of consultation by the DCLG in 2006 – “*Tackling Overcrowding in England - a discussion paper*” (July 2006). That consultation period closed on 15 December 2006. 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 endorse those statements which are confirmed by our own experience as practitioners

41. HLPAs responded to that consultation (copy attached). It is not known what consideration was given to the responses 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.

42. We do find it surprising that there is no reference to either this previous consultation or to the responses which were received. It does suggest that the DCLG pays scant regard to these consultation processes and to the views expressed.

43. We welcome the commitment given at para 7.4 that no secure or assured tenant of a social landlord who is under-occupying their home will be required to move as a result of their proposals. They have the same right as any owner occupier to peaceful enjoyment of their home.

44. Whilst we support the policy measures set out at para 7.5, these are unlikely to make any significant impact on the problems identified:

(i) We do not believe that there are currently “inflexible barriers” preventing authorities from tackling the problem.

(ii) We agree that those tenants who wish should be assisted in moving by cash incentives, offers of suitable alternative accommodation, or practical support (para 7.6). Many authorities actively encourage under occupying tenants to move. We question what more they can do.

(iii) The vast majority of overcrowded tenants are living in the private rented sector.

(iv) Most large units of social housing are currently allocated to applicants living in overcrowded conditions.

(v) The real problem is the chronic shortage of large units of social housing to let.

(vi) Street properties were the first to be bought up under the right to buy provisions. These tended to be the larger units of social housing.

45. There also seems to be a lack of joined up government. Current proposals to limit the payment of housing benefit will have a particular impact on private tenants living in overcrowded conditions. These include proposals to cap the payment of housing benefit to £400pw for any property with 4 or more bedrooms and to limit the total amount of benefits which may be paid. Such large families living in private sector properties are unlikely to be able to afford the rebated rents. This will create further pressure on local authority homelessness services and on their limited stock of large family-sized accommodation.

Current Legal framework (paras 7.8-7.9)

46. We agree that the current legal framework is complicated and obsolete. As the previous discussion paper stated, the current overcrowding definition in Part 10 Housing Act 1985 was that originally provided in the Housing Act 1935 (para 2.1-2.3). A new definition of overcrowding was the topic of that paper (3.4).

47. We would remind the DCLG of the comment of the minister when this standard was first introduced in 1935:

“It is relevant to point out that this standard does not represent any ideal standard of housing, but the minimum which is in the view of Parliament tolerable while at the same time capable of early enforcement.”⁵

It is a matter of regret to HLPAs that no attempt has been made over the past 75 years to raise this standard. It is no longer appropriate for a living room to be treated as being available as sleeping accommodation.

48. We propose (as we did in 2006) that a new definition of overcrowding be inserted into Part 10, based on the Bedroom Standard used by the Survey of English Housing (2.5-2.6 of the 2006 discussion paper refers). Alternatively the Housing Health and Safety Rating System - Operating Guidance could form the basis – (paras 2.12-2.13). The Minister has power to insert a new definition under s 216 Housing Act (HA) 2004. That could be inserted for the purposes of the allocation provisions at s 167 HA 1996 and the enforcement provisions of Part 10 of HA 1985.

49. We highlight to our comments at paras 6, 7 and 8 of HLPAs’ 2006 response, particularly as to the effect of widening the definition so far as allocation and enforcement is concerned. However, that does not seem to us to justify concealing the extent of the problem behind an obsolete definition. The extent needs to be known so that the problem can be tackled. We would like to see greater use of the enforcement powers under Part 1 of the HA 2004 in an overcrowding context. We have seen little evidence of this to date.

Q 28 What powers do local authorities need to address overcrowding?

50. We refer to our response above.

Q29 Is the framework set out in the 1985 Housing Act fit for purpose? Are any detailed changes needed to the enforcement provisions in the 1985 Act?

⁵ See p.244 “Environmental Health Standards in Housing”, Ormandy and Burrige (1988)

51. Yes. We refer to our response above.

Q30 Should the Housing Health and Safety Rating System provide the foundation for measures to tackle overcrowding across all tenures?

52. We support this. In addition, the Rating System could usefully be applied in determining reasonable preference under s167(2)(c) of the Housing Act 1996 (see para 23 above).

Reform of social housing regulation - Section 8

53. HLPAs regret the decision to abolish the TSA as part of the bonfire of the quangos. We believe that Professor Martin Cave was correct to recommend that there should be a split the housing finance and the regulatory roles. We question whether any real savings will be made by replacing the TSA with a statutory committee of the HCA.

54. We note that the Government has now made its decision on the future course of regulation and that this is not specifically raised in this consultation. However, we would highlight Martin Cave's concern to separate policy from regulation. The policy framework should be set out in the Localism Bill. In HLPAs view there should be a common statutory framework for the allocation of all social housing and in respect of the rights and obligations under which such accommodation is occupied (see paras 11 and 12 above).

55. These are two further issues which HLPAs would raise in the context of the Localism Bill and the reform of social housing. First, HLPAs do not believe that it is appropriate for housing associations, as public authorities, to rely on Ground 8, a mandatory ground for possession based on 8 weeks arrears of rent in respect of an assured tenant. A LHA has no similar mandatory ground for possession against a secure tenant. If the DCLG does not address this, it is likely to come before the courts in the context of whether this is compatible with Article 8 of the European Convention in the light of the recent

decision of the Supreme Court in *Manchester CC v Pinnock* [2010] UKSC 45 (3 November 2010).

56. Secondly, the covenant to repair implied by section 11 of the Landlord and Tenant Act 1985 does not require a landlord to remedy an inherent defect, i.e. inadequate thermal insulation which causes condensation induce dampness (see *Quick v Taff Ely* [1986] QB 809). We suggest that there should be a covenant for fitness, as provided by s.8 of the 1985 in respect of tenancies at low rents. Clause 43 of the Rented Homes Bill proposes a standard that “the landlord must ensure that (a) there is no category 1 hazard on the premises and (b) if the premises form part only of the a building, there is no category 1 hazard on the structure or exterior of the building or the common parts”. We recommend this as a standard term.

Reform of council housing finance - Section 9

57. We note that further details are to be announced shortly and there is no consultation question. We will respond to any further consultation as appropriate

Conclusion

58. We hope these comments are helpful.

David Watkinson,
Convener, HLPAs Law Reform Sub-Committee,
Barrister, Garden Court Chambers,

17 January 2011

TACKLING OVERCROWDING IN ENGLAND

A DEPARTMENT FOR COMMUNITIES and LOCAL GOVERNMENT DISCUSSION PAPER JULY 2006

RESPONSE OF THE HOUSING LAW PRACTITIONERS ASSOCIATION

GENERAL INTRODUCTION

1 This paper contains a brief response prepared on behalf of the Association to the above Consultation Paper.

2 Firstly, to state a little about the Association. It is an organisation of solicitors, barristers, advice workers, and independent environmental health officers, and others who work in the field of housing law. Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. It has existed for over 15 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area (almost invariably members themselves).

3 The Association has been regularly consulted on proposed changes in housing law, by the means of primary and subordinate legislation, and relevant codes etc by the relevant Departments, including the former Department of the Environment, and was on the List of Consultees for the Appointment of Queen's Counsel and Assistant Recorders. A previous Chair (until Jan 2000) is also a member of the Law Society's Housing Law Sub-Committee as is a member of the current Executive. The Vice-Chair (until January 2006) was appointed Queen's Counsel in 2000. Another executive member has recently been a member of the Civil Justice Council and the same member is currently deputy Chair of the Civil Justice Council's Housing and Land Sub-Committee. Although the Association is London based, the membership is country-wide. The Association is also informally linked with similar Housing Law Practitioners Groups in the North-West, South Yorkshire and the West Midlands.

THE RESPONSE

(NB all page references are to the Discussion Paper)

4 First of all HLPAs welcomes this proposal to implement s 216 of the Housing Act 2004. There is no doubt that the present standards for overcrowding cannot be permitted to continue for all the reasons indicated in paras 2.2 and 2.3 (page 5) of the Paper. They allow for conditions of what any reasonable person would call overcrowding to persist. They do not fit modern conceptions and have not for some considerable time. We agree with the views expressed in paras 2.9, 2.21. and 2.22 (pages 6 and 8)

5 Of the specific proposals in the Paper, on the whole, HLPAs favours the adoption of the bedroom standard (para 3.4 (a) page 8). We are concerned at the proposal that this be implemented in stages. There is a risk of the succeeding stages not being achieved. This could be avoided by providing the time-table for each stage from the implementation of the new standard. If there is to be staging then the worst excesses identified at 3.4 (a) should be dealt with immediately.

6 However, the bedroom standard itself has problems. For example, even that contemplates adolescents/teenager between 15-20 sharing one bedroom during the critical examination years. We would prefer to see the bedroom standard improved and note the proposal for creation of a new definition of overcrowding (unspecified) at 3.4 (c) (page 9). We would not however wish to see this change unduly delayed. Rather than a further “wide discussion and consultation” an improved “bedroom standard “could be implemented.

7 HLPAs recognises any step will result in more households being within the overcrowded definition and the effect this will have so far as allocation of public housing and control of housing conditions in the private sector is concerned. In addition overcrowding “in common parlance” is already a basis for finding accommodation not “reasonable to continue to occupy” in the definitions of homelessness and intentional homelessness in s 175(3) and s 191 (1) of the Housing Act 1996 for the purposes of qualifying for the duty to accommodate under Part VII of that Act (*R v Westminster CC ex p Alouat 1989 HLR 477*). A refined definition may lead to more applicants qualifying. These results must be recognised and appropriate resources made available (see the article by Steve Povey, solicitor in Shelter’s Roof Magazine for September/October 2006 page 38, also “Making Room” by Bill Rashleigh from page 21 same issue)

8 A means of alleviating this result so far as the allocation priorities under s 167 Housing Act 1996 could be to draw a distinction between the “overcrowded “ and the “severely

overcrowded". The latter could attract "additional preference" under s 167 (2). "Severe overcrowding" could also lead to accommodation not being reasonable to continue to occupy as the probability of violence now does (s.177) while "overcrowding" remaining a factor which could lead to that result in particular circumstances (impact on a disabled child) while not necessarily doing so. An example of "severe overcrowding" could be a deficiency of two bedrooms and "overcrowding" one bedroom.

CONCLUSION

9 We hope these comments are helpful. We look forward to responding to any further consultation (para 1.9 page 5)

DAVID WATKINSON,

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