

Allocating social housing: the registered social landlord context



This is the final article in a three-part series by **Robert Latham** which discusses the allocation of social rented housing in the context of the statutory framework of Housing Act (HA) 1996 Parts 6 and 7. The first article focused on the policy context (June 2008 *Legal Action* 25), and the second reviewed the local housing authority (LHA) context (August 2008 *Legal Action* 29).

Introduction

As a result of government policies over the past 30 years, registered social landlords (RSLs) are now allocating as much social housing in England as LHAs. Only 210, out of 354, LHAs retain housing stock, much of which is outsourced to Arms Length Management Organisations (ALMOs) (see Table 1).

Table 1¹

Provider	Homes managed (approx)
RSLs	1,900,000
LHAs (retained stock)	1,300,000
ALMOs	800,000

There are now 60 large RSLs, or group structures, each of which manages more than 10,000 homes. These comprise some 55 per cent of RSL stock. However, there are also some 1,165 small RSLs with less than 250 units, often making specialist provision. In 2007, RSLs were building, or acquiring, some 30,000 additional new homes a year, funded in the ratio of £1 of public money to £2 of private finance.

In contrast to the position of LHAs (see August 2008 *Legal Action* 29), there is a dearth of legal challenges in respect of the allocation of accommodation by RSLs. While allocations made up 11 per cent of complaints to the Housing Ombudsman in 2006/2007,² his report does not disclose the systemic problems identified by the Local Government Ombudsman (LGO). As noted in 'Allocating social housing: the local housing authority context', August 2008 *Legal Action* 29, a LGO report into a complaint against Hounslow found that only ten out of a sample of 35 cases had been given the correct priority date.

Is this because RSLs adopt lawful lettings

policies which are operated fairly? Or, does this reflect the lack of transparency in the allocation process and the absence of any effective legal remedy? The answer to these questions will become more apparent as choice-based lettings (CBL) provides greater transparency in the allocation process.

Legislative change

This article is written at a time of transition. In July 2008, the Housing and Regeneration Act (H&RA) received royal assent. This creates two new bodies, namely the Homes and Communities Agency (HCA) and the Office for Tenants and Social Landlords (which is to be known as the Tenant Services Authority (TSA)). The TSA was established on 8 September 2008: see the Housing and Regeneration Act 2008 (Commencement No 1 and Transitional Provision) Order 2008 SI No 2358. On 1 December, the TSA will take over from the Housing Corporation (HC) as housing regulator, but will continue to use existing regulatory processes. Next summer there will be formal consultation on the new standards framework which will come into effect in autumn 2009.³

The HCA is intended to deliver more social and affordable housing and to promote regeneration in line with the housing green paper, *Homes for the future: more affordable, more sustainable*, published in July 2007.⁴ The HCA replaces both the Urban Regeneration Agency and the Commission for the New Towns (currently they operate under the joint name of English Partnerships). The HCA will also take on certain functions of the HC relating to investment in housing.

In December 2006, Professor Martin Cave began his independent review of social housing regulation in England. The Cave review's remit was to establish a clear set of objectives for the regulation of social housing to underpin any new regulatory system. The

Cave review's report, *Every tenant matters: a review of social housing regulation*, was published in June 2007.⁵ It identified three principles for the regulation of social housing:

- to ensure continued provision of high-quality social housing;
- to empower and protect tenants; and
- to expand the availability of choice of provider at all levels in the provision of social housing.

The Cave review concluded that the objective of expanding the supply of social housing is best promoted by the diversity of organisations engaged in ownership and management. Its proposed regulatory regime allows such alternative providers to compete on level terms. The choice afforded to tenants should extend to choice of tenure. It noted the current failure adequately to separate policy and regulation, leading to the unacknowledged implementation of policy by regulation.

The H&RA gives effect to the Cave review's recommendations and abolishes the HC. HA 1996 Part 1 is amended to restrict the current 'registered social landlord' system to Wales. The TSA will regulate 'registered providers of social housing' in England, which will include current RSLs, together with other bodies that choose to register. Social housing includes both low-cost, rented accommodation and low-cost home ownership with either shared ownership or an equity percentage. The new registered providers may include for profit organisations. H&RA s114 makes provision for the TSA to regulate LHAs and ALMOs. It is currently envisaged that this will occur in 2010.

The new regulator may set standards for registered providers, including criteria for allocating accommodation and terms of tenancies (s193(2)). In setting such standards, the regulator 'shall have regard to the desirability of registered providers being free to choose how to provide services and conduct business' (s194(3)). Low cost rental accommodation is defined as accommodation that is made available with rules designed to ensure that it is 'made available to people whose needs are not adequately served by the commercial housing market' at a rent 'below the market rate' (s69).

In August 2008, Peter Marsh, chief executive of the TSA, outlined how the new regulator should act as a 'thought leader' on housing issues (*Inside Housing* 8 August 2008, p3). He proposed a debate about alternative forms of tenure in which there should be no assumption that 'shorter-life tenancies are bad ideas'. The government plans to publish a housing reform green paper before the end of this year that will set out proposals to provide housing services and

Table 2 Allocations by RSLs 2007/2008

	Nominated by LHAs		Not nominated, but via CHR or CAS*		Internal transfer		Direct application		Other	
London	8,967	67.9%	898	6.8%	2,398	18.2%	604	4.6%	331	2.6%
South East	12,060	74.4%	1,639	10.1%	1,650	10.2%	732	4.5%	130	0.8%
South West	7,832	73.9%	1,285	12.1%	952	9.0%	489	4.6%	39	0.4%
East Midlands	4,394	59.3%	538	7.3%	543	7.3%	1,916	25.8%	23	0.4%
East	9,328	72.5%	1,881	14.6%	902	7.0%	664	5.2%	84	0.6%
West Midlands	6,904	44.2%	1,536	9.8%	2,071	13.3%	4,977	31.9%	136	0.8%
Yorkshire & Humberside	6,600	46.8%	921	6.5%	1,643	11.7%	4,827	34.2%	110	0.8%
North East	3,384	36.8%	743	8.1%	1,853	20.2%	3,105	33.8%	108	1.2%
North West	8,016	31.3%	4,210	16.4%	2,728	10.6%	10,521	41.0%	163	0.7%
Total (England):	67,485	54.1%	13,651	10.9%	14,740	11.8%	27,835	22.3%	1,124	0.9%

* Common Housing Register (CHR) and Common Allocation Scheme (CAS) both held with LHA.

Source: CORE general needs lettings data

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options which help and encourage people towards greater economic independence and social mobility.⁶

The statutory framework

While HA 1996 Part 6 imposes a strict statutory framework within which LHAs allocate accommodation, there is nothing equivalent in respect of allocations by RSLs. The current framework within which RSLs allocate accommodation is governed by the following:

- HA 1996 ss170 and 213;
- *The regulatory code and guidance* (issued in August 2005 by the HC under HA 1996 s36);⁷
- HC regulatory circular 02/03: *Local authority nominations* (February 2003);⁸
- HC circular 02/07: *Tenancy management: eligibility and evictions* (April 2007);⁹
- HC good practice note 12: *Choice based lettings* (published in Oct 2005).¹⁰

Section 170 of the HA 1996 provides that where a LHA so requests, a RSL shall co-operate to such extent as is reasonable in the circumstances in offering accommodation to people with priority under the authority's allocation scheme. Section 213 imposes a similar duty to co-operate in respect of a LHA's discharge of its functions under HA 1996 Part 7. It is for the RSL to determine whether or not the request is reasonable. In the absence of an agreed solution, the responsibility will rest with the LHA. These provisions are not amended by the H&RA.

In November 2002 and August 2008 respectively, Communities and Local Government (CLG) issued two statutory codes of guidance to LHAs under HA 1996 s169, namely *Allocation of accommodation. Code of guidance for local housing authorities* and *Allocation of accommodation: choice based lettings. Code of guidance for local housing*

authorities.¹¹ The secretary of state considers that these are 'of direct relevance' to RSLs by reason of these duties to co-operate (see paras 1.3 and 1.4 respectively of the two codes of guidance).

Are RSLs public authorities?

It is outside the scope of this article to review the extent to which RSLs are 'public authorities' for the purposes of:

- judicial review;
- the Human Rights Act (HRA) 1998; and/or
- the various equality duties.

However, 'Recent developments in housing law', August 2008 *Legal Action* 37 and 38 respectively considered the unsuccessful attempt to amend the Housing and Regeneration Bill expressly to make the provision of social housing a public function and the decision in *R (Weaver) v London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin), 24 June 2008 in which the Divisional Court held that the RSL was a public authority for the purposes of judicial review and the HRA in the management and allocation of its housing stock. *Weaver* is under appeal.

Allocations by RSLs

The means whereby RSLs currently allocate accommodation are set out in Table 2 (see above) and Table 3 (see left). These have been compiled by the National Housing Federation from data filed by LHAs and RSLs on the COntinuous REcording (CORE) system database maintained by the University of St Andrews.¹² Recording is mandatory for all RSLs that own or manage 250 properties or more and is encouraged, but is voluntary, for smaller RSLs.¹³

Table 2 confirms that the largest number of allocations is made through nominations by

Table 3 RSLs participating in CBL schemes 2007/2008

	With CBL lettings		Without CBL lettings	
London	108	75.5%	35	24.5%
South East	94	61.0%	60	39.0%
South West	63	70.8%	26	29.2%
East Midlands	44	57.9%	32	42.1%
East	60	66.7%	30	33.3%
West Midlands	49	55.1%	40	44.9%
Yorkshire & Humberside	29	48.3%	31	51.7%
North East	20	50.0%	20	50.0%
North West	73	52.9%	65	47.1%
Total (England):	374	62.0%	229	38.0%

Note: A number of RSLs operate in more than one region but England total counts these as one; hence the totals do not add up.

Source : CORE general needs lettings data

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LHAs. While this is 54.1 per cent for England as a whole, there are large regional variations. Nominations are highest in London, the East, the South East and the South West (67–74 per cent), and lowest in the North East and North West (31–37 per cent). HC regulatory circular 02/03: *Local authority nominations* recommends nomination agreements in respect of 50 per cent of true voids but recognises that the agreed percentage may be considerably higher in areas of housing stress (para 4.1).

The second category shows that some 11 per cent of lettings are now being made through common housing registers (CHR) or common allocation schemes (CAS). These will be particularly relevant to the LHAs that have transferred their entire housing stock to RSLs. These will have been established at the initiative of the LHA which is obliged to adopt an allocation scheme (HA 1996 s167). This is not a function which a LHA can contract out (see Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 SI No 3205 Sch 1). HA 1996 Part 6 is extremely prescriptive both about whom a LHA is able to treat as being eligible for housing accommodation and the factors which must be taken into account in assessing the respective priorities of applicants. Such arrangements demonstrate the extent to which RSLs have been willing to surrender their independence and have become mere agents of LHAs to enable them to discharge their housing duties under HA 1996 Parts 6 and 7.

The third category is internal transfers. There are compelling housing management grounds for a social landlord to permit such transfers, ie major repairs, under occupation, and domestic violence or other harassment. Any tenant is likely to be given a higher priority by his/her current social landlord than by another provider.

The final category is direct applications. Many RSLs in areas of high housing stress no longer permit such applications. Applicants rather register with the relevant LHA and access RSL accommodation under nomination agreements or join a CHR. RSLs in the north of England continue to allocate a significant proportion of their stock through their own waiting lists, reflecting the relative absence of housing stress.

Delivering choice

RSLs are under the same ministerial dictate as LHAs to achieve national coverage of CBL by 2010.¹⁴ This is also reflected in *The regulatory code and guidance* (see above), which provides that RSLs should seek to offer residents and prospective residents a choice of home while giving a reasonable preference

to those in priority housing need (para 3.5.1). Table 3 illustrates the extent to which RSLs are now participating in CBL schemes.

In *Allocation of accommodation: choice based lettings*. *Code of guidance for local housing authorities* (see above), the secretary of state recommended that LHAs work together with RSLs in their district to provide joint CBL schemes which extend to all (or the majority) of the social housing vacancies to ensure that:

- best use is made of the available social housing in the district; and
- applicants are offered the widest choice of accommodation and a single point of access to that accommodation (para 6.1).

A CHR and/or CAS are obvious options for a LHA which has transferred its stock to a RSL. In other circumstances, there are a number of practical difficulties:

- Any LHA is obliged to adopt an allocation scheme that will reflect its local circumstances. This is a function which cannot be contracted out. Any LHA will wish to ensure that it is able to discharge its HA 1996 Part 7 duties to its homeless applicants.
- RSLs are independent bodies as is emphasised by the HC's *The regulatory code and guidance* (see above) at para 2.1.1. RSLs' governing bodies, which may also be charitable trustees, must be satisfied that it is appropriate to surrender their freedom to adopt their own letting criteria.
- LHAs are only permitted to allocate accommodation to 'eligible persons' (HA 1996 s160A). There are no such statutory restrictions for RSLs.
- RSLs have tended to adopt stricter eligibility criteria where applicants have a history of rent arrears or anti-social behaviour; this has led to complaints that they cherry pick. The circumstance whereby a LHA can treat an applicant as ineligible or reduce the priority that is afforded to his/her application is prescribed by HA 1996 Part 6 and the *Allocation of accommodation*. *Code of guidance for local housing authorities* (see above). However, HC circular *Tenancy management: eligibility and evictions* (see above) contemplates wider exclusions for RSLs (see below).
- The HC's circular on tenancy management (see above) provides that housing need should normally override any special consideration of local connection. While any applicant is entitled to seek accommodation from a LHA, it is likely to afford lower priority to applicants with no local connection (HA 1996 s167(2A)(c)).
- RSLs and LHAs need to retain the means to facilitate transfers of their tenants. If a landlord needs to decant an estate, CBL is an

efficient mechanism of matching tenants with suitable alternative accommodation. Any participating landlord must retain sufficient control over the allocation of its housing stock to enable it to discharge such housing management responsibilities.

In the absence of a CAS, there must be clarity about the basis on which a LHA advertises any RSL property under its CBL scheme:

- Will the bidder with the highest priority merely be nominated to the RSL?
- If so, what are the consequences should the RSL decline to accept the nomination?
- What redress, if any, is open to the applicant?
- Or, is the property being advertised under the RSL's letting policy?
- If so, will the bidder know the criteria which s/he must meet?

In the absence of such information, an applicant will have a legitimate expectation that the accommodation will be allocated to the bidder with the highest priority.

Lettings policies

Any RSL needs a lettings policy in respect of internal transfer applications. It may also invite applications from external applicants. Finally, the lettings policy will impact on any nomination agreement with any partner LHA: this is a source of tension. Should this agreement reflect the eligibility criteria and lettings standards in the LHA's allocation scheme or the RSL's lettings policy?

The regulatory code and guidance (see above) provides that lettings policies should:

- be responsive to LHA housing duties;
- take account of the need to give reasonable priority to transfer applicants including applicants from other RSLs;
- be responsive to national, regional and local mobility and exchange schemes; and
- be demonstrably fair and effectively controlled (para 3.6(f)).

Applicants should only be excluded from consideration for housing where their unacceptable behaviour has been serious enough to make them unsuitable to be a tenant, and only in circumstances that the RSL is not unlawfully discriminating (para 3.6(e)).

While this is similar to the wording in HA 1996 s160A(7), HC circular *Local authority nominations* (see above) contemplates eligibility criteria that are wider than those permitted for LHAs. For example, it is recognised that RSLs usually expect a clean rent record for transfer applicants except in emergency situations. External applicants may be deemed ineligible because they owe rent for a previous tenancy. The circular suggests that RSLs should actively encourage

applicants to enter into agreements to pay their arrears. During that period, the application might be suspended and only reactivated if such agreements are kept for a reasonable period. A LHA is not permitted to suspend an applicant in such circumstances; an authority may only treat an applicant as ineligible if his/her past conduct would have justified an outright possession order.

HC circular *Tenancy management: eligibility and evictions* (see above) provides that procedures for assessing eligibility should be specified in the RSL's lettings policy. Applicants should not be excluded automatically from housing if their circumstances 'fit' a defined category. Every case must be judged on its merits and efforts made to resolve any possible ineligibility. Decisions should be monitored and all rejected applicants should be notified of an appeals process which should be heard by adjudicators who were not involved in the original decision.

Nominations by LHAs

HC circular *Local authority nominations* requires RSLs to sign an 'effective nominations agreement' with LHAs that sets out in detail how the nominations process will operate and in what circumstances nominations will be refused. However, the HC also advises that '[i]n order to preserve an association's independence, the agreement must ... reflect the [RSL's] objectives both as set out in [its] governing instrument and as agreed by the governing body' (para 4.2). This highlights the inherent contradiction between the public law duties of the LHA and the private law interests of the RSL.

The nomination agreement will be of utmost importance to LHAs that have transferred their housing stock to RSLs. Without a legally enforceable agreement, the LHA will be unable to ensure that it is able to discharge its statutory housing duties. The uncertainty of the current situation is captured by the wording of HA 1996 s159(4), which refers to nominations 'whether legally enforceable or not'.

Traditionally, LHAs have nominated a number of applicants, giving the RSL discretion about whom to accept. An unsuccessful applicant may have been unaware of either his/her nomination or the reason for his/her rejection. CBL provides greater transparency in the allocation process. Most CBL schemes publish outcomes of the previous bidding rounds. Increasingly, applicants will ask why their bids for RSL properties have been trumped by applicants with lower priority. The following situations are likely to arise:

■ While the LHA has assessed applicant A as

being capable of maintaining a general needs tenancy; the RSL assesses A as requiring supported accommodation. HC circular *Tenancy management: eligibility and evictions* (see above) urges RSLs to work with LHAs and other agencies to ensure that any appropriate support is available for vulnerable applicants at the start of the tenancy.

■ While the LHA has assessed applicant A as being eligible despite a history of rent arrears or anti-social behaviour; the RSL contends that A falls foul of its stricter eligibility rules. A may be a vulnerable homeless applicant to whom the LHA has accepted a full housing duty despite his/her past behaviour.

■ While the LHA has assessed A as requiring three bedrooms, the authority permits A to bid for two-bedroom accommodation; the RSL refuses to accept A's bid and s/he is assessed as requiring an additional bedroom under its space standard.

The practical problems that arise are considered in the report entitled '*Problematic nominations*'.¹⁵ The research covered three LHAs:

■ one of which had retained its housing stock;

■ the second had transferred its entire stock to an RSL; and

■ the third had established an ALMO.

These problems have remained prevalent in these areas despite the existence of CBL and CHRs.

Conclusions

To date, there have been few challenges to the allocation of accommodation by RSLs. However, this is likely to change as increasingly RSLs act as agents of LHAs in discharging their strategic housing duties and as CBL provides greater transparency in the allocation process. The allocation of social housing is a public function. The status of RSLs as public authorities needs to be established beyond doubt.

The H&RA was a missed opportunity to enact a coherent statutory code for the allocation of accommodation by social landlords, whether they are LHAs or RSLs. Now, it is only through RSLs that many LHAs are able to discharge their housing duties under HA 1996 Parts 6 and 7.

In April 2009, the TSA will assume the statutory duties of the HC in respect of registered providers of social housing in England. We must await its statutory guidance in respect of both the criteria for allocating accommodation and the terms of any tenancies that are granted. The extent of the powers granted to the regulator is a sad reflection of the extent to which parliament has abrogated its responsibility for the allocation of social housing and the terms

under which RSL tenancies are held. The prospects for the Law Commission's Rented Homes Bill whereby the 'secure contract' becomes the standard form of tenure in the social sector now seem as remote as ever.¹⁶

- 1 See note 5 for the statistics set out in Table 1.
- 2 Available at: www.ihos.org.uk/downloads/common/HOS_Annual_Report_2007.pdf.
- 3 See: www.housingcorp.gov.uk/server/show/ConWebDoc.14987/changeNav/431 and *Inside Housing*, 12 September 2008, p35.
- 4 Available at: www.communities.gov.uk/documents/housing/pdf/439986.pdf.
- 5 Available at: www.communities.gov.uk/documents/housing/pdf/320365.pdf.
- 6 See: www.communities.gov.uk/housing/strategiesandreviews/reformgreenpaper.
- 7 Available at: www.housingcorp.gov.uk/upload/pdf/RegulatoryCode.pdf.
- 8 Available at www.housingcorp.gov.uk/upload/pdf/CIRCULARNominationsJan03.pdf.
- 9 Available at: www.housingcorp.gov.uk/upload/pdf/Tenancy_management.pdf.
- 10 Available at: www.housingcorp.gov.uk/upload/pdf/Final_HC_GPN_12_v3.pdf.
- 11 Available at: www.communities.gov.uk/documents/housing/pdf/157737.pdf and www.communities.gov.uk/documents/housing/pdf/choicecodeguidance respectively. At the same time as publishing the new statutory guidance for LHAs on CBL schemes, CLG published *Summary of responses to the consultation on the choice based lettings code of guidance* available at: www.communities.gov.uk/documents/housing/pdf/cblresponsecode.pdf. These will be considered in a further article in December 2008 *Legal Action*.
- 12 Visit: www.core.ac.uk.
- 13 See note 8 at para 4.4.
- 14 See *Sustainable communities: homes for all*, Office of the Deputy Prime Minister, January 2005, para 1.29 at: www.communities.gov.uk/documents/corporate/pdf/homes-for-all.pdf.
- 15 The report was written by David Cowan, Morag McDermont and Karen Morgan, School of Law, Bristol University. It is available at: www.bristol.ac.uk/law/research/centres-themes/nominations/nominationsreport.pdf.
- 16 See: www.lawcom.gov.uk/docs/lc297_vol2.pdf.



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