

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

***Fair and flexible: draft
statutory guidance on
social housing
allocations for local
authorities in England***

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About HLPAs

The Housing Law Practitioners Association (HLPAs) 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. HLPAs 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 (by primary and subordinate legislation and also by other means such as relevant codes) by the relevant Departments, currently the DCLG (Department of Communities and Local Government).

Most recently it made a communication to the Committee of Ministers of the Council of Europe on the execution of the judgement of the European Court of Human Rights in *McCann v UK* under Rule 9 of the Committee of Ministers Rules (March 2009), responded to the Legal Services Commissions consultation paper on changes to civil legal aid remuneration (May 2009) and to the "Review of Civil Litigation Costs: Preliminary Report- the "Jackson Report"(July 2009)

The Chair, Vivien Gambling, is an experienced housing specialist and currently works for Lambeth Law Centre. Although the Association is London based, the membership is countrywide. The Association is also informally linked with similar Housing Law Practitioners Groups in the North-West, South Yorkshire and the West Midlands.

Membership of HLPAs is on the basis of a commitment to HLPAs'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 over 100 practitioners.

CAS	-	Common Allocation Scheme
CBL	-	Choice Based Lettings Scheme
CHR	-	Common Housing Register
CLG	-	Communities and Local Government
HA 1985	-	Housing Act 1985
HA 1988	-	Housing Act 1988
HA 1996	-	Housing Act 1996
H&RA 2008	-	Housing and Regeneration Act 2008
HC	-	Housing Corporation (Abolished November 2008)
LHA	-	Local Housing Authority
RSL	-	Registered Social Landlord (to be abolished April 2010)
RP	-	Registered Provider (to replace RSLs in April 2010)
TSA	-	Tenants Services Authority which HPLA understands will regulate both RPs and LHAs from April 2010.
2002 Code	-	The Code of Guidance on the Allocation of Accommodation (November 2002)
CBL Code	-	The Code of Guidance on Choice Based Lettings (August 2008)

2. Summary of Response

- HPLA welcomes the proposal for greater transparency in the allocation of social housing. Such transparency does not exist at present (see 3.4).
- However, the consultation is restricted to allocations within Part 6 HA 1996. This excludes much of the accommodation that is allocated by both RSLs and LHAs. HPLA believes that this transparency should extend to the allocation of all social housing (see 3.4 and 3.5).
- HPLA questions whether such transparency can be achieved within the current legislative framework whereby LHAs and RSLs allocate under different statutory frameworks and their tenants occupy under different statutory codes. A level playing field is needed in respect of the manner in which social housing is allocated and the terms upon which such accommodation is occupied (see Sections 3 and 4).

- There should be a single statutory code of guidance relating to the allocation of social housing. The CLG currently contemplates that LHAs should grapple with three separate codes and one circular. RPs await the regulatory framework to be set by the TSA. This will not create the transparency that is required. (see 7.1 and 3.5).
- HLPAs welcomes the government statement that security of tenure is to be retained for council tenants. HLPAs is concerned that the TSA will not ensure that similar security of tenure will be afforded to tenants of RPs (see 3.9 below).
- HLPAs agrees that that the overriding objective that social housing should be allocated to those in greatest need. However, the proposed guidance on *Ahmad* and waiting time is difficult to reconcile with this objective (see 5.3-5.7).
- More detailed guidance is required if LHAs and RSLs/RPs are to comply with their equality duties (see 5.8-5.14).
- More detailed guidance is required on how LHAs should determine applications for accommodation. (see 6.7-6.16).
- More detailed guidance is required in a range of further areas (see 7.9).
- It is almost impossible to achieve the desired policy objectives if Regional CHR and/or CAS within the current legislative framework (see 3.6 and Section 8).

3. The Policy Objectives – The impact Assessment

3.1 The Impact Assessment specifies two policy objectives behind the consultation:

- to increase the involvement of local people in discussions about allocation policies to increase awareness and tackle misconceptions;
- to encourage LHAs to adopt policies that best reflect local needs and circumstances;

3.2 The Impact Assessment highlights the public response to the following questions in the Ipsos MORI Survey:

(i) “The way in which social housing is allocated is fair”: 32% disagreed; 23% agreed and 23% neither agreed nor disagreed.

(ii) “How much, if anything, do you feel you know about how council and housing association homes are allocated to people?”: 41% knew nothing; 48% knew a little and 8% knew a lot.

3.3 It is a matter of regret that the consultation paper does not discuss the current environment within which social housing is allocated. We discuss this in Section 4 below. Tables 2 and 3 were published in an article “Allocating Social Housing: the Registered Social Landlord Context” (Legal Action, October 2008). This Section highlights a range of issue which should have been addressed in the consultation paper. HLPAs believes that a much wider debate is required as to how social housing is allocated. Had this been addressed, we suggest that the need for a wider range of options should have been considered than those discussed in the Impact Assessment.

3.4 HLPAs welcomes the proposal for greater transparency in the allocation of social housing. Such transparency does not exist at present. However, the consultation is restricted to allocations within Part 6 HA 1996. This excludes:

- Accommodation allocated by LHAs outside Part 6 (i.e. decants at the instigation of the LHA – see s.159(5), or the allocation of temporary accommodation;
- Much of the accommodation that is allocated by RSLs, namely internal transfers and direct applications (see Table 2 below).

3.5 HPLA suggests that this transparency should extend to the allocation of all social housing whether by LHAs or RSLs/RPs. This should include not only rented accommodation but also low cost home ownership. It should also extend to lettings by RSLs at intermediate rents (i.e. key worker schemes) and temporary accommodation managed by RSLs, which HPLA understands to be currently outside the scope of the TSA’s regulatory framework.

3.6 HPLA does not believe that the stated policy objectives can be achieved within the current statutory framework:

(i) LHAs and RSLs allocate under different statutory codes. Part 6 HA 1996 provides strict rules within which LHAs allocate accommodation. RSLs currently allocate pursuant to guidance issued by the HC (s.36 HA 1996). The guidance relating to eligibility and assessing priorities bears little resemblance to the statutory code provided by Part 6. This is not addressed in the consultation paper.

(ii) From April 2010, RPs will allocate accommodation within the statutory framework provided by the H&RA 2008. It is open to the Secretary of State to issue a s.197 direction to the TSA to set a standard on “the criteria for allocating accommodation” (s.193(2)(c)). HPLA is surprised that this was not a direction which was considered in “Directions to the Tenants Services Authority: Consultation Paper” (July 2009). This is not addressed in the consultation paper.

(iii) Parliament also failed to address these issues when debating the H&RA 2008. Indeed, HPLA notes that no attempt has been made to amend either s.170 or 213 HA 1996. Thus in April 2010, there will be no duty on RPs to cooperate with LHAs to assist them in discharging their allocation and homelessness duties. HPLA hopes that these omissions will be promptly corrected by secondary legislation.

(iv) Part 6 HA 1996 only extends to nominations by LHAs to RSLs (s. 159(2)(c))¹. Such allocations are currently made through nomination agreements, many of which are badly drafted; were executed years ago; and were made between two parties both of which may have changed their legal identity. Such nomination agreements are no substitute for a coherent and comprehensive statutory framework for the allocation of all social housing.

(v) There has been no consistency between the statutory guidance issued respectively by the CLG to LHAs and by the Housing Corporation to RSLs.

(vi) HPLA is concerned that the TSA will apply a “light touch” in setting standards about “criteria for allocating accommodation”. In their discussion paper “Building a New Regulatory Framework” (June 2009), allocations attract just 4 paragraphs in Chapter 4C which relates to tenancy agreements. Such an approach will not secure a coherent and consistent framework for the allocation of social housing.

¹ Again, legislation has yet to be enacted to substitute RPs as from April 2010.

3.7 HPLA also questions whether it is appropriate for social tenants to occupy under different statutory codes, LHA tenants being secure tenants within Part 4 HA 1985; whilst RSL tenants occupy under assured or assured shorthold tenancies within Party 1 HA 1988. These statutory codes make different provision for (i) security of tenure (many RSLs using Ground 8); (ii) rights of succession; (iii) rights to assign and (iv) the right to buy.

3.8 On 6 April 2006, the Law Commission published its Rented Homes Bill. This sought to achieve a level playing field for tenants of LHAs and RSLs. Such tenants would normally occupy under a “secure contract”. In May 2009, the CLG announced that it does not consider that the time is right to implement the Rented Homes Bill because of the burdens and uncertainty that this would create for both tenants and landlords at a difficult time in the housing market². HPLA rejects this view. We believe that this Bill would simplify the law and reduce burdens on landlords. It would empower tenants by enabling them to better understand their rights. It would ensure the level playing field between tenants of LHAs and RSLs.

3.9 HPLA welcomes the government statement in “Building Britain’s Future” (June 2009) that security of tenure is to be retained for council tenants. However, the position is less clear in relation to tenants of RSLs/RPs. The TSA currently contemplates giving RPs greater discretion as to the security of tenure which is to be provided³. HPLA believes that the TSA is usurping the role of those entrusted with such policy decision. This is also a matter which the CLG should address through a s.197 direction.

4. Allocations – The Current Housing Environment

4.1 Only 210 out of 354 LHAs retain housing stock, much of which is outsourced to Arms Length Management Organisations (ALMOs)⁴:

Table 1

<u>Provider</u>	<u>Homes Managed (approx)</u>
RSLs	1,900,000
LHAs (retained stock)	1,300,000
ALMOs	800,000

4.2 Thus whether a tenant is granted a “secure” or an “assured” tenancy may turn on whether the LHA in which the applicant resides has retained its housing stock. Yet a secure tenancy is a more valuable social asset (see para 3.6 above). Such arbitrariness is hardly consistent with the stated objective of securing equality of access to social housing.

4.3 RSLs are now allocating as much social housing in England as LHAs. In 2006/7⁵, LHAs granted 152,217 new tenancies; whilst RSLs granted 145,034. Whilst the stock of LHA and RSL housing had declined by 10% in the decade to 2006/7, new lettings fell by 40%. Transfer

² (see para 17 of the Consultation Paper “The Private Rented Sector: professional and quality – The Government response to the Rugg Review”)

³ see para 4.99 of “Building a New Regulatory Framework” (June 2009)

⁴ statistics are taken from the Cave Report (June 2007) - see 4 below

⁵ statistics from Housing Corporation Sector Study 62 (2008)

moves declined more sharply than new lets (43% as compared with 38%). LHA lettings fell by 56%.

4.4 Given that access to social housing has been so significantly reduced, it is scarcely surprising that there is an increasing feeling that there is unfairness, or even corruption, in the allocation process. The greater the mismatch between the demand and supply for social housing, the more important it is that there are fair and robust procedures for assessing applications and allocating social housing.

4.5 CBL has not created the transparency that is required. In the early days, LHAs were encouraged to move towards self-assessment by applicants. HPLA does not believe that the current guidance is sufficient to ensure that LHAs adopt the robust procedures that are required if the CLG is serious in its concern that social housing should be allocated in a more transparent manner.

Table 2: Allocations by RSLs (2007/8)

(Source: CORE general needs lettings data⁶)

	<u>Nominated by LHAs</u>		<u>Not nominated, but via CHR or CAP</u>		<u>Internal transfer</u>		<u>Direct application</u>		<u>Other</u>	
London	8,967	67.9%	898	6.8%	2389	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%

4.6 There are now 60 large RSLs, or group structures, each of which manage more than 10,000 homes. These comprise some 55% of RSL stock. HPLA would question whether it is appropriate for these RSLs to maintain their own waiting lists. HPLA believes that there should be a single route to social housing in the district of any LHA.

4.7 However, there are also some 1,165 small RSLs with less than 250 units, often making specialist provision. Obviously different criteria relate to how these RSLs should allocate accommodation. These issues are not addressed in the consultation paper.

5. Objectives and Outcomes – Question 1

5.1 The following are suggested as objectives and outcomes which allocation policies must achieve (at pp.15-16):

⁶ © CORE Housing Corporation supplied by Housing Figures, National Housing Federation

- (i) Support for those in greatest housing need;
- (ii) Providing settled homes for people who have experienced homelessness;
- (iii) Promoting greater equality, and clearly meeting equalities duties.

5.2 The following are suggested as objectives and outcomes which allocation policies should achieve (at pp. 17-19):

- (i) Greater choice and wider options for prospective tenants;
- (ii) Greater mobility;
- (iii) Making better use of the housing stock;
- (iv) Policies which are fair and considered to be fair;
- (v) Support for people in work or seeking work.

Support for those in greatest housing need

5.3 HLPAs support the statement of principle at para 12 of the draft Code that “we remain of the view that overall priority for social housing should go to those in greatest housing need”. HLPAs note that Annex 3 of the 2002 Code, which specifies criteria for assessing housing need within the parameters of the s.167(2) reasonable preference criteria, is to remain in force.

5.4 There is some ambiguity in the language used in the draft code. Does the CLG believe that “support” should be provided to those in greatest housing need, or that any allocation scheme should be framed so as to secure that priority is afforded to those in greatest need? HLPAs support the latter.

5.5 Whilst a LHA is no longer **required** to make a composite assessment of housing needs (see *R (Ahmad) v Newham LBC* [2009] UKHL 14 (“*Ahmad*”), does the CLG consider that this is **desirable** if an LHA is to achieve this **essential** objective of allocating social housing to those in **greatest** need?

5.6 This **essential** objective is undermined by the reference (at para 64) to waiting time: “The simplest way of determining priorities would be to take into account the length of time which applicants have been waiting for an allocation. It goes on to add (at para 65): “Waiting time has the benefits of being simple, transparent, and easy to understand. It also accords with the view held by some sections of the public about how social housing should be prioritised”. The draft code suggests that there is now scope for giving waiting time more weight in the light of the decision in *Ahmad*. This is correct in law. But what is the CLG’s policy objective?

5.7 The guidance on “allocating to those in greatest housing need” and “waiting time” are irreconcilable in any inner city area. This is illustrated by the statistics for Newham for the property results for the period 2 – 5 October 2009⁷. A statutory homeless family seeking a three bedroom property would have to wait between 10 and 16 years before they could make a successful bid (the range of priority dates for the successful applicants being 15 November 1993 and 13 December 1999). This is a scheme which has a very blunt mechanism for assessing the respective needs of applicants. Such a policy is lawful. However, is the

⁷ see www.elcchoicehomes.org.uk/Data/ASPPages/1/55.aspx?LettingCycleID=839

intention of the CLG that homeless families should be condemned to the uncertainties of temporary accommodation for the majority of the period that their children will be passing through the education system? This seems to be inconsistent with the **essential** objective of providing settled homes for those who have experienced homelessness. HPLA agrees that this objective should be essential. However, in the absence of clear and unambiguous guidance from the CLG, this will be a matter of political judgment for the individual LHA.

Promoting Greater Equality

5.8 HPLA questions what is the difference between “Promoting greater equality” (stated to be an essential objective at paras 22 -22) and “Policies which are fair and considered to be fair” (a desirable outcome at 29-31)? The overriding objective should be that LHAs and RSLs/RPs should have robust procedures to ensure that they comply with their equality duties.

5.9 HPLA notes that paras 5.28 – 30 of the 2002 Code is to be replaced, whilst paras 1.6-1.13 of the CBL Code remains. There should be one statutory code giving clear guidance to LHAs, RSLs and RPs on what is required of them if they are to comply with their equality duties. Examples of good practice should be provided. A mere reference to the relevant statutory provisions is not sufficient. There is a growing body of case law as to the obligations placed on public authorities by their equality duties, namely to eliminate unlawful discrimination and to promote equality of opportunity. These were usefully summarised by the Master of the Rolls in *R (Domb and others) v Hammersmith and Fulham LBC* [2009] EWCA Civ 941 (at para 52).

5.10 HPLA notes that the draft guidance (at para 21) strongly recommends that LHAs carry out equality impact assessments. HPLA would have hoped that the CLG would have monitored what equality impact assessments were carried out last autumn by LHAs to ensure that their policies complied with the CBL Code and that examples of best practice could be provided. We note from the minister’s letter (31 July 2009) that LHAs will again be expected to review and revise their allocation schemes in the light of the new guidance which is to be issued. Further equality impact assessments will be required. The CLG should not underestimate the burden that this will impose on LHAs if equality impact assessments are to be pursued “with vigour and with an open mind”, and are matters of “substance”, not a “form of box ticking”.

5.11 The Disability Discrimination Act 1995 may impose significant and expensive positive obligations on a LHA to make “reasonable adjustments” to their practices and procedures if it is to ensure that disabled applicants have equal access to social housing. One example noted at para 33 is to identify accommodation that is capable of being made accessible for disabled applicants and to give such applicants priority for such accommodation.

5.12 Social housing is an increasingly scarce and valuable resource. However, over the past 30 years, the balance has shifted away from “secure” tenancies under Part 4 HA 1985 towards “assured tenancies” under Part 1 HA 1988. A “secure tenancy” is a more valuable asset than an “assured tenancy” held from a RSL. A LHA must ensure that an applicant is able to make an informed choice as to respective advantages/disadvantages of a LHA or RSL tenancy.

5.13 At the same time, applicants seeking housing whether under Part 6 (allocations) or Part 7 (homelessness) are increasingly being asked to consider private sector alternatives (see para 20 of the draft guidance). An applicant threatened with homelessness who accepts an assured shorthold tenancy in the private rented sector under a Homelessness Prevention Scheme as an alternative to a Part 7 homelessness application, is foregoing the prospect of gaining access to an extremely valuable social commodity. A LHA must ensure that any applicant is able to make an informed decision to forego such rights.

5.14 LHAs are also strongly recommended to monitor outcomes and ensure that this is regularly and publicly available. HPLA recommends that this should extend to the allocation of **all** social housing within the district of a LHA. This should include direct offers and transfers in addition to allocations under CBL. It should also extend to all RSL/RP accommodation.

Greater Choice and Wider Options to Prospective Tenants

5.15 HPLA agrees with the policy objective affording greater choice to housing applicants. However, we note that this is to be a desirable objective. In January 2005, the government set a target of achieving national coverage of CBL by 2010 (see Sustainable Communities: homes for all. A five year plan from the Office of the Deputy Prime Minister”). Have LHAs now been given a greater discretion as to whether they adopt CBL?

Greater Mobility

5.16 HPLA supports the principle that social housing tenants should have greater opportunities to move. However, in HPLA’s experience most LHAs reduce priority for applicants who lack a local connection using their discretion provided by s.167(2A) to do so. We therefore suggest that there are only two means whereby this objective will be achieved in practice: (i) CHR and CAS adopted on a Regional basis; and (ii) greater opportunities for mutual exchanges.

5.17 HPLA believes that there is considerable scope for CBL to facilitate mutual exchanges. HPLA also supports the HomeSwapper initiative which facilitates some 16,621 mutual exchanges every year. HomeSwapper also highlights the extent to which mutual exchanges can encourage a more effective use of the housing stock. Many of their applicants are currently underoccupying their existing homes. They estimate that their 131,617 current occupants have 28,213 bedrooms more than they need.

5.18 HPLA is concerned that the ability of a social tenant to secure a transfer depends upon the existing policies of their current landlord, whether LHA or RSL and the stock that is available to their landlord. This is a further example of the need for there to be a more comprehensive review as to how social housing is allocated if a more level playing field is to be achieved between tenants of LHAs and RSLs.

6. Involving, Consulting and Raising Awareness with Local Communities – Questions 2 to 4

6.1 HPLA believes that the allocation of social housing must be made more transparent. The current situation is illustrated by the case of *R (Van Boolean) v Barking and Dagenham LBC* [2009] EWHC 2196 (Admin). Ms Van Boolean lived in Newham. She wished to live in Barking

and Dagenham (“B&D”) where she had friends. She was unable to establish a “local connection” within s.199. However, she was able to establish a need to move on medical grounds. In February 2005, she applied to B&D for accommodation and was registered on their housing register. In October 2006, B&D allocated Ms Van Boolean to their “reasonable preference band”. Between March 2007 and December 2008, Ms Van Boolean bid for 78 properties for which she was first in the queue. She was able to monitor her bids on line. When the outcomes were published, she appeared to be the successful applicant. However, she was never invited to a viewing. Only after the properties had been allocated was she notified that her bids had been unsuccessful. The allocation scheme merely provided that if an applicant does not have a local connection that may result them in receiving less priority. In each case, at the shortlisting stage, B&D decide to relegate Ms Van Boolean’s bid on grounds of local connection. It became apparent that there was internal guidance, not in the allocation scheme, providing that priority would be reduced in such circumstances unless there were exceptional circumstances. That narrow discretion had never been exercised. It is scarcely surprising that housing applicants in Barking and Dagenham do not believe that accommodation is being fairly allocated.

6.2 HPLA suggests that these are essential elements in ensuring greater transparency in the allocation of social housing:

- LHAs must be more open about what social housing is available within their district and how it is allocated;
- Allocation Schemes must specify all aspects of the allocation process;
- The current allocation scheme must be published;
- LHAs must have robust procedures for determining applications for accommodation;
- LHAs must allocate accommodation in accordance with their allocation schemes.

Greater Transparency about the Availability and Allocation of Social Housing

6.3 HPLA questions whether it is possible to achieve the required transparency within the current statutory framework. These issues have been fully canvassed in Sections 3 and 4 above.

The Content of the Allocation Scheme

6.4 Section 167(1) requires any allocation scheme to include all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are to be taken. In HPLA’s experience, this is a provision that is honoured more in the breach than in the observance. *Van Boolean* illustrates the point, albeit that the judge decided that the internal guidance did not need to be included in the allocation scheme. In *R (Yazar) v Southwark LBC [2008] EWHC 515 (Admin)*, Simon J had described Southwark’s procedures for making social services nominations as being “unclear to the point of obscurity”.

6.5 HPLA welcomes the reference in para 36 that “it is essential that the scheme reflects all the local authority’s policies and procedures”. The courts have sought to distinguish between “an important aspect of the allocation scheme” and “a mere matter of detail” (see *R (A) and (Lindsay) v Lambeth LBC [2002] EWCA Civ 1084* and *R (Lin) v Barnet LBC [2007] EWCA Civ 132*). This distinction is one that is easier to state than to apply. If the CLG considers that LHAs should go further than the existing case law requires, and HPLA believes

that it should, the draft guidance should state so in specific terms. There is no reason why any LHA should not be able to publish all their relevant procedures on their website as their “allocation scheme”. A LHA is under a separate duty to publish a summary.

Publication of the Scheme

6.6 All LHAs should be required to publish their current allocation scheme on their web-site. An increasing number of LHAs now do so. A significant minority do not. This should not merely be a matter of “encouragement” (para 45).

Robust Procedures for Determining Applications

6.7 Recent decisions of the Local Government Ombudsman and the Courts provide compelling evidence that LHAs do not have robust procedures for lawfully determining Part 6 applications. Applicants must be assessed in accordance with the criteria published in the scheme. Medical assessments will be open to challenge if not made rationally and fairly (see *R (Ghandali) v Ealing LBC [2006] 1859 (Admin)*). It should be noted that whilst *Mr Ahmad’s* challenge related to the structure of the Newham allocation scheme, the LHA had failed to make a lawful determination of his application. This was conceded when the matter was initially listed in the Administrative Court. 18 months later, when his appeal was heard in the House of Lords, Mr Ahmad was still waiting for a lawful determination of his application. Such guidance is essential if there is to be greater transparency in the allocation process.

6.8 Part 6 does not prescribe the same structured decision making-process as is to be found in Part 7 (homelessness). A LHA is obliged to consider every application for accommodation if made in accordance with their procedural requirements (s.166(1)). A LHA must ensure that any necessary assistance is available free of charge to any applicant in their district who is likely to have difficulty in making their application (s.166(1)(b)). It is lawful for an applicant to pursue Part 6 and Part 7 applications simultaneously (see *R (Silverstone) v Oxford CC [2003] EWHC 2434 (Admin)*). It should be noted that a LHA is obliged to afford a reasonable preference to any applicant who is homeless within Part 7 (s.167(2)(a)), regardless of what duty, if any, is owed under Part 7.

6.9 The CBL Code (at paras 4.5 – 4.6) recommended a two stage assessment process. This guidance has now been withdrawn. No alternative guidance is provided. HLPAs recommend that a full assessment of the applicant’s housing need should be made at the initial stage. In areas of high demand, an applicant may have to wait for a considerable time before s/he can make a successful bid. An applicant should therefore be informed of their obligation to notify the LHA of any material change of circumstances and of what constitutes such a material change of circumstances. Any assessment at the bidding stage, should merely be to confirm that there has been no change of circumstances which would affect the level of priority that was originally awarded.

6.10 Given the emphasis that the draft code places on securing equality of access to social housing, it is surprising that the Code gives no guidance on the scope of any inquiries that a LHA should make before determining the application. It seems that “self assessment” is now out, save for the most articulate applicant. HLPAs recommend that a LHA should carry out such inquiries as are necessary to satisfy themselves (a) whether the applicant is eligible for accommodation and, if so, (b) the priority that should be afforded to the application. This is

to impose the statutory language of s.184(1) of the Act which parliament has signally failed to apply to Part 6. This makes the need for proper guidance from the CLG the more important if there is to be transparency in the allocation process.

6.11 Part 7 (homelessness) requires a LHA to issue a reasoned decision letter (s.184(3)) with a statutory right of review (s.202). Part 6 rather provides that such rights must be specified in the allocation scheme. It is not happily worded. An applicant has the right to request the LHA to inform her/him of “any decision about the facts of his case which is likely to be, or has been, taken into account in considering whether to allocate housing accommodation to him” (s.167(4A)(c)). The applicant has the right to request a review of such a decision. The Act permits the Secretary of State to specify the procedures that should be followed by regulation (s.167(5)). It is a matter of regret to HLPAs that the Secretary of State has not done so.

6.12 Some LHAs merely notify applicants of their points or band/priority date without any explanation as to how the priority has been determined. This approach does not commend itself to the Courts (see *R (Faarah) v Southwark LBC [2008] EWCA Civ 807* at [21] – [32]). At the very least, an applicant is entitled to a reasoned decision letter on request (s.167(4A)).

6.13 In the letter dated 11th November 2002 which accompanied the 2002 Code, it was noted that no detailed guidance was provided on review procedures. LHAs were advised to ensure that their procedures were fair and complied with the European Convention on Human Rights. At the time, *Runa Begum v Tower Hamlets LBC [2003] UKHL 5* was pending before the House of Lords. Further guidance would be considered in the light of this judgment.

6.14 The 2008 Code failed to provide that guidance. Paragraph 50 of the draft guidance refers to “information about the relevant complaints procedure that are available”. The previous paragraph refers to the right of review which is provided in respect of certain decisions under s.160A(9) and s.167(4A). No guidance is given as to the scope of the right of review, how such reviews should be conducted or where a complaints procedure is considered to be more appropriate.

6.15 HLPAs recommend the following practice. An applicant should be given a decision letter notifying them as to whether they are eligible for accommodation, and if so the level of priority that has been afforded. This should indicate the type of accommodation for which they have been assessed. This may merely be the assessed bedroom size. The applicant should be notified whether they are permitted to bid for accommodation with fewer bedrooms. Many London LHAs permit applicants to bid for one bedroom less than their assessed size. The letter should also give some indication as to their prospects of being able to make a successful bid for accommodation. Reasons should be given for the decision. These should address any issues raised by the application which have been decided adversely to the interests of the applicant. If the reasons are brief, the applicant should be notified of their right to request a fuller explanation. An applicant should also be notified of any right of review. This right of review extends to a decision as to whether the applicant is eligible and the degree of priority afforded to the application. It should also extend to any decision not to allocate accommodation where the applicant is the bidder with the highest priority.

6.16 CBL provides greater transparency in the allocation process. It alerts applicants, and their advisers, to flaws in the assessment and allocation processes. The best means of minimising the risks of legal challenge is a robust review procedure in respect of any adverse decision. The procedure for the review must be specified in the allocation scheme. In the absence of any regulations or statutory guidance, LHAs must devise their own procedures. Again the best advice is to mirror the review procedures adopted for the statutory homeless under Part 7.

Allocating Accommodation in Accordance with the Scheme

6.17 In HLPAs' experience, LHAs regularly do not allocate accommodation in accordance with their allocation scheme. The following passage from the judgment of Sedley LJ in *R (Faarah) v Southwark LBC* [2008] EWCA Civ 807 speaks for itself:

“I share his (Toulson LJ's) concern at the sustained endeavour of the local authority, through Mr Broatch, to treat this appeal more as a damage limitation exercise than as an endeavour to get their policy and practice within the law. Both Southwark and other authorities with similar schemes have a duty to make sure that their schemes are compliant with their statutory obligations and are not subverted by inconsistent administrative practices.”

7. Framing an Allocation Scheme – Question 5

Three Codes and a Circular

7.1 LHAs are entitled to expect the CLG to provide them with clear and unambiguous guidance on how to lawfully discharge their statutory duties under Part 6. We do not see how this is consistent with the proposal that there should be three separate statutory codes of guidance: (i) the 2002 Code; (ii) the CBL Code; and (iii) the proposed guidance. In addition, LHAs must have regard to Circular 04/2009: Housing Allocations – Members of the Armed Forces.

7.2 Any statutory guidance should consider the lessons to be learnt from recent case law, together with reports from the Local Ombudsman and the Audit Commission. None of the existing codes have sought to do this. However, this is essential if a proper framework is to be established to enable LHAs are to allocate accommodation in a more transparent manner.

Determining priorities

7.3 The draft code comes out firmly in favour of banding in preference to point schemes (see para 66). The House of Lords in *Ahmad* has given the green light to a scheme that has just two bands, namely Band A for those falling within one of the s.167(2) reasonable preference groups or a locally determined preference group and Band B for those who do not. This approach is wholly inconsistent with the stated policy outcome that social housing should be allocated to those in greatest need. The CLG must make this clear in the statutory guidance.

7.4 The draft guidance fails to give LHAs any adequate guidance on how to construct a lawful allocation scheme having regard to the statutory framework provided by Part 6. Any LHA must address the following issues:

(i) What is the threshold to be set before allocating an applicant to the “reasonable preference” band? In Newham, the threshold is extremely low. Hence the vast majority of housing applicants are able to qualify, and the long waiting time.

(ii) Is it appropriate to give the same level of priority to all applicants meeting one of the reasonable preference grounds? This is a matter for the discretion of the HLA. For example, is it appropriate to give the same priority to (a) the person who is homeless within Part 7, but to whom no housing duty is owed (s.167(2)(a)); (b) the homeless applicant to whom a full s.193(2) housing duty is owed; and/or (c) the homeless applicant who is priority need, but became homeless intentionally ((b) and (c) falling within s.167(2)(b))? This was the issue raised in *Alam v Tower Hamlets LBC [2009] EWHC 44 (Admin)*.

(iii) What other applicants would a LHA wish to afford some preference (i.e. under-occupiers; decants; management transfers; social services nominations etc)? What level of priority should these applicants be afforded? When transfer applicants were brought with Part VI by the Homelessness Act 2002, the reasonable preference criteria were not amended to reflect the categories of applicant whom a LHA might wish to move on housing management grounds.

(iv) In *Ahmad*, the House of Lords have given a green light to LHAs to allocate properties to transfer applicants who do not meet any of the reasonable preference categories. LHAs need to consider the extent to which such transfers are stock neutral and the priority that they should be afforded (see paras 72 and 73). Indeed, where LHAs operate a CHR and/or CAS with RSLs, an issue arises as to the extent to which each partner would wish to give priority to their own tenants over other applicants registered under the CHR. It is understood that many such internal transfers fall outside the scope of any CAS.

(v) Whilst a LHA is not obliged to make a composite assessment of need, would they wish to do so? Should a need to move on medical grounds reflect whether such a move is (a) “desirable”; (b) “necessary” or (c) “essential”? Should an applicant who meets more than one reasonable preference criterion be given a higher priority than just one?

(vi) A LHA may also decide to award “additional preference” to people falling within the reasonable preference categories and who have urgent housing needs. How is this to be addressed?

(vii) The scheme may also make provision for reducing priority having regard to (a) the financial resources of the applicant; (b) the behaviour of a member of the family (rent arrears or nuisance); and/or (c) lack of local connection. It is probable that most LHAs would wish to take all these factors into account. A LHA may decide to take other factors into account (para 62 of the draft guidance). These may also have a cumulative effect. At what stage should this be assessed, at the initial assessment stage or at the offer stage (see Van Boonen above).

7.5 It is only having addressed these issues that a LHA can logically determine on a mechanism to assess priorities. The more a LHA seeks to identify those in **greatest** housing need, the more sophisticated the assessment process will need to be. HLPAs remain of the view that whilst banding schemes may operate well in areas of low demand, points based schemes are required in inner city areas where demand far outstrips supply.

7.6 We note that the CLGs are using the *Ahmad* decision to strengthen their guidance that banding schemes should be adopted. HLPAs believe that this is a mistake, albeit that this is now a policy decision. The less prescriptive the guidance for the CLGs on the need to allocate to those in greatest need, the greater the discretion for the individual LHA.

7.7 If an inner city authority elects to adopt a banding scheme, how is priority to be afforded to those within the same band? The draft code suggests that this should be waiting time (see paras 64-65). How many applicants are in the top band? In such inner city areas, even if the top band were to be restricted to some 5% of applicants, it is probable that all properties advertised would be allocated to applicants in the top band. Does the LHA therefore restrict certain properties to applicants in the lower bands? In such circumstances, the applicant at the bottom of the top band would be disadvantaged as against the top applicant in the lower band.

Quotas, targets and lettings plans

7.8 HLPAs welcome the guidance in the draft code recommends that LHAs set targets for the percentage of properties to be allocated to particular groups, namely the statutory homeless, transfer applicants and waiting list applicants, or other target groups. HLPAs also welcome the recommendation that such targets and outcomes are published (para 77). These should extend to **all** social housing allocated within the district of a LHA (see 5.14 above)

Further Areas where Statutory Guidance is Required

7.9 HLPAs suggest that there are a range of further areas upon which statutory guidance is required if LHAs are to lawfully discharge their functions under Part 6. We highlight the following:

(i) Eligibility: HLPAs note that annexes 4-9 and Annex 12 of the 2002 Code are “replaced” (para 3). However, no alternative guidance on eligibility is provided. HLPAs acknowledge that the 2002 guidance is now out of date. However, this is a complex area of the law on which LHAs are entitled to clear statutory guidance. This is the more urgent given the recent Opinion of the Advocate General of the ECJ (20 October 2009) in *Harrow LBC v Ibrahim and SSHD* Case C-310-/08 and *Teixeira v Lambeth LBC and SSHD* C-480/08. This is the more important given the public perception that social housing is being wrongly allocated to persons from abroad.

(ii) Who is to be treated as a member of the applicant’s household? For Part 7 (homelessness) applications this is addressed in s.176. There is no equivalent provision in Part 6 and this is an area where guidance is required (see *R (Ariemuguvbe) Islington LBC* [2009] EWHC 470 (Admin))

(iii) Contracting out and Stock Transfer: Chapter 7 of the 2002 Code is to remain in force. However, this needs to be updated in the light of the policy move towards CHR and CAS. LHAs need clear guidance on what functions they can, and what functions they cannot, contract out. HPLA is aware that some LHAs who have divested themselves of their housing stock and have contracted out the whole of their allocation function. This is clearly unlawful (see s.167(1)).

(iv) Discretionary Lettings: Any allocation scheme must make provision for discretionary lettings where a joint tenant determines the tenancy or where there is no statutory right to succession. We note that LHAs have to delve into paras 3.7 – 3.10 of the 2002 Code to find the current guidance on the grant of joint tenancies. There are still cases relating to the right of succession where the tenant was a tolerated trespasser (see *R (Neville) v Wandsworth LBC [2009] EWHC 2405 (Admin)*).

(v) Assessing applications from children: The interaction between the respective duties of a local authority under Part 3 of the Children Act 1989 and Parts 6 and 7 HA 1996 has been a continuing area of tension (see *R (G) v Southwark LBC [2009] UKHL 26*). Clear guidance is required on how a LHA should assess housing applications from children.

8. Partnership with RSLs – Question 6

Table 3: RSLs participating in CAS (2007/8)

(Source: CORE general needs lettings data⁸)

	<u>With CBL Lettings</u>		<u>Without CBL Lettings</u>	
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*	61.4%	229	38.0%

(* a number of RSLs operate in more than one region; but England total counts them as one; hence the totals do not add up)

8.1 HPLA believes that the scope for effective partnership working is restricted by the current statutory framework. We have addressed this in Sections 3 and 4 above.

8.2 As Table 3 indicates, many LHAs and RSLs are working in partnership to allocate social housing. However, whilst CHR and CAS have many attractions, these are immense difficulties

⁸ © CORE Housing Corporation supplied by HousingFigures, National Housing Federation

in achieving this within the current statutory framework. These difficulties are discussed more fully in the article “Allocating Social Housing: the Registered Social Landlord Context” (Legal Action, October 2008)

8.3 Many LHAs have now divested themselves of all their housing stock to RSLs. Some such LHAs have no allocation scheme despite their statutory duty to do so. This illustrates the extent to which many LHAs are failing to comply with their statutory obligations.

9. Additional Questions for Local Authorities – Questions 7 to 9

9.1 Whilst these questions are outside HPLA’s competence, we hope that CLG will scrutinise what steps have been taken by LHAs to formulate their responses. These should inform the statutory guidance that the CLG is to issue in due course.

10. Impact Assessment – Questions 10 to 14.

10.1 HPLA is concerned that the CLG currently plan to issue the statutory guidance in November. It is to be noted that some LHAs are still seeking to amend their policies and procedures in line with the CBL Code which was issued last August. We suggest that this timescale is hopelessly inadequate given the flaws in the draft guidance and the scope of the exercise upon which LHAs have been encouraged to embark in informing their response. LHAs have been urged to carry out detailed consultations with their local communities before formulating their responses. They have a legitimate expectation that their views will be fully considered before any statutory guidance is issued.

10.2 HPLA also suggests that there is a need for greater clarity as to what will be expected from LHAs when the new guidance is issued. We note that the minister’s letter (31 July 2009) “expects” LHAs to review and revise their allocation schemes and procedures in the light of the statutory guidance. It is probable that they will be required to conduct equality impact assessments. They will need to improve their partnership arrangements with the RSLs within their district. Those RSLs will be awaiting the statutory standards and any code of practice to be issued by the TSA within the next six months. We suggest that the Impact Assessment underestimates the costs required of LHAs in complying with the guidance.

10.3 We recognise that many of the strategic issues raised in Sections 3 and 4 above fall outside the scope of the current consultation. However, HPLA would emphasise that these are issues which the CLG must address if the policy objective of greater transparency in the allocation of social housing is to be achieved.

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23rd October 2009