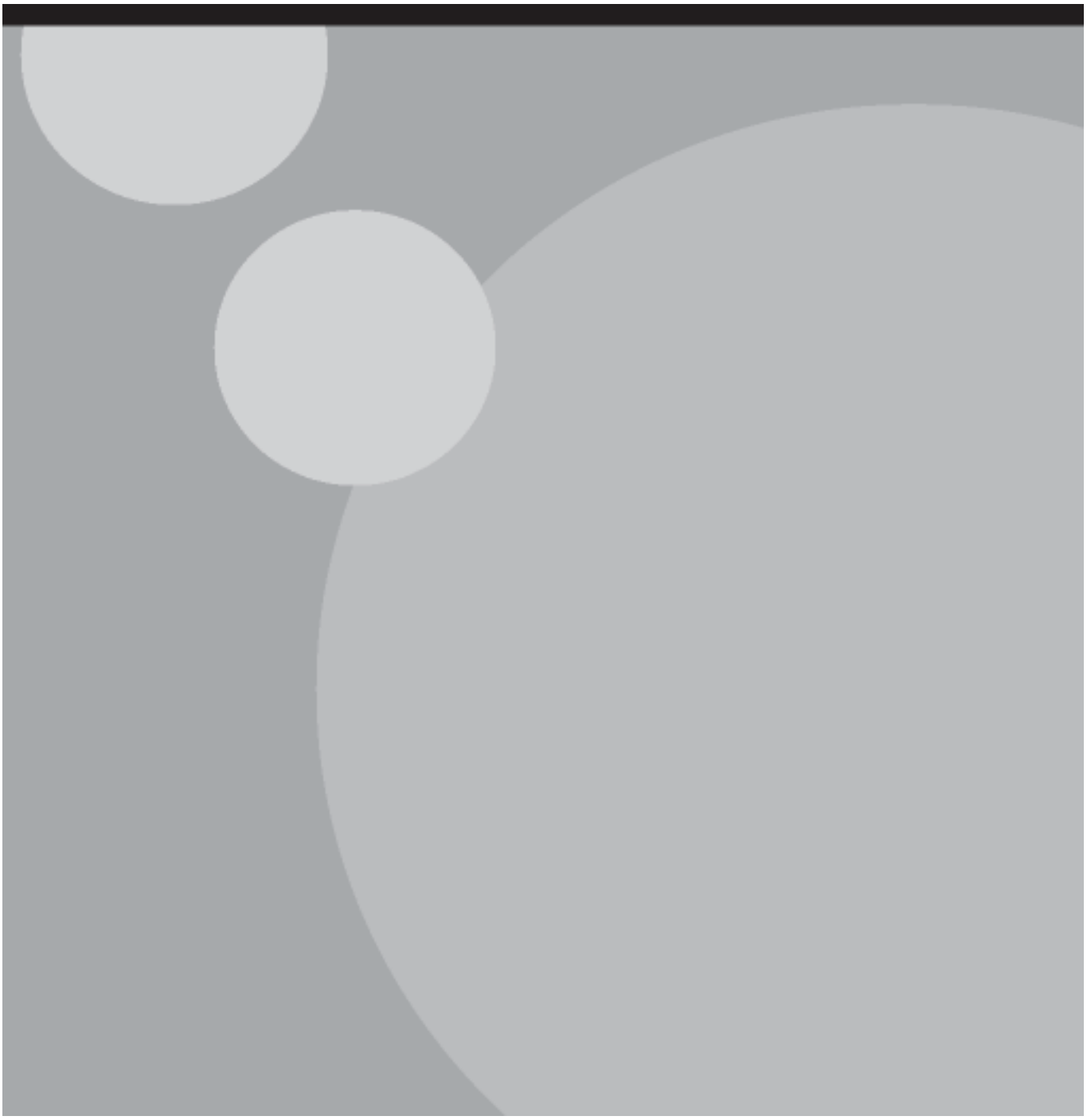
Communities and Local Government

Allocation of accommodation: guidance for local housing authorities in England

Consultation



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Any enquiries regarding this document/publication should be sent to us at:

Department for Communities and Local Government
Eland House
Bressenden Place
London
SW1E 5DU
Telephone: 030 3444 0000

January 2012

ISBN: 978-1-4098- 3298- 0

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Ministerial foreword

Social housing is of enormous importance - for the millions who live in it now, and for the many more who look to social housing to provide the support they need to live safe, healthy and prosperous lives.

The Localism Act makes fundamental changes to the social housing system which will make the system fairer, striking a proper balance between the needs of new and existing tenants.

Currently, many are trapped by their housing – lacking incentives to work, and often unable to move even if they want to. Our reforms will enable councils and social landlords to make social housing a springboard to success.

But it's important that councils and social landlords seize the opportunity which these changes offer to make the best use of this precious resource, so that more people benefit from a social home when they need it and for as long as they need it. This draft guidance points councils to the new and existing flexibilities within the allocation legislation which allow them to tailor local services to real local needs.

The guidance makes clear that we expect social homes to go to people who genuinely need them, such as hard working families and ex-servicemen and women, and not to those who do not – such as people who already own a home that is suitable for them to use.

It encourages councils to adopt a modern measure of overcrowding – so families in crowded housing will find it easier to move into more suitably sized homes. It encourages councils to prioritise tenants who want to downsize, helping those whose children have fled the nest to move to smaller, more manageable properties.

I know that several councils are already starting to introduce a new flexible approach to allocations – prioritising those who show responsibility by making an effort to find work. This guidance will help others follow suit. And it will help councils reward those who contribute in other ways, such as people who are looking to adopt or foster a child in need of a stable, loving family.

Through the Military Covenant, the Government has made clear its responsibility to support our armed forces in return for the important contribution they make to the country. That is why, alongside the guidance, we are consulting on new regulations which will bring an end to the unfair treatment of service families in need of a social home - ensuring they get the priority for social housing they deserve, and that those who have to move from base-to-base do not lose their qualification rights.

This new draft guidance and the draft armed forces regulations are an important part of the Government's commitment to make the social housing system more flexible and responsive, to get the best out of our four million social homes, and to make the system fairer for all. I look forward to receiving your views.

Rt Hon Grant Shapps, MP

The consultation process and how to respond

Scope of the consultation

Topic of this consultation:	Proposed new statutory guidance to local housing authorities on the allocation of social housing; and proposed regulations designed to improve access to social housing for former and serving armed forces personnel.
Scope of this consultation:	The consultation seeks views on the content of the new guidance and desirability and practicability of the proposed changes in the regulations.
Geographical scope:	England.
Impact Assessment:	Not applicable.

Basic information

To:	This consultation is aimed primarily at local authorities. Housing associations, social housing tenants and waiting list applicants, as well as voluntary and community organisations representing tenants and applicants are also expected to have an interest.
Body/bodies responsible for the consultation:	Department for Communities and Local Government.
Duration:	**5 January 2012 to 5 pm on 30 March 2012.**

Enquiries:	Please contact Frances Walker: frances.walker@communities.gsi.gov.uk 0303 444 3655
How to respond:	By email to: housingreform@communities.gsi.gov.uk Or by post to: Frances Walker Department for Communities and Local Government Zone 1/J9, Eland House Bressenden Place London SW1E 5DU
Additional ways to become involved:	Not applicable.
After the consultation:	The Government will take into account the responses to this consultation when finalising the guidance and taking forward the regulations.
Compliance with the Code of Practice on Consultation:	The consultation complies with the Code.

CHAPTER 1

Scope of guidance and definition of an allocation

1.1 The Secretary of State is issuing this guidance to local housing authorities (referred to in this guidance as 'housing authorities') in England under s.169 of the Housing Act 1996 ('the 1996 Act'). Housing authorities are required to have regard to this guidance in exercising their functions under Part 6 of the 1996 Act ('Part 6'). In so far as this guidance comments on the law, it can only reflect the Department's understanding at the time of issue. Housing authorities will still need to keep up to date on any developments in the law in these areas.

1.2 This guidance replaces the following:

- Code of guidance on the allocation of accommodation, issued November 2002
- Code of guidance on choice based lettings, issued August 2008
- Circular 04/2009: Housing allocations – members of the armed forces
- Fair and flexible: statutory guidance on social housing allocations, issued December 2009.

1.3 This guidance is specifically for housing authority Members and staff. It is also of direct relevance to Private Registered Providers. Private Registered Providers have a duty under s.170 of the 1996 Act to cooperate with housing authorities to such extent as is reasonable in the circumstances in offering accommodation to people with priority under the housing authority's allocation scheme.

Definition of an 'allocation'

1.4 For the purposes of Part 6, the allocation of housing by a housing authority is defined in s.159(2) as:

- selecting a person to be a secure or introductory tenant of housing accommodation held by them (ie by that authority)
- nominating a person to be a secure or introductory tenant of housing accommodation held by another person (ie by another housing authority); or

- nominating a person to be an assured tenant of housing accommodation held by a Private Registered Provider (or Registered Social Landlord in Wales).

1.5 The term 'assured tenant' includes a person with an assured shorthold tenancy (as well as a full assured tenancy) and includes Affordable Rent properties[1]. 'Secure tenant' includes a person with a flexible tenancy granted under s.107A of the Housing Act 1985[2].

Allocations to existing tenants

1.6 Provisions in relation to existing tenants are contained in s.159(4A) and (4B).

1.7 Under s.159(4A) and (4B), the provisions of Part 6 do not apply in relation to an allocation of accommodation by a housing authority to an existing tenant of a housing authority or a Private Registered Provider unless:

- the allocation involves a transfer
- the transfer is made at the tenant's request, and
- the housing authority is satisfied that the tenant has reasonable preference for an allocation.

1.8 Accordingly, social housing tenants applying to the housing authority for a transfer and who are considered by the authority to have reasonable preference for an allocation must be treated on the same basis as new applicants in accordance with the requirements of s.166A(3) (see chapter 4 for guidance on the application of s.166A).

1.9 Transfers at the tenant's request, where the authority is satisfied that the tenant does not have reasonable preference, do not fall within Part 6. As a result, housing authorities may set their own transfer policies in relation to these tenants. Housing authorities should consider carefully how to make the best use of this flexibility. Providing social housing tenants with greater opportunities to

[1] Rented housing let by Private Registered Providers to households who are eligible for social rented housing. Affordable Rent is not subject to the national rent regime but is subject to other rent controls that require a rent (including service charges, where applicable) of no more than 80% of the local market rent.

[2] Inserted by s.154 of the Localism Act 2011.

move within the social sector can help to promote social and economic mobility, as well as meeting individual tenants' specific needs and aspirations. It can also help make the best use of social housing stock.

1.10 Authorities may want to consider the importance of giving existing social tenants who are under-occupying their accommodation appropriate priority for a transfer. This will be important in the light of measures in the Welfare Reform [Bill 2011] which, subject to Parliamentary approval, will reduce Housing Benefit entitlement for working age tenants in the social rented sector who are under-occupying their property (as measured in accordance with the Local Housing Allowance size criteria) from April 2013. Ensuring that under-occupiers are given sufficient priority for a transfer will make it easier for tenants to downsize to more suitably sized accommodation, and help authorities to tackle overcrowding in their area. Authorities may also wish to consider whether there are other provisions in their transfer policy which might make it more difficult for under-occupiers to move, such as a prohibition against tenants transferring where they have accrued minor rent arrears, and the scope for removing or revising these in relation to under-occupiers.

Consultation questions:

1. **Does your allocation scheme/transfer policy already provide for social tenants who are under-occupying to be given priority?**
2. **Do you intend to revise your allocation scheme in order to make it easier for under-occupying social tenants to downsize to more appropriately sized accommodation?**
3. **If so, what changes will you be considering?**

1.11 Transfers that the housing authority initiates for management purposes do not fall within Part 6. These would include a temporary decant to allow repairs to a property to be carried out.

1.12 The renewal of a flexible tenancy in the same property also does not fall within Part 6; neither do mutual exchanges between existing tenants, including exchanges between secure and assured tenants and those with flexible tenancies (under s.107A of the Housing Act 1985). See Annex 1 for a full list of exemptions.

CHAPTER 2

Overview of the amendments to Part 6 made by the Localism Act 2011

2.1 The Localism Act 2011 introduces significant amendments to Part 6. The main policy objectives behind these amendments are:

- To enable housing authorities to better manage their housing waiting lists by giving them the power to determine which applicants do or do not qualify for an allocation of social housing within their district. Housing authorities will be able to operate a more focused waiting list which better reflects local circumstances and can be understood more readily by local people. It will also be easier for housing authorities to manage unrealistic expectations by excluding people who have little or no prospect of being allocated accommodation

- To make it easier for existing social tenants to move by removing the constraints of Part 6 from those social tenants who apply to the housing authority for a transfer, unless they have reasonable preference. As a result, housing authorities will be able to strike an appropriate balance between meeting the needs of existing tenants and new applicants for social housing, while making best use of their stock. Part 6 continues to apply to transferring tenants with reasonable preference, ensuring they continue to receive priority under the housing authority's allocation scheme

- To maintain the protection provided by the statutory reasonable preference criteria – which ensure that the priority for social housing goes to those in the greatest need.

2.2 The detailed changes to Part 6 contained in the Localism Act 2011 are set out in the following paragraphs.

2.3 Under s.159, housing authorities are obliged to comply with the provisions of Part 6 in the allocation of introductory and secure tenancies in their own or another housing authority's stock and the nomination of applicants to assured tenancies in Private Registered Providers' stock. Secure tenancies now include new flexible tenancies (s.107A of the Housing Act 1985). The term 'allocation' applies to a transfer at the request of an existing secure, introductory or assured tenant, but only where the housing authority is satisfied that he or she has 'reasonable preference' for an allocation. Existing secure, introductory and assured tenants

seeking a transfer who are not considered to have reasonable preference are outside the scope of Part 6. (The provisions in s.159(5) which bring all transferring tenants within the allocation rules continue to apply to allocations by authorities in Wales.)

2.4 New s.160ZA replaces s.160A in relation to allocations by housing authorities in England. Section 160A continues to apply to allocations by housing authorities in Wales.

2.5 Social housing may only be allocated to 'qualifying persons' and housing authorities in England are given the power to determine what classes of persons are or are not qualified to be allocated housing (s.160ZA(6) and (7)). These are new requirements and are in addition to the provisions on eligibility in respect of persons from abroad (s.160ZA(2) and (4)) which continue to be set centrally. The power for a housing authority to decide that an applicant is to be treated as ineligible by reason of unacceptable behaviour serious enough to make him unsuitable to be a tenant is redundant and has therefore been repealed (in relation to England). The power is no longer required, as housing authorities may set their own qualification criteria, including (but not limited to) disqualifying people who are guilty of serious unacceptable behaviour.

2.6 New s.166A requires housing authorities in England to allocate accommodation in accordance with a scheme which must be framed to ensure that certain categories of applicants are given reasonable preference for an allocation of social housing. With certain exceptions, s.166A replicates the provisions in s.167 which continues to apply to allocations by housing authorities in Wales. Section 166A(9) includes a new requirement for an allocation scheme to give a right to review a decision on qualification in s.160AZ(9), and to be informed of the decision on the review and the grounds for it. This is in addition to the existing right to review a decision on eligibility. Section 166A(12) is also new and provides that housing authorities must have regard to their homelessness and tenancy strategies when framing their allocation scheme.

2.7 The provisions in s.167 which allow for no preference to be given to a person guilty of serious unacceptable behaviour (s.167(2B) – (2D)) are not reproduced in s.166A. This is consequent on the decision to omit the unacceptable behaviour provisions from new s.160ZA. However, the power to take behaviour – whether good or poor - into account in determining priorities between people in the reasonable preference categories remains (new s.166A(5)(b)).

2.8 The requirement for an allocation scheme to contain a statement of the authority's policy on offering a choice of accommodation or the opportunity to express preferences about their accommodation is retained (s.166A(2)). However, the requirement to provide a copy of this statement to people to whom they owe a homelessness duty (under s.193(3A) or s.195(3A) of the 1996 Act) is

repealed[3]. This is because, following the changes to the main homelessness duty made by the Localism Act 2011, there can no longer be a presumption that the homelessness duty will be brought to an end in most cases with an allocation under Part 6.

[3] Repealed by s.148(2) and s.149(3) of the Localism Act 2011.

CHAPTER 3

Eligibility and qualification

3.1 Housing authorities must consider all applications for social housing that are made in accordance with the procedural requirements of the authority's allocation scheme (s.166(3)). In considering applications, authorities must ascertain:

- if an applicant is eligible for an allocation of accommodation, and
- if he or she qualifies for an allocation of accommodation.

3.2 The provisions concerning eligibility and qualification for an allocation of accommodation are contained in s.160ZA. (Section 160A continues to apply to an allocation of accommodation by local authorities in Wales.)

Eligibility

3.3 An applicant may be ineligible for an allocation of accommodation under s.160ZA(2) or (4).

3.4 Authorities are advised to consider an applicant's eligibility at the time of the initial application and again when considering making an allocation to him or her, particularly where a substantial amount of time has elapsed since the original application.

Joint tenancies

3.5 Under s.160ZA (1)(b), a housing authority must not grant a joint tenancy to two or more people if any one of them is a person from abroad who is ineligible. However, where two or more people apply and one of them is eligible, the authority may grant a tenancy to the person who is eligible. In addition, while ineligible family members must not be granted a tenancy, they may be taken into account in determining the size of accommodation which is to be allocated.

Existing tenants

3.6 The provisions relating to the eligibility of persons from abroad do not affect the eligibility of an applicant who is already a secure or introductory tenant or an assured tenant of a Private Registered Provider. Most housing authority tenants and tenants of Private Registered Providers (and Registered Social Landlords in Wales) who apply to a local authority for a transfer fall outside the scope of the allocation legislation (s.159(4A)); while transferring tenants who are considered

to have reasonable preference for an allocation are specifically exempted from the eligibility provisions by virtue of s.160ZA(5).

Persons from abroad

3.7 A person will not be eligible for an allocation of accommodation under Part 6 if he or she is a person from abroad who is ineligible for an allocation under s.160ZA of the 1996 Act. There are two categories for the purposes of s.160ZA:

(i) *a person subject to immigration control* - such a person is not eligible for an allocation of accommodation unless he or she comes within a class prescribed in regulations made by the Secretary of State (s.160ZA(2)), and

(ii) *a person from abroad other than a person subject to immigration control* - the Secretary of State may make regulations to provide for other descriptions of persons from abroad who, although they are not subject to immigration control, are to be treated as ineligible for an allocation of accommodation (s.160ZA(4)).

3.8 The regulations that set out which classes of persons from abroad are eligible or ineligible for an allocation are the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006 No.1294) ('the Eligibility Regulations').

Persons subject to immigration control

3.9 The term 'person subject to immigration control' is defined in s.13(2) of the Asylum and Immigration Act 1996 as a person who under the Immigration Act 1971 requires leave to enter or remain in the United Kingdom (whether or not such leave has been given).

3.10 Only the following categories of persons do not require leave to enter or remain in the UK:

(i) British citizens

(ii) certain Commonwealth citizens with a right of abode in the UK

(iii) citizens of an EEA country ('EEA nationals'[4]), and their family members, who have a right to reside in the UK that derives from EU law. The question of whether an EEA national (or family member) has a particular right to reside in the UK (or in another Member State) will depend on the

[4] European Economic Area nationals are nationals of any EU member state (except the UK), and nationals of Iceland, Norway, Liechtenstein and Switzerland.

circumstances, particularly the economic status of the EEA national (e.g. whether he or she is a worker, self-employed, a student, or economically inactive)

(iv) persons who are exempt from immigration control under the Immigration Acts, including diplomats and their family members based in the UK, and some military personnel.

3.11 Any person who does not fall within one of the four categories in paragraph 3.10 will be a person subject to immigration control and will be ineligible for an allocation of accommodation unless they fall within a class of persons prescribed by regulation 3 of the Eligibility Regulations (see paragraph 3.13 below).

3.12 If there is any uncertainty about an applicant's immigration status, housing authorities are recommended to contact the UK Border Agency using the procedures set out in Annex 7.

Persons subject to immigration control who are eligible for an allocation of accommodation

3.13 Regulation 3 of the Eligibility Regulations provides that the following classes of persons subject to immigration control are eligible for an allocation of accommodation:

i) *a person granted refugee status*: persons granted refugee status are granted 5 years' limited leave to remain in the UK.

ii) *a person granted exceptional leave to enter or remain in the UK without condition that they and any dependants should make no recourse to public funds*: this status is granted for a limited period where there are compelling humanitarian and/or compassionate circumstances for allowing them to stay. However, if leave was granted on condition that the applicant and any dependants should not be a charge on public funds, the applicant will not be eligible for an allocation of accommodation. Exceptional leave to remain (which is granted at the Secretary of State's discretion outside the Immigration Rules) now takes the form of 'discretionary leave'.

iii) *a person with current leave to enter or remain in the UK with no condition or limitation, and who is habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland* (the Common Travel Area): such a person will have indefinite leave to enter (ILE) or remain (ILR) and will be regarded as having settled status. However, where ILE or ILR status was granted as a result of an undertaking that a sponsor would be responsible for the applicant's maintenance and accommodation, the person must have been resident in the Common Travel Area for five years since the date of entry - or the date of the sponsorship undertaking,

whichever is later - for the applicant to be eligible. Where all sponsors have died within the first five years, the applicant will be eligible for an allocation of accommodation.

iv) *a person who has humanitarian protection granted under the Immigration Rules*[5]: humanitarian protection is a form of leave granted to persons who do not qualify for refugee status but who would face a real risk of suffering serious harm if returned to their state of origin (see paragraphs 339C-344C of the Immigration Rules (HC 395)).

Other persons from abroad who may be ineligible for an allocation

3.14 By virtue of regulation 4 of the Eligibility Regulations, a person who is not subject to immigration control and who falls within one of the following descriptions is to be treated as a person from abroad who is ineligible for an allocation of accommodation:

(i) a person who is not habitually resident in the Common Travel Area (subject to certain exceptions - see paragraph 3.16 below)

(ii) a person whose only right to reside in the UK is derived from his status as a jobseeker (or his status as the family member of a jobseeker). For this purpose, 'jobseeker' has the same meaning as for the purpose of regulation 6(1)(a) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ('the EEA Regulations')

(iii) a person whose only right to reside in the UK is an initial right to reside for a period not exceeding three months under regulation 13 of the EEA Regulations

(iv) a person whose only right to reside in the Common Travel Area is a right equivalent to one of the rights mentioned in (ii) or (iii) above and which is derived from EU Treaty rights.

3.15 See Annex 3 for guidance on rights to reside in the UK derived from EU law.

[5] Inserted by the Allocation of Housing and Homelessness (Miscellaneous Provisions) (England) Regulations 2006

Persons exempted from the requirement to be habitually resident

3.16 Certain persons from abroad are eligible for an allocation of accommodation even though they are not habitually resident in the Common Travel Area. Such a person is eligible for an allocation even if not habitually resident, if he or she is:

a) an EEA national who is in the UK as a worker (which has the same meaning as it does for the purposes of regulation 6(1) of the EEA Regulations)

b) an EEA national who is in the UK as a self-employed person (which has the same meaning as in regulation 6(1) of the EEA Regulations)

c) a person who is treated as a worker for the purposes of regulation 6(1) of the EEA Regulations, pursuant to the Accession (Immigration and Worker Authorisation) Regulations 2006 (ie nationals of Bulgaria and Romania who are required to be authorised by the Home Office to work until they have accrued 12 months uninterrupted authorised work)[6]

d) a person who is a family member of a person referred to in (a) to (c) above,

e) a person with a right to reside permanently in the UK by virtue of regulation 15(c), (d) or (e) of the EEA Regulations
f) a person who left Montserrat after 1 November 1995 because of the effect of volcanic activity there

g) a person who is in the UK as a result of his deportation, expulsion or other removal by compulsion of law from another country to the UK. Such persons could include EEA nationals, where the UK immigration authorities were satisfied that the person was settled in the UK and exercising EU Treaty rights prior to deportation from the third country. Where deportation occurs, most countries will signal this in the person's passport and provide them with reasons for their removal.

3.17 On (a) and (b), authorities should note that a person who is no longer working or no longer in self-employment will retain his or her status as a worker or self-employed person in certain circumstances. On (c), authorities should note that

[6] As of 1 May 2011, nationals of the 8 Eastern European countries (A8 nationals) which acceded to the EU in 2004 are no longer required to register with the Workers Registration Scheme in order to work in the UK. Regulation 4(2)(c) of the Eligibility Regulations no longer applies to applications from A8 workers as of that date. Rather applications from A8 workers should be considered on the same basis as those from other EU workers under regulation 4(2)(a).

accession state workers requiring authorisation will generally only be treated as a worker when they are actually working as authorised and will not retain 'worker' status between jobs until they have accrued 12 months continuous authorised employment. On (d), authorities should note that 'family member' does not include a person who is an extended family member who is treated as a family member by virtue of regulation 7(3) of the EEA Regulations (see Annexes 3 and 4 for further guidance).

The habitual residence test

3.18 The term 'habitual residence' is intended to convey a degree of permanence in the person's residence in the Common Travel Area; it implies an association between the individual and the place of residence and relies substantially on fact.

3.19 Applicants who have been resident in the Common Travel Area continuously during the two year period prior to their housing application are likely to be habitually resident. A period of continuous residence in the Common Travel Area might include periods of temporary absence, e.g. visits abroad for holidays or to visit relatives. Where two years' continuous residency has not been established, housing authorities will need to conduct further enquiries to determine whether the applicant is habitually resident (see Annex 5 for further guidance).

Qualification

3. 20 Housing authorities may only allocate accommodation to people who are defined as 'qualifying persons' (s.160ZA(6)(a)). However, subject to the requirement not to allocate to persons from abroad who are ineligible and the exception for members of the armed forces in paragraph 3.23 below, a housing authority may decide the classes of people who are, or are not, qualifying persons.

3.21 In developing their qualification criteria, housing authorities are strongly encouraged to consult with their tenants and residents, partner Private Registered Providers and relevant statutory agencies and voluntary and community organisations. In framing their qualification criteria, authorities will need to have regard to their duties under the equalities legislation, as well as the requirement in s.166A(3) to give overall priority for an allocation to people in the reasonable preference categories.

3.22 There may be sound policy reasons for applying different qualification criteria in relation to existing tenants from those which apply to new applicants. So, for example, where residency requirements are imposed, authorities may wish to ensure they do not restrict the ability of existing social tenants to transfer to

another property within the district to take up work or to downsize to a smaller home.

Members of the armed forces

3.23 [The Allocation of Housing (Qualification Criteria for Armed Forces Personnel) (England) Regulations 2012] provide that authorities must not disqualify members of the armed forces on residency grounds. This prohibition extends to applications from former service personnel, where the application is made within five[7] years of discharge. These provisions recognise the special position of members of the armed forces whose employment requires them to be mobile and who are likely therefore to be particularly disadvantaged by residency requirements.

Question 4

Do you agree that members of the armed forces and former service personnel should not be disqualified on residency grounds? Is 5 years from the date of discharge an appropriate time limit for this restriction? If not, what would be a more appropriate period?

Joint tenants

3.24 In the case of an allocation to two or more persons jointly, at least one of the persons must be a qualifying person (s.160ZA(6)(b)) and all of them must be eligible (see paragraph 3.5 above).

Fresh applications

3.25 An applicant who has been deemed not to qualify in the past may make a fresh application if the person considers that he or she should now be treated as qualifying, but it will be for the applicant to show that his or her circumstances have changed (s.160ZA(11)).

[7] 5 years reflects guidelines issued by the local authorities associations which propose a working definition of normal residence for the purposes of establishing a local connection (see paragraph 4.1(i) to Annex 18 of the Homelessness Code of Guidance 2006).

Question 5

Does the draft guidance provide sufficient clarity on how to implement the new power for housing authorities to set their own allocations qualification criteria? If not, in what areas would more guidance be useful?

Reviews of decisions on eligibility and qualification

3.26 Subsections 160ZA (9) and (10) provide that, when a housing authority decides that an applicant is ineligible by virtue of s.160ZA (2) or (4) or is not a qualifying person, it must give the applicant written notification of the decision. The notification must give clear grounds for the decision which must be based firmly on the relevant facts.

3.27 Under s.166A(9)(c), applicants have the right to request a review of any decision as to eligibility or qualification, and a right to be informed of the decision on review and the grounds for that decision.

3.27 For more detail on reviews and decisions, see further Chapter 5.

CHAPTER 4

Framing an allocation scheme

4.1 Housing authorities are required by s.166A(1) of the 1996 Act to have an allocation scheme for determining priorities, and for defining the procedures to be followed in allocating housing accommodation; and they must allocate in accordance with that scheme (s.166A(14)). All aspects of allocation procedure should be covered in the scheme, including the people by whom decisions are taken.

4.2 The requirement to have an allocation scheme applies to all housing authorities, regardless of whether or not they retain ownership of housing stock and whether or not they contract out the delivery of any of their allocation functions (see further Chapter 6).

4.3 When framing or modifying their allocation scheme, housing authorities must have regard to their current tenancy and homelessness strategies (s.166A(12)).

Choice and preference options

4.4 Section 166A(2) provides that an allocation scheme must include a statement as to the housing authority's policy on offering people who are to be allocated housing accommodation a choice of accommodation, or the opportunity to express preferences about the accommodation to be allocated to them.

4.5 It is for housing authorities to decide, in the light of local circumstances, and after appropriate consultation with their local community and Private Registered Providers, what their policy is on providing a choice of accommodation or the ability to express preferences about accommodation.

Reasonable preference

4.6 In framing their allocation scheme so as to determine priorities in the allocation of housing, housing authorities must ensure that reasonable preference is given to the following categories of people, as set out in s166A(3):

(a) people who are homeless (within the meaning of Part 7 of the 1996 Act)

(b) people who are owed a duty by any housing authority under section 190(2), 193(2) or 195(2) of the 1996 Act (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any housing authority under s.192(3)

(c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions

(d) people who need to move on medical or welfare grounds, including grounds relating to a disability[8], and

(e) people who need to move to a particular locality in the district of the housing authority, where failure to meet that need would cause hardship (to themselves or others).

4.7. In framing their allocation scheme to give effect to s.166A(3), housing authorities should have regard to the following considerations:

- the scheme must be framed so as to give reasonable preference to applicants who fall within the categories set out in s.166A(3), over those who do not
- although there is no requirement to give equal weight to each of the reasonable preference categories, housing authorities will need to demonstrate that, overall, reasonable preference has been given to all the reasonable preference categories
- there is no requirement for housing authorities to frame their scheme to afford greater priority to applicants who fall within more than one reasonable preference category (cumulative preference) over those who have reasonable preference on a single, non-urgent basis[9].

4.8 Otherwise, it is for housing authorities to decide how to give effect to the provisions of s.166A(3) in their allocation scheme. In particular, a scheme may provide for other factors than those set out in s.166A(3) to be taken into account in determining which applicants are to be given preference under a scheme, provided they do not dominate the scheme at the expense of those in s.166A(3) (see paragraphs 4.25 to 4.27 below).

[8] The words 'including grounds relating to a disability were added by the Housing Act 2004.
[9] (*R (on application of Ahmad) v Newham LBC* March 2009)

Restricted persons

4.9 Applicants should not be given reasonable preference under paragraph (a) or (b) of s.166A(3) if they would only qualify for reasonable preference by taking into account a 'restricted person' within the meaning of Part 7 (s.166A(4)). A restricted person is a person subject to immigration control who is not eligible for homelessness assistance because he or she does not have leave to enter or remain in the UK or has leave which is subject to a 'no recourse to public funds' condition (s.184(7) of the 1996 Act).

Homeless or owed a homelessness duty

4.10 Housing authorities are required to frame their allocation scheme to give reasonable preference to people who are homeless within the meaning of Part 7 of the 1996 Act or who are owed certain homeless duties under that part. This remains the case, notwithstanding the amendments made by the Localism Act to Part 7 which give housing authorities the power to end the main homelessness duty with an offer of private rented accommodation, without requiring the applicant's consent. This means that housing authorities will still be able to end the main homelessness duty with an offer of social housing where they decide this is appropriate. The term 'homeless within the meaning of Part 7' includes people who are intentionally homeless, and those who are not in priority need.

Overcrowding

4.11 The Secretary of State is aware that, in determining whether housing is 'overcrowded' for the purpose of according reasonable preference, many housing authorities look at whether the number of persons sleeping in the dwelling contravenes the 'bedroom standard'. The Secretary of State takes the view that the bedroom standard is an appropriate measure of overcrowding for allocation purposes, and recommends that all housing authorities should adopt a similar approach. The bedroom standard allocates a separate bedroom to each:

- married or cohabiting couple
- adult aged 21 years or more
- pair of adolescents aged 10-20 years of the same sex
- pair of children aged under 10 years regardless of sex.

Question 6

Do you agree that the bedroom standard is an appropriate measure of overcrowding for the purpose of according reasonable preference? If not, what measure do you consider would be more appropriate?

Question 7

Should this guidance provide advice on how to define 'severe overcrowding' for the purpose of according additional preference? (See paragraph 4.18 below.) If so, would an appropriate measure be two bedrooms or more short of the bedroom standard?

Question 8

How does your allocation scheme currently define 'overcrowding' for allocation purposes? Does it, for example, use the bedroom standard, the statutory overcrowding standards in Part 10 of the Housing Act 1985, or another definition? If the last of these, please provide brief details.

Medical and welfare grounds

4.12 The medical and welfare reasonable preference category includes people who need to move because of their disability or access needs, and authorities are reminded that this would include people with a learning disability as well as those with a physical disability.

4.13 In the case of applicants with access needs which are not met by their existing accommodation, authorities should consider, together with the applicant, whether their needs would be better served by staying put in their current accommodation, if appropriate aids and adaptations were put in place.

4.14 'Welfare grounds' would encompass a wide range of needs, including, but not limited to, the need to:

- Provide a secure base from which a care leaver, or a person who is moving on from a drug or alcohol recovery programme, can build a stable life
- Provide accommodation, with appropriate care and support, for those who could not be expected to find their own accommodation, such as young adults with learning disabilities who wish to leave

the family home so that they can live independently within the community

- Provide or receive care or support. This would include foster carers, those approved to adopt, or those being assessed for approval to foster or adopt, who need to move to a larger home in order to accommodate a looked after child or a child who was previously looked after by a local authority.

4.15 It is important for housing authorities to work closely with social services at the local level, to ensure that those whom social services identify as having housing needs (as part of a community care assessment, for example) are given appropriate priority for suitable housing which meets those needs.

Hardship grounds

4.16 This would include, for example, a person who needs to move to a different locality in order to give or receive care, to access specialised medical treatment, or to take up a particular employment, education or training opportunity.

4.17 Possible indicators of the criteria which apply to reasonable preference categories (c) and (d) are given in Annex 2.

Additional preference

4.18 Section 166A(3) gives housing authorities the power to frame their allocation scheme so as to give additional preference to particular descriptions of people who fall within the statutory reasonable preference categories and who have urgent housing needs. All housing authorities must consider, in the light of local circumstances, the need to give effect to this provision. Examples of people with urgent housing needs to whom housing authorities should consider giving additional preference within their allocation scheme include:

- those who need to move for urgent medical reasons, eg because of a life threatening illness or sudden disability
- families in severe overcrowding such that it poses a serious health hazard
- those who are homeless and require urgent rehousing – as a result of violence, fire or flood.

4.19 In the case of former members of the armed forces[10], authorities must ensure

[10] As defined by s.374 of the Armed Forces Act 2006. This provides that 'the regular forces'

that their allocation scheme is framed to give additional preference to those applicants who fall within one or more of the reasonable preference categories and who have urgent housing needs[11]. Other ways in which former and serving members of the armed forces can be given appropriate priority for an allocation are considered at paragraphs 4.34 and 4.35 below.)

Question 9

We propose to regulate to require housing authorities to frame their allocation scheme to provide for former service personnel with urgent housing needs to be given additional preference for social housing. Do you agree with this proposal?

Determining priorities between households with a similar level of need

4.20 Section 166A(5) provides that authorities may frame their allocation scheme to take into account factors in determining relative priorities between applicants in the reasonable (or additional) preference categories. Examples of factors which may be taken into account are given in the legislation: financial resources, behaviour and local connection. However, these examples are not exclusive and authorities may take into account other factors instead or as well as these.

Financial resources

4.21 This would enable a housing authority, for example, to give less priority to owner occupiers (wherever the property is situated) or to applicants who are financially able to secure alternative accommodation in the private sector.

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means the Royal Navy, the Royal Marines, the regular army or the Royal Air Force. The 'the regular army' means any of Her Majesty's military forces other than: (a) the Army Reserve; (b) the Territorial Army; and (c) forces raised under the law of a British overseas territory.

[11] [The Housing Act 1996 (Additional Preference For Former Armed Forces Personnel) (Amendment) (England) Regulations 2012 (SI 2012/[xxxx]).]

Behaviour

4.22 Housing authorities would be able to take account of good as well as bad behaviour. So, for example, authorities could provide for greater priority to be given to applicants who have been model tenants or have benefited the community.

Local connection

4.23 Local connection is defined in accordance with s.199 of the 1996 Act. Broadly, a person has a local connection if they have a connection because of normal residence there (either current or previous) of their own choice, employment there, family associations, or special circumstances. Residence in an area is not of a person's own choice if it is the consequence of being detained in prison or detained in hospital under the Mental Health Act.

4.24 As a result of changes to s.199 introduced in 2008[12] a person serving in the armed forces can establish a local connection with a local authority district through residence or employment there, in the same way as a civilian.

Including local priorities alongside the statutory reasonable preference categories

4.25 Section 166A(11) of the 1996 Act provides that, subject to the reasonable preference requirements (and to any regulations made under s.166A), it is for housing authorities to decide on what principles their allocation scheme is to be framed.

4.26 As the House of Lords made clear in the case of *R (on application of Ahmad) v. Newham LBC*[13] (*Ahmad*), s.166A(3)[14] only requires that the people encompassed within that section are given 'reasonable preference'. It 'does not require that they should be given absolute priority over everyone else'[15]. This means that an allocation scheme may provide for other factors than those set out in s.166A(3) to be taken into account in determining which applicants are to be given preference under a scheme, provided that:

[12] Amendment to s.199 of the 1996 Act made by s.315 of the Housing and Regeneration Act 2008 with effect from 1 December 2008.
[13] [2009] UKHL 14
[14] Previously s.167(2), which continues to apply to allocations by housing authorities in Wales.
[15] Baroness Hale

- they do not dominate the scheme, and
- overall, the scheme operates to give reasonable preference to those in the statutory reasonable preference categories over those who are not

The Secretary of State would encourage authorities to consider the scope to take advantage of this flexibility to meet local needs and local priorities.

4.27 The House of Lords in *Ahmad* also made clear that, where a housing authority's allocation scheme complies with the reasonable preference requirements and any other statutory requirements, the courts should be very slow to interfere on the ground of alleged irrationality[16].

Local lettings policies

4.28 Section 166A(6)(b) of the 1996 Act enables housing authorities to allocate particular accommodation to people of a particular description, whether or not they fall within the reasonable preference categories, provided that overall the authority is able to demonstrate compliance with the requirements of s.166A(3). This is the statutory basis for so-called 'local lettings policies'. Local lettings policies may be used to achieve a wide variety of housing management and policy objectives.

4.29 Before adopting a local lettings policy, authorities should consult with those who are likely to be affected and in particular with tenants and residents.

4.30 Local lettings policies should be published and should be revised or revoked where they are no longer appropriate or necessary.

Hard to let properties

4.31 Housing authorities may need to go outside the reasonable preference categories in order to fill hard to let stock and this is a matter to which authorities may wish to have regard when setting their qualification criteria.

[16] Lord Neuberger

Under-occupation

4.32 When framing the rules which determine the size of property to allocate to different households and in different circumstances under Part 6, housing authorities are free to set their own criteria, provided they do not result in a household being statutorily overcrowded. However, in setting these criteria, authorities will want to take account of the provisions in the Welfare Reform [Bill] (mentioned in paragraph 1.9) which will reduce the amount of Housing Benefit working age claimants receive if they under-occupy a property. Where an allocation is likely to lead to a property being under-occupied and there is a possibility that Housing Benefit may not meet the full rent as a result, authorities should explore the implications of this with the household before an offer of accommodation is accepted.

Equal opportunities

4.33 Housing authorities are subject to the general public sector equality duty in the Equality Act 2010. As well as the duty to eliminate unlawful discrimination, housing authorities are subject to a duty to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not, and to foster good relations between persons who share a relevant protected characteristic and those who do not. The protected characteristics are age, race, disability, sex, pregnancy and maternity, sexual orientation, religion or belief, and gender reassignment.

Members of the armed forces

4.34 Housing authorities must frame their allocation scheme to give 'additional preference' to former members of the regular armed forces who fall within any of the statutory reasonable preference categories and are considered to be in urgent housing need (see paragraph 4.19 above).

4.35 Authorities are also strongly encouraged to take into account the needs of other serving or former service personnel when framing their allocation schemes. Examples of ways in which authorities can ensure they are given appropriate priority, include:

- using the flexibility within the allocation legislation to set local priorities alongside the statutory reasonable preference categories so as to give preference, for example, to those who have recently

left, or are close to leaving, the armed forces[17] (see paragraph 4.25 above)

- using the power to determine priorities between applicants in the reasonable preference categories, so that applicants in housing need who have served in the armed forces are given greater priority for social housing over those who have not (see paragraph 4.20 above)

- if taking into account an applicant's financial resources in determining priorities between households with a similar level of need (see paragraph 4.21 above), disregarding any lump sum received by a member of the armed forces as compensation for an injury or disability sustained on active service

- setting aside a proportion of properties for former members of the armed forces under a local lettings policy (see paragraph 4.28 above).

Question 10

Does your allocation scheme already make use of the flexibilities within the allocation legislation to provide for those who have served in the armed forces to be given greater priority for social housing? If so, how does your scheme provide for this?

Question 11

If not, do you intend to take advantage of the flexibilities in the allocation legislation to provide for former members of the armed forces to be given greater priority for social housing? If so, what changes might you be considering?

Households in work or seeking work

4.36 Local authorities are urged to consider how they can use their allocation policies to support those households who want to work, as well as those who – while unable to engage in paid employment - are contributing to their community in other ways, for example, through voluntary work. The flexibilities which authorities are encouraged to make use of to meet the needs of service personnel would apply equally here. This might involve, for example, framing an

[17] MoD issues a Certificate of Cessation of Entitlement to Occupy Service Living Accommodation 6 months before discharge.

allocation scheme to give some preference to households who are in low paid work or employment-related training, even where they are not in the reasonable preference categories; or to give greater priority to those households in the reasonable preference categories who are also in work or who can demonstrate that they are actively seeking work. Alternatively, it might involve using local lettings policies to ensure that specific properties, or a specified proportion of properties, are allocated to households in particular types of employment where, for example, skills are in short supply.

4.37 Authorities should also consider how best they can make use of the new power to offer flexible tenancies to support households who are in low paid work, and incentivise others to take up employment opportunities. Flexible tenancies, by offering a time limited period of stability, may prove an attractive option both for those entering or re-entering the labour market and for authorities concerned to make the best use of their stock. At the end of the fixed term of the flexible tenancy, the authority will be able to decide whether to reissue the tenancy or support the tenant to move out of social housing, based on their published policy on tenancies.

Question 12

Does your allocation scheme already provide for some priority to be given to people who are in work, seeking work, or otherwise contributing to the community? If so, how does your scheme provide for this?

Question 13

If not, do you intend to revise your allocation scheme in light of the guidance in paragraphs 4.36 and 4.37? If so, what changes might you be considering?

Carers

4.38 In making accommodation offers to applicants who receive support from carers who do not reside with them but may need to stay overnight, housing authorities should, wherever possible, take account of the applicant's need for a spare bedroom.

Prospective adopters and foster carers

4.39 When considering housing applications from prospective foster carers or adopters who would require an extra bedroom to accommodate a foster or adoptive child, authorities will wish to weigh up the risk that the application to foster or adopt may be unsuccessful (leading to the property being under-occupied), against the wider benefits which would be realised if the placement was successful.

4.40 Children's services have a duty under s.22G of the Children Act 1989 to ensure sufficient accommodation to meet the needs of the looked after children in their area. As a matter of good practice, we would expect housing authorities to work together with children's services to best meet the needs of prospective and approved foster carers and adopters, so that children's services can meet their s.22G duty. One way to strike an appropriate balance would be to set aside a quota of properties each year for people who need to move to larger accommodation in order to foster or adopt a child on the recommendation of children's services.

Question 14

Are there other ways in which housing authorities can frame their allocation scheme to meet the needs of prospective adopters and foster carers?

General information about particular applications

4.41 Under s166A(9), allocation schemes must be framed so as to give applicants the right to request from housing authorities general information that will enable them to assess:

(a) how their application is likely to be treated under the scheme and, in particular, whether they are likely to fall within the reasonable preference categories

(b) whether accommodation appropriate to their needs is likely to be made available and, if so, how long it is likely to be before such accommodation becomes available.

Notification about decisions and the right to a review of a decision

4.42 Under s166A(9), allocation schemes must also be framed so as to give applicants the following rights about decisions which are taken in respect of their application:

(a) the right, on request, to be informed of any decision about the facts of the applicant's case which has been, or is likely to be, taken into account in considering whether to make an allocation to him; and

(b) the right, on request, to review a decision mentioned in (a) or a decision that the applicant is ineligible or does not qualify for an allocation. The applicant also has the right to be informed of the decision on the review and the grounds for it.

Question 15

Does the draft guidance provide sufficient clarity on the extent of flexibilities available to housing authorities when framing their allocation scheme?

CHAPTER 5

Allocation scheme management

5.1 Section 168(1) of the 1996 Act requires a housing authority to publish a summary of their allocation scheme and, if requested, to provide a free copy of that summary. Under s.168(2), housing authorities must also make the full scheme available for inspection at their principal office and, if requested, provide a copy of it on payment of a reasonable fee. It is recommended that authorities also publish their full scheme on their website.

5.2 Section168(3) provides that, when an alteration is made to a scheme reflecting a major change of policy, an authority must ensure within a reasonable time that those likely to be affected by the change shall have the effect brought to their attention, taking such steps as the housing authority consider reasonable. A major policy change would include, for example, any amendment that affects the relative priority of a large number of people being considered for social housing. It might also include a significant alteration to procedures. Housing authorities should be aware that they still have certain duties under s.106 of the Housing Act 1985.

Consulting on allocation schemes

5.3 Section 166A(13) requires housing authorities, before adopting an allocation scheme, or altering an existing scheme to reflect a major change of policy, to:

- send a copy of the draft scheme, or proposed alteration, to every Private Registered Provider[18] with which they have nomination arrangements, and
- ensure that those Private Registered Providers have a reasonable opportunity to comment on the proposals.

5.4 The Secretary of State considers that housing authorities should include all those who may be affected by, or have an interest in, the way social housing is allocated when consulting on a new allocation scheme or making major changes to it. It will be important to engage with a wide range of partners in the statutory, voluntary and community sectors, as well as applicants, existing tenants and the wider community.

[18] And, where relevant, every Registered Social Landlord in Wales with which they have nomination arrangements.

Advice and information

5.5 Section 166(1)(a) requires a housing authority to ensure that advice and information is available free of charge to everyone in their district about the right to apply for an allocation of housing accommodation. This would include general information about the procedures for making an application; as well as information about qualification criteria and how applicants are prioritised.

5.6 If a person is likely to have difficulty in making an application without assistance, the authority must secure that any necessary assistance is available free of charge (s.166(1)(b)). There is no requirement for the authority to provide that assistance itself. However, where an authority relies on other organisations and individuals to provide such assistance, it will need to ensure that the needs of all relevant applicants can be addressed.

5.7 Section 166(1A) requires housing authorities to inform applicants that they have the right to certain general information, as follows:

- information that will enable them to assess how their application is likely to be treated under the authority's allocation scheme, and, in particular, whether they are likely to fall within the reasonable preference categories, and
- information about whether accommodation appropriate to their needs is likely to be made available to them and, if so, how long it is likely to be before such accommodation becomes available.

5.8 Section 166(4) prohibits housing authorities from divulging to other members of the public that a person is an applicant for social housing, unless they have the applicant's consent. Furthermore, authorities should process any personal data which they hold about applicants consistently with the Data Protection Act 1998.

5.9 If landlords are unclear about their obligations and responsibilities under the Data Protection Act they should contact the Information Commissioner.

Elected members involvement in allocation decisions

5.10 The Allocation of Housing (Procedure) Regulations 1997 (SI 1997/483) restrict elected members' involvement in allocation decisions in certain specified circumstances. They prevent an elected member from being part of a decision-making body at the time the allocation decision is made, when either:

- the accommodation concerned is situated in their division or electoral ward, or

- the person subject to the decision has their sole or main residence in the member's division or electoral ward.

5.11 The regulations do not prevent an elected Member from representing their constituents before the decision making body, or from participating in the decision making body's deliberations prior to its decision. The regulations do not prevent elected Members' involvement in policy decisions that affect the generality of housing accommodation in their division or electoral ward; for example, that allocation of units in a certain block of flats should not be let to older persons or to households including young children.

Offences related to information given or withheld by applicants

5.12 Section 171 makes it an offence for anyone seeking assistance from a housing authority under Part 6 of the 1996 Act to:

- knowingly or recklessly give false information, or
- knowingly withhold information which the housing authority has reasonably required the applicant to give.

5.13 It is for individual housing authorities to determine when these provisions apply and when to institute criminal proceedings. However, the circumstances in which an offence is committed could include:

- any false information given on an application form for social housing
- any false information given in response to subsequent review letters
- any false information given or submitted by applicants during the proceedings of a review.

5.14 Ground 5 in Schedule 2 to the Housing Act 1985 (as amended by s.146 of the 1996 Act) enables a housing authority to seek possession of a tenancy granted as a result of a false statement by the tenant or a person acting at the tenant's instigation.

Fraudulent or incorrect allocations

5.15 Authorities may also wish to take action to minimise the risk of staff allocating incorrectly or even fraudulently, for example by allocating to applicants who do not have sufficient priority under the allocation scheme, or who do not meet the authority's qualification criteria. Appropriate steps might include vetting staff who take allocation decisions or providing for allocation decisions to be validated, perhaps by employing senior staff to undertake random checks.

Decisions and reviews

Information about decisions and reviews

5.16 Housing authorities must inform applicants that they the have the right to information about certain decisions which are taken in respect of their application and the right to review those decisions (s.166(1A)).

5.17 Housing authorities must notify an applicant in writing of any decision that he or she:

- is ineligible for an allocation of accommodation under s.160ZA(2) or (4) (persons from abroad), or
- is not a qualifying person under s.160ZA(7).

5.18 The notification must give clear grounds for the decision, which must be based firmly on the relevant facts of the case. Section 160ZA(10) provides that, where a notification is not received by an applicant, it can be treated as having been given to him or her, if it is made available at the housing authority's office for a reasonable period.

5.19 An applicant also has the right, on request, to be informed of any decision about the facts of their case which has been, or is likely to be, taken into account in considering whether to make an allocation to them (s.166A(9)(b)).

5.20 Under s.166A(9)(c) applicants have the right to request a review of any of the decisions mentioned in paragraphs 5.15 and 5.17 above and to be informed of the decision on the review and the grounds for it.

Procedures on review

5.21 It is important that an authority's review procedures are clearly set out, including timescales for each stage of the process, and that the review process accords with the principles of transparency and fairness. Failure to put in place a fair

procedure for reviews, which allows for all relevant factors to be considered, could result in a judicial review of any decision reached. The following are general principles of good administrative practice which should be incorporated in a review process:

i. The applicant should be notified of the timescale within which they must request a review. A period of 21 days from the date the applicant is notified of the decision is well-established as a reasonable timescale. However, a housing authority should retain some discretion to extend this time limit, in exceptional circumstances

ii. The applicant should be notified that the request for review should be made in writing, and that it would also be acceptable for the request to be submitted by a representative on behalf of the applicant. The applicant should also be advised of the information which should accompany the request

iii. In cases where an authority believes that an applicant may have difficulty in understanding the implications of a decision on ineligibility or disqualification, it would be good practice to make arrangements for the information to be explained verbally

iv. The review should be carried out by an officer in a senior position to the officer who made the original decision. As an alternative, an authority may wish to appoint a panel of officers to consider the appeal. If so, it should not include any person who was involved in the original decision

v. The review should be considered on the basis of council policy, legal requirements and all relevant information. This might include information provided by the applicant on any relevant developments since the original decision was made - for instance, the settlement of arrears or establishment of a repayment plan, or departure of a member of the household responsible for anti-social behaviour

vi. Reviews should be completed wherever practicable within a set deadline. The applicant should be notified of any extension to this deadline and the reasons for this

vii. In notifying an applicant of their right to make written submissions, an authority may also want to consider advising the applicant that provision can be made for verbal representations to be made, if the applicant requests this

viii. The applicant must be notified in writing of the outcome of the review. The notification must set out the reasons for the decision. This will assist the applicant and the authority if, for example, the applicant is not satisfied with the outcome and decides to seek a judicial review or to take their case to the [Housing Ombudsman]

CHAPTER 6

Working with Private Registered Providers and contracting out

Working with Private Registered Providers

Statutory framework for cooperation

6.1 Private Registered Providers have a duty under s.170 of the 1996 Act to cooperate with housing authorities – where the authority requests it - to such extent as is reasonable in the circumstances in offering accommodation to people with priority under the authority's allocation scheme. Similarly, s.213 of the 1996 Act provides that, where a Private Registered Provider has been requested by a housing authority to assist them in the discharge of their homelessness functions under Part 7, it must also cooperate to the same extent.

Nomination agreements

6.2 Housing authorities must comply with the requirements of Part 6 of the 1996 Act when they nominate an applicant to be the tenant of a Private Registered Provider. A housing authority nominates a person to accommodation held by a Private Registered Provider when it does so 'in pursuance of any arrangements (whether legally enforceable or not) to require that housing accommodation, or a specified amount of housing accommodation, is made available to a person or one of a number of persons nominated by the authority' (s.159(4)).

6.3 Nomination agreements should set out the proportion of lettings that will be made available; any criteria which the Private Registered Provider has adopted for accepting or rejecting nominees; and how any disputes will be resolved. Housing authorities should ensure that robust monitoring arrangements are in place to monitor effective delivery of the terms of the nomination agreement. This will be crucial, to ensure that housing authorities can demonstrate they are meeting their statutory obligations under Part 6.

Affordable Rent

6.4 The Secretary of State expects that Affordable Rent homes will be allocated in the same way as social rent properties and that existing lettings arrangements operated by local authorities and Private Registered Providers will continue to apply. The statutory and regulatory framework for allocations provides scope for

local flexibility, and local authorities and Private Registered Providers may wish to exercise this discretion in relation to Affordable Rent in order to meet local needs and priorities in the most effective way possible.

Contracting Out

6.5 The *Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996* (SI 1996/3205) enables housing authorities to contract out certain functions under Part 6 of the 1996 Act. The Order is made under s.70 of the Deregulation and Contracting Out Act 1994 (the 1994 Act). In essence, the Order allows the contracting out of administrative functions, while leaving the responsibility for making strategic decisions with the housing authority.

6.6 Schedule 1 to the Order lists the allocation functions which may not be contracted out:

- adopting or altering the allocation scheme, including the principles on which the scheme is framed, and consulting Private Registered Providers
- making the allocation scheme available at the authority's principal office.

6.7 The Order therefore provides that the majority of functions under Part 6 may be contracted out. These include:

i) making enquiries about and deciding a person's eligibility for an allocation

ii) carrying out reviews of decisions

iii) making arrangements to secure that advice and information is available free of charge to persons within the housing authority's district on how to apply for housing

iv) making arrangements to secure that any necessary assistance is made available free of charge to anyone who is likely to have difficulty in making a housing application without such assistance, and

v) making individual allocations in accordance with the allocation scheme.

6.8 The 1994 Act provides that a contract made:

i) may authorise a contractor to carry out only part of the function concerned

ii) may specify that the contractor is authorised to carry out functions only in certain cases or areas specified in the contract

iii) may include conditions relating to the carrying out of the functions, e.g. prescribing standards of performance

iv) shall be for a period not exceeding 10 years and may be revoked at any time by the Minister or the housing authority. Any subsisting contract is to be treated as having been repudiated in these circumstances

v) shall not prevent the authority from itself exercising the functions to which the contract relates.

6.9 The 1994 Act also provides that the authority is responsible for any act or omission of the contractor in exercising functions under the contract, except:

- where the contractor fails to fulfil conditions specified in the contract relating to the exercise of the function
- where criminal proceedings are brought in respect of the contractor's act or omission.

6.10 Where a housing authority has delegated or contracted out the operation of its allocation functions to an external contractor, the contractor must be made aware of the provisions of Part 6 and advised how the legislation and this guidance may apply to them.

6.11 Where there is an arrangement in force under s.101 of the Local Government Act 1972 by virtue of which one authority exercises the functions of another, the 1994 Act provides that the authority exercising the function is not allowed to contract it out without the principal authority's consent.

List of consultation questions

1. **Does your allocation scheme/transfer policy already provide for social tenants who are under-occupying to be given priority?**

2. **Do you intend to revise your allocation scheme in order to make it easier for under-occupying social tenants to downsize to more appropriately sized accommodation?**

3. **If so, what changes to your allocation scheme will you be considering – to make it easier for under-occupying tenants to downsize?**

4. **Do you agree that members of the armed forces and former service personnel should not be disqualified on residency grounds? Is 5 years from the date of discharge an appropriate time limit for this restriction? If not, what would be a more appropriate period?**

5. **Does the draft guidance provide sufficient clarity on how to implement the new power for housing authorities to set their own allocations qualification criteria? If not, in what areas would more guidance be useful?**

6. **Do you agree that the bedroom standard is an appropriate measure of overcrowding for the purpose of according reasonable preference? If not, what measure do you consider would be more appropriate?**

7. **Should this guidance provide advice on how to define 'overcrowding' for the purpose of according additional preference? If so, would an appropriate measure be two bedrooms or more short of the bedroom standard?**

8. **How does your allocation scheme currently define 'overcrowding' for allocation purposes? Does it, for example, use the bedroom standard, the statutory overcrowding standards in Part 10 of the Housing Act 1985, or another definition? If the last of these, please provide brief details.**

9. **The Government proposes to regulate to require housing authorities to frame their allocation scheme to provide for former service personnel with urgent housing needs to be given additional preference for social housing. Do you agree with this proposal?**

10. **Does your allocation scheme already make use of the flexibilities within the allocation legislation to provide for those who have served in the armed forces to be given greater priority for social housing? If so, how does your scheme provide for this?**

11. **If not, do you intend to take advantage of the flexibilities in the allocation legislation to provide for former members of the armed forces to be given**

greater priority for social housing? If so, what changes might you be considering?

12. Does your allocation scheme already provide for some priority to be given to people who are in work, seeking work, or otherwise contributing to the community? If so, how does your scheme provide for this?

13. If not, do you intend to revise your allocation scheme to provide for more priority to be given to people who are in work, seeking work, or otherwise contributing to the community? If so, what changes might you be considering?

14. Are there other ways in which housing authorities can frame their allocation scheme to meet the needs of prospective adopters and foster carers?

15. Does the draft guidance provide sufficient clarity on the extent of flexibilities available to housing authorities when framing their allocation scheme?

ANNEX 1

Scope of Part 6 - exemptions

Primary legislation exemptions

1. Part 6 does not apply to an allocation of accommodation by a housing authority to an existing secure (including flexible) or introductory tenant, or an assured tenant of a Private Registered Provider, unless the allocation involves a transfer; is made on the tenant's application; and the authority is satisfied that the person has reasonable preference.

2. Section 160 exempts from Part 6 cases:

a) where a secure tenant dies, the tenancy is a periodic one, and there is a person qualified to succeed the tenant under s.89 of the Housing Act 1985

b) where a secure tenant with a fixed term tenancy dies and the tenancy remains secure by virtue of s.90 of the Housing Act 1985

c) where a secure tenancy is assigned by way of exchange under s.92 of the Housing Act 1985 or s.158 of the Localism Act 2011

d) where a secure tenancy is assigned to someone who would be qualified to succeed to the tenancy if the secure tenant died immediately before the assignment

e) where a secure tenancy vests or is otherwise disposed of in pursuance of an order made under:

- s.24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with matrimonial proceedings)
- s.17(1) of the Matrimonial and Family Proceedings Act 1984 (property adjustment orders after overseas divorce)
- paragraph 1 to Schedule 1 of the Children Act 1989 (orders for financial relief against parents)
- Part 2 of Schedule 5, or paragraph 9(2) or (3) of Schedule 7, to the Civil Partnership Act 2004 (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership, etc)

(f) where an introductory tenancy:

- becomes a secure tenancy on ceasing to be an introductory tenancy
- vests under s.133(2) of the 1996 Act (succession to an introductory tenancy on death of tenant)
- is assigned to someone who would be qualified to succeed the introductory tenancy if the introductory tenant died immediately before the assignment
- meets the criteria in paragraph 2(e) above

Secondary Legislation Exemptions

3. The Allocation of Housing (England) Regulations 2002 (SI 2002/3264), Regulation 3,

exempts the following allocations from Part 6:

a) where a housing authority secures the provision of suitable alternative accommodation under s.39 of the Land Compensation Act 1973 (duty to rehouse residential occupiers)

b) the grant of a secure tenancy under s.554 and s.555 of the Housing Act 1985 (grant of a tenancy to a former owner-occupier or statutory tenant of defective dwelling-house)

c) an allocation to a person who lawfully occupies accommodation let on a family intervention tenancy[19].

[19] Inserted by the Allocation of Housing (England) (Amendment) (Family Intervention Tenancies) Regulations 2008 (SI 2008/ 3015).

ANNEX 2

Indicators of the criteria in the reasonable preference categories (s.166A(3) (c) and (d)

Housing authorities may devise their own indicators of the criteria in the reasonable preference categories. The following list is included for illustrative purposes and to assist housing authorities in this task. It is by no means comprehensive or exhaustive, and housing authorities may have other, local factors to consider and include as indicators of the categories.

Insanitary, overcrowded and unsatisfactory housing conditions

Lacking bathroom or kitchen
Lacking inside WC
Lacking cold or hot water supplies, electricity, gas, or adequate heating
Lack of access to a garden for young children
Sharing living room, kitchen, bathroom/WC
Property in disrepair
Poor internal or external arrangements
Young children in flats above ground floor

People who need to move on medical or welfare grounds (criteria may apply to any member of the household)

A mental illness or disorder
A physical or learning disability
Chronic or progressive medical conditions (e.g. MS, HIV/AIDS)
Infirmity due to old age
The need to give or receive care
The need to recover from the effects of violence (including racial attacks) or threats of violence, or physical, emotional or sexual abuse
Ability to fend for self restricted for other reasons
Young people at risk
People with behavioural difficulties
Need for adapted housing and/or extra facilities, bedroom or bathroom
Need improved heating (on medical grounds)
Need sheltered housing (on medical grounds)
Need ground floor accommodation (on medical grounds)
Need to be near friends/relatives or medical facility on medical grounds
Need to move following hospitalisation or long term care

ANNEX 3

Rights to reside in the UK derived from EU Law

1. EEA nationals and their family members who have a right to reside in the UK that derives from EU law are not persons subject to immigration control. This means that they will be eligible for an allocation of accommodation under Part 6 unless they fall within one of the categories of persons to be treated as a person from abroad who is ineligible for an allocation of accommodation by virtue of regulation 4 of the *Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006* ('the Eligibility Regulations').

General

Nationals of EU countries

2. Nationals of EU countries enjoy a number of different rights to reside in other Member States, including the UK. These rights derive from the EU Treaty, EU secondary legislation (in particular *Directive 2004/38*), and the case law of the European Court of Justice.

3. Whether an individual EU national has a right to reside in the UK will depend on his or her circumstances, particularly his or her economic status (e.g. whether employed, self-employed, seeking work, a student, or economically inactive etc).

Nationals of Bulgaria and Romania - the A2 accession states

4. A slightly different regime applies to EU nationals who are nationals of Bulgaria and Romania which acceded to the EU on 1 January 2007. Bulgaria and Romania are referred to in this guidance as the A2 accession states.

The Immigration (European Economic Area) Regulations 2006

5. The *Immigration (European Economic Area) Regulations 2006* ('the EEA Regulations' – SI 2006/1003) implement into UK domestic law Directive 2004/38. Broadly, the EEA Regulations provide that EU nationals have the right to reside in the UK without the requirement for leave to remain under the Immigration Act 1971 for the first 3 months of their residence, and for longer, if they are a 'qualified person' or they have acquired a permanent right of residence.

Nationals of Iceland, Liechtenstein and Norway and Switzerland

6. The EEA Regulations extend the same rights to reside in the UK to nationals of Iceland, Liechtenstein and Norway as those afforded to EU nationals. (The EU countries plus Iceland, Liechtenstein and Norway together comprise the EEA.) The EEA

Regulations also extend the same rights to reside in the UK to nationals of Switzerland. For the purposes of this guidance, 'EEA nationals' means nationals of any of the EU member states (excluding the UK), and nationals of Iceland, Norway, Liechtenstein and Switzerland.

Initial 3 months residence

7. Regulation 13 of the EEA Regulations provides that EEA nationals have the right to reside in the UK for a period of up to 3 months without any conditions or formalities other than holding a valid identity card or passport. Therefore, during their first 3 months of residence in the UK, EEA nationals will not be subject to immigration control (unless the right to reside is lost following a decision by an immigration officer in accordance with regulation 13(3) of the EEA Regulations).

8. However, regulations 4(1)(b)(ii) and (c) of the Eligibility Regulations provide that a person who is not subject to immigration control is not eligible for an allocation of accommodation if:

- his or her **only** right to reside in the UK is an initial right to reside for a period not exceeding 3 months under regulation 13 of the EEA Regulations, or
- his or her **only** right to reside in the Channel Islands, the Isle of Man or the Republic of Ireland (the Common Travel Area) is a right equivalent to the right mentioned in (i) above which is derived from the EU Treaty

Rights of residence for 'qualified persons'

9. Regulation 14 of the EEA Regulations provides that 'qualified persons' have the right to reside in the UK so long as they remain a qualified person. Under regulation 6 of the EEA Regulations, 'qualified person' means:

a) a jobseeker
b) a worker
c) a self-employed person
d) a self-sufficient person
e) a student

Jobseekers

10. For the purposes of regulation 6(1)(a) of the EEA Regulations, 'jobseeker' means a person who enters the UK in order to seek employment and can provide evidence that he or she is seeking employment and has a genuine chance of being employed.

11. Nationals of Bulgaria and Romania who need to be authorised to work do not have

a right to reside in the UK as a jobseeker[20] . However, they may have a right to reside by virtue of another status, eg as a self-sufficient person.

12. Although a person who is a jobseeker is not subject to immigration control, regulation 4 of the Eligibility Regulations provides that a person is not eligible for an allocation of accommodation if:

- his or her **only** right to reside in the UK is derived from his status as a jobseeker or the family member of a jobseeker, or
- his or her **only** right to reside in the Channel Islands, the Common Travel Area is a right equivalent to the right mentioned in (i) above which is derived from the Treaty establishing the European Community

Workers

13. In order to be a worker for the purposes of the EEA Regulations, a person must be employed. That is to say, he or she is obliged to provide services for another person in return for monetary reward and is subject to the control of that other person as regards the way in which the work is to be done.

14. Activity as an employed person may include part time work, seasonal work and cross-border work (ie. where a worker is established in another Member State and travels to work in the UK). However, the case law provides that the employment must be effective and genuine economic activity, and not on such a small scale as to be regarded as purely marginal and ancillary.

15. Provided the employment is effective and genuine economic activity, the fact that a person's level of remuneration may be below the level of subsistence or below the national minimum wage, or the fact that a person may be receiving financial assistance from public benefits, would not exclude that person from being a 'worker'

16. A person who is a worker is not subject to immigration control, and is eligible for an allocation of accommodation whether or not he or she is habitually resident in the Common Travel Area.

Retention of worker status

17. A person who is no longer working does not cease to be treated as a 'worker' for the purpose of regulation 6(1)(b) of the EEA Regulations, if he or she :

(a) is temporarily unable to work as the result of an illness or accident; or

[20] Regulation 6(2) of the *Accession (Immigration and Worker Authorisation) Regulations 2006* (SI 2006/3317).

(b) is recorded as involuntarily unemployed after having being employed in the UK, provided that he or she has registered as a jobseeker with the relevant employment office, and:

(i) was employed for one year or more before becoming unemployed, or

(ii) has been unemployed for no more than 6 months, or

(iii) can provide evidence that he or she is seeking employment in the UK and has a genuine chance of being engaged; or

(c) is involuntarily unemployed and has embarked on vocational training; or

(d) has voluntarily ceased working and embarked on vocational training that is related to his or her previous employment.

A2 state workers requiring authorisation who are treated as workers

18. By virtue of the *Accession (Immigration and Worker Authorisation) Regulations 2006* ('the Accession Regulations'), nationals of the A2 states (with certain exceptions) must obtain authorisation to work in the UK until they have accrued a period of 12 months continuous employment.

19. An A2 national requiring authorisation is only treated as a worker if he or she is actually working and:

(a) holds an accession worker authorisation document, and

(b) is working in accordance with the conditions set out in that document (regulation 9(1) of the Accession Regulations)

20. Authorities may need to contact the employer named in the authorisation document, to confirm that the applicant continues to be employed.

21. See Annex 4 for guidance on the Worker Authorisation Scheme.

Self-employed persons

22. 'Self-employed person' means a person who establishes himself in the UK in order to pursue activity as a self-employed person in accordance with Article 43 of the Treaty establishing the European Union.

23. A self-employed person should be able to confirm that he or she is pursuing activity as a self-employed person by providing documents relating to their business. A person

who is no longer in self-employment does not cease to be treated as a self-employed person for the purposes of regulation 6(1)(c) of the EEA regulations, if he or she is temporarily unable to pursue his or her activity as a self-employed person as the result of an illness or accident.

24. A2 nationals are not required to be authorised in order to establish themselves in the UK as a self-employed person.

25. A person who is a self-employed is not subject to immigration control and is eligible for an allocation of accommodation whether or not he or she is habitually resident in the Common Travel Area.

Self-sufficient persons

26. Regulation 4(1)(c) of the EEA regulations defines 'self-sufficient person' as a person who has :

(i) sufficient resources not to become a burden on the social assistance system of the UK during his or her period of residence, and

(ii) comprehensive sickness insurance cover in the UK.

27. By regulation 4(4) of the EEA Regulations, the resources of a person who is a self-sufficient person or a student (see below) and, where applicable, any family members, are to be regarded as sufficient if they exceed the maximum level of resources which a UK national and his or her family members may possess if he or she is to become eligible for social assistance under the UK benefit system.

28. Where an EEA national applies for an allocation of accommodation as a self-sufficient person and does not appear to meet the conditions of regulation 4(1)(c) of the EEA regulations, the housing authority will need to consider whether he or she may have some other right to reside in the UK.

29. Where the applicant does not meet the conditions of regulation 4(1)(c) but has previously done so during his or her residence in the UK, the case should be referred to the Home Office for clarification of their status.

30. A person who is a self-sufficient person is not subject to immigration control, but must be habitually resident in the Common Travel Area to be eligible for an allocation of accommodation.

Students

31. Regulation 4(1)(d) of the EEA regulations defines 'student' as a person who :

(a) is enrolled at a private or public establishment included on the Register of Education

and Training Providers[21], or is financed from public funds, for the principal purpose of following a course of study, including vocational training, and

(b) has comprehensive sickness insurance cover in the UK, and

(c) assures the Secretary of State, by means of a declaration or such equivalent means as the person may choose, that he or she (and if applicable his or her family members) has sufficient resources not to become a burden on the social assistance system of the UK during his or her period of residence.

32. A person who is a student is not subject to immigration control but must be habitually resident in the Common Travel Area to be eligible for an allocation of accommodation.

Permanent right of residence

33. Regulation 15 of the EEA Regulations provides that the following persons shall acquire the right to reside in the UK permanently :

(a) an EEA national who has resided in the UK in accordance with the EEA regulations for a continuous period of 5 years;

(b) a non-EEA national who is a family member of an EEA national and who has resided in the UK with the EEA national in accordance with the EEA regulations for a continuous period of 5 years;

(c) a worker or self-employed person who has ceased activity (see regulation 5 of the EEA Regulations for the definition of worker or self-employed person who has ceased activity) ;

(d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person who has died, where the family member resided with the worker or self-employed person immediately before the death and the worker or self-employed person had resided continuously in the UK for at least 2 years before the death (or the death was the result of an accident at work or an occupational disease);

(f) a person who has resided in the UK in accordance with the EEA regulations for a continuous period of 5 years, and at the end of that period was a family member who has retained the right of residence (see regulation 10 of the EEA Regulations for the definition of a family member who has retained the right of residence).

Once acquired, the right of permanent residence can be lost through absence from the

[21] Now known as the Register of Sponsors and held by United Kingdom Borders Agency.

UK for a period exceeding two consecutive years.

34. A person with a right to reside permanently in the UK arising from (c), (d) or (e) above is eligible for an allocation of accommodation whether or not he or she is habitually resident in the Common Travel Area. Persons with a permanent right to reside by virtue of (a), (b), or (f) must be habitually resident to be eligible**.**

Rights of residence for certain family members

The right to reside

35. Regulation 14 of the EEA Regulations provides that the following family members are entitled to reside in the UK:

(i) a family member of a qualified person residing in the UK;

(ii) a family member of an EEA national with a permanent right of residence under regulation 15; and

(iii) a family member who has retained the right of residence (see regulation 10 of the EEA Regulations for the definition).

36. A person who has a right to reside in the UK as the family member of an EEA national under the EEA Regulations will not be subject to immigration control. The eligibility of such a person for an allocation of accommodation should therefore be considered in accordance with regulation 4 of the Eligibility Regulations.

37. When considering the eligibility of a family member, local authorities should consider whether the person has acquired a right to reside in their own right, for example a permanent right to reside under regulation 15 of the EEA Regulations (see paragraph 33 above).

Who is a 'family member'?

38. Regulation 7 of the EEA regulations provides that the following persons are treated as the family members of another person (with certain exceptions for students - see below):

(a) the spouse of the person;

(b) the civil partner of the person;

(c) a direct descendant of the person, or of the person's spouse or civil partner, who is under the age of 21;

(d) a direct descendant of the person, or of the person's spouse or civil partner, who is over 21 and dependent on the person, or the spouse or civil partner;

(e) an ascendant relative of the person, or of the person's spouse or civil partner, who is dependent on the person or the spouse or civil partner;

(f) a person who is an extended family member and is treated as a family member by virtue of regulation 7(3) of the EEA regulations (see below).

Family members of students

39. Regulation 7(2) of the EEA regulations provides that a person who falls within (c), (d) or (e) above shall not be treated as a family member of a student residing in the UK after the period of 3 months beginning on the date the student is admitted to the UK unless:

(i) in the case of paragraph 38(c) and (d) above, the person is the dependent child of the student, or of the spouse or civil partner, or

(ii) the student is also a qualified person (for the purposes of regulation 6(1) of the EEA regulations) other than as a student.

Extended family members

40. Broadly, extended family members will be persons who:

(a) do not fall within any of the categories (a) to (e) in paragraph 38 above, and

(b) are either a relative of an EEA national (or of the EEA national's spouse or civil partner) or the partner of an EEA national, and

(c) have been issued with an EEA family permit, a registration certificate or a residence card which is valid and has not been revoked.

Family members' eligibility for an allocation of accommodation

Relationship with other rights to reside

41. This section concerns the eligibility of an applicant for an allocation of accommodation whose right to reside is derived from his or her status as the family member of an EEA national with a right to reside. In some cases, a family member will have acquired a right to reside in his or her own right. In particular, a person who arrived in the UK as the family member of an EEA national may have subsequently acquired a permanent right of residence under regulation 15 of the EEA Regulations, as outlined in

paragraph 33 (a) – (f) above. The eligibility for an allocation of accommodation of those with a permanent right of residence is discussed at paragraph 34.

Family members who must be habitually resident

42. For family members with a right to reside under regulation 14 of the EEA Regulations, the following categories of persons must be habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland in order to be eligible for an allocation of accommodation:

a) a person whose right to reside derives from their status as a family member of an EEA national who is a self-sufficient person for the purposes of regulation 6(1)(d) of the EEA regulations;

b) a person whose right to reside derives from their status as a family member of an EEA national who is a student for the purposes of regulation 6(1)(e) of the EEA regulations;

c) a person whose right to reside is dependent on their status as a family member of an EEA national with a permanent right to reside;

d) a person whose right to reside is dependent on their status as a family member who has retained the right of residence.

Family members who are exempt from the habitual residence requirement

43. A person with a right to reside under regulation 14 as a family member of an EEA national who is a worker or a self-employed person for the purposes of regulation 6(1) of the EEA regulations is exempted from the requirement to be habitually resident by regulation 4(2)(d) of the Eligibility Regulations. However, authorities should note that an extended family member (see above) is not counted as a family member for the purposes of regulation 4(2)(d) of the Eligibility Regulations (see regulation 2(3) of the Eligibility Regulations).

Family members of UK nationals exercising rights under the EU Treaty

44. There are some limited cases in which the non-EEA family member of a UK national may have a right to reside under EU law. Under regulation 9 of the EEA Regulations, the family member of a UK national should be treated as an EEA family member where the following conditions are met:

(i) the UK national is residing in an EEA State as a worker or self-employed person, or was so residing before returning to the UK; and

(ii) if the family member of the UK national is his spouse or civil partner, the parties are living together in the EEA State, or had entered into a marriage or civil partnership and were living together in that State before the UK national returned to the UK.

45. Where the family member of a UK national is to be treated as an EEA family member by virtue of regulation 9 of the EEA Regulations, that person is not subject to immigration control, and his or her eligibility for an allocation of accommodation should therefore be determined in accordance with regulation 4 of the Eligibility Regulations.

ANNEX 4
Worker authorisation scheme

1. Bulgaria and Romania ('the A2') acceded to the European Union on 1 January 2007. A2 nationals have the right to move freely among all EU Member States. However, under the EU Accession Treaty for Bulgaria and Romania existing Member States can impose limitations on the rights of A2 nationals to access their labour markets (and the associated rights of residence), for a transitional period.

The Accession (Immigration and Worker Authorisation) Regulations 2006

2. Under the *Accession (Immigration and Worker Authorisation) Regulations 2006* (SI 2006/3317) (the Accession Regulations), nationals of the A2 States (with certain exceptions set out in paragraph 9 below) are required to be authorised to work by the Home Office if they work in the UK during the transitional period. While looking for work (or between jobs) their right to reside will be conditional on them being self-sufficient and not imposing an unreasonable burden on the UK social assistance system. These conditions cease to apply once they have worked in the UK continuously for 12 months.

3. The Accession Regulations also give workers from the A2 States the right to reside in the UK. This means that workers from the A2 States have the same right to equal treatment as other EEA workers while they are working.

The worker authorisation scheme

4. Nationals of A2 States who wish to work in the UK (except those who are exempt from the requirement) must have an accession worker authorisation document and must be working in accordance with the conditions set out in that document.

5. Nationals of the A2 States who are self-employed are not required to be authorised.

6. The following constitute worker authorisation documents:

i. a passport or other travel document endorsed to show that the person was given leave to enter or remain in the UK before 1 January 2007, subject to a condition restricting his or her employment in the UK to a particular employer or category of employment

If the leave to enter or remain expires before the person qualifies to be exempt from the work authorisation requirements, or they wish to engage in employment other than the job for which the leave was granted, they will need to obtain an accession worker card.

ii. a seasonal agricultural work card issued by the Home Office under the Seasonal Agricultural Workers Scheme. The card is valid for 6 months from the date the person starts work for the agricultural employer specified in the card

iii. an accession worker card issued by the Home Office

7. The accession worker card is valid for as long as the person continues to work for the employer specified in the card. If the person changes employer, he or she must apply for a new accession worker card.

8. The worker authorisation scheme is a transitional measure. The Accession Regulations 2006 provide for the scheme to operate for up to five years from 1 January 2007 (i.e. until 31 December 2011). However, there is provision for the scheme to be extended for a further two years in the event of a serious disturbance to the labour market. The decision was taken on 23 November 2011 to maintain transitional controls on Romanian and Bulgarian workers until the end of 2013.

A2 nationals exempt from worker authorisation

9. The following are the categories of A2 nationals who are <u>not</u> required to obtain authorisation to work:

- those who are classified as highly skilled persons and hold a registration certificate allowing them unconditional access to the UK labour market
- those working legally, and without interruption, in the UK for a period of 12 months or more ending on 31 December 2006 (for example, they may have been already present in the UK as a work permit holder before accession)
- those who had leave to enter the UK under the Immigration Act 1971 on 31 December 2006 and that leave does not place any restrictions on taking employment in the United Kingdom, (for example, a person may have been given leave to remain as the spouse of a British citizen or as the dependant of a work permit holder)
- those who are providing services in the UK on behalf of an employer established elsewhere in the EEA
- those who are also a national of the UK or another EEA state (other than an A2 state)
- those who are a spouse or civil partner of a national of the UK or a person settled in the UK
- those who are a family member (spouse, civil partner or dependant child) of an EEA national who has a right to reside in the UK under the EEA Regulations (other than an A2 national who is subject to worker authorisation or is exempt from those requirements by virtue of being self-employed, self-sufficient or a student)
- those who have a permanent right to reside in the UK under regulation 15 of the EEA Regulations
- those who are in the UK as a student and are permitted to work for 20 hours a week

10. In addition, where a person has worked legally in the UK without interruption for a

12 month period falling wholly or partly after 31 December 2006 they will be free from the requirement to seek authorisation. At that stage, they will be able to apply to the Home Office for an EEA residence permit to confirm their right to equal treatment on the same basis as other EEA nationals.

12 months' uninterrupted work

11. In order to establish '12 months' uninterrupted work' an A2 worker must have been working legally in the UK at the beginning and end of the 12 month period. The 12 month period does not have to run continuously. However, any intervening period in which an A2 national is not legally working must not exceed 30 days in total. If more than 30 days between periods of employment occur before a 12-month period of uninterrupted employment is established, a fresh period of 12 months' uninterrupted employment would need to commence from that point.

12. There is no restriction on the number of different authorised jobs (or employers) that a worker can have during a 12-month period of continuous employment.

Highly skilled workers

13. A national of an A2 state is not required to be authorised under the worker authorisation scheme, if he is a highly skilled worker who has been given a registration certificate by the Home Office which includes a statement that he or she has unconditional access to the UK labour market.

ANNEX 5
Habitual residence

1. In practice, when considering housing applications from persons who are subject to the habitual residence test, it is only necessary to investigate habitual residence if the applicant has arrived or returned to live in the UK during the two year period prior to making the application.

Definition of habitual residence

2. The term 'habitual residence' is not defined in legislation. Housing authorities should always consider the overall circumstances of a case to determine whether someone is habitually resident in the Common Travel Area.

General principles

3. When deciding whether a person is habitually resident, consideration must be given to all the facts of each case in a common sense way. It should be remembered that:

- the test focuses on the fact and nature of residence
- a person who is not resident somewhere cannot be habitually resident there
- residence is a more settled state than mere physical presence in a country. To be resident a person must be seen to be making a home. It need not be the only home or a permanent home but it must be a genuine home for the time being. For example, a short stay visitor or a person receiving short term medical treatment is not resident
- the most important factors for habitual residence are the length, continuity and general nature of actual residence rather than intention
- the practicality of a person's arrangements for residence is a necessary part of determining whether it can be described as settled and habitual
- established habitual residents who have periods of temporary or occasional absence of long or short duration may still be habitually resident during such absences

Action on receipt of an application

Applicant came to live in the UK during the previous two years

4. If it appears that the applicant came to live in the UK during the previous two years, authorities should make further enquiries to decide if the applicant is habitually resident, or can be treated as such.

Factors to consider

5. The applicant's stated reasons and intentions for coming to the UK will be relevant to the question of whether he or she is habitually resident. If the applicant's stated intention is to live in the UK, and not return to the country from which they came, that intention must be consistent with their actions.

6. To decide whether an applicant is habitually resident in the UK, authorities should consider the factors set out below. However, these do not provide an exhaustive check list of the questions or factors that need to be considered. Further enquiries may be needed. The circumstances of each case will dictate what information is needed, and all relevant factors should be taken into account.

Why has the applicant come to the UK?

7. If the applicant is returning to the UK after a period spent abroad, and it can be established that the applicant was previously habitually resident in the UK and is returning to resume his or her former period of habitual residence, he or she will be immediately habitually resident.

8. In determining whether an applicant is returning to resume a former period of habitual residence authorities should consider:

- when the applicant left the UK
- how long the applicant lived in the UK before leaving
- why the applicant left the UK
- how long the applicant intended to remain abroad
- why the applicant returned
- whether the applicant's partner and children, if any, also left the UK
- whether the applicant kept accommodation in the UK
- if the applicant owned property, whether it was let, and whether the lease was timed to coincide with the applicant's return to the UK
- what links the applicant kept with the UK
- whether there have been other brief absences

- why the applicant has come back to the UK

9. If the applicant has arrived in the UK within the previous two years and is not resuming a period of habitual residence, consideration should be given to his or her reasons for coming to the UK, and in particular to the factors set out below.

Applicant is joining family or friends

10. If the applicant has come to the UK to join or rejoin family or friends, authorities should consider:

- whether the applicant has sold or given up any property abroad
- whether the applicant has bought or rented accommodation or is staying with friends
- whether the move to the UK is intended to be permanent

Applicant's plans

11. Authorities should consider the applicant's plans, e.g.:

- if the applicant plans to remain in the UK, whether their stated plan is consistent with their actions
- whether any arrangements were made for employment and accommodation (even if unsuccessful) before the applicant arrived in the UK
- whether the applicant bought a one-way ticket
- whether the applicant brought all their belongings
- whether there is evidence of links with the UK, eg membership of clubs

12. The fact that a person may intend to live in the UK for the foreseeable future does not, of itself, mean that habitual residence has been established. However, the applicant's intentions along with other factors, for example the disposal of property abroad, may indicate that the applicant is habitually resident in the UK.

13. An applicant who intends to reside in the UK for only a short period, for example for a holiday or to visit friends is unlikely to be habitually resident in the UK.

Length of residence in another country

14. Authorities should consider the length and continuity of an applicant's residence in another country:

- whether the applicant has any remaining ties with his or her former country of residence

- whether the applicant stayed in different countries outside the UK

15. It is possible that a person may own a property abroad but still be habitually resident in the UK. A person who has a home or close family in another country would normally retain habitual residence in that country. A person who has previously lived in several different countries but has now moved permanently to the UK may be habitually resident here.

Centre of interest

16. An applicant is likely to be habitually resident in the Common Travel Area despite spending time abroad, if his or her centre of interest is located in one of these places.

17. People who maintain their centre of interest in the Common Travel Area for example a home, a job, friends, membership of clubs, are likely to be habitually resident there. People who have retained their centre of interest in another country and have no particular ties with the Common Travel Area are unlikely to be habitually resident.

18. Authorities should take the following into account when deciding the centre of interest:

- home
- family ties
- club memberships
- finance accounts

19. If the centre of interest appears to be in the Common Travel Area but the applicant has a home somewhere else, authorities should consider the applicant's intentions regarding the property.

20. In certain cultures, e.g. the Asian culture, it is quite common for a person to live in one country but have property abroad that they do not intend to sell. Where such a person has lived in the Common Travel Area for many years, the fact that they have property elsewhere does not necessarily mean that they intend to leave, or that the applicant's centre of interest is elsewhere.

ANNEX 6

Persons subject to immigration control ineligible for an allocation

1. Persons subject to immigration control who are not eligible for an allocation include the following:

- a person registered as an **asylum seeker**
- a **visitor** to this country (including an overseas student) **who has limited leave to enter or remain** in the UK granted on the basis that he or she will not have recourse to public funds
- a person **who has a valid leave to enter or remain** in the UK which includes a condition that there shall be **no recourse to public funds**
- a person who has a **valid leave to enter or remain** in the UK which carries no limitation or condition and who is **not habitually resident** in the Common Travel Area
- a **sponsored person** who has been in this country less than 5 years (from date of entry or date of sponsorship, whichever is the later) and **whose sponsor(s) is still alive**
- a person who is **in the UK illegally**, or who has **overstayed** his/her leave

Illegal entrants and overstayers

2. Illegal entrants include:

- a person who entered the country by evading immigration controls
- a person who has been deported from the United Kingdom, but who re-enters the country while the deportation order is still in force
- a person who obtained entry clearance by practising fraud or deceit towards the entry clearance officer when applying for a visa or other entry clearance abroad, or by deceiving the immigration officer on arrival (the deceit or fraud would have to be material)

3. Establishing whether a person has overstayed his or her leave to remain is unlikely to be straightforward and may require detailed knowledge of the provisions of the Immigration Act 1971.

4. Where a housing authority considers that an applicant may be an illegal entrant or an overstayer, it is recommended that they make an inquiry of the UK Border Agency, using the procedures set out in Annex 7.

ANNEX 7

How to contact the Home Office's UK Border Agency

1. The Home Office's UK Border Agency (UKBA) will exchange information with housing authorities, subject to relevant data protection and disclosure policy requirements being met and properly managed, provided that the information is required to assist with the carrying out of statutory functions or prevention and detection of fraud.

2. UKBA will provide a service to housing authorities to confirm the immigration status of an applicant from abroad (Non Asylum Seekers). In order to take advantage of the service, local housing authorities will need to email them at LA@UKBA.gsi.gov.uk.

3. Registration details required by UKBA's Local Authorities' Team are:

- Name of enquiring housing authority
- Job title/status of officer registering on behalf of the housing authority
- Names of housing authority staff, and their respective job titles/status, who will be making enquiries on behalf of the authority

4. In cases where UKBA indicate that the applicant may be an asylum seeker, enquiries of their status can be made to the Immigration Enquiry Bureau helpline on 0870 606 7766.

Consultation criteria

This consultation document and consultation process have been planned to adhere to the code of practice on consultation issued by the Department for Business, Enterprise and Regulatory Reform (now known as the Department for Business, Innovation and Skills) and is in line with the seven consultation criteria, which are:

- formal consultation should take place at a stage when there is scope to influence the policy outcome
- consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible
- consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals
- consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach
- keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained
- consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation
- officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

The Department for Communities and Local Government will process your personal data in accordance with DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Individual responses will not be acknowledged unless specifically requested.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

Are you satisfied that this consultation has followed these criteria? If not or you have any other observations about how we can improve the process please contact:

DCLG Consultation Co-ordinator

Zone 6/H10 Eland House

London SW1E 5 DU

e-mail: consultationcoordinator@communities