Llywodraeth Cynulliad Cymru
Welsh Assembly Government

# REVIEW OF LOCAL AUTHORITY ALLOCATION SCHEMES (2006)

**REPORT BY**
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# 1. INTRODUCTION

1.1 In its publication on social landlord allocations *Striking the Right Balance*[1] the Chartered Institute of Housing Cymru noted:

> *'Prior to the 1980's there was very little guidance or regulation on how social housing should be allocated. Most landlords allocated their accommodation on a discretionary basis or by date order. As increasing pressures were placed on social housing however, due to declining development programmes and the impact of the Right to Buy, national policy and good practice recognised the need for allocating housing according to greatest need. Since then, nearly all landlords have adopted needs-based policies using points schemes to assess relative need. On the face of it, this is the most logical approach to rationing a scarce publicly funded resource'.*

1.2 The legal framework within which local authority landlords operated at the time the above quote was made was contained in Part 6 of the Housing Act 1996 (1996 Act). This was significantly amended by the Homelessness Act 2002 (2002 Act).

1.3 Part 6 of the 1996 Act has its origins in the Housing Act 1985 (1985 Act). S.22 of the 1985 Act required local authorities when allocating accommodation, to ensure certain groups were given reasonable preference, including homeless applicants. Part 6 of the 1996 Act repealed s.22 and sought to put all those with long-term housing need on an equal footing. It introduced:

- a single route into social housing via the single housing register
- allocations only to 'qualifying persons' these being defined as those qualified to be on the single housing register

- statutory classes of applicant who were not qualified to go on the housing register

- powers for local authorities to decide other non-qualifying classes

- allocation schemes to determine priority, with reasonable preference being given to certain applicants (but not homeless applicants).

1.4 One of the first measures introduced by the then new UK Government in 1997 was to restore reasonable preference to those applicants who were unintentionally homeless and owed a housing duty under the homelessness provisions set out in Part 7 of the 1996 Act.[2] Subsequent policy documents developed the theme of choice and long term, settled housing solutions for those in housing need. (Note 1)

1.5 The 2002 Act completed the process by introducing significant amendments to the existing allocations framework contained in Part 6 of the 1996 Act.

**An overview of the current legal position on the allocation of local authority accommodation**

1.6 Under Part 6 of the 1996 Act (as amended by the 2002 Act), local authorities must:

- have an allocation scheme, publish a summary of their scheme and provide a copy of the summary free of charge to any member of the public who requests one

- give overall reasonable preference to categories of person set out in the 1996 Act

- issue a statement on its policy on giving choice or the opportunity to express preferences about housing that is allocated, and how these will be met

- include transfer applicants within schemes

- consider all applications properly made

- not allocate to persons ineligible because of their immigration status or who are from abroad and ineligible

- ensure advice and information is available about the right to make an application and to provide assistance to those who have difficulty making an application

- give applicants rights under the scheme to request certain information, to request to be informed of certain decisions and in some cases to request reviews of decisions

- consult with housing associations with whom they have nomination agreements before adopting an allocation scheme or altering an existing scheme.

1.7 Local authorities can:

- decide that applicants are ineligible because they are unsuitable to be a tenant due to unacceptable behaviour

- adjust preference amongst those afforded reasonable preference

- remove preference from those unsuitable to be a tenant

- adopt local lettings and key worker schemes

- include elected members in the allocation process but only in line with Assembly Government regulations.[3]

**The Assembly Government Code of Guidance (2003)**

1.8 The main expression of Assembly Government policy on allocations is contained in the *Code of Guidance for Local Authorities on Allocation of Accommodation and Homelessness*[4] (the Code) which was issued in April 2003. The effective date of the allocations provisions of the 2003 Code was 27 January 2003.

1.9 The Code accommodates changes introduced by the 2002 Act and gives guidance on how local authorities should discharge their functions and apply the various statutory criteria in practice. It is not a substitute for legislation and in so far as it comments on the law can only reflect the Assembly Government's understanding of the provisions and the decisions of the courts on the provisions at the time of issue. Decisions on allocations should always take account of the guidance in the Code, as they can be challenged unless the authority can show this has been done. Local authorities should be familiar with the statutory provisions, and keep up to date on any developments in case law. Information on important case law examples is given in **Annex 1.**

**Revisions to the Code of Guidance (2003)**

1.10 The Code of Guidance issued in 2003 was under review when this report was published. The 2003 Code reflects the changes in law introduced by the Homelessness Act 2002. The current review of the Code therefore, particularly in relation to allocations, mainly centres on clarifying areas of guidance and up-dating policy on allocations to persons from abroad – it is not a fundamental review of law and policy which will largely remain unchanged. Local authority landlords have been notified by letter of important changes to allocations law

and policy following the dissemination of the Code in April 2003 (see **Annex 2A and B**).

1.11 In view of the above, local authorities have been advised not to delay reviewing their allocation schemes in order to wait for the revised Code (see **Annex 2C**).

**Note 1** - UK Government publication '*Quality and Choice- A Decent Home for All: The Housing Green Paper*' (April 2000) followed in December 2000 by '*Quality and Choice - A Decent Home for All: The Way Forward for Housing*' which contained the UK Government's proposals for implementation.

## 2. PURPOSE OF REVIEW

2.1 There is growing evidence that some local authorities in Wales have either not reviewed their allocation schemes following amendments to Part 6 of the Housing Act 1996 or are operating outside the law in respect of some decisions on allocations.

2.2 In February 2006, the Public Services Ombudsman for Wales issued a special report on housing allocations and homelessness.[5] Based on complaints received by his office concerning allocations, the Ombudsman reported:

> *'So far as housing allocation policies are concerned, the problems varied in significance from there being no apparent changes evident in the policy since the introduction of the legislative changes – thus potentially calling into question every subsequent allocation of housing – to specific problems with the number of points awarded and the proper reflection of reasonable preference for particular categories of individual'.*

2.3 In addition, complaints letters to the Assembly Government and advice from Shelter Cymru combined to highlight the urgency of the need to review local authority allocation schemes in Wales with a view to:

a) identifying areas of non-compliance with the law and the Code of Guidance

b) informing future reviews of the Code of Guidance

c) making recommendations to encourage the development of allocation schemes which are legally compliant and based on good practice.

2.4 The Assembly Government asked Shelter Cymru to participate in the review due to its understanding of allocation issues gained from their experience of representing housing applicants dissatisfied with local authority allocation decisions. However, the report represents the policy and legal position of the Assembly Government.

**Housing Association Allocations**

2.5 Housing associations are not required to abide by the Housing Act 1996 when allocating properties. Instead they are expected to comply with the Assembly Government's Regulatory Code[6] and supporting guidance. The Assembly Government proposes to develop and issue lettings guidance for housing associations in 2007 which will reflect the Assembly Government's policy on allocations for local authorities and will form part of future sector-wide allocations reviews, inspections or Ombudsman investigations.

**The Choice Agenda**

2.6 The current review did not involve an assessment of the way in which local authorities have enabled applicants to choose a home or to express preferences about allocated properties within their allocation schemes because a detailed evaluation of these has been undertaken on behalf of the Assembly Government the report on which is due for publication in 2007.

**Legal Compliance**

2.7 The purpose of this report is to help local authorities produce legally compliant allocation schemes by highlighting some common problems identified by this review. Local authorities are responsible for producing lawful schemes and introducing measures to ensure they can respond to new or amended legislation and reflect these within their schemes and associated policies and procedures. In so doing authorities should secure appropriate advice as to the legality of their schemes and adherence to good practice.

# 3. METHODOLOGY

3.1 In September 2005, Housing Directorate officials wrote to Chief Housing Officers of local authority housing departments in Wales requesting copies of their '*current housing allocation scheme and all associated documents*'.

3.2 All 22 local authorities provided some written information on their allocation schemes which varied from a single leaflet for applicants to multiple documents comprising many pages.

**Assessment of Schemes**

3.3 Housing Directorate and Shelter Cymru officials assessed 11 schemes each. They were selected alphabetically.

3.4 Assessment criteria were drawn up based on key policy areas including consideration of whether schemes:

1. are part of a common register
2. contain an overall statement as to the purpose of the scheme
3. cover who is eligible/ineligible
4. refuse access to the waiting list if applications do not have a local connection with the area
5. adopt suspension, exclusion, deferment or no preference policies
6. accommodate all reasonable preference categories
7. accommodate urgent housing needs
8. use local connection, finances, or the behaviour of applicants to determine priority for rehousing
9. contain timescales on the duration of the application assessment process
10. apply any age restrictions

11. treat transfer applicants as other applicants in accordance with Part 6 of the 1996 Act
12. refer to nominations to housing associations
13. refer to member involvement in the allocation process
14. covers help with moves outside the local authority area
15. are in English and Welsh
16. are offered in different formats
17. refer to staff/Member training
18. refer to monitoring and review of the scheme
19. are comprehensive
20. elicited any other comments or observations e.g. use of jargon, presentation of information, plain language etc.

3.5 Assessor observations in respect of these criteria were drawn from the written information provided by local authorities and recorded on a proforma containing key criteria and supplementary questions (see **Annex 3**).

# 4. FINDINGS

## Overview

4.1 All 22 local authorities provided some information to the request for copies of their '*current housing allocation scheme and all associated documents*'. There was considerable variation in the quality and type of information received. Documents ranged from a basic, out-of-date leaflet for applicants to a series of documents involving notes for applicants, stock details, frequently asked questions and a list of detailed service standards. The majority of documents were referred to as being the authority's allocations policy and often included information about its points scheme. Only one set of guidance notes for staff on applying the scheme was received.

4.2 An overview of the findings is given in **Table 1**. Generally, it was found that all allocation schemes required some level of review. The level of non-compliance in some cases was minimal whereas in others, fundamental reviews of schemes were needed to make them legally compliant as minimum.

4.3 The following section provides a description of the main findings from the review in respect of the assessment criteria used. The issues identified are then considered in more detail in Chapter 5.

## Description of Main Findings

4.4 **1. Is the scheme part of a common register?** Of the 22 schemes assessed, 6 referred to the fact that they operated a common housing register. Within this minority, three explained what a common register was and its purpose while the information in the remaining three schemes was judged to be inadequate or poor.

## Table 1: Overview of Findings

| No | Criteria | Yes | No/Not covered/ Other |
|---|---|---|---|
| 1 | Is the scheme part of a common register? | 6 | 16 |
| 2 | Is there an overall statement as to the purpose of the scheme? | 16 | 6 |
| 3 | Who is eligible/ineligible? | 21 | 1 |
| 4 | Are people refused access to the waiting list if they don't have a local connection? | | 22 |
| | Are local connection points awarded | 15 | 7 |
| | Are homelessness points awarded | 20 | 2 |
| 5 | Does the scheme adopt exclusion, no preference or adjusted preference policies? | 21 | 1 |
| 6 | Are all reasonable preference categories accommodated? | 14 | 8 |
| 7 | How are urgent housing needs accommodated? | 14 | 8 |
| 8 | Is local connection, an applicants finances or his/her behaviour taken into consideration in determining priority for housing? | | |
| | Local connection | 16 | 6 |
| | Finances | 14 | 8 |
| | Behaviour | 19 | 3 |
| 9 | Are timescales given regarding the application assessment process? | 11 | 11 |
| 10 | Are any age restrictions applied? | 13 | 6 |
| 11 | Are transfer applicants treated as other applicants? | 9 | 13 |
| 12 | Are nominations to housing associations referred to? | 12 | 10 |
| 13 | Is Member involvement in the process referred to? | 8 | 14 |
| 14 | Does the scheme cover help with moves outside the local authority area? | 10 | 12 |
| 15 | Is the scheme in English and Welsh? | 5 | 17 |
| 16 | Is the scheme offered in different formats? | 3 | 19 |
| 17 | Is staff/Member training covered? | | 22 |
| 18 | Is monitoring and review of the scheme included? | 7 | 15 |
| 19 | Is the scheme comprehensive? | 4 | 18 |
| 20 | Any other comments e.g. use of jargon, presentation of information, plain language etc? | n/a | n/a |

4.5 **2. Is there an overall statement as to the purpose of the scheme?** Of the 22 schemes, 16 contained one or more of the following statements as to the purpose of the scheme:

- to address housing need (x4)
- to ensure people in greatest housing need have highest priority for housing (x6)
- to meet/prevent homelessness (x3)
- to give more choice(x7)
- to ensure anyone who wishes to apply for housing understands how to do so and what method is used to determine who may 'qualify' for housing and who may be nominated (x2)
- to keep people near support networks and communities (x1)
- to make best use of housing stock (x4)
- to build strong, safe/sustainable communities and improve social inclusion (x8)
- to deal with applications in accordance with the law and regulations (x1)
- to provide good quality homes at affordable rents for people on low incomes (x2) and to provide affordable accommodation for rent to meet local need (x1)
- to provide a route into permanent housing (x1)
- to treat all groups in the community fairly (x2)
- contribute towards strategic functions linked to health, social care and homelessness etc. (x1)

4.6 **3. Who is eligible?** Only 6 of the 22 schemes were considered to be accurate and comprehensive regarding eligibility/ineligibility for housing in accordance with the 1996 Act (as amended). Issues identified included:

- reference still to 'qualifying' persons which was removed by the Homelessness Act 2002
- failure to refer to the test of unacceptable behaviour in making ineligible decisions due to an applicant's behaviour (see **Annex 4**)
- removal of preference for an allocation for reasonable preference applicants without a local connection (until they met connection criteria)
- other reasons for removal of preference not prescribed by the 1996 Act (e.g. being home owners and for having previously bought under the right to buy) by placing these applicants on an inactive list indefinitely or until such categorisations no longer applied
- incomplete or incorrect information regarding persons from abroad
- people between 16 and 18 years not eligible for general needs accommodation unless the authority had a homeless or other legal duty. Guarantors were also required in some cases.

4.7 **4. Are people refused onto the waiting list if they don't have a local connection?** One scheme stated that applicants should be 'qualifying persons' by currently living or working in the area and had been doing so for the 2 year period preceding the date of application. Such applicants were placed on a 'special inactive list' until they met local connection criteria and would not be considered for an allocation until then, regardless of their need for housing. 2 schemes were vague in this respect and the policy intent unclear. (See paragraph 4.16 for more information).

4.8 **5. Does the scheme use suspension or adjusted preference policies?** Only 1 scheme did not refer to any of the above. The remaining schemes all made some provision for restricting access to housing though methods on how this was achieved varied. Information was often vague or confused making accurate assessments difficult.

4.9 Rather than render applicants ineligible for an allocation due to behaviour and so effectively restrict them from accessing the waiting list, most landlords allowed 'unacceptable behaviour' applicants to access inactive, deferred or similar lists until conditions were met – usually through the full or partial repayment of arrears or other debt. This approach is tantamount to being rendered ineligible for an allocation which should be informed by the test of unacceptable behaviour. (See **Annex 4** for an explanation on the test of unacceptable behaviour and **Annex 5** for an explanation of terminology around restricting access to housing).

4.10 10 schemes mentioned the test of unacceptable behaviour but with little or no explanation of what this entailed. Some authorities appeared to adopt contradictory positions (e.g. statements that the test would be complied with then blanket statements about removing preference due to outstanding debt). 2 schemes stated if an applicant was considered to be ineligible for an allocation, they '*must apply the 3 stage test before the power to exclude must be used (see Code of Guidance*)' but gave no explanation of what the test or Code of Guidance was or where information about either could be found.

4.11 The same 2 schemes stated that the law required that authorities '*must not*' house anyone deemed ineligible including those ineligible due to behaviour, while another scheme stated that people guilty of unacceptable behaviour were an ineligible category. All three schemes failed to convey that the power to exclude applicants as a result of behaviour is discretionary.

4.12 Information on notifications of ineligible decisions and the right of applicants to request a review of such decisions was generally poor. With the exception of cases involving rent arrears, there was seldom any information on what an applicant might do to reverse an

ineligible decision. There was also limited evidence of any monitoring or reviews of excluded applications.

4.13 **6. Are all reasonable preference categories accommodated?** 14 schemes were considered to accommodate all reasonable preference categories giving rise to the potential of 8 authorities not affording statutory preference to categories of persons set out in s.167(2) of the 1996 Act. 2 schemes did not refer to homeless applicants. One scheme referred to pre-Homeless Act 2002 provisions i.e. stating that the council could only consider allocations to accommodation for people on the housing register and to get on the register, applicants needed to be 'qualifying persons'.

4.14 A number of schemes lacked information around access to housing for homeless and homelessness-related reasonable preference applicants. For example, some failed to accommodate preference for applicants owed a duty by other local authorities under s.190(2), 193(2) or 195(2) as required under s.167(2)(b) of the 1996 Act.

4.15 Also, a number of schemes failed to cover the full range of duties to homeless households including:

- preference only to those owed a full homeless duty under s.193 and no reference to those owed duties under s.190(2) (intentionally homeless) and s.195(2) (threatened with homelessness)

- award of points only to those to whom the authority had a full statutory homeless duty and who were residing in temporary accommodation provided by the authority with no mention of other categories given under s.167(2)(a) and (b). Preference was therefore only being given to people to whom the authority owed a full duty and who are in temporary accommodation provided by the authority. There was no mention of the other categories of

applicant in s.167(2) (a) and (b) and preference was further restricted to those in accommodation secured by the authority.

4.16 The way in which points were awarded in a number of schemes could potentially negate the requirement of landlords to ensure that overall, reasonable preference for allocations is given to people in all the reasonable preference categories. This was found to be particularly prevalent where points were awarded for local connection. 15 schemes gave some level of preference for applicants with a local connection. This sometimes reflected a disproportionate points' award between housing need and residency. For example one authority awarded 3 points for every complete year residing in the area up to a maximum of 30. If the applicant was living in the community council area to which his/her application related, a further award of 1 point per year lived in the community council area up to a maximum of 10 points was awarded. Thus a total award of 40 points could be secured by local connection. Contrast this with the award by the same authority of 40 points for applicants to whom it had a main homeless duty under Part 7 of the 1996 Act which was reduced to 30 points where there was no local connection.

4.17 In one scheme local connection was used to create preference for housing rather than differentiate between people in housing need. The position of a number of other schemes was unclear regarding the award of local connection points being reliant on the award of housing need points.

4.18 'Time on list' points were also used in a way that might negate giving overall reasonable preference to people in housing need.

4.19 Council employees were sometimes awarded preference as a result of losing accommodation tied to their employment. That an applicant works for an authority does not automatically afford them priority for

housing and their housing need should be assessed in the same way as other housing applicants.

4.20 Choice-based schemes using housing need bands were sometimes very wide-ranging and included categories of applicant within and outside the statutory preference categories. Authorities need to be careful about how they intend to differentiate between such applications. One scheme operating needs bands used date of registration to determine priority for housing for applicants within the same band. The concern with this approach is where bands include diverse categories of applicants using date order may not adequately demonstrate that those who are owed preference for housing receive it. (See **Annex 1** for relevant case law).

4.21 Discretionary or management awards were often poorly explained or vague with little or no reference to how such awards are made and monitored.

4.22 Preference for living in unsuitable, insanitary or unsatisfactory conditions being awarded to applicants from the private sector only thereby ignoring the needs of those housed in unsuitable, insanitary or unsatisfactory public sector accommodation.

4.23 **7. How are urgent housing needs accommodated?** 14 schemes accommodated urgent housing need in their allocation schemes. In the remaining 8, information on urgent housing need was either not included or the information was so limited it was difficult to determine policy intent.

4.24 **8. Is an applicant's financial resources, their behaviour or connection with an area taken into consideration in determining priority for rehousing?**It was found that 14 schemes took the financial situation of an applicant into account; 19 schemes took behaviour into account; and 16 schemes took a person's local

connection with the area into account to help determine priority for housing.

4.25 Whilst most schemes used one or more of the above to help determine priority for housing, most were unclear as to how such criteria would be applied. In terms of the behaviour of applicants for example, many schemes used active/inactive lists or deferred applications for rent arrears (or other breach of tenancy) appearing to confuse the power to give no preference for an allocation (s.167 (2B) and (2C)) with the power to adjust preference for an allocation permitted by s.167(2A) of the 1996 Act. More information on local connection is given in paragraph 4.16.

4.26 **9. Assessments - Application processing times** - Only 11 schemes mentioned some application assessment timescales, one of which provided timescales for applicants only.

4.27 Examples of application processing times included 2 months (for those in housing) or 6 months (for those accommodated in caravans/mobile homes) and applications being processed would not be considered for housing within these timeframes except in specified circumstances. Other schemes included timescales such as 1 month; 28 days; 20 days; 14 days; 10 working days; 7 days and 5 days.

4.28 Applicant appeal/review timescales were given in 15 of the 22 schemes including the requirement of applicants to request a review within 21 days (x9) and 28 days (x6). Only 3 landlords offered applicants the opportunity to appeal the outcome of a review. The timescales for requesting an appeal were 14 and 28 days of being notified of the decision of the review. One landlord had established an independent Housing Appeals Committee to consider appeals if the initial review upheld the original decision.

4.29 6 schemes referred to offer periods. One landlord gave applicants 48 hours of viewing within which to either accept or refuse an offer, 1 gave 3 working days, 3 gave 5 days and 1 gave 7 days for this.

4.30 **References** - 4 schemes referred to references; one landlord said they 'may' seek references from previous landlords or mortgage providers and one said they would secure such references where there was evidence of a history of anti-social behaviour. 1 authority said it might request references if the applicant was from outside the area.

4.31 **Other supporting information** - this included proof of identity; copies of tenancy agreements; proof of pregnancy; medical assessments; change of circumstances; evidence of harassment (physical, sexual or mental cruelty); evidence of income and employment.

4.32 **10. Are any age restrictions applied?** 13 schemes referred to some sort of age restrictions. In terms of eligibility for housing, a number of landlords placed restrictions on access to housing for 16 - 17 (and indeed 18) year olds. Restrictions included the need for guarantors or referees or only enabled access where the authority had a homelessness duty. There is no legal reason for authorities to adopt this approach and the ability to secure a guarantor could prove problematic particularly for this group yet exclude many vulnerable young people from accessing publicly subsidised housing

4.33 Other age-related restrictions were linked to certain types of accommodation, particularly for older people aged 60+. There was a range of criteria used to apply age restrictions. Some landlords stated that if a married couple were to apply for older persons accommodation, both must be 60+. If only one applicant was above 60, consideration for this type of housing would only be made where there was a medical priority for it. The allocation of some older

persons accommodation was dependent on them having medical points. Some had to be 60+ or registered/severely disabled.

4.34 Some properties were designated as suitable for persons being 40+ but no reason was given as to why this was so.

4.35 **11. Are transfer applicants treated as other applicants?** As with other applicants, transfer applicants should be given reasonable preference if they are in one of the categories in s.167(2) and subject to the same test of unacceptable behaviour. According to the information provided, only 9 schemes treated transfer applicants in the same way as other applicants. In the remaining 13 schemes, the position of transfer applicants was either not referred to or appeared to be considered separately from direct applicants.

4.36 In some cases transfer applicants had to satisfy higher thresholds of behaviour. Examples included offers of accommodation being dependant upon the satisfactory condition of the tenant's existing property, or allowing tenants to register but stating that an offer would not be made if there were rent arrears or other breaches of tenancy. The approach did not afford the applicant any priority and thereby effectively removed his/her preference for housing rather than adjusting it. The applicant would need to fail the legislative test for the lawful removal of preference (namely ss.167(2B) and (2C)).

4.37 **12. Are nominations to housing associations referred to?** 12 schemes referred to the potential for applicants to be nominated to housing associations for accommodation. Where information was provided it was often poor and assumed a good level of understanding by the reader as to what a nomination to a housing association meant in practice.

4.38 **13. Is elected member involvement in the process referred to?** 8 schemes referred to the involvement of members in the allocation process. Generally involvement was reserved to applications outside a member's ward in accordance with relevant regulations[3]. One scheme however said the relevant member would be consulted about applications within his/her ward though the information did not say whether he/she would or would not be involved in the allocation decision. Another scheme used a Review Panel with representation from the housing portfolio Member and Leader of the Opposition. The scheme did not stipulate the procedure to be followed if applicants were from these members' wards.

4.39 **14. Does the scheme cover help with moves outside the local authority area?** 12 schemes referred to providing help with moves to another area. Most information however was out of date.

4.40 **15. Is the scheme in English and Welsh?** 5 of the 22 schemes were provided in Welsh and English and the remaining 17 were provided in English only - a few of these offered to provide documents in Welsh on request.

4.41 **16. Is the scheme offered in different formats?** 2 schemes were offered in large print and 1 authority said the scheme was available in Braille, audio or a 'community language' on request. There was no reference as to the availability of information in different formats/languages in 20 schemes.

4.42 **17. Is staff/member training covered?** Nothing in the information received referred to staff/member training.

4.43 **18. Is monitoring and review of the scheme included?** 7 schemes offered information on the scheme review mechanism to be used. Only 1 scheme identified that the authority would review the scheme with regard to housing need and another referred to reviewing the scheme according to the number of appeals made.

4.44 A minority of schemes said they had been reviewed in 2003 but did not fully reflect changes in law introduced by the Homelessness Act 2002.

4.45 **19. Is the scheme comprehensive?** 4 of the 22 schemes were considered to be reasonably comprehensive. The remaining 18 schemes were judged as being poor and deficient in key areas as demonstrated in these findings. Key areas of concern were linked to eligibility, restricting access to housing, and the award of reasonable preference. Most schemes also failed to accommodate new sections 166(1) and (2) of the 1996 Act regarding applicants' rights to advice to help secure accommodation and to receive/request certain information about their applications.

4.46 **20. Any other comments e.g. use of jargon, presentation of information, plain language etc?** Generally the information provided was poor and difficult to follow. Legalistic terms were sometimes used (e.g. reference to s.184 notices being issued to determine a preference category) or outdated (e.g. 'qualifying persons'), and technical terms were not explained (e.g. test of unacceptable behaviour).

# 5. DISCUSSION AND CONCLUSIONS

5.1 This section draws out the main issues from the findings and considers them in the context of:

- compliance with the law and Assembly Government Code of Guidance (2003), and
- effective scheme administration and management.

## Law and Code of Guidance

5.2 Local authorities are required to comply with Part 6 of the Housing Act 1996 ('1996 Act') as amended by the Homelessness 2002 ('2002 Act) in determining council house allocations. Part 1 of the Assembly Government's 'Code of Guidance for Local Authorities on the Allocation of Accommodation and Homelessness' (2003)[4] gives guidance on how local authorities should discharge their functions and apply the various statutory criteria in practice in respect of allocations. It is not a substitute for legislation and in so far as it comments on the law can only reflect the Assembly Government's understanding of the provisions and the decision of the courts on the provisions at the time of issue (see paragraph 1.10 for information on current review of the 2003 Code). However, local authorities must have regard to the Assembly Government's guidance as required by s. 169 of the 1996 Act.

### Eligibility

5.3 **Law**: S.166(3) of the 1996 Act places an obligation on authorities to consider all applications for social housing that are made in accordance with the procedural requirements of the housing authority's allocation scheme. In considering applications, authorities must ascertain if an applicant is eligible for an allocation. Eligible persons are:

- existing tenants
- British nationals habitually resident in the Common Travel Area
- European Economic Area Nationals (the Assembly Government did not introduce measures to restrict access to an allocation under Part 6 of the 1996 Act for persons from Eastern European countries which acceded to the European Union in May 2004 - see **Annex 2A** for correspondence notifying local authorities of this in July 2005)
- persons subject to immigration control prescribed as eligible (e.g. refugees, those with humanitarian protection or who are nationals of a country with whom special arrangements have been agreed). (**Annex 2B** contains copy correspondence to local authorities on the introduction of regulations in respect of humanitarian protection issued in December 2006)

5.4 Authorities also have a discretionary power to treat eligible applicants as ineligible (s.160A(7)) for an allocation due to unacceptable behaviour. Unacceptable behaviour issues are considered in the next section.

5.5 **Issues:** Whilst most allocation schemes stated they would comply with the eligibility provisions of the 1996 Act (as amended), it was found that less than 1/3 were correctly applying the law on eligibility while others appeared to have adopted practices which, based on the information provided, fell outside the legal powers of local authorities. Main areas of practice which effectively rendered persons ineligible for reasons not permitted by law included:

- absence of a local connection
- unacceptable behaviour without the application of the relevant test (see paragraph 5.8 for more on this)
- absence of guarantors for people under the age of 18 unless a homeless or other legal duty applied

- placing homeowners or those having previously bought under the right to buy on inactive or deferred lists indefinitely or until such categorisations no longer applied
- removal of transfer applicants' preference by placing conditions on them not permitted by Part 6 (e.g. unable to request a transfer for a year following a move).

5.6 Also, guidance about European Union nationals and other people from abroad were often cited as groups to which eligibility criteria should be applied but with little or no explanation given about identifying such persons or on how to assess their applications.

5.7 **Conclusion**: The 1996 Act and the Assembly Government Code of Guidance (2003) sets out the legal and policy framework within which local authorities are required to develop allocation schemes to meet housing need in their areas. The law stipulates those persons who should be deemed eligible (and ineligible) for an allocation yet a number of schemes failed to accommodate this most fundamental of legal provisions giving rise to concerns about denying access to those entitled to subsidised housing and the risk of legal challenge and consequential drain on resources this entails.

**Restricting Access to Housing**

5.8 **Law**: Under S.160A(7) of the 1996 Act a local authority may, where it is satisfied that an applicant (or household member) is guilty of unacceptable behaviour serious enough to make them unsuitable to be a tenant of the authority at the time their application is considered, decide to treat the applicant as ineligible for an allocation and effectively exclude them from accessing the housing waiting list.

5.9 By virtue of s.167(2B) and (2C) of the 1996 Act however, where an authority is satisfied that an applicant is unsuitable to be a tenant, it is not required to decide that s/he is ineligible for an allocation but

may instead effectively enable an applicant to access the waiting list but give him/her no preference for an allocation.

5.10 S.160A(8) provides that the only behaviour which can be regarded as unacceptable for the above purposes is behaviour by the applicant (or household member) that would, if the applicant had been a secure tenant of the local authority at the time, have entitled the authority to a possession order under s.84 of the Housing Act 1985 in relation to any of the discretionary grounds in Part 1 of Schedule 2, other than Ground 8. These are fault grounds and include behaviour such as non-payment of rent, breach of tenancy conditions, conduct likely to cause nuisance or annoyance, and the use of property for immoral or illegal purposes. Under s.84 of the Housing Act 1985, the court can only make a possession order if satisfied in all the circumstances that it is reasonable to do so. It is not necessary for the applicant to have been a tenant of the authority when the behaviour occurred.

5.11 In order for the behaviour to be regarded as serious enough to make the applicant unsuitable to be a tenant, the local authority must also be satisfied that the behaviour would have entitled it to an outright possession order (as opposed to a suspended or postponed possession order) if the applicant had been a secure tenant.

5.12 Finally, the local authority must be satisfied that at the time the application for an allocation is made, the applicant remains unsuitable to be a tenant by virtue of his/her unacceptable behaviour.

5.13 Ineligible decisions and decisions to give no preference for an allocation must be informed by this three stage test, further details of which are contained in section 3.17 of the Code of Guidance (2003) and appended at **Annex 4**.

5.14 S.167(2A) of the 1996 Act allows allocation schemes to make provision for determining priorities in relation to applicants who fall within the reasonable preference categories, and provides that the factors which may be taken into account includes any behaviour by the applicant (or household member) which affects his/her suitability to be a tenant. This provision enables local authorities to adjust the preference of an applicant (e.g. by reducing their points), not remove it (e.g. by removing all of their points).

5.15 Paragraph 3.14 of the Code of Guidance (2003) says of the law on unacceptable behaviour '*there is no obligation on local authorities to implement these provisions and where they do, robust procedures are needed to ensure compliance with the law, this Code and the fair and consistent treatment of applicants*'). There was little evidence of adherence to this in the allocation schemes received.

5.16 **Issues:** The majority of allocation schemes contained measures designed to restrict access to housing. Rather than excluding applicants from accessing waiting lists, many landlords opted to place applicants on deferred or inactive lists with conditions attached e.g. that rent arrears or other debt are partially or wholly cleared before the applicant is considered for an allocation. Landlords adopting such practices may be deeming such applicants ineligible for an allocation or removing his/her statutory preference for an allocation – a decision that must only be arrived at by application of the test of unacceptable behaviour. The law allows priority for housing to be adjusted (e.g. reduction in points) where an applicant who has been awarded reasonable preference is guilty of any behaviour that would affect his/her suitability to be a tenant.

5.17 **Conclusion:** 12 allocation schemes did not refer to the test of unacceptable behaviour leading to the conclusion that most 'restricting access' practices in Wales are probably unlawful. There is

no requirement placed on local authority landlords to render an applicant ineligible, give them no preference or adjust their priority for an allocation (see **Annex 5** for an explanation of terminology). Where they do, landlords should ensure that restricting access to housing policies and procedures are legally compliant and adhere to the Assembly Government Code of Guidance (2003) as a minimum.

5.18 Paragraph 3.20 of the Code says that '*Social housing is subsidised stock and it is incumbent on authorities to allocate tenancies primarily to meet housing need in their areas and to co-operate with other housing providers in so doing*'. The Assembly Government encourages the development of common 'restricting access to housing' policies between local authorities and housing associations to facilitate fair and consistent practices and promote inclusion. The Assembly Government has developed draft regulatory guidance for housing associations which mirrors the law on restricting access which local authorities are required to abide by. It is also undertaking a research project into the restricting access practices of social landlords in Wales to promote and build on the good practice that exists.

**Reasonable preference**

5.19 **Law**: S.167(2) of the 1996 Act requires local authorities to ensure that reasonable preference is given to all of the following categories of people:

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

(ii) people who are owed a duty by any local authority people under sections:
- 190(2) (intentionally homeless and in priority need)
- 193(2) (main homelessness duty or 1985 Act equivalent)

- 195(2) (threatened with homelessness unintentionally and in priority need or 1985 Act equivalent)
- 192(3) (occupying accommodation secured at the authority's discretion where not in priority need or intentionally homeless)

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

(iv) people who need to move on medical or welfare grounds, and

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

5.20 Paragraph 4.51 of the Code of Guidance (2003) says that '*While housing authorities will need to ensure that, overall, reasonable preference for allocations is given to applicants in the relevant categories in s.167(2), these should not be regarded as exclusive. A scheme should be flexible enough to incorporate other considerations. For example, housing authorities may wish to give sympathetic consideration to the housing needs of extended families. However, housing authorities must not allow their secondary criteria to dominate schemes at the expense of the statutory preference categories. The latter must be reflected on the face of schemes and be evident when schemes are evaluated over a longer period*'.

5.21 **Issues**: The allocation scheme review identified a range of issues around the award of reasonable preference. About one third of schemes failed to accommodate all reasonable preference categories and two schemes failed to refer to homeless applicants. Some schemes lacked information on the award of preference for applicants owed a duty by other local authorities and others only awarded preference to those owed a full homeless duty. Some

scheme provisions may have created preference from non-housing need criteria (e.g. council employees losing accommodation tied to their employment with the council). Others gave weighting to secondary criteria in a way that diluted reasonable preference thereby potentially allowing secondary criteria to override statutory preference being awarded to people in housing need (e.g. time on list or local connection). Many schemes also appeared to remove an applicant's preference for an allocation by placing them on deferred or inactive lists when adjusted preference should have been used (see paragraph 5.14 for more on this). A few choice-based schemes using bands of need sometimes included applicants within and outside the statutory preference categories and care is needed in the mechanisms used to differentiate priority for these groups as evidenced by the case law in this area (see **Annex 1**).

5.22 **Conclusion**: The over-riding purpose of allocation schemes is to meet housing need. The law therefore stipulates the categories of person to whom reasonable preference for an allocation of accommodation should be given. It is essential for authorities to provide clear information to applicants on their rights to secure reasonable preference but there was substantial evidence of the need for significant improvements in this area. In particular, authorities should review their schemes to ensure they clearly reflect who is and is not eligible for an allocation and the methods they will use to award, rescind or alter statutory preference for an allocation, and to ensure that they are legally compliant.

## Scheme Administration and Management

### Common housing registers

5.23 **Policy:** The Assembly Government has promoted the development of common housing registers for a number of years. This is reflected in the Code of Guidance (2003) and in common registers being a theme for funding under the Social Housing Management Grant programme for a number of years. Such approaches have long been recognised as an effective means of facilitating access to social housing, of improving consistency and fairness in processes, of improving partnership working between the local authority and housing association sectors, of informing the strategic and operational responses to allocating a rationed resource, and of contributing to assessments of housing need.

5.24 **Issues**: According to the information provided, less than a third of allocation schemes in Wales (6) form part of a common system of housing application and/or allocation. Whilst there is no legal requirement placed on local authorities to develop common systems, the promotion of choice in allocations under the Homelessness Act 2002 and of the increasing recognition of the benefits of regional working within the planning and regeneration agendas, highlights further the usefulness of common housing access systems.

5.25 **Conclusion:** It would be good practice for landlords to consider the planning and service delivery improvements afforded by common access systems.

### Content of Allocation Schemes

5.26 **Law:** S.167 of the 1996 Act requires local authorities to have allocation schemes which determine priorities and the procedure to be followed in allocating housing. 'Procedure' includes all aspects of the allocation process, including the people, or descriptions of people, by whom decisions are taken.

5.27 **Issues**: Whilst the 22 local authorities in Wales all supplied some written information on allocations, few were judged to fully accommodate the provisions of s.167 of the 1996 Act in that much of the information could not be said to constitute an allocation 'scheme'. Much of the documentation received were described as being an authority's 'allocation policy' and were not supported by procedures for implementation in the majority of cases. Some of the information received appeared to be summary information for applicants. Guidance on important service provisions was either missing or incorrect with the attendant consequences of applicants in housing need being denied their rights to be considered for subsidised housing. Information also varied as regards the purpose of allocation schemes. Just under half of the schemes made some reference to meeting housing need though all other statements given were relevant to social housing allocations (e.g. 'to deal with applications in accordance with the law and regulations').

5.28 **Conclusion**: As local authorities are required by law to give reasonable preference for housing to people in housing need it follows that allocation schemes should reflect this position. Policies and procedures which are clear about their purpose and statutory obligations will help housing applicants understand the context within which local authorities must operate and may help minimise protracted and time consuming challenges against scheme provisions.

**Advice and Information**

5.29 **Law:** S.166(1) of the 1996 Act requires a local authority to ensure advice and information is freely available to everyone in its area on how to apply for housing. If a person is likely to have difficulty in making an application without assistance, then any necessary assistance he/she requires must be made available free of charge.

5.30 S.166(2) of the Act requires authorities to inform applicants that they have the right to the information contained in s.167(4A) that is:

(a) the right to request information which will enable them to assess:

- 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, and

- 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

(b) the right to be notified in writing of any decision to which s.167(2C) applies and the grounds for it i.e.
- whether the applicant (or household member) is guilty of unacceptable behaviour serious enough to make them unsuitable to be a tenant, or

- whether the behaviour at the time the application is considered, is such that the applicant should not be treated as a member of a reasonable preference group

(c) the right to request the authority to inform them of any decision about the facts of the application which is likely to be, or has been, taken into account in considering whether to allocate housing, and

(d) the right to request a review of a decision in respect of (b) or (c) above or in respect of s.160A(9) regarding ineligibility (of persons from abroad and unacceptable behaviour), and to be informed of the decision and the grounds for it.

5.31 **Issues:** It was found that very few schemes contained information on applicants' legal rights to advice to help them secure accommodation and to receive certain information. Given the growth in homelessness in Wales in recent years and a greater reliance on private sector housing for which various schemes have been developed to facilitate access to it (e.g. bond schemes), then the absence of advice services and of information about applying for housing represents significant shortcomings in service delivery.

5.32 **Conclusion:** It is fundamentally important for local authorities to ensure that their allocations schemes enable staff, members and service users alike to be aware of their respective powers, duties, responsibilities and rights. They should not only focus on meeting statutory provisions however, but should be written from the perspective of helping people in housing need to secure suitable accommodation within their areas.

**Application processing times**

5.33 **Policy:** There is nothing in law or the Code of Guidance (2003) which stipulates timescales within which local authorities might be expected to assess applications for housing.

5.34 **Issues**: Only half of the schemes provided information on application processing times. Those that did reflected wide variations in practice ranging from 6 months (for those in caravans and mobile homes) to 2 months (for those in housing) to only 5 days. The information provided did not enable an assessment of possible reasons for the wide variation in application processing times.

5.35 **Conclusion**: Whilst it is for each authority to determine application processing timescales in light of priorities and resources, such determinations should be reasonable. Only half of the schemes received referred to application processing times but 10 of these had processing times of 1 month or less. Thus, based on available data,

there is evidence of a sector prescribed standard of 30 days or less within which to assess application for housing under Part 6.

**Elected Member Involvement in Allocations**

5.36 **Law:** In terms of decisions around individual allocations, elected members are required to abide by The Local Authorities (Prescribed Principles for Allocation Schemes) (Wales) Regulations 1997 (SI 1997 No 45). These regulations prevent an elected member from being part of a decision-making body at the time the allocation decision is made when either:

(i) the accommodation concerned is situated in their electoral ward; or

(ii) the person subject to the decision has their sole or main resident in the member's electoral ward.

5.37 The regulations do not prevent elected members' involvement in allocation decisions where the above do not apply. Nor do they prevent a ward member from seeking or providing information on behalf of their constituents, or from participating in the decision making body's deliberations prior to its decision. However, members should be careful to ensure compliance with the relevant Code of Conduct in doing this.

5.38 **Issues**: Just over a third of the 22 allocation schemes referred to the involvement of members in the allocations process. Compliance with the regulations was unclear in the processes adopted by 2 schemes (i.e. one said the relevant member would be consulted about applications within his/her ward and another used a Review Panel with representation from the housing portfolio member and Leader of the Opposition). In both cases it was not clear from the information received how adherence to regulations would be assured.

5.39 **Conclusion**: Elected members are responsible for producing allocation policies which are compliant with the law, the Code of Guidance (2003), equal opportunities and other relevant law. They are also responsible for monitoring allocation scheme implementation to ensure the operation of open and accountable systems that are compliant with stated objectives. Local authorities should make explicit if and how local members will be involved in the process, ensuring that they are not involved in decisions pertaining to allocations within their own wards. Local authority members involved in developing allocation schemes and/or allocations decisions should be given training on the law and good practice to facilitate their understanding of allocations issues and the development and review of policy and guidance.

**Monitoring and Review**

5.40 **Policy:** Paragraph 5.27 of the Code of Guidance (2003) says '*It is essential that housing authorities monitor allocations to determine, for example, the success of lettings plans and whether they are meeting equal opportunities obligations. Service reviews under WPI [Wales Programme for Improvement] will also provide valuable feedback on services provided and whether reasonable preference has been given*'. Further, paragraph 5.29 says that '*Allocations policies and procedures should be reviewed on a cyclical basis to ensure they are compliant with the law and good practice*'.

5.41 **Issues**: Only 7 schemes provided information that referred to the monitoring and/or review of the scheme. A small number of authorities said their schemes had been reviewed to accommodate changes brought about by the Homelessness Act 2002 but still contained information about provisions removed or amended by that Act. This and the level of out-of-date and inaccurate information suggest not only that some schemes have not been adequately reviewed to accommodate fundamental changes introduced by

statute (and reflected in the Code of Guidance (2003)) but are not routinely reviewed as should be the practice.

5.42 **Conclusion**: It is essential for authorities to monitor allocations on a regular basis to ensure that practice meets with scheme objectives and as a check to any perverse or unanticipated outcomes. Monitoring data and mechanisms to accommodate new and emerging law and practice should be put in place to inform scheme reviews which should be undertaken as required or on a predetermined basis. Reviews should include expert input, consultation with housing associations (s.167(7) of the 1996 Act) and with those likely to be affected by major changes to the scheme (s.168(3) of the 1996 Act). Plans for staff and member training and the production of detailed procedures for implementation to promote consistent and fair practice should also form part of the review process as should the quality of information for applicants.

**Quality of Information**

5.43 **Policy**: Paragraph 4.98 of the Code of Guidance (2003) states that '*Application forms should be accompanied by guidance notes that are easy to understand and in plain language. Translations of all forms and notes should, wherever possible, be available for applicants whose first language is not Welsh or English. Alternatively, authorities might wish to provide applicants with access to translation or interpreting services. Audio tapes of the notes, large print versions or Braille copies should be available for visually impaired people*'.

5.44 **Issues**: The review found that nearly all schemes were deficient to a greater or lesser degree and often lacked important information. This position was compounded by the quality of documents provided. These were often poor quality photocopies containing incomplete, inaccurate and out of date information. There was very little evidence of authorities providing information in Welsh or relevant

minority languages or in different formats to meet the needs of applicants with disabilities.

5.45 **Conclusion**: Facilitating access to social housing should be a key function of local authority housing departments in order to meet their statutory duties and Assembly Government policy on equality of opportunity and social inclusion. Often catering for societies most excluded groups, authorities should ensure that they provide good quality and accurate information that is easy to understand to help such groups access accommodation that is intended for them. Whilst the extent to which schemes comply with the law and Code of Guidance (2003) varies from authority to authority, a significant number require a fundamental overhaul to meet their legal obligations and Code provisions.

# 6. RECOMMENDATIONS

6.1 It was found that all 22 of the local authority allocation schemes received required some level of review. In many cases, issues involved a failure to produce allocation schemes which meet legislative requirements whilst in others action was needed to, for example, aid clarification, elaborate on the information provided or improve its quality.

6.2 The following recommendations aim to bring about changes needed to local authority allocation schemes in Wales to ensure they are compliant with the law, Assembly Government guidance and good practice.

## Recommendations for the Assembly Government

6.3 The Assembly Government should:

- undertake a sector wide review of allocation schemes every 3 years involving visits to organisations to discuss policy and implementation of the scheme with relevant staff
- issue briefing notes and up-dates on new and emerging law and policy as required
- issue revisions to the Code of Guidance (2003) (see paragraph 1.10 for more information), and
- issue guidance on allocations for housing associations to facilitate improved partnership working between sectors.

## Recommendations for Local Authorities

6.4 Local authorities should:

- within 6 months of the issue date of this report (unless already done within the preceding 12 months) undertake a fundamental review of their allocation schemes to ensure they are compliant

with the law, Code of Guidance and good practice, and review them annually thereafter

- undertake a fundamental review of allocation schemes at least 3 yearly ensuring appropriate consultation with housing associations, service users and others affected by proposed changes
- include within their allocation schemes mechanisms for regularly monitoring allocations decisions to ensure they are compliant with scheme objectives
- take appropriate measures to ensure schemes are legally accurate and compliant with the Code of Guidance (2003) particularly around:

  - eligibility
  - restricting access due to unacceptable behaviour
  - reasonable preference, and
  - advice and information

  by, for example, securing legal advice or other expert input, adoption of good practice, peer reviews, consultation with housing associations, other key partners and applicants

- develop detailed guidance for front line staff regarding implementation of the scheme

- provide staff and members with appropriate training regarding the law, Code of Guidance and good practice in allocations, and on how to apply the authority's policy.

## ANNEX 1 – IMPORTANT CASE LAW

**Lambeth LBC v A; Lambeth LBC v Lindsay**
(2002) EWCA Civ 1084

The allocation scheme must afford preference to those categories contained within the Act. The scheme must have a mechanism for identifying those with greatest housing need and ensuring, as far as possible and subject to reasonable countervailing factors, that they are given priority.

**R v Wolverhampton MBC ex parte Watters**
(1997) 29 HLR 931

Positive favour should be shown to those who satisfy any of the reasonable preference criteria. Use of the word 'reasonable' envisages that other factors may diminish or even nullify preference.

**R v Islington LBC ex parte Reilly & Mannix**
(1999) 31 HLR 651

Where the applicant falls into more than one of the reasonable preference categories, the scheme must allow for cumulative priority.

**R v Lambeth LBC ex parte El Yemlahi**
(2002) EWHC Admin 1187

Time spent waiting for an allocation can be taken into account when adjusting preference.

**R (Cali) v L.B.Waltham Forest**
[2006] EWHC Admin 302

Banding schemes must permit a composite assessment so that appropriate priority is afforded to those in greatest housing need. In this case, a scheme with three bands was unlawful because "a large number of needs of widely varying severity are banded together and thereafter priority is determined solely on the basis of waiting time".

**R (Lin & Hassan) v L.B.Barnet**
[2006] EWHC Admin 1041

Whilst it is open to an authority to take other factors into account, these must not dominate the scheme at the expense of the reasonable preference criteria. Thus a scheme that awarded 100 points to all transfer applicants with the effect of artificially raising their points threshold to the detriment of homeless applicants entitled to statutory preference (who were awarded 10 points) was held to be unlawful.

**R (Bilverstone) v Oxford CC**
[2003] EWHC 2434 (Admin

It is lawful for an applicant to pursue Part 6 (allocations) and Part 7 (homelessness) applications simultaneously.

**ANNEX 2A – LETTER TO LOCAL AUTHORITIES AND HOUSING ASSOCIATIONS ON EU ENLARGEMENT IN MAY 2004**

All Chief Housing Officers of Local Authorities and Chief Executives of Housing Associations

**July 2005**

Dear Colleague

**EU ENLARGEMENT: ELIGIBILITY FOR LOCAL AUTHORITY HOUSING ALLOCATIONS AND HOMELESSNESS ASSISTANCE**

I am writing to advise you of the Welsh Assembly Government's position regarding statutory provisions as to eligibility for an allocation of housing under Part 6 of the Housing Act 1996 ('the 1996 Act') and eligibility for homelessness assistance under Part 7 of the 1996 Act.

**Background**

As you will be aware, on 1 May 2004 an additional 10 countries acceded to the European Union: Cyprus and Malta, and Poland, Lithuania, Estonia, Latvia, Slovenia, Slovakia, Hungary and the Czech Republic (the 'A8 states'). Nationals of all of these countries have the right to move freely among all Member States of the EU.

Nationals of Malta and Cyprus enjoyed full EU Treaty rights from 1 May 2004. These include the right to seek work and take up employment in another Member State.

Nationals of the A8 States are subject to transitional provisions which allow pre-1 May 2004 Member States to adopt measures which restrict the rights of A8 State nationals to work in their territories and access their labour markets. This is a derogation from the usual position under Community Law and reflects the disparity between the economic situations of the A8 States and those of pre-1 May 2004 Member States.

In February 2004, the Home Secretary introduced measures designed to allow A8 State workers to access the UK labour market subject to certain conditions. The *Accession (Immigration and Worker Registration) Regulations 2004* (SI 2004/1219) (amended by SI 2004/1236) imposed limitations on access by A8 State nationals to the UK labour market by establishing a worker registration scheme.

The *Allocation of Housing and Homelessness (Amendment) (England) Regulations 2004* (SI 2004/1235) required housing applicants in England who were eligible for housing because they were habitually resident in the Common Travel Area (UK, Republic of Ireland, Channel Islands and Isle of Man), to also have a 'right to reside' in the Area.

In broad terms, housing applicants in England who prior to 1 May 2004 were exempt from the requirement to be habitually resident in the Common Travel Area (e.g. nationals of Member States employed or self-employed in the UK), continued to be eligible for allocations of housing / homelessness assistance. The *Allocation of Housing and Homelessness (Amendment) (England) Regulations 2004* however, established an additional exemption from the habitual residence test for persons treated as workers pursuant to the *Accession (Immigration and Worker) Regulations 2004* (SI 2004/1219) (as amended) and the *Immigration (European Economic Area) Regulations 2000* (SI 200/2326) (as amended).

**The position in Wales**

The position in Wales is different to the position in England.

*The Allocation of Housing (Wales) Regulations 2003* (SI 2003/329) – these regulations have not been amended since they came into force on 29 January 2003. Consequently, housing applicants from abroad who are nationals of a country within the EEA continue to fall within the following two categories:

(A) persons who are exempt from the requirement to be habitually resident in the Common Travel Area and who are therefore eligible for an allocation of housing on an 'unconditional' basis; and

(B) persons who are eligible if they are habitually resident in the Common Travel Area. There is no requirement to have a 'right to reside' in one of the countries within that Area.

*The Homelessness (Wales) Regulations 2000* (SI 2000/1079) - the Assembly Government's policy regarding homelessness assistance under Part 7 of the 1996 Act does not mirror its policy on allocations above but rather reflects the position in England. Consequently, certain applicants will be ineligible for homelessness assistance if they are not habitually resident in the Common Travel Area (and such applicants cannot be treated as habitually resident if they do not have a 'right to reside').

Because of the way in which the *Homelessness (Wales) Regulations 2000* (SI 2000/1079) are drafted, they apply by reference to the *Homelessness (England) Regulations 2000* (SI 2000/701) as amended by the *Allocation of Housing and Homelessness (Amendment) (England) Regulations 2004* (SI 2004 1235).

The Assembly's 'Code of Guidance for Local Authorities on Allocation of Accommodation and Homelessness' issued under Parts 6 and 7 of the 1996 Act will be revised to reflect the above.

Contact Geoff Marlow (029 2082 6926, Geoff.Marlow@wales.gsi.gov.uk) for homelessness inquiries arising from this letter or Maureen Haire for inquiries

on allocations (029 2082 6928, Maureen.Haire@wales.gsi.gov.uk).

Yours sincerely

**JOHN BADER**
Director of Social Justice and Regeneration Department

## ANNEX 2B – LETTER TO LOCAL AUTHORITIES ABOUT HUMANITARIAN PROTECTION AND ASSOCIATED REGULATIONS

Local Authority Chief Executives and Directors of Housing

**December 2006**

Dear Colleague

I refer to the following sets of regulations which came into force in Wales over the past few months:

- The Allocation of Housing (Wales) (Amendment) Regulations 2006
- The Homelessness (Wales) Regulations 2006, and
- The Introductory Tenancies (Review of Decisions to Extend a Trial Period) (Wales) Regulations 2006

An overview of the purpose of the regulations and links to each is given below.

**The Allocation of Housing (Wales) (Amendment) Regulations 2006**
**The Homelessness (Wales) Regulations 2006**

These regulations came into force on 9th October 2006.

The regulations are required to give effect to Article 31 'Access to accommodation' of European Council Directive 2004/83/EC and its regulations in respect to Local Authority allocations and homelessness assistance. This Directive lays down the rules for the recognition of refugees and those in need of Subsidiary Protection, and the content of the status to be given to such people. By virtue of Article 31 of the Directive beneficiaries of Subsidiary Protection must be given accommodation under equivalent conditions to other third nationals legally resident in the UK. In this context accommodation includes an allocation of Local Authority housing and homelessness assistance.

Subsidiary Protection is equivalent to the existing category of leave to remain in the U.K. called Humanitarian Protection, which is granted by the Home Office to asylum seekers who do not qualify for refugee status but would be at serious risk if returned to their state of origin. Humanitarian Protection was a form of exceptional leave to remain granted outside the Immigration Rules. The Directive and allocations ad homelessness regulations have the effect of formalising Humanitarian Protection and bringing them within the Immigration Rules.
The Allocation of Housing (Wales) (Amendment) Regulations 2006

I have provided a link to these regulations below for ease of reference:
http://www.opsi.gov.uk/legislation/wales/wsi2006/20062645e.htm

These regulations have amended the Allocation of Housing (Wales) Regulations 2003 by adding a new class 'D1' into Regulation 4 of the 2003 Regulations to provide that a person subject to Immigration Rules under the Immigration and Asylum Act 1996 is eligible for an allocation if he/she has Humanitarian Protection granted under the Immigration Rules.

The Homelessness (Wales) Regulations 2006

I have provided a link to these regulations below for ease of reference:
http://www.opsi.gov.uk/legislation/wales/wsi2006/20062646e.htm

These regulations have revoked and replaced the Homelessness (Wales) Regulations 2000 by adding a new class 'J' into regulation 3 of the 2000 Regulations to provide that a person subject to Immigration Rules under the Immigration and Asylum Act 1996 is eligible for housing assistance if he/she has Humanitarian Protection granted under the Immigration Rules.

The Homelessness (Wales) Regulations 2000 stipulate that "regulations 3, 4, 5 and 6 of the Homelessness (England) Regulations [2000] shall have effect in Wales…". Because of this form of drafting, Legal Counsel advised in 2004 that any subsequent changes to England's eligibility regulations (2000) will also have effect in Wales. Two sets of changes have been made in England since then, which means that the revocation and replacement of the Homelessness (Wales) Regulations 2000 will make explicit via the Homelessness (Wales) Regulations 2006, the following clauses which had previously been implicit:

- Regulation 3(i) Class I deals with a person on income-based jobseekers' allowance or income support and is eligible for the benefit because of limited leave to enter U.K. and temporarily without funds or been deemed by the amending Regulations 2005/1379 – the Displaced Persons (Temporary Protection) Regulations 2005 to have been given leave to enter or remain in U.K. for purposes of provision of means of subsistence. This provision was designed to ensure that the EU can respond quickly and in a regulated manner should there be a mass influx of displaced persons into its territory, similar to that which occurred from Kosovo in 1999.

- Regulation 4 deals with a description of persons who are to be treated as persons from abroad ineligible for housing assistance and are mainly people who are not habitually resident, or whose right to reside is conditional on having no recourse to public funds. This was substituted in the 2000 England Regulations by 2004/1235 – The Allocation of Housing and Homelessness (Amendment) (England) Regulations 2004.

**The Introductory Tenancies (Review of Decisions to Extend a Trial Period) (Wales) Regulations 2006**

These regulations came into force on 17 November 2006.

I have provided a link to these regulations below for ease of reference:
http://www.opsi.gov.uk/legislation/wales/wsi2006/20062983e.htm

Section 179 of the Housing Act 2004 added sections 125A and 125B into the Housing Act 1996. Section 125A allows a local authority to extend an introductory tenancy by 6 months where certain conditions are met (e.g. the landlord has served a notice of extension on the tenant at least 8 weeks before the original expiry date, a notice of extension must set out the reasons for the landlord's decision), and Section 125B allows tenants to request a review of a decision to extend the trial period. Section 125B(3) sets out the procedures to be followed by a local authority landlord in connection with this kind of review.

These regulations provide for:

- an introductory tenant to be entitled to request an oral hearing and how this right should be exercised
- the landlord to give the tenant notice of the review
- the review to be conducted by a person who was not involved in the original decision. If the person conducting the review and the person who made the original decision are both officers of the landlord, the person carrying out the review must be senior.
- how written representations are to be made at the review.
- the procedures to be followed for an oral hearing.

Section 179 was commenced in Wales on 25 November 2005. These powers apply only to introductory tenancies granted on or after 25 November 2005. Therefore, the earliest date by which these regulations may be applied in Wales is 26 November 2006.

I would be grateful if you could ensure that relevant staff are notified of the regulations.

Should you have any queries regarding the allocations or introductory tenancy regulations, contact Jonathan Jones on 01685 729198 or email jonathanc.jones@wales.gsi.gov.uk. In the case of homelessness queries, Geoff Marlow on 01685 729200 or email geoff.marlow@wales.gsi.gov.uk.

Jonathan Jones
Housing Strategy and Services Unit
Housing Directorate

**ANNEX 2 C – LETTER TO LOCAL AUTHORITIES REGARDING REVIEW OF CODE OF GUIDANCE (2003)**

Local Authority Chief Executives and Directors of Housing

**January 2007**

Dear Colleague

**Code of Guidance for Local Authorities on Allocation of Accommodation and Homelessness**

I refer to the above guidance which was issued by the Welsh Assembly Government in April 2003.

As you may be aware, the Assembly Government is in the process of reviewing the Code of Guidance on allocations and homelessness. However, there is likely to be a delay in issuing the revised guidance for consultation until May 2007.

Please note that in terms of allocations, the current review is intended to clarify the available information and add to it. The law and the Assembly Government's policy with regard to allocations at least will remain unchanged. It is essential that authorities do not delay action to make their allocations' policies legally compliant.

The Assembly Government's policy on homelessness is already articulated in the National Homelessness Strategy for Wales 2006-2008. The revised Code of Guidance on homelessness will reflect this Strategy and will bring together other guidance published over the course of 2005-2006. In particular, it will address the Homelessness (Suitability of Accommodation) (Wales) Order 2006, which will be based upon the summary version of this legislation issued to you in March 2006. Strategic planning for homelessness will also be covered in the Code, and again this will reflect the guidance already issued for developing local housing strategies.

Should you have any queries regarding allocations, contact Maureen Haire on 01685 729203 or email maureen.haire@wales.gsi.gov.uk. In the case of homelessness queries, contact Geoff Marlow on 01685 72900 or email geoff.marlow@wales.gsi.gov.uk.

Yours sincerely

Jonathan Jones
Housing Strategy and Services Unit

**ANNEX 3 - ASSESSMENT FORM – LOCAL AUTHORITY ALLOCATION SCHEMES (2006)**

| **LOCAL AUTHORITY** | | **CONCERNS/GOOD PRACTICE?** |
|---|---|---|
| 1. Does the LA operate a common register? | Yes / No | |
| 2. Policy statement | Does the scheme have an overall statement as to the purpose of the scheme: Yes / No. If yes, describe: | |
| 3. Eligibility | Who is eligible/ineligible? | |
| 4. Local connection | Are people refused access to the list if they don't have a local connection? Yes / No.<br><br>Are local connection points awarded? Yes / No<br>Please specify points?<br>Are homelessness points awarded? Yes / No<br>Please specify points?<br><br>Please describe similar comparisons for schemes that do not use points. | |
| 5. Suspensions/ Exclusions/No preference/ Adjusted preference? | Does the scheme refer to any of these (or similar)? Yes / No<br><br>What are the grounds for any of these?<br><br>In your view, are the grounds compliant with the Homelessness Act 2002 in relation to unacceptable behaviour? Yes / No<br><br>If no, please say why: | |

| LOCAL AUTHORITY | | CONCERNS/GOOD PRACTICE? |
|---|---|---|
| 6. Reasonable preference | Are all categories accommodated? Yes. | |
| 7. Additional preference | How are urgent housing needs accommodated? | |
| 8. Priority for rehousing | In determining priority for rehousing are any of the following taken into consideration:<br><br>Local connection - Yes/No. If yes, provide details:<br>Finances - Yes/No. If yes, provide details:<br>Behaviour - Yes/No. If yes, provide details: | |
| 9. Assessment | Are timescales given on action of LA throughout process? Yes / No. If yes, please say what:<br><br>Are references requested? Yes / No. If yes, provide details:<br><br>Please say what other supporting information is required:<br>e.g. proof of id; copies of ten. ags., proof of pregnancy etc. Medical assessments for specialised accomm. | |
| 10. Age restrictions | Are any age restrictions applied to acceptance onto a list or allocations? Yes / No – Please provide details: | |
| 11. Transfer Applicants | Are they treated as for other applicants for housing – Yes / No. If no, provide details: | |
| 12. Nominations to RSLs | Is this referred to in the scheme. Yes / No<br><br>If yes, what percentage of noms do they say should go to an RSL (state where this is a min/max figure).<br>Do they explain what housing associations are? Yes / No | |

| LOCAL AUTHORITY | | CONCERNS/GOOD PRACTICE? |
|---|---|---|
| 13. Member involvement | Is this referred to? How are Members involved? | |
| 14. Mobility? | Does the scheme cover helps with moves outside the local authority area? Yes / No Yes<br><br>Does this apply to all applicants for housing including transfer applicants? Yes / No<br><br>Please specify the formal mobility schemes that are used: HOMES | |
| 15. Is the scheme in Welsh and English? | Yes / No. | |
| 16. Is the scheme offered in different formats (eg on tape, Braille) or in languages other than Welsh/English? | Yes / No. If yes, please provide details: | |
| 17. Staff/Member training? | Is there any information on this? Yes / No<br>If yes, please describe | |
| 18. Monitoring/Review of Scheme | Any information on this (including consultation). Yes / No. If yes, please say what | |
| 19. Is the scheme comprehensive? | If applicable, specify key areas that are missing: | |
| 20. General | Any other comments regarding the scheme regarding:<br><br>Use of jargon<br>Presentation of information<br>Plain Language<br>Other | |

## ANNEX 4 – EXTRACT FROM CODE OF GUIDANCE (2003) – UNACCEPTABLE BEHAVIOUR

### Unacceptable Behaviour

3.14 Most applicants for social housing will not be persons from abroad, and will have been resident in the UK (or elsewhere in the CTA) for 2 years prior to their application. Such applicants, together with eligible applicants from abroad may, at the discretion of the authority, be treated as ineligible by the housing authority on the basis of unacceptable behaviour. There is no obligation on local authorities to implement these provisions and where they do robust procedures are needed to ensure compliance with the law, this Code and the fair and consistent treatment of applicants. Policies regarding the application of sanctions on the grounds of unacceptable behaviour should accommodate the broader Assembly Government policy aims of equality of opportunity, social inclusion and sustainability. Therefore, sanctions to exclude people from social housing should be kept to a minimum and support mechanisms developed to maximise opportunities for people to secure social housing. However, in developing sustainable communities the Assembly Government recognises that housing authorities must also take into account the needs of existing tenants. A decision to treat an applicant as ineligible must be underpinned by compliance with the law and this Guidance, and should be just one of a range of measures used by an authority to address issues of applicants with unacceptable behaviour. Further guidance is given in paragraphs 3.20 and 3.21 below.

### Description

3.15 Under s.160A(7)/*[s.14(2)]*, a housing authority ***may***, where it is satisfied that an applicant (or a member of the applicant's household) is guilty of unacceptable behaviour serious enough to make him or her unsuitable to be a tenant of the housing authority, to decide to treat the applicant as ineligible for an allocation. (Housing authorities should note, however, that where they are satisfied that an applicant is unsuitable to be a tenant they are not required to decide that he or she is ineligible for an allocation; they may instead proceed with the application and decide to give the applicant no preference for an allocation. It is for each housing authority to decide whether this provision is applied. This option is considered further in Chapter 4, paragraph 4.15.

3.16 Section 160A(8)/[*s.14(2)*] provides that the only behaviour which can be regarded as unacceptable for these purposes is behaviour by the applicant or by a member of his or her household that would - if the applicant had been a secure tenant of the housing authority at the time - have entitled the housing authority to a possession order under

s.84 of the Housing Act 1985 in relation to any of the discretionary grounds in Part I of Schedule 2, other than Ground 8 (see **Annex 23** for a list of relevant grounds). These are fault grounds and include behaviour such as non-payment of rent, breach of tenancy conditions, conduct likely to cause nuisance or annoyance, and use of the property for immoral or illegal purposes. Housing authorities should note that it is not necessary for the applicant to have actually been a tenant of the housing authority when the unacceptable behaviour occurred. The test is whether the behaviour would have entitled the housing authority to a possession order if, whether actually or notionally, the applicant had been a secure tenant.

**Test of unacceptable behaviour**

3.17 Where a housing authority has reason to believe that s.160A (7)/[*s.14(2)*] may apply, there is a three stage test before the power to exclude (or not afford any priority for re-housing) can be used.

(i) **Where there is evidence of unacceptable behaviour, was it serious enough to have entitled an authority to obtain a possession order?**

Authorities will need to satisfy themselves that there has been unacceptable behaviour which falls within the definition in s.160A(8)/[s.14(2)]. If a Court has already made a possession order on one of the discretionary grounds, then an authority may accept that as evidence of unacceptable behaviour, and proceed to paragraphs (ii) and (iii) below.

a) **Grounds for Possession**: In considering whether a possession order would be granted in the circumstances of a particular case, where no possession order has been made, the housing authority must first ask itself whether one of the discretionary grounds for possession (see **Annex 23**), would have been established. This would require the housing authority proving to the court, on the balance of probabilities, (i.e. it is more likely than not) that, for example, the property was used for immoral or illegal purposes, or the tenant caused a nuisance or annoyance to neighbours. If the housing authority are not satisfied that, on the information it has about the applicant (or a member of the applicant's household), it would have been able to prove one of the grounds for possession, the applicant cannot be guilty of unacceptable behaviour as per s.160A(7).

b) **Reasonableness**: If the housing authority is satisfied that, on the information it has about the applicant (or a member of the applicant's household), it would have been able to prove one of the grounds for possession, it then has to consider whether the court would have decided that it was reasonable to grant a possession order. The court can only grant a possession order if

it considers it reasonable to do so. In deciding whether it is reasonable to grant possession, the court must have regard to the interests and circumstances of the tenant (and their household), the housing authority and the wider public. If the housing authority is not satisfied that the court would decide it was reasonable to grant a possession order, the applicant cannot be guilty of unacceptable behaviour as per s.160A(7).

(ii) **Was the behaviour serious enough to render the applicant or a household member unsuitable to be a tenant?**

Having concluded that there would be entitlement to an order, the housing authority will need to satisfy itself that the behaviour is serious enough to make the person unsuitable to be a tenant. To do this, the authority needs to satisfy itself that if a possession order were granted it would have been an outright order. Where an authority has reason to believe that the court would have suspended the order, then such behaviour should not be considered serious enough to make the applicant unsuitable to be a tenant.

Possession orders are often suspended in rent arrears cases to give tenants an opportunity to clear the rent arrears. This is particularly true where:

a) the arrears are relatively modest, and/or

b) have been caused by delays in housing benefit, and/or

c) the tenant does not have a history of persistently defaulting on rent payments; and/or

d) the applicant was not in control of the household's finances or was unaware that rent arrears were accruing or is being held liable for a partner's debts; and/or

e) the housing authority has failed to take steps or provide advice to help the tenant pay their rent.

Similarly, courts are generally inclined to suspend a possession order in respect of anti-social behaviour where:

a) the allegations of nuisance are relatively minor; and/or

b) the nuisance was caused by a member of the household who has since left; and/or

c) the court is satisfied that the imposition of a suspended order will serve to control the tenant's future behaviour.

(iii) **Is the behaviour unacceptable at the time of application?**

Finally, if satisfied that the applicant is unsuitable to be a tenant by reason of the unacceptable behaviour in question, the housing authority must have regard to the circumstances at the time the application is considered and must satisfy itself that the applicant is still unsuitable at the time of the application. Previous unacceptable behaviour or even an outright possession order, may not justify a decision to treat the applicant as ineligible where that behaviour can be shown by the applicant to have improved. A policy of treating all those evicted on one of the discretionary grounds as unsuitable is likely to be unlawful.

3.18 Only if satisfied on all three aspects, can a housing authority consider exercising its discretion to decide if the applicant is to be treated as ineligible for an allocation. In reaching its decision, an authority must act reasonably. That means it must consider each application on its own merits. It must have regard for each applicant's personal circumstances (and the personal circumstances of the applicant's household), including his or her health and medical needs, dependants and any other factors relevant to the application. In practice, the matters before the housing authority will include the information provided on the application form and supporting information.

3.19 If an applicant, who has, in the past, been deemed by the housing authority to be ineligible, considers his/her unacceptable behaviour should no longer be held against him/her as a result of changed circumstances, he/she can make a fresh application. Unless there has been a considerable lapse of time it will be for the applicant to show that his/her circumstances or behaviour has changed. What constitutes a considerable lapse of time, will depend upon the individual circumstances of the case and in particular the nature of the unacceptable behaviour.

## ANNEX 5 – RESTRICTING ACCESS TO SOCIAL HOUSING DUE TO BEHAVIOUR – A NOTE ON TERMINOLOGY

There is considerable confusion around the terms used to describe the different means by which local authorities may restrict access to council housing as a result of unacceptable behaviour. This note gives the Assembly Government's position on this with the aim of promoting consistency of terminology across local authority landlords.

It is the Assembly Government's view that the majority of local authority decisions to restrict applicants' access to social housing because of their (or household members') behaviour will be time limited and is effectively a '**suspension**' from accessing housing. Suspension should be reserved for cases in which an applicant will not receive an allocation for a prescribed period. Thus, a decision not to give an applicant any preference for housing does not preclude a landlord from making an allocation and is therefore not a suspension. The term '**no priority**' might be used to distinguish applicants awarded no preference but who may receive an allocation from applicants who have been suspended.

Decisions to restrict access to housing indefinitely or with a time restriction exceeding a landlord's prescribed period for suspension is called '**exclusion**'.

The law does not define a 'prescribed period' for suspension so it is for each landlord to define the maximum period for suspension and their reasons for it. It would be good practice for suspended cases to be reviewed at least annually to determine whether the decision to suspend remains valid.

Authorities should make provision to accommodate a suspended or deferred applicant's change of circumstances or behaviour which might affect their eligibility to be a tenant. Paragraph 3.19 of the Code of Guidance (2003) states '*If an applicant, who has, in the past, been deemed by an authority to be ineligible, considers his/her unacceptable behaviour should no longer be held against him/her as a result of changed circumstances, he/she can make a fresh application. Unless there has been a considerable lapse of time it will be for the applicant to show that his/her circumstances or behaviour has changed. What constitutes a consider lapse of time, will depend upon the individual circumstances of the case and in particular the nature of the unacceptable behaviour*'.

**Power to Suspend, Give No Priority, or Exclude**

Applicants (or household members) found guilty of unacceptable behaviour serious enough to make them unsuitable can be suspended from accessing housing by virtue of s.160A(7) of the Housing Act 1996.

The same test enables authorities to remove an applicant's priority (ss.167(2B) – (2D) Housing Act 1996).

Decisions to suspend or give no priority must be informed by the test of unacceptable behaviour (see **Annex 4** for more information).

**Adjusting Priority**

In taking unacceptable behaviour into account in the allocations process, there is no obligation placed on authorities to suspend applicants in the ways described above. Rather local authority landlords can adjust (not remove) an applicants' preference for housing where their behaviour affects their suitability to be a tenant.

**Power to Adjust Priority**

The power to adjust an applicant's priority for housing is contained in s.167(2A) of the 1996 Act.

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