Housing Law Practitioners' Association

Minutes of the Meeting held on 17 July 2013
Fyvie Hall, University of Westminster

Allocations: The New World

Speakers: **Catherine Rowlands, Cornerstone Chambers**
Giles Peaker, Anthony Gold Solicitors

Chair: **Ian Greenidge, Mary Ward Legal Centre**

Chair: Welcome to tonight's meeting on the topic of Allocations: The New World. Before introducing our speakers, could I ask if there are any amendments to the Minutes of the last meeting? Thank you. Our first speaker probably needs no introduction as he Giles Peaker, the HLPA Chair, founder of Nearly Legal and a partner at Anthony Gold. Our second speaker is Catherine Rowlands, who has been practising at the Bar for over 20 years and is currently at Cornerstone Barristers. She has been involved in a number of leading housing cases and she also advises councils on homelessness and allocations, so we will have a cross-view this evening from both sides. Catherine will speak first and will look predominantly at the legislation and Giles will then look at a specific case study in respect of Barnet. Without any further ado I will introduce you to Catherine Rowlands.

Catherine Rowlands: This is intended to be a fairly simple exposé of the various legislative provisions and a few cases relating to those. Effectively, I am the straight man and Giles will give the interesting anecdotes about Barnet. Think of us as Morecambe and Wise with me in the role of Ernie Wise telling you about the allocation policy what I wrote. I have had the pleasure of advising various councils on their allocations policies over the past few years and I can tell you it is no fun being a local authority and having to draft these policies. They work extremely hard on them, then they send them off to me or somebody like me and we tell them, no you can't do that or you should do that. At least when I send them back they have all the apostrophes in the right place, if nothing else. So here we are, two years after the Localism Act came into force; what effect is this having? I think many local authorities at the moment are sitting tight and waiting to learn from people like Barnet who have bravely taken the plunge and Giles will tell you more about the plunge that they have taken.

So we will start with the Localism Act 2011 and you will recall that 2011 was fairly grim; it was raining outside, the Olympics had not started yet and we all thought it was going to be disaster, Andy Murray was never going to win Wimbledon so to cheer us up the Government introduced the Localism Act; a jolly little bit of legislation which covers a huge range of topics. It includes provisions that define the general competence of local authorities; local authorities can do anything a person can do, basically. It covers governance and standards for local authorities; it covers community empowerment, things like the community right to challenge and referendums on council tax increases that really have not had any effect at all on our day to day lives. It has a huge section on planning and a huge section on housing so it is all about trying to take decisions at the lowest possible level; at least that is what the Government says it wants to do. When you look at the Localism Act it is not so much 2011 that sometimes comes to mind but 1984. You will remember that in 1984 George Orwell told us about the principle of double-think; the power of believing two contradictory things at the same time. Sometimes when you look at the Localism Act and the way it has been shoe-horned into the existing provisions in relation to allocations a bit of double-think is required.

So in relation to housing it covers six main headings; it includes allocation and homelessness at its first topic, it includes tenure reform in social housing. That is to say the introduction of flexible tenancies and, of course, those two really match up together. It includes housing finance and housing mobility, the new Regulation of Social Housing and a few other odds and ends. So in relation to the topic under consideration tonight, there are four main principles we are supposed to have in mind. The first idea is

that the Localism Act was intended to give local authorities more discretion in relation to allocation policies so that they could better manage their waiting lists. It was to promote mobility for existing social tenants by removing restrictions on transfers. It was intended to enable local authorities to more easily discharge their duties to homeless people in the private rented sector. I know that back in January you had a whole session devoted to that issue so I shall not say anything more on that. Of course, the Government has handed down Guidance on the allocation of accommodation with the signature of the Right Honourable Grant Shapps MP all over the second page after the Ministerial forward and chapter 2 tells you what those priorities are. One of the priorities that is set out at the head of the chapter is to maintain a protection provided by the statutory reasonable preference criteria that already existed in the previous legislation, so ensuring that priority for social housing goes to those in the greatest need. So that need is therefore maintained and respected but at the same time we are looking at encouraging mobility and more discretion given to local authorities to promote the interests that they see as relevant to their local areas.

So with regard to the statutory framework, the Localism Act inserts itself into the existing Part 6 of the Housing Act of 1996 that you are probably all familiar with. Local authorities must have an allocation scheme for determining priorities between applicants and which sets out the procedure to be followed when allocating homes. It is not a duty to maintain a waiting list; when you talk about allocations most people think this means sitting on the waiting list. "I have been on the waiting list for 20 years and the council still hasn't given me a house". But it is not necessary, actually, to have a waiting list, not a ladder that you climb up to eventually come to the top. Think of it more as a pool of people waiting for an allocation. So who can be the recipient of an allocation of social housing? 160ZA is the new Section in relation to this. So local authorities must only allocate to eligible persons; that is to say eligible in the immigration sense and that is a national definition. That applies to all local authorities, there is no discretion to a local authority to decide it wants to allocate to foreign nationals, for example. Local authorities now, and this is the real innovation of the Localism Act, should only allocate to qualifying persons and this is the local definition. This is where the local authority decides who it wants in its nice council houses, its nice social housing. So the local authority is given flexibility to determine who it wants to allocate to but, again, it is subject to national over-riding criteria and it should not include classes with reasonable preferences; classes of people who are defined as having reasonable preference for social housing must not be excluded by the qualifying person's aspect of the policy. So it is suggested that local authorities were crying out for this power to determine who was qualifying persons. That is not really my experience, I have not heard that cry from any local authorities myself.

I have put in the text of 160ZA for your edification. You will see that it includes the mixture of the over-riding and the local qualifying statuses. So a local authority now has the power to include people in or exclude people out and one thing that is suggested is that unacceptable behaviour could exclude you out of social housing. Now you will recall that the Housing Act used to have ways of excluding people out; it was basically behaviour that was so bad that it would have you evicted from your social housing. It is now a lot more flexible; the local authority can really make its own definitions. You will recall the riots and on the back of those riots people kept coming up to me and saying, "Oh housing lawyer, you must be really busy now because of those riots?" I kept saying to them, "no, no, no, local authorities don't want to evict somebody for one incident on one crazy day." "Oh really!" they said, surprised. They thought that local authorities had that power to evict somebody for a one-off incident. But this is, perhaps, a way that local authorities could give themselves the power, not to evict obviously, but to not allocate to somebody who had been guilty of a one-off incident. It is a lot more flexible in terms of what definitions someone can use for unacceptable behaviour. The other side of it is not having local connection; for example, in Wandsworth it is now a qualifying factor that you should have resided in Wandsworth for the two years prior to your application and the Government's avowed intention here is to remove foreign migrants and to prioritise local people to ensure that local people get first choice on the properties within the local area.

So this is where I say aspects of double-think come in, because at the same time as saying we need to prioritise those in most need, such as someone who needs to flee violence, we are looking at keeping people where they are. Again, we want to prioritise mobility but we want to prioritise those who are not being mobile. So there is a certain contradiction inherent in the criteria set out in the Act. One thing that should be noted is that Armed Forces and the bereaved spouses of Armed Forces personnel are an exception to the local connection criterion. If they do not meet the two years or whatever the criterion may be for applying then that must be over-ridden because Armed Forces are entitled to special treatment.

Now there have been a couple of challenges in recent times to exclusion from allocations on the basis of unacceptable behaviour. One was the case of *Khana v Bolton at Home Ltd* and the reference for that is [2012] EWHC 2553 (Admin). This was a young woman who was barely into her majority and she had been a very naughty girl in her past and she challenged the exclusion from allocations just to a specific area of the Bolton at Home pilot. Bolton at Home had not said "We are not allocating anything to you at all", they had just said, "We are not allocating to you anything in that area because that is the area that you get into trouble". That challenge was brought on very basic judicial review grounds such as irrationality, not given a chance to consult etc and most of the challenges failed. That was an example of the exclusions standing up to judicial scrutiny. In *Cranfield-Adams v Richmond,* which was not under the current Localism Act provisions but before those came into force, a man had applied as homeless. Richmond has a policy of making one offer to homeless people and they made him an offer, he refused and they did not make him another offer then for two years. That was upheld as well. The Court said that it was not irrational to defer a further offer for two years in circumstances where someone who had one suitable offer, ex hypotheses, and had refused it, and given the extreme pressures on the waiting list. So we see from these cases the kind of approach that the Courts will give. Lots of credit being given to local authorities for the fact that they really are under the cosh and lots of problems of allocation; more people applying than there are homes for, as we all clearly know about.

It is suggested, then, that there should be preference given to other qualifying classes. People who are making a community contribution, which is such a vague term, but then the suggestion is that these are people who are essential key workers, nurses and people like that, and priority should be given to foster carers or adopters who need to provide a home for a vulnerable young person. One that really strikes me as unrealistic is under occupiers moving out of social housing into private rented, smaller accommodation with the hope that they will then move back in later. So if your council cannot provide you with a smaller house because of the bedroom tax, and we all know what those problems are at the moment, and you move into private rented you should be given priority to move back into council housing later. It seems to me extremely unrealistic to think that you would be able to move back at a later stage. Then priority to those in work in education or in training who are going to build up the community, who are going to be an asset to the community; again, rather vague and very hard to define. Also those moving out of adapted and supported housing should be given priority, obviously in order to free up those types of accommodation.

Now, as well as having qualifying persons the allocation scheme has to look at those with reasonable preference. Reasonable preference towards people who are homeless, including, and you have no idea how hard it has been to convince certain local authorities of this, those who are intentionally homeless still get a priority and those who are in unsatisfactory housing conditions, those who need to move on medical, welfare or disability grounds and those who need to move for urgent reasons. The authority now has the power to build additional preference inside the reasonable preference categories into this increasingly byzantine scheme. Different degrees of over-crowding, for example, being forced to move urgently because of threats of violence or even though you need to move, you have your own financial resources where you could find your home, so you might be able to knock those people down in priority and those who need to move for urgent reasons but have also been guilty of bad behaviour.

Finally, the principle I mentioned earlier that existing tenants now seeking a transfer do not have to be dealt with under the allocation scheme unless they are within the reasonable preference categories. So there is no statutory guidance dealing with transfers now with people who just fall within the normal basis, if you like. The intention of taking transfers out of the scheme is to promote flexibility and mobility. So local authorities now have to balance people transferring, people with reasonable preference, people with qualifying status, people without qualifying status, people with increased/decreased preference; how do you do it all? It is really difficult for a local authority to produce that kind of scheme and there are a thousand pitfalls.

What is reasonable preference? What does the local authority have to achieve by their scheme? The definition of reasonable preference was considered by the House of Lords in *R (Ahmad) v Newham LBC* only a few years ago and it was said in that case that the Act only requires a "reasonable preference" to be given to a particular group of people. It is not a guarantee of accommodation and it says "It cannot be said that a scheme for identifying which individual households are in greatest need at any particular time is the only way in which a reasonable council might decide to give reasonable preference to those groups. It is the groups rather than the individual households within them which have to be given reasonable

preference." It does not require absolute priority over everyone else. Other factors, like being a nice person, can be taken into account as long as they do not dominate the scheme and overall your scheme ensures that the reasonable preference categories get reasonable preference over those who do not fall within that category. In a later case, *Babakandi v Westminster City Council* [2011] EWHC 1756, Mr Babakandi had been waiting for an offer of accommodation for three years and he said, "I'm in a reasonable preference category, I'm entitled to accommodation." That did not assist him; the Court in that case held that you have to look at it over a period of time, over a number of people, not just in relation to one applicant. It is how the scheme works as a whole that has to be the subject of a challenge and not individual cases which, of course, makes finding a challenge that much more difficult. That may well be, of course, why there has been little challenge to allocation schemes since the case of *R (Ahmad) v Newham LBC*.

So when you are balancing the needs of those qualifying and those in need it is very important to take an evidence based approach. On Monday morning you may have all been listening to the radio and heard Iain Duncan Smith say that evidence approach is not the way to deal with things. He just said, "I believe that my approach is right, I have seen the evidence and I know it does not say what I say it is but I believe it does so I am right because I believe I am right". Local authorities who proceed on that basis are going to come a cropper very quickly. So it is really important that a local authority is able to show the workings, if you like, the number of properties that they have at their disposal, the people who are looking for that kind of property, breaking down into categories, breaking down the property into categories and the people into categories. Who falls within the category? Then look at what categories the local authority wants to prioritise. What are the needs in the locality? If you give huge priority to nurses, why is that? Why is your local area so in need of nurses living locally? Do you have a huge accident and emergency hospital within your area? The Guidance exhorts the local authority to have regard to the problems created by a needs based approach. We are back in double-think territory here because we are told, of course, that one of the aims of the Act is to protect those in the greatest need but then at the same time we are told that a needs based approach creates ghettos. It creates a situation where those who are in greatest need get the housing, so you have people who are vulnerable and poor and not really the kind of up and coming achievers that the Localism Act is trying to bring into council housing. So although you have to prioritise those in the greatest need you are not supposed to disregard the problems that that approach can take. So again, it is very difficult for a local authority to balance. It seems that in the recent case law there has been something more of a move away from looking at needs. It is not a question of who needs council housing, social housing, most; it is a question of what is the best thing to do with the council housing looking at it from maybe the resource rather than the person's point of view.

When drafting a policy it is hugely important for the local authority to be as flexible as possible and that really means taking a broad brush approach to defining categories. If you get too tight a definition you are liable to exclude people and find that you have a big hole in your policy which could have been filled simply by changing your definitions. The starting point for the allocation policy must, however, be the tenancy strategy which the local authority must formulate in partnership with other local registered providers. That must set out the matters to which registered providers in the authority's district must have regard to when formulating policies in relation to the kind of tenancies that they grant, the circumstances in which they do so, the length of terms that they grant tenancies for and when they will grant a further tenancy. Now this, obviously, takes us back to the second part of the Localism Act, the housing section, which is Tenure Reform and the introduction of flexible tenancies. Flexible tenancies is a topic on its own so I am not going to say too much about this but the idea is, of course, that it is the abolition of the council tenancy for life. It is getting people out after a particular period of time so as to encourage them to be mobile, to move on to somewhere else, and to aspire to better things than a council house. It aims to encourage mutual transfers between localities and to provide support for those with the lowest income so council housing is there, again, for the needs of those with the lowest income and when they are no longer in that need, move on and let somebody else have the house.

We have all heard stories about the Trade Union leader who is earning £100,000+ still living in a council house. Should you not move out and leave it for somebody else? Well if you had been given a flexible tenancy in the first place then the local authority would be able to do that. What bothers me on this is how are we going to monitor that? How can the local authority keep tabs on who is working and what they are earning? If they not actually claiming housing benefit, how do you know whether somebody has reached a particular earning level? Even if they are claiming, how do you know if they are telling the truth? So flexible tenancies are shoe-horned into the Housing Act 1985; they are sections 107A to 107E. They are

to be granted for a minimum two year term. When it was discussed in Parliament it was declared that it would normally be five years but the Act actually says two years and it does seem that in practice those who are adopting flexible tenancy schemes are going for five years. There is a right of early termination if the tenant wants to get out and after the expiry of that five year period or whatever it is, a statutory periodic tenancy arises but the local authority can seek possession. A local authority has a broad discretion whether to have flexible tenancies or not. Some of them are fighting shy of it because it does include more paperwork which is not the local authority's favourite thing. It does mean, like introductory tenancies, keeping an eye on people to see how they are managing their tenancies. Interestingly, it does not need to be brought in over all their stock; you can give flexible tenancies, for example, in relation to supported housing and then at the end of the two or five year period you could review what the need is after that. And it does not have to be the same tenancy for everybody.

So allocation schemes must be published. Obviously the internet these days makes that terribly easy. It should be in plain English. As I said at the outset, make sure your apostrophes are in the right place. It must have regard to equality issues; this is something that really exercises local authorities. They have to remember, for example, to include civil partnerships as well as spouses and those living on a civil partnership basis. Any amendments must be publicised and local authorities need to ensure that advice and information for people is available free of charge in their area. Local authorities have to keep the scheme under review and this involves record keeping and constant monitoring that you have the right data. How will all this work in practice? At the moment we are standing on the brink of these changes really beginning to filter through to the Court. What will be the effect of having flexible tenancies? Will there be challenges to the offer of flexible tenancies, challenges to the term of flexible tenancies, challenges to the ending and the refusal of renewal of flexible tenancies and how will that fit in with allocations policies? That is something that I will be watching with great interest. What will be the effect of the bedroom tax and the welfare cap on these questions of mobility and need and homelessness, priorities to be given to people who are most vulnerable? And how is it going to wash with the public? Most people think that if you are on the waiting list long enough that should be enough to get you into social housing. Some people feel that the priorities are unfair; why should he get preference over me? I am more important than him; my problems are bigger than his. There is also likely to be a certain degree of resistance to the grant of flexible tenancies because people are very used to social housing being for life. So how is will this work out in the next few years? Hopefully I will be able to come back and tell you more about that in a couple of years' time.

Giles Peaker: I am going to take us, plunge us even, Icarus style, from the lofty heights of statute to the painful, grubby, should we say shifting conditions on the ground. What I will be taking us through is a case study of an allocation policy; one of the few which has actually been produced, post-Localism Act, with considerable changes adopting a number of the techniques of the Localism Act.

The stated purpose of the Localism Act amendments was to enable "a more focused waiting list which better reflects local circumstances". But it should not be a surprise to see that the divergences in proposed allocation policies are broadly along political lines, certainly in London, rather than being driven clearly by local circumstances. Neighbouring councils can have quite different approaches with the result that eligibility for social housing and priority within a list can vary from one side of the street to another. The divide in London, at least, unsurprisingly, seems to be between some Tory boroughs on the one hand and Labour boroughs, with some exceptions, on the other and conditions for qualifying, additional preferences and implementation of flexible tenancy policies being the main difference. Those most keenly pursuing the Localism Act possibilities, you will not be surprised to learn, include Wandsworth, Westminster, Hammersmith & Fulham and our friends for this evening, the London Borough of Barnet. I think the revised policies bring along with them new issues and, indeed, new potentials for challenge. We will, hopefully, see some of these coming up as we go along.

The London Borough of Barnet, as an example, introduced a revised allocation policy as of November 2012. Here it is, rather hubristically termed The Full Rules and I can safely say it has not been in front of Catherine because it has misplaced far more than apostrophes. They also implemented their flexible tenancy strategy in July 2012 which, I think, was the first. They apparently consulted between January 2012 and April 2012. I have seen no consultation document but they were, of course, obliged to take into account the views of the other social housing providers in Barnet or those otherwise affected, how they did that I do not know. Nonetheless, their tenancy strategy came into force in July 2012, announced with a press release stating this is the end of the tenancy for life. They are currently consulting on their new

allocation policy on reducing what we will see is their two offer basis to one offer and on offering private sector out of borough accommodation where affordability is an issue. They ended their choice based letting scheme in November 2011; the current scheme operates by direct offer with two offers of suitable accommodation made at least subject to the current consultation. Barnet's old waiting list had some 14,500 people on it. There are no figures as to the scale of the new list that I have been able to find but as will no doubt become clear as we go through, I think it is considerably smaller.

So let us go through the main areas of the changes in Barnet's scheme. If you are looking through my notes, anything that appears in square brackets is definitely me and not Barnet so do not get confused. Qualification, as well as the usual exclusions on eligibility grounds, in particular immigration status as Catherine has set out, Barnet's list of those excluded from the housing list includes. You will find the list in my notes from a. to l.: (a) applicants with no local connection to Barnet save for those in Band 4, which we will come back to; (b) applicants who are overcrowded by only one bedroom and this is their only housing need; (c) anyone who has been convicted of housing and welfare benefits related fraud where the conviction is unspent; (d) applicants who have refused two reasonable offers of accommodation. They do not have to wait; they are disqualified. The list continues with:

(e) Homeless applicants found to be intentionally homeless.
(f) Homeless applicants to whom the main homelessness duty has been ended due to refusal of a suitable offer.
(g) Homeless applicants placed in long-term suitable temporary accommodation under the main homeless duty, unless the property does not meet the needs of the household or is about to be ended through no fault of the applicant; this is an interesting one.
(h) Applicants with lawfully recoverable arrears or other housing related debt.

Then there is (i) an income limit. If you are a household with child or children your household income has to be below median Barnet earnings, currently £36,200. A single person or childless couple and household income has to be below Barnet's median earnings less 15%, currently £30,770. A slight digression but if I remember rightly, Shelter's analysis of affordability of boroughs found that to be able to afford a two bedroom private flat in Barnet without paying most of your income for it, you would have to be earning about £44,000 so there is a little gulf there.

The final categories are:

(j) Homeless applicants but assessed as having no priority need under homeless law.
(k) Applicants who owe arrears of rent or other accommodation charges to the council, although they will take into account the size of the debt, the means to pay and the degree of need.
(l) Applicants in breach of another condition of their tenancy agreement and this is accepted by both parties. Any condition of their tenancy agreement? Apparently so. Barnet does say that they have a discretion retained to waive these categories in exceptional circumstances.

Now some of those exclusions are clear; others are troubling. Under local connection, Barnet appears to have not, as yet, even though it was in force before they published their scheme, taken into account the requirements of the Allocation of Housing (Qualification for Criteria for Armed Forces) (England) Regulations 2012, in force from August 2012, which provides that local connection requirements do not apply to anybody serving in the Armed Forces or has recently ceased to reside in MOD accommodation or where their spouse or partner was a member of the Forces, and so on. This was actually spelt out in the Allocation Code of Guidance 2012 as well. That appears to have escaped this scheme.

The overcrowding by one bedroom at b. is unclear. By what standard? The policy does not state. If this is statutory overcrowding how on earth is this reasonable, how does this not fall under the reasonable preference category for overcrowded conditions, which is stated at 4.4 (c) of the Allocation Code of Guidance, let alone be excluded from qualification? The disqualification at d. for anybody refusing two suitable offers does in fact last for 12 months, except where there has been a material change in circumstances, they do not necessarily say. I spent some time going through this document and there are points where it becomes opaque where I have been reduced to banging my head on the desk and this would be one of them. So you will not be reconsidered for housing under the allocation scheme for 12 months from the date that the council notified their decision except where there has been a material change in circumstances such that the offer of rehousing would no longer be suitable, for example,

enlargement of household, deterioration in health. Does this mean, if the circumstances had changed at the time of the second offer, that offer would not be suitable? But if that were so, it would not have been a second offer. But if the circumstances changed during the 12 months suspension, does this mean a retrospective reassessment of the suitability of the last offer?

With regard to homeless applicants placed in long term suitable accommodation, the policy goes on to state that a non-exhaustive list of long term temporary accommodation includes private sector properties let via the council or a housing association under a leasing arrangement and non secure tenancies on the regeneration estates. I find it hard to see any basis for this; there is no discharge of duty, a full duty is owed, the person is homeless and in temporary accommodation. Why is this not a homeless, reasonable preference under 4.4 (a) of the Guidance? How come exclusion not simply not getting a reasonable preference but actually not qualifying on the basis of an apparent security of temporary accommodation? Homeless applicants assessed as having no priority need. As Catherine has made clear and as does the Guidance stating at 4.4 (a) reasonable preference must be given to "people who are homeless within the meaning of Part 7 of the 1996 Act (including those who are intentionally homeless and those not in priority need)." Barnet's exclusion from qualifying of "homeless but not in priority need" seems to run directly contrary to that.

There has to be a local connection. This is specified as living in the borough through their own choice for a minimum of 2 years up to and including the date of their application or the date on which a decision is made on their application. Accepted homeless households placed by this authority in accommodation outside Barnet will have a local connection so long as they fulfil the 2 year residential qualification and the time spent out of borough where Barnet has placed them out of borough will count as Barnet time. There is an exceptional hardship exception if you really, really, really need to move to Barnet, but those who will not normally be considered as having a local connection are those placed in Barnet in temporary accommodation by another borough, those placed in Barnet in residential or supported housing by another borough, secure or flexible tenants of other boroughs and those who do not meet the residential criteria but who have family members in this borough. So if you have had the misfortune to be placed in Barnet by another borough in temporary accommodation you might have been there for 2 years but you are not a Barnetian. You have no local connection because you have not been there through choice; you have to want to be in Barnet and have acted upon that.

A decision that an applicant does not qualify is subject to a review process, as has been mentioned, and we will come back to the review process in a moment. So, assuming you qualify, how does the preference and priority part of the scheme work? You will find Barnet's housing bands in a table headed Annex 1 at the end of my notes. I do not propose to go through them in immense detail; there are some distinct peculiarities. Band 1, as you might expect, is to some extent the management band, it is where people need to move for emergency medical reasons or disability, exceptional circumstances, welfare and hardship and exceptional need to move, whether it is domestic abuse, extreme violence or extreme harassment. Extreme? Disability, need to move on hardship grounds, release of an adapted property, statutorily overcrowded, acute overcrowding, which is three bedrooms short of Barnet's bedroom standard and then private sector properties in insanitary or unfit conditions which is defined as where the council's private sector housing team has determined that the property poses a category 1 hazard under the HHSRS. Under-occupation, whether looking to release an under-occupied property, major works or demolition so decant or foster carers approved by the council where they need a move, basically, to be able to provide foster care. Of course, they will then be subject to the bedroom tax but that is another issue.

Let me just take you back to private sector properties in insanitary or unfit conditions. Strangely enough, we then find in Band 2, lesser priority, applicants living in unsatisfactory housing lacking basic facilities. This is applicants without access at all to any of the following facilities: a bathroom or kitchen, inside WC, hot or cold water supplies, electricity, gas or adequate heating. All of which sound like category 1 hazards under the HHSRS. There will be some interesting banding decisions going on there as to whether your mould is a category 1 hazard moving you into band 1 or your absence of a toilet or kitchen puts you into band 2.

Barnet's preference tables basically are for people with a reasonable preference only; there is no other category. So if you do not fall under one of the reasonable preference categories from Section 166A (3) Housing Act 1996 as amended, not what Barnet refers to as Section 167(2) preferences, that is Welsh.

Barnet apparently considers that they have moved to Wales. If you do not fall into one of those reasonable preference categories you will not be on Barnet's list. This has some fairly interesting ramifications as we will see when we come to Band 4. A further significant element is that their scheme awards an additional preference for community contribution. Again, Catherine talked about community contribution; here is where we see that rather nebulous concept in action. The terms of that are in Annex 3, which you will also find at the back of the notes.. What is counted as a community contribution is pretty strictly defined, employment being at least one member of a household in employment or self-employed for six of the last twelve months, it does not say whether full or part-time. Voluntary work, because this is Big Society Barnet, must be for a minimum of ten hours a month but can only be with a not-for-profit organisation that is registered with volunteer centre Barnet, or recognised by the council or a charity registered with the Charity Commission, or funded by the council or another local authority, or a faith-based community group or organisation. That may include tenants and residents associations which are constituted or classified as not-for-profit organisations. They must be registered with Barnet council or a registered social landlord. So you have a fairly clearly prescribed set of groups for which you can volunteer for your ten hours a month. There is a possible community contribution preference for what are politely described as older residents or the disabled where frailty or disability prevents them from working or, presumably, volunteering but this decision is left as an exercise of discretion by the housing officer. There is also an age distinction drawn; if you are under twenty-five you have to be volunteering twenty hours a month for at least six months rather than ten hours a month if you are over twenty-five, take that youth!

Registered foster carers are acknowledged as performing a community contribution but, of course, bedroom tax still applies. On ex-service personnel, applicants who have served in the British Armed Forces and lived in Barnet for at least six months prior to enlisting will qualify for a community contribution award automatically unless they have been dishonourably discharged. They are going to check with the Royal British Legion.

Now the lowest band, Band 4, is reserved for those owed a full housing duty under Section 193(2) but without a local connection and this was that exception to the local connection on the qualifying list. The scheme points out, helpfully, that this is very unlikely to result in an offer of social housing but applicants may be helped to find a home in the private rented sector. There has to be a question, I think, as to how far this can actually be described as a reasonable preference. It is the lowest band for those considered to qualify for the housing list and there is, quite simply, nobody to be preferred to, whether it is as an individual or as a group, you are the bottom. So how far this counts as reasonable preference is a moot point. It also appears to be putting into action the suggestion made by favourite DCLG advisor (liable advisor, Andy Gale) that councils should ensure that the reasonable preference for accepted homeless cases is to be reduced to the bottom of the reasonable preference groups to ensure that a social housing offer does not come before a private sector offer. You will find the source for that on Nearly Legal. It is also worth noting that an offer of private sector accommodation, even out of borough, can be considered as a reasonable offer for the purposes of the allocation scheme as a whole, not just for homeless discharge. Applicants may be offered a property in the private rented sector; these are subject to specific regulations protecting the health and safety of tenants which they will tell you about on request. There is, I think, notably no description of the process or rebanding in a change of circumstances. Whether there would be a rebanding or whether one would, effectively, have to make a fresh application is not clear.

Reviews and appeals; Section 166A(9)(c) provides that the applicant has a right to request a review of a decision that they are not a qualifying person. There is no prescribed mechanism for an appeal unlike Section 202, 204 of the 1996 Act. Barnet, rather less than clearly, appear to have both reviews and appeals depending upon which paragraph you are looking at. The relevant section of the policy is attached; you will find the procedure for appeals and reviews at the back. The mechanism for a review, at 5.4, appears to be clear enough. It is written submissions and a fifty-six day review period and remember this is on a decision that you do not qualify. The only way to challenge a negative review or indeed the way that the review was carried out will, of course, be by judicial review. Unsurprisingly, Barnet does not mention that. It is a little hard to know what to make of reviews and/or appeals of suitability of offers of accommodation. These are sequential paragraphs, where an applicant wishes to appeal the suitability of an offer of accommodation under 5.1 of this policy, although that is not actually a paragraph that talks about either suitability of accommodation or appeals but the property will be held available whilst the appeal is considered where this is not likely to lead to an unreasonable delay in letting the property. However, at 5.6 where you request a formal review concerning the suitability of accommodation under 5.3

and 5.3 really has nothing to do with a formal review of anything, the property will not normally be held available whilst the appeal is considered. So I think the lesson there seems to be that you do not want to request a review; you want to request an appeal. Quite what an appeal constitutes is not really clear, it appears to be a review but that is where we are. So quite what prospective tenants are supposed to make of this as to whether they are able to effectively request a review of suitability and still possibly have the offer of that property open if the review goes against them or whether it is going to be disposed of and that is it, who knows.

Again, the only route to challenge a negative review of suitability of an offer will be judicial review; there is no other appeal process. There is no provision for oral submissions or oral hearing either, it appears to be simply written and considered by a superior and unconnected officer.

Flexible tenancies, the end of the tenancy for life as Barnet put it. Now this is not part of the main allocation policy; this is from the separate Tenancy Strategy that was not produced on the back of a fag packet between January and April 2012 but it has to be considered as part of the overall policy dealing, as it does, with forms of tenure to be offered to whom and for what period. I was rather rude about the Tenancy Strategy on the blog back in 2012 and the link is in the notes, as is a link to the Strategy. Basically, with certain exceptions: existing secure tenants who are transferring, which is actually quite generous of Barnet but there we are; older people who are in receipt of state pension and occupy a general needs property; ex-armed forces personnel who have been both medically and honourably discharged and seen active service, so it is no good being brave but getting run over by a colleague in base it has to be in active service; households where the applicant, spouse or dependent child is disabled according to certain criteria or households where the applicant or spouse is terminally ill; apart from those people everybody gets a flexible tenancy. These exceptions will get a secure tenancy, apart from that everybody else gets a flexible tenancy; initially a one year introductory tenancy followed by a five year term flexible tenancy unless you are single and under twenty-five; then the offer will be for a one year introductory followed by a two year flexible tenancy. Now you may recall, as Catherine said, the debate suggested that the usual term would be five years and, indeed, there was ministerial guidance on this point, offered up instead of an amendment, and the ministerial guidance was that terms should be five years for a flexible tenancy save in exceptional circumstances. Apparently being single and under twenty-five is exceptional.

A two year term may be offered to prospective tenants in other circumstances and, again, this is the extent of the policy, depending upon their vulnerability and the outcome of the housing assessment which sounds like a hugely unspecified discretion.

The only challenge to being offered flexible tenancy is a review of the fixed term offered, Localism Act 107B(2). Save for a challenge to a two year term that has been based on an unspecified outcome of housing assessment or, possibly, the classification of under twenty-fives as exceptional, it is hard to see what other challenge prospective tenants could raise. Their being offered a five year flexible tenancy, the only challenge you have is to the term.

The termination of a flexible tenancy is rather more opaque and, in fact, involves, as we will see, a little time travel. A review of the tenant's circumstances will take place eight months prior to the end date of the fixed term. The tenancy review criteria which will reflect the continuing needs of tenants is listed in the notes; any assets they may have accrued or inherited, their attitude to work, training opportunities that might have presented themselves and pressures on social housing. Tenancies will not normally be extended where one or more of this list applies. As you can see again, we have the income cut off, we have conviction of tenant or member of their household for an act of civil disturbance or other criminal activity, a breach of terms of tenancy where you have not agreed with the council to remedy it, including rent arrears, under-occupation by one bedroom or more, an adapted property where the disabled person no longer lives, assets of greater than £30,000 currently or the tenant is a young, single person on a flexible two year tenancy who has not worked or undertaken any training or education for a period of six months prior to the tenancy end date. This review is taking place eight months before the end of the tenancy. Notice to be served six months before the end date of the tenancy, Localism Act Section 107D(3) and the tenant has a statutory right to request a review of the decision to terminate the flexible tenancy, Section 107E within twenty-one days of the decision. Barnet's review procedure is, again, for written submissions and an unconnected team leader or manager to conduct the review within fifty-six days. Again, no provision for an oral hearing; there is provision for the Secretary of State to make

regulations about whether there should be an oral hearing in the Localism Act 107E(4) and (5) but I do not think any has yet been made. Again, no statutory provision for an appeal from the review decision and there is not in Barnet's scheme.

I think an open question is what route a challenge to such a review decision could take? Potentially judicial review but then, of course, there is also the alternative route of a public law defence to the subsequent possession claim on the same grounds. If you are making a public law case against the review decision one should be able to deploy that as the public law defence to the possession claim and this would, potentially, make judicial review inappropriate, at least if possession proceedings were being followed. Barnet, very generously, state that where a tenant wishes to appeal the termination of a tenancy and the notice period expires during the period of the appeal, the tenant will be permitted to stay in the property where this is not likely to lead to an unreasonable delay in the property being vacated. Well, of course, until the review has been completed, it is extremely unlikely that the Court would actually grant possession; it has the discretion not to if the review procedure has not been carried out adequately or completed or carried out properly under Section 107D(6) of the Localism Act and if the review is still ongoing and has not yet been decided I would, frankly, be astonished if a Court would grant possession on possession proceedings. So Barnet's generosity in saying "we won't necessarily take proceedings to throw you out where we have not actually decided your review yet" is perhaps limited.

This could go horribly wrong; Barnet's scheme makes no mention at all of the requirement for the service of a second notice on the flexible tenant not less than two months prior to the end date of the tenancy under Section 107D(4) of the Localism Act. I do hope they do not forget to do it. One hopes that the tenants manage to find out somehow that they should get such a notice. Barnet's scheme does note that a possession claim may be defended; "Our right to possession may be challenged on the limited grounds that the landlord has made a legal error, a material error of fact, or that possession is not proportionate in all the circumstances". I am not sure that is the full list but they have had a stab.

So as we were going through Barnet's, I hope that the idea that there might actually be some challenges to allocation schemes sprang to mind, whether to the policy in general in terms of transparency, but certainly some specific areas present real issues. Challenges to the reasonable preference aspect of allocation schemes became very difficult after *R (Ahmad) v Newham* 2009 UKHL14, indeed so did any challenges to previous allocation schemes so long as they were not actively irrational or did not comply with the broad terms of the statute. But I think the new post-Localism Act schemes may well be subject to challenges. The introduction of flexibility for the authorities to develop their own rules also presents fresh issues of transparency, of reasonableness and of compliance with the statute when the authorities choose to do so. Save for the flexible tenancy possession claim, though, the only real route of challenge to allocation schemes or the decisions made in allocation is via judicial review once, for instance, any review process has been exhausted if one was provided.

Allocation issues are, as we all know, now out of scope for legal aid so there is no funding for seeing applicants through a review or for making transfer requests or for applications for consideration for the list. But there is still funding for judicial review so while advisors may not be funded to assist with allocation issues, if an issue is suitable for judicial review in an allocation scheme or a process presents itself we are still funded subject, of course, to the Lord Chief Justice managing to make sure that we do it for no pay whatsoever until we get permission.

Chair: I will now invite questions from the floor to our speakers.

Dermot McKibben, Greenwich Housing Rights: Greenwich council has a five year residency rule for Part 6 applications and is currently consulting on changes to Part 7 whereby people who do not have five year residence in the borough will be put into temporary accommodation for six months and then they will be discharged through a private sector offer. In other neighbouring boroughs such as Lewisham you have a Part 6 connection if you have got a Part 7 connection and that is the same also for Bromley. I wonder if the panel could comment on the tension between Part 6 qualifications and also Part 7 qualifications in terms of local connections.

Giles Peaker: I think there clearly is one and Barnet has illustrated it to the extent that they are simply not going to consider anybody placed by another authority in their borough as having a local connection. The difficulty with Part 7 and private sector discharge is that they can do it assuming that they can find the

properties which, I think, is a big question. In a sense they do not actually need to wait that six months but I think as people are placed out of borough in temporary accommodation more and more, that is going to present an issue for at least some of the councils, depending on how they frame it when they adopt local connection policies for Part 6. Barnet's, at least, does say you are still Barnet even if we place you out of borough as long as you are our homeless person, which is fine but it is entirely possible that local connection would be developed in other ways in other boroughs that would mean you could be placed out of borough.

Catherine Rowlands: Of course the spirit of the reforms to the Act are there so a challenge to that is going to be quite hard to mount, but housing people out of the borough depends how far you go, but Stoke on Trent really is a nice place compared to Greenwich! People may find that they actually like it when they get there.

Ann Benington, Fisher Meredith Solicitors: On funding for allocations matters, I have not actually done a case so my reading may have been incorrect of the provisions but I thought that if your client could be described as homeless under Part 7, even if they have not made a homeless application, you would then be able to get funding to advise them on Part 6 and that would include somebody whose accommodation is not reasonable for them to continue to occupy, which would account for quite a lot of people seeking advice on transfer. Is that not correct?

Catherine Rowlands: I thought that was correct, I have certainly had funded challenges that I have been on the other side of but on that kind of basis.

Ann Benington, Fisher Meredith Solicitors: If we do not know at least it might be worth checking before just assuming.

Giles Peaker: The definition of homelessness for the LASPO Schedule is homelessness under Part 7.

Ann Benington, Fisher Meredith Solicitors: But then you are allowed to advise them on Part 6?

Giles Peaker: Yes, but whether that would extend to, for instance, dealing with a review of qualification or a review of suitability under this scheme I think might be another issue.

Catherine Rowlands: The trouble with bringing a challenge for an allocations policy is really you need a peg to hang it on. People who are just sitting on the waiting list for twenty years very rarely come to a solicitor and say, "hang on, I've been sitting on the waiting list for twenty years, what I do about it?" Really the challenge to an allocations policy will come in the context of some other legal action, possession or homelessness in particular and so the funding will come through one of those routes in the vast majority of cases. A pure allocations challenge will be few and far between although, that said, the Babakinda case that I referred to was a pure allocations challenge and he seemed to have got funding for that.

Giles Peaker: But that will have been before LASPO. I think there is the possibility for effectively pure challenges to occur again. If you are dealing with somebody who, for instance, under the Barnet scheme has had an intentional homeless decision then the homeless decision is no longer an issue; they are intentionally homeless, they have applied and been told they do not qualify, it looks like a straight allocation challenge to me.

Contributor: My understanding of that question was basically that if you have gone through the Part 7 housing route and a determination has been made and you have not been moved to allocation, is that what you are saying? Because my view is that it might be a separate case because it might be difficult for you to prove to legal aid that it would be under Part 7.

Sara Stephens, Anthony Gold Solicitors: My understanding is that whilst that is included, because allocation is expressly excluded you always have to look at the inclusions and then the exclusions to work out if something is actually covered, so I think you would be able to give the advice under one case about the homelessness in general and their option to apply for social housing, etc. I think you would struggle to get funding to request a review and make all the general enquiries that we used to make. If someone thinks I am wrong about that please check with your contract manager and see if there is a way around that but I have not found one yet.

Contributor: The joys of the iphone and the internet: the relevant provision reads "civil legal services provided to an individual who is homeless or threatened with homelessness in relation to the provision of accommodation and assistance for an individual under Part 6 Allocation of Housing or Part 7", although that is, of course, subject to statutory definitions, subject to Parts 2 and 3.

Giles Peaker: If somebody comes to you as homeless you can advise them to apply via the Part 6 route and that is pretty much it.

Jan Luba QC, Garden Court Chambers: I would like to return to the first two questions that were put to the speakers because I think they really go to the heart of the issue which both presentations covered. On the one hand you have a statutory regime requiring certain classes of people to be given a reasonable preference yet you have local authorities, and Enfield is only one of scores of examples, disqualifying from admission to the scheme at all hosts of people who represent sub-classes of the reasonable preference categories. The $64,000 question is, can you be giving a reasonable preference within the scheme by class if you have excluded heaps of sub-classes? That is not just an interesting abstract question; it is the only one that we can legitimately deal with with a client from the start if they are in the homeless category and that is why Ann is spot on with that reference to the paragraph in Schedule 1. So the prime client we want is somebody who is in reasonable preference category A, homeless, and is in an excluded sub-class. Enfield's policy allows you to identify about eight excluded sub-classes of people who do not have sufficient residence, people who are not owed the full housing duty, people who are owed a homeless duty by another borough and so and so forth. We can see those people on controlled work basis as a new matter start under the paragraph that has just been mentioned and if our initial representations or review do not work then we can judicially review the whole scheme. But the real irony here is that *Ahmad* makes it clear, as Catherine pointed out, that there is nobody in this country who has a right to a reasonable preference under a particular council's scheme. The legal proposition is they are a member of the class and the class has not been given reasonable preference. Taking the example that Giles has offered us of the Enfield scheme, I think that the sub-classes of homeless excluded will outweigh numerically the number of homeless included and therefore will bring down the scheme as a whole. That would be true, of course, were any homeless entitled at all but, as Giles has pointed out, because of the out of date references in the Barnet scheme the only homeless who get any preference at all are those applying from Wales and I doubt there are very many of those.

I wanted to intervene with a question and make those observations because it is really chilling to sit in a room like this and hear an exposition of a scheme which is patently and manifestly unlawful in so many respects. Obviously one that did not get Catherine's scrutiny and yet it has been in force since last November and we have not even had a whisper of a challenge to it and more and more local authorities are adopting similar schemes, as Dermot indicated is the case in south-east London. I wonder if we are, in relation to this mass law-breaking by local authorities, going to find ourselves in exactly the same position we are with present mass law-breaking, that is to say having large numbers of homeless families in bed and breakfast for more than the statutory maximum of six weeks. No case in court yet, what on earth are we collectively waiting for and how embarrassing it is that here, months on after the introduction of LASPO, we are asking ourselves questions about whether this is scope or not, the result is that we are not taking the clients and we are not taking the cases. We can have an argument with the contract manager later down the line about whether it was in scope or out of scope but hopefully meanwhile we will have done something decent for the client.

I would like to ask a specific question for Giles. You mentioned right at the end of the note that in most cases, that is to say for the non-homeless allocation applicant, you cannot do it on the normal housing basis, you have to go by way of judicial review. How do you do that if you do not have a public law contract?

Giles Peaker: You can do it on a housing contract. It is a housing judicial review. If you were dealing with it as an allocation issue you could not but if you are dealing with it as a judicial review housing issue you can.

Catherine Rowlands: The other point to add to what Jan just said though is that it is self-perpetuating. Local authorities copy each other's policies and so Barnet's looks terrifyingly familiar to me because I have seen them in other schemes. If I then say to one of my local authorities, "no, you can't do that" they

come back to me and say, “well Barnet did and nobody has challenged them”. They will just carry on spiralling until somebody does find some way of challenging it.

Giles Peaker: I am obviously far too junior to have Jan’s confidence to describe the scheme as manifestly unlawful when something is before you, but I was offering it up in the hope that somebody will challenge it because it seems to me to have stunning, stunning problems.

Catherine Rowlands: You need to set up a stall in Barnet High Street and say, “anybody want a judicial review of the council?” and you could also do insurance premium repayments at the same time.

Chair: If there are no more questions I would like to thank the speakers this evening for their excellent talks and invite you to show your appreciation again in the usual way.

We will now move on to the Information Exchange, so does anybody have any interesting cases that they would like to share or perhaps, as we have already entered into a debate regarding the new legal aid reforms, has anyone else had any experiences that they would like to share with the interpretations of the new rules?

Sara Stephens, Anthony Gold Solicitors: I would just like to give a quick legal aid update in general. Thank you to everybody who contributed to the Transforming Legal Aid response; that obviously was submitted on time. Apparently we will get a response in the autumn when the changes are due in. We are obviously now dealing with post-LASPO issues. A general concern across the board in every area of law has been that there has been a fall in new enquiries. We are trying to work out why that is. One of the problems is the gov.uk website which is full of inaccuracies. Can I please ask everybody to check their firm’s details on the Find a Legal Advisor section of that website because a lot of firms have been listed incorrectly or not listed on there at all, or listed as doing areas of law they do not do and not listed in areas they do do. Please contact your contract manager with any errors or feel free to contact me; I have a direct link at the MOJ with the people who are sorting out the website because they have accepted that it is wrong. It does also imply that the telephone gateway is mandatory for all areas so we are trying to get them to resolve that as quickly as possible. One area that has been brought to mind is, and I hope everyone in this room does know this, that homelessness is in scope. I am concerned that there are people who think that homelessness is not in scope and just to clarify that does not mean just street homelessness; that does mean the Part 7 definition of homelessness so I hope everybody is giving advice to homeless clients out there. I am sure nobody in this room is included in that, but itt has been brought to light so just to remind everybody.

Justin Bates, Arden Chambers: I look after the Law Reform section of HLPA. We have two consultation documents to respond to in the next couple of weeks. One is the Welsh Government’s proposal to enact the Renting Homes Bill as updated and the other is the Westminster Government’s proposal to make private landlords check the immigration status of potential tenants. If anyone has any views on these matters, can you email them to me, justin.bates@ardenchambers.com in the next couple of weeks? I

David Foster, Foster and Foster Solicitors: You asked for examples of problems under LASPO. Perhaps I could list two that we are having? The first is in relation to the new claims for disrepair regime where we are acting for a private tenant who under legal help has got a surveyor’s report. The surveyor’s report confirms that there is severe penetrating dampness, no heating and no hot water and that the Parker test is met for an interim injunction. We therefore grant an emergency certificate under delegated functions. Two weeks later, after we have submitted the AP 1, we have our emergency certificate embargoed with effect from two weeks previously on the basis that it is not sufficiently urgent and because the surveyor’s report has a paragraph in it saying that it is not a statutory nuisance for the purposes of Section 82 and not prejudicial to health. We have submitted a formal complaint on that one. But the second is rent arrears possession proceedings where there are adult non-dependents in the household, where the Legal Aid Agency is insisting that the adult non-dependents are means-tested and apply for legal aid because they will benefit from the proceedings even though counsel is advising. We consider there is a conflict of interest between the adult non-dependents and the tenant because they may be withholding their resources and not giving the tenant the money towards rent. I was wondering if any others had experienced these problems.

Chair: I certainly have on the second, every rent arrears claim that was coming through to us where there are adult non-dependents we have seen a request for a form to be completed along with bank statements and proof of income as well. Thus far we are simply complying; we have not had any instances where there has been any conflict between adult child and parents so we are simply getting them to complete the forms.

James Harrison, Edwards Duthie Solicitors: Just linked to the last point, one problem we have been noticing is what one would term over-zealous means enquiries where the LAA trawls through your client's bank statements asking endless questions about apparently trivial transactions and it is a real barrier to justice because you have not got legal aid until it is sorted and it can go on for weeks. We have had a case recently where questions have been asked about an ex-girlfriend where the client has no means of getting information; that is a real barrier to the case continuing so I would be interested to know whether anybody else has.

Contributor I have got so frustrated I did query why the agency wanted to know why my client had made two withdrawals of £50 and £200 from her account. I queried it and did get a semi-apology and an acceptance that, actually, it was not required so I suggest that everybody who is experiencing those sorts of issues, you may want to submit the information but also ask why is it necessary?

Cheryl Gaunt, North Kensington Law Centre: Just on that point, I just wonder if this whole issue could be subject to judicial review in relation to the public body if they are not acting reasonably? I had a client who had some money put into his account for a funeral because his mother was a paraplegic and I had to go through every single item, even amounts of £5 and £10, to say what that money spent on. I just wonder whether or not, because it must be a common experience amongst other practitioners, it is right and for someone like the Public Law Project, maybe, to gather information and make a judicial review challenge in relation to unwillingness to act reasonably in terms of gathering information, because it is really time consuming. They put an embargo on your certificate; you are spending ages trawling through piles and piles of statements. It is just so frustrating; you end up wanting to bang your head against a wall. I had one client who was in prison; he got £10, they said what did he spend the £10 on? He said, "My mate sent me the £10 to buy a pair of flip flops so I didn't catch anything in the shower." I literally wrote back to the Legal Services Commission saying that because I just despair, basically.

Chair: I genuinely think it is worthwhile writing back and saying please can you confirm why is this relevant, why do you need this information?

Cheryl Gaunt, North Kensington Law Centre: And also for everybody to make formal complaints. At least with delay I have made a formal complaint. At least I got an email back with somebody's personal email address in a certain office, so we have sorted it out and if there are any future problems I can contact them. Maybe they should be overloaded with formal complaints where there is delay because it is just so frustrating.

Sara Stephens, Anthony Gold Solicitors: I was at a meeting at the MOJ on Monday and if you do think they have made a stupid decision call them, get an authority to email or fax someone directly. They should give that to you, if they are not giving that to you then please let me know because I raised the ridiculous decisions they have made in David Foster's case and that is what I have been told to do. Apparently, if and when the IDP system ever gets rolled out then we will get instant notification of decisions and we should have someone to instantly go back to. If and when that will happen we do not know but in the meantime if you think they are being stupid and they are asking stupid questions call and get someone that you can write to directly to try and get some sense out of someone.

Angus King, Cambridge House Law Centre: The Law Society is having a set of meetings with the Legal Aid Agency. I went to the first one. The head of the means assessment team has said exactly what Sara has said, that they have taken on lots and lots of inexperienced assessors. It was made very clear to him the immense amount of stupid decisions that are coming back. He did admit that there is a problem and that they should be exercising more discretion. I am no longer on this committee because I am not part of the Housing Law Committee of the Law Society but Deborah Wilson is. There is going to be an on-going series of meetings. I cannot volunteer Deborah because she is not here but you could get together a legal aid list of shame. They know what is going on and I think if you present a database which will no doubt have several thousand entries on it asking for £10 that you spent in 2002 on a pair of flip

flops in Ibiza, I think they might take notice. It is running in parallel with what Sara is doing so if you can co-ordinate.

Jan Luba QC, Garden Court Chambers: I am just a little anxious about the last point made by the last commentator. Please do not leave it to a representative organisation to take this up for you. The Legal Aid Agency are getting away with a great deal because when these stupid decisions occur they are challenged only back to the caseworker who made the decision or to the supplier's contract manager and neither of those register on the LAA landscape. The only thing that counts is that you have utilised the complaints procedure that the MOJ has established. That is how they know things are going wrong and it is the only way they know things are going wrong so do not rely on the idea that somebody, some contact manager you are dealing with is going to feedback to headquarters; it just does not work like that so please, every time one of these things happens use their complaints procedure. Remarkably, it is the first page of the website that came up on 1 April 2013; it was the only part working because the MOJ already had and could therefore activate their own internal complaints procedure. As Sara Stephens has indicated, what they have said publicly at the meeting she and I were at on Monday is that if you utilise that procedure then the response will be to give you a dedicated contact person, fax and phone number, to sort that query. If that does not work then accelerate it through the complaints procedure because that is the only thing that counts.

The other aspect in which they are getting away with things is on exceptional funding. We are more than three and a half months into the new scheme but there have only been seventeen applications across the whole country for exceptional funding for housing work which has gone out of scope and that is extraordinary. So I think we need to know something more about why we are not making exceptional funding applications and what is happening to those that are being made. Of course, if we do not apply they will say, "You see we never needed it in the first place" so please do make applications in appropriate cases.

Chair: I will now formally draw the meeting to a close. Thank you all for coming. The next meeting will be on Wednesday 18 September and the topic will be Housing Money Claims: Disrepair, Deposits and Unlawful Evictions.

Allocations: the New World

Catherine Rowlands

Localism Act 2011

- Covers diverse range of topics including
  - General competence of LAs
  - Governance and standards
  - Community empowerment
    - Referendums on council tax increases
    - Community right to challenge
  - Planning
  - Housing

Localism Act Part 7: housing

- 1. Allocation and homelessness
- 2. Social Housing: Tenure reform
- 3. Housing finance
- 4. Housing mobility
- 5. Regulation of Social Housing
- 6. Other housing matters
  - Ombudsman

Localism

- The Localism Act 2011: 4 principles
  - To give local authorities more discretion in relation to allocation policies to better manage waiting list
  - To promote mobility for existing social tenants by removing restrictions on transfers
  - To enable local authorities to more easily discharge their duties to homeless people into the private rented sector
  - To continue to ensure the most in need have priority for social housing
- See Guidance Chapter 2

Allocations: the statutory framework

- Part 6 of the Housing Act 1996 as amended
- LAs must have an allocation scheme for determining priorities between applicants and which sets out the procedure to be followed when allocation homes: s166A
- No duty to have a register or “waiting list”

Allocation to whom?

- LAs must only allocate to eligible persons: s160ZA
  - *National definition*
- LAs must only allocate to “qualifying persons”: s160ZA(7)
  - *Local definition*
  - *Local authority’s own policies - flexibility*
  - *Subject to national overriding criteria*
  - *Should not exclude classes (cf individuals) with reasonable preference*

Section 160ZA

- **Allocation only to eligible and qualifying persons: England**
  - (1)A local housing authority in England shall not allocate housing accommodation—
  - (a)to a person from abroad who is ineligible for an allocation of housing accommodation by virtue of subsection (2) or (4), or
  - (b)to two or more persons jointly if any of them is a person mentioned in paragraph (a).
  - (2)A person subject to immigration control within the meaning of the Asylum and Immigration Act 1996 is ineligible for an allocation of housing accommodation by a local housing authority in England unless he is of a class prescribed by regulations made by the Secretary of State.
  - (3)No person who is excluded from entitlement to housing benefit by section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) shall be included in any class prescribed under subsection (2).
  - (4)The Secretary of State may by regulations prescribe other classes of persons from abroad who are ineligible to be allocated housing accommodation by local housing authorities in England.
  - (5)Nothing in subsection (2) or (4) affects the eligibility of a person who falls within section 159(4B).
  - (6)Except as provided by subsection (1), a person may be allocated housing accommodation by a local housing authority in England (whether on his application or otherwise) if that person—
  - (a)is a qualifying person within the meaning of subsection (7), or
  - (b)is one of two or more persons who apply for accommodation jointly, and one or more of the other persons is a qualifying person within the meaning of subsection (7).

S160ZA

- (7)Subject to subsections (2) and (4) and any regulations under subsection (8), a local housing authority may decide what classes of persons are, or are not, qualifying persons.
- (8)The Secretary of State may by regulations—
- (a)prescribe classes of persons who are, or are not, to be treated as qualifying persons by local housing authorities in England, and
- (b)prescribe criteria that may not be used by local housing authorities in England in deciding what classes of persons are not qualifying persons.
- (9)If a local housing authority in England decide that an applicant for housing accommodation—
- (a)is ineligible for an allocation by them by virtue of subsection (2) or (4), or
- (b)is not a qualifying person,
- they shall notify the applicant of their decision and the grounds for it.
- (10)That notice shall be given in writing and, if not received by the applicant, shall be treated as having been given if it is made available at the authority's office for a reasonable period for collection by him or on his behalf.
- (11)A person who is not being treated as a qualifying person may (if he considers that he should be treated as a qualifying person) make a fresh application to the authority for an allocation of housing accommodation by them.”

Qualifying persons

- A LA now has the power to designate classes of persons as “non-qualifying persons” excluded from allocation
- The power extends to including *in* only certain classes of persons

Non-qualifying persons

- Suggested categories
  - Unacceptable behaviour
    - Replaces previous limited matters that a local authority could take into account
  - No local connection
    - Intention to remove foreign migrants
    - Armed forces (and bereaved spouses) an exception: *Allocation of Housing (Qualification Criteria for Armed Forces Personnel) (England) Regs 2012*

Qualifying classes

- Suggested classes
  - Community contribution eg essential workers
  - Foster carers/adopters
  - Underoccupiers moving out of social housing into private rented with the hope of moving back later.
  - In work, education or training
  - Moving out of adapted/supported housing

Reasonable preference

- An allocation scheme must ensure that *reasonable preference* is given to certain categories of applicant: s166A(3)
  - Homeless (inc. IH) – NB private sector offer discharges duty Housing Act 1996, s.193(7AA)-(AC), s.195A
  - Unsatisfactory housing conditions
  - Medical/welfare/disability grounds
  - Need to move

Additional preference

- The local authority has the power to give additional (or decreased) preference inside the reasonable preference categories
  - Eg overcrowded
  - behaviour
  - Threats of violence
  - Financial resources

Transfers

- Existing tenants seeking a transfer do not have to be assessed on the same basis as new applicants unless the authority considers that the transferring household should be given reasonable preference
- No statutory guidance on transfers outside the reasonable preference categories
- Intention is to promote flexibility/mobility

How do you do it?

How do you balance qualifying classes and reasonable preference?

- What is a reasonable preference anyway?
- *R (Ahmad) v Newham LBC* [2009] UKHL 14
  - "The Act only requires a "reasonable preference" to be given to particular groups of people. It cannot be said that a scheme for identifying which individual households are in greatest need at any particular time is the only way in which a reasonable council might decide to give reasonable preference to those groups. It is the groups rather than the individual households within them which have to be given reasonable preference."

Reasonable preference

- Does not require absolute priority over everyone else
- Other factors can be taken into account as long as they do not dominate the scheme and overall the scheme ensures that the RP categories get reasonable preference

Balancing needs

- An evidence-based approach (IDS take note!)
- Having regard to the problems created by a needs-based approach
- Flexibility and broad-brush approaches

The starting point: Strategy

- Every local authority must formulate a tenancy Strategy: s150(4)
- To be formulated in partnership with local registered providers
- A strategy must set out the matters to which registered providers in the authority's district must have regard to when formulating their own policies in relation to:
  - the kinds of tenancies that they grant;
  - the circumstances in which they do so;
  - the lengths of terms that they grant tenancies for; and
  - when they will grant a further tenancy.

Flexible tenancies

- No more Council tenancies for life?
- Encouraging mobility?
- Encouraging mutual transfers
- Support for those with the lowest income means moving on if your income increases
  - Monitoring?!

Flexible tenancies

- Housing Act 1985 ss 107A-107E
- Minimum 2 year term (5 years was said to be normal in Parliamentary debates)
- Right of early termination – tenant only
- Statutory periodic tenancy arises after expiry subject to mandatory ground for possession

Flexible tenancies: policies

- Local authority has broad discretion whether to have FTs or not
- need not be for all of stock
- Can be different terms in different circumstances

In practice

Good practice

- Allocation scheme must be published
- Should be in Plain English
- Have regard to equalities issues
- Amendments must be publicised
- Local authority to ensure advice and information available free of charge
- Need for good record keeping to keep the scheme under review

Challenges to the working of new schemes

- Uncertainty about effect of changes
  - Effect of FTs?
  - Effect of bedroom tax?
  - Effect of welfare cap?
  - Local perceptions?
    - Feeling that being on the waiting list should be enough
    - Feeling that priorities are unfair
    - Resistance to FTs

Localism Act in action
Case study of a new allocation scheme

Giles Peaker
Anthony Gold Solicitors

The stated purpose of the Localism Act amendments to allocation scheme requirements was to enable 'a more focused waiting list which better reflects local circumstances'. It should not be a surprise to see that divergences in allocation policies (or proposed allocation policies) that have resulted are actually along broadly political lines, rather than driven by local circumstances. Neighbouring councils can have quite different approaches, with the result that eligibility for social housing and priority within the list can vary from one side of a street to the other. The divide in London at least, and unsurprisingly, seems to be between the Tory boroughs on the one hand and the Labour boroughs (with some exceptions) on the other. Conditions for qualifying, additional preferences, implementation of flexible tenancy policies are the main differences.

Revised policies bring with them new issues and potentials for challenge. I'll try to flag some potential issues as we go on.

In the context of the Localism Act and the Allocation of Accommodation code of guidance of 2012, it is worth looking at one of the new Allocation schemes to see how the permitted changes have been implemented and to see some of the difficulties that might arise from that implementation.

London Borough of Barnet introduced a revised Allocation policy as of November 2012. Barnet also implemented a Flexible Tenancy policy in July 2012, probably the first. Barnet are currently consulting on reducing two offers to one, and offering private sector out of borough accommodation where affordability is an issue. (http://www.barnethomes.org/news/2013/07/have-your-say-on-how-barnet-council-allocates-housing/)

Barnet ended their choice based letting scheme in November 2011. The current scheme operates by direct offer, with up to two offers of 'suitable accommodation' made (subject to current consultation). Barnet's old waiting list had some 14,500 people on it. There are no figures as to those on the new list, but as we will see, it is likely to be hugely fewer.

I'll run through the main areas of post Localism Act changes in Barnet's scheme, highlighting some issues and failings of the scheme as published. Square brackets indicate my additions.

Qualification.

As well as the usual exclusions on eligibility grounds, Barnet's list of those excluded from the housing list includes:

a. Applicants with no local connection to Barnet as set out at Para 3.4 [save

for applicants placed in band 4 as described below.]

b. Applicants who are overcrowded by only 1 bedroom and this is their only housing need

c. Applicants who have been convicted of housing or welfare benefits related fraud where that conviction is unspent under the Rehabilitation Offenders Act 1974. Any person caught by this may re-apply once this conviction is spent

d. Applicants who have refused two reasonable offers of accommodation under the terms of this Allocations Scheme, [see below]

e. Homeless applicants found to be intentionally homeless

f. Homeless applicants to whom the main homelessness duty has been ended due to refusal of a suitable offer

g. Homeless applicants placed in long term suitable temporary accommodation under the main homelessness duty unless the property does not meet the needs of the household or is about to be ended through no fault of the applicant see para 3,6

h. Applicants with lawfully recoverable arrears or other housing related debt within the meaning of this Scheme

i. Applicants whose income or assets exceeds the limits set by the Council (as these limits will change the Officers will use guidance to apply this test) [Current figures are: With child or children: household income is below median Barnet earnings (currently £36,200); A single person or childless couple and household income is below median Barnet earnings less 15% (currently £30,770)]

j. Homeless applicants but assessed as having no priority need under the homelessness law

k. Applicants who owe arrears of rent or other accommodation charges to the Council in respect of the current tenancy or former accommodation, unless an appropriate agreement has been reached and sustained for a reasonable period. In assessing the application for registration, the Council will take into account the size of the debt, the means to pay and the degree of need

l. Applicants in breach of another condition of their Tenancy Agreement and this is accepted by both parties.

Barnet does state that a discretion is retained to waive these categories in exceptional circumstances.

Some of these exclusions are unclear. Others troubling.

At (a.), local connection, Barnet's scheme does not, as yet, take follow the requirement of The Allocation of Housing (Qualification Criteria for Armed Forces) (England) Regulations 2012, in force from August 2012, which provides that local connection does not apply to a person who:

> 3(3)
> (a) is serving in the regular forces or who has served in the regular forces within five years of the date of their application for an allocation of housing under Part 6 of the 1996 Act;
> (b) has recently ceased, or will cease to be entitled, to reside in accommodation provided by the Ministry of Defence following the death of that person's spouse or civil partner where—
>
> (i) the spouse or civil partner has served in the regular forces; and
> (ii) their death was attributable (wholly or partly) to that service; or
>
> (c) is serving or has served in the reserve forces and who is suffering from a serious injury, illness or disability which is attributable (wholly or partly) to that service.

The intent to introduce this regulation was spelled out at 3.27 of Code of Guidance 2012.

The overcrowding by one bedroom (b.) is unclear. By what standard is this measured? The policy doesn't state, but if the measure is statutory overcrowding, is this reasonable? How does this not fall under the reasonable preference category for overcrowded conditions (4.4(c) of the Guidance), let alone be excluded from qualification?

The disqualification at (d.) for anyone refusing two suitable offers lasts for 12 months, para 4.25 (the second 4.25) of the scheme states:

> *An applicant whose housing priority has been reduced under 4.24 will not be entitled to be reconsidered for housing under this allocations scheme for a period of 12 months from the date that the Council notified them of its decision, except where there has been a material change in circumstances such that the offer of rehousing would no longer be suitable, for example because of an enlargement of the applicant's household or a deterioration in ill health.*

Quite what this means is unclear. If the circumstances had changed at the time of the second offer, that offer would not be suitable, so would not be a second offer. But if circumstances change in the 12 month suspension, does this mean a retrospective assessment of the suitability of the last offer in the new circumstances?

Homeless applicants placed in long term suitable temporary accommodation (g.). The policy goes on to state that a non-exhaustive list of 'long term temporary accommodation' includes "private sector properties let via the council or a housing association under a leasing arrangement, and non-secure tenancies on the regeneration estates."

It is hard to see the basis for this, where there has been no discharge of duty. Why not homeless reasonable preference (4.4(a) of the Guidance)? How come exclusion simply on the basis of the apparent security of temporary accommodation?

Homeless applicants assessed as having no priority need (j.). The Guidance states at 4.4(a) that reasonable preference **must** be given to:

> *people who are homeless within the meaning of Part 7 of the 1996 Act (including those who are intentionally homeless and those not in priority need)*

Barnet's exclusion from qualifying of 'homeless but not in priority need' would appear to run contrary to the requirement to give reasonable preference.

Local Connection

Barnet specify local connection as:

> *Local connection within the terms of this scheme will normally mean that an applicant has lived in this borough, through their own choice, for a minimum of 2 years up to and including the date of their application, or the date on which a decision is made on their application whichever is later.*
>
> *Accepted homeless households placed by this authority in accommodation outside Barnet will also have a local connection as long as they fulfil the two year residential qualification (time spent placed by Barnet in temporary accommodation outside the borough will count towards time spent in Barnet.*
>
> *Local connection may also be awarded to people who need to move to a particular locality in the borough, where failure to meet that need would cause exceptional hardship to themselves or to others. Those without a local connection will not be eligible to be placed in bands 1, 2 or 3 until this condition is satisfied.*
>
> *People in the following categories will not normally be considered as having a local connection:*

- *Those placed in the borough of Barnet in temporary accommodation by another borough*
- *Those placed in the borough of Barnet in residential or supported housing by another borough*
- *Secure or flexible tenants of other boroughs*
- *Those who do not meet the residential criteria but who have family members in this borough.*

So, what if you have spent two years in Barnet but were placed there in temporary accommodation by another borough? Apparently you have no local connection as regarded as not being there 'by your choice'.

A decision that an applicant does not qualify is subject to a review process, which I'll come back to below.

Preference and priority

The preference tables are attached at the end of these notes. The key point is that nobody without a reasonable preference under s.166A(3) Housing Act 1996 as amended will be allocated any band at all. Barnet label these as s.167(2) preferences, but that only applies to Wales.

A further significant element in Barnet's scheme awards an additional preference for Community Contribution (from Band 3 to Band 2). The terms of this are set out in the annex 3 to the Policy, attached at the end of these notes. What is counted as a Community Contribution is in most instances, strictly defined - eg Employment is one member of household in employment or self employed for 6 of the last 12 months. (Though whether full time or part time is not specified).

Voluntary work must be for a minimum of 10 hours per month and can only be for

> *a not-for profit organisation that is registered with the Volunteer Centre Barnet or recognised by the Council, or a charity that is registered with the Charity Commission or is funded by the Council or another local authority or a faith based community group or organisation. Tenants and Residents Associations which are constituted are classified as not-for-profit organisation* [sic.] *They must be registered with Barnet Council or a Registered Social Landlord to qualify.*

In other instances, such as awarding a community contribution preference to 'older' residents or the disabled, where 'frailty or disability' prevents them from working, the decision is left as an exercise of discretion by the housing officer.

There is also an age distinction drawn. Someone who is under 25 would have to be volunteering for 20 hours a month for at least 6 months, rather than the 10 hours per month required of the over 25s.

Registered foster carers are acknowledged as performing a community contribution, although ironically, the bedroom tax penalty still applies.

On ex-service personnel, the Community Contribution is awarded as follows:

> *Applicants who have served in the British Armed Forces and lived in Barnet for at least 6 months immediately prior to enlisting, will qualify for a community contribution award automatically, with the exception of those who have been dishonourably discharged. This includes people who have served in the Royal Navy, Royal Air Force and British Army.*
>
> *Service with the armed forces will be confirmed with the Royal British Legion.*

The lowest band, band 4, is reserved for those owed a full housing duty under s.193(2) but without a local connection. The Scheme notes that this is very unlikely to result in an offer of social housing, but applicants may be helped to find a home in the private rented sector.

There has to be a question as to how far this can be described as a 'reasonable preference', when it is the lowest band for those considered to qualify for the housing list. There is, quite simply, nobody to be preferred to.

It also appears to be partially putting into practice the suggestion made by DCLG 'advisor' Andy Gale that councils should ensure that:

> *the reasonable preference for accepted homeless cases to be reduced to the bottom of the reasonable preference groups to ensure that a social housing offer doesn't come before a PRSO offer. (http://nearlylegal.co.uk/blog/2012/11/homeless-legislation-a-thing-of-the-past/)*

It is also worth noting that an offer of private sector accommodation, even out of borough, can be considered as a reasonable offer for the purposes of the allocation scheme as a whole. 4.23 states:

> *Applicants may be offered a property in the private rented sector. These offers are subject to specific regulations that protect the health and safety of tenants. Full details of these regulations are available on request.*

There is, notably, no description of a process for rebanding if circumstances change.

'Reviews and Appeals'

S166A(9)(c) provides that the applicant has a right to request a review of a decision that they are not a qualifying person. There is no prescribed mechanism for an appeal, unlike s.202 and s.204 of Part VII Housing Act 1996.

Barnet, less than clearly, appear to have both reviews and appeals. The relevant section of the policy is attached. The mechanism for a review, at 5.4 is: written submissions and a 56 day review period. The only way to challenge a negative review, or review procedure is by judicial review, although not mentioned in the policy.

On reviews and/or appeals of suitability of offers, it is hard to know what to make of this:

> 5.5 Where an applicant wishes to appeal the suitability of an offer of accommodation under 5.1 of this policy, the property will be held available whilst the appeal is considered where this is not likely to lead to an unreasonable delay in letting the property.
>
> 5.6 Where an applicant requests a formal review concerning the suitability of accommodation under 5.3 of this policy, the property will not normally be held available whilst the appeal is considered. [5.3 has nothing to do with a formal review of anything!]

What is the difference between a review and an appeal? Why would one see the offer kept open while the other doesn't? We do not know. Any applicant considering requesting a review of suitability of an offer is going to have a hard time working out the possible consequences.

Again, the only route to challenge a negative review of suitability of an offer will be judicial review.

Flexible tenancies

While flexible tenancies do not form part of the main allocation policy, the separate Tenancy Strategy must be considered as part of the overall allocation policy dealing as it does with the forms of tenure to be offered, who to and for what period.

I took a critical look at Barnet's Tenancy Strategy, published in April 2012, here: http://nearlylegal.co.uk/blog/2012/07/barnets-brave-new-dawn/

The Strategy is at http://www.barnet.gov.uk/downloads/download/955/local_tenancy_strategy

In effect, all new secure tenancies will be flexible tenancies save for those offered to:

■ Secure tenants whose tenancy commenced before 9 July 2012 moving to another council property – already protected in law; [Actually no, only mutual exchanges, but that's fine if Barnet extend it to transfers]
■ Older people who are in receipt of the state pension and will occupy a general needs property. [...] The terms of Sheltered Housing tenancies will remain the same as they are currently and will be let as secure (life-time) tenancies;
■ Ex-armed forces personnel who have been both medically and honourably discharged and who have also seen active service; to be validated by the Royal British Legion;
■ Households where the applicant, their spouse or a dependant child is disabled in accordance with the criteria contained in Appendix 2.
■ These criteria would also be applied in the event that a household member becomes disabled during the period of a flexible tenancy and, as a result, become eligible for a life-time tenancy;
■ Households where the applicant or their spouse is terminally ill; this would also apply in the event that a household member becomes terminally ill during the period of a flexible tenancy and, as a result, become eligible for a life-time tenancy;

Tenancies will be offered as a 1 year introductory, followed by a 5 year term flexible tenancy. Except if the applicant is single and under 25. Then the offer will be of a 1 year introductory tenancy followed by a 2 year flexible tenancy. The Ministerial Guidance on flexible tenancy was that terms should be 5 years save in 'exceptional circumstances'. Whether being single and under 25 counts as an exceptional circumstance is an open

question. A 2 year term may be offered to a prospective tenant in other circumstances, "depending on their vulnerability and the outcome of the housing assessment."

The only challenge to being offered a flexible tenancy is a review of the fixed term offered - Localism Act 107B(2) . Save for a challenge to a 2 year term that has been based on the unspecified 'outcome of the housing assessment', or possibly the classification of under 25s are 'exceptional', it is hard to see challenges here.

The termination of a flexible tenancy is more opaque. A review of the tenant's circumstances is to take place 8 months prior to the end date of the fixed term

> The tenancy review criteria will reflect the continuing needs of tenants, any assets they might have accrued or inherited, attitude to work / training opportunities that might have presented themselves and pressures on social housing. Tenancies will not normally be extended where one or more the following apply:
>
> ■Households with children with a gross income that is equivalent to the median earnings in Barnet [currently £36,200];
> ■A household with no children that has a gross income that is equivalent to the median earnings in Barnet minus 15% [currently £30,800. Note income not earnings. Including benefits/tax credits etc.?];
> ■A tenant or a member of their household who has been convicted of an act of civil disturbance or other criminal activity;
> ■The tenant has breached the terms of their tenancy and has failed to reach or maintain an agreement with the Council to remedy this breach. For example, there are rent arrears and the tenant has not agreed or maintained an agreement to clear these;
> ■The property is under-occupied by one bedroom or more;
> ■The property has been extensively adapted but for someone with a disability who no longer lives with the tenant (this allows the property to be released for someone who will benefit from the adaptations);
> ■Assets – the tenant or their spouse has assets or savings greater than the amount stipulated in the Council's Housing Allocations Scheme which would normally exclude someone from being granted a council tenancy [currently £30,000].
> ■The tenant is a young, single person on a flexible two year tenancy who has not worked or undertaken any training or education for a period of 6 months prior to the tenancy end date.

Notice to be served 6 months before the end date of the tenancy (Localism Act s.107D(3)

Tenants have the statutory right to request a review of the decision to terminate the flexible tenancy s.107E, within 21 days of the decision. Barnet's review procedure is for written submissions and an unconnected team leader or manager to conduct the review with 56 days. There is no provision for an oral hearing.

The Flexible Tenancies (Review Procedures) Regulations 2012 No. 695 state that:

> *3.—(1) Where an application includes a statement to the effect that the applicant requires the review to be conducted by way of an oral hearing, the review must be conducted in accordance with regulations 6 to 10.*

6-10 then set out the manner in which the hearing is to be conducted, including the applicant's right to be represented, possibly by a solicitor. Barnet's scheme does not incorporate this, and fails to provide for a possible hearing.

There is no statutory provision for an appeal from the review decision, nor in Barnet's Scheme. The question is what route a challenge to the decision could take. While there may be judicial review as a route, arguably there is an alternative route of a public law defence to a subsequent possession claim on the same grounds, making judicial review inappropriate.

Barnet generously state:

> *Where a tenant wishes to appeal the termination of a tenancy and the notice period expires during the period of the appeal, the tenant will be permitted to stay in the property where this is not likely to lead to an unreasonable delay in the property being vacated.*

But of course, until the review has been completed, it is likely that the Court would refuse possession, under s.107D(6).

Barnet's Scheme makes no mention at all of the requirement for a second notice, not less than 2 months prior to the end date of the tenancy, s.107D(4). This is a significant omission.

Barnet's scheme does note that a possession claim may be defended, although not wholly accurately:

> *Our right to possession may then be challenged on the limited grounds that the landlord has made a legal error, a material error of fact, or that possession is not proportionate in all the circumstances*.

Challenges

Challenges to the 'reasonable preference' aspect of allocation schemes became very difficult after *R(Ahmad) v LB Newham* [2009] UKHL 14. Indeed, so did any challenges to the previous allocation schemes so long as they weren't irrational, or didn't comply with the broad terms of the statute. However, the new post Localism Act schemes may well be subject to challenges. The introduction of flexibility for the Authorities to develop their own rules also presents issues of transparency, of reasonableness and of compliance with statute when the authorities chose to do so. Taking Barnet's allocation scheme as an example, there would seem to be clear possibilities for challenges to the scheme.

Save for a flexible tenancy possession claim, the only route of challenge to the allocations schemes or decisions made in allocation, is judicial review, once any review process has been exhausted if one is provided.

A problem in practice is that allocation issues are out of scope for legal aid. There is no funding for seeing applicants through a review, or for making transfer requests or applications for consideration. There may be legal help funding for advice and assistance for a homeless person making a Part VI application. It is not clear how far this would extend under the LASPO schedule terms.

However funding is still available for judicial review, so while advisors may not be funded to assist with allocation issues, if an issue suitable for judicial review presents itself, there is still funding available. (Subject to the latest proposals, at least.)

ANNEX 1 – BARNET HOUSING BANDS

Band 1: Urgent Need to Move due to Reasonable Preference PLUS additional priority and a local connection[8]	
	-Summary Guide of Criteria[9]
Emergency medical or disability Reasonable preference category S.167(2)(d)	• Where an applicant's condition is expected to be terminal within a period of twelve months and rehousing is required to provide a basis for the provision of suitable care. • The condition is life threatening and the applicant's existing accommodation is a major contributory factor. • The applicant's health is so severely affected by the accommodation that it is likely to become life threatening. • The applicant is unable to mobilise adequately in their accommodation and requires rehousing into accommodation suitable for their use. • The applicant's accommodation is directly contributing to the deterioration of the applicant's health such as severe chest condition requiring intermittent hospitalisation as a result of chronic dampness in the accommodation and the condition of the property cannot be resolved within a reasonable period of time – usually 6 months. • Where overcrowding in the property leaves the applicant at risk of life threatening infection.
Exceptional Circumstances Welfare and Hardship Criteria Reasonable preference category S.167(2)(e)	• Emergency need to move determined by the Council and authorised by the Assistant Director for Housing or equivalent.
Exceptional need to move Reasonable preference category S.167(2)(e)	• Applicants who need to move due to domestic abuse, extreme violence or extreme harassment. • Extreme violence or harassment will be verified by the Police and/or other agencies as necessary. This may include where a move is necessary to protect a witness to criminal acts. • Agreed in exceptional circumstances due to significant problems associated with the tenant's occupation of a dwelling in the social or private rented sector and there is a high risk to the tenant or their family's safety if they remain in the dwelling/area. For social housing tenants

[8] As defined in paragraph 3.4 of this scheme
[9] This summary guide of criteria does not represent an exhaustive list of all applicants entitled to reasonable preference

	transfers will be to properties of the same size or smaller if they are under-occupying and type where required, but locations or areas are likely to change. Examples of exceptional circumstance cases are given in the policy at paragraph 3.9
Disability need to move on hardship grounds Reasonable preference category S.167(2)(d)	• This is any applicant who needs to move to suitable adapted accommodation because of a serious injury, medical condition or disability which he or she, or a member of their household, has sustained as a result of service in the Armed Forces
Release of adapted property Reasonable preference category S.167(2)(e)	• Where a tenant is willing to transfer to a suitable non adapted property and is releasing an adapted house or designated older persons property.
Statutory Overcrowded Reasonable preference category S.167(2)(c)	• Tenants who are statutorily overcrowded
Acute Overcrowding Reasonable preference category S.167(2)(c)	• Where a household is 3 bedrooms short of the bedroom standard outlined in Annex 2.
Private sector properties insanitary or unfit. Those living in insanitary conditions where the conditions pose an ongoing and serious threat to health; Reasonable preference category S.167(2)(c)	• Private sector tenants and residents of dwellings that the Council's Private Sector Housing Team has determined that the property poses a category 1 hazard under the Housing Health and Safety Rating System (e.g.: crowding and space, excessive cold or risk of falls) and the Council are satisfied that the problem cannot be resolved by the landlord within 6 months and as a result continuing to occupy the accommodation will pose a considerable risk to the applicant's health. This includes a property that has severe damp, major structural defects including subsidence, flooding, collapse of roof, or have living conditions which are a statutory nuisance, and there is no prospect of the problems being remedied within a 6 month time period. • A private sector property either owned or rented where a statutory notice has been issued by the environmental health department that an unfit property is to be demolished under the Housing Act 2004.
Under-occupation Reasonable preference category S.167(2)(e)	• Where a secure Council tenant will release a home with two or more bedrooms by moving to a property with fewer bedrooms than they currently have. • Housing association tenants who will release a home with two or more bedrooms are eligible if their landlord agrees that the vacated property can be used for a nomination by the council

Major works or demolition Reasonable preference category S.167(2)(c)	• Where a council tenant has to move either temporarily or permanently whilst major works are undertaken or where their home is due to be demolished
Foster carers referred by the Council's Children's Service Reasonable preference category 167(2) (d) or (e)	• Foster carers approved by the Council whose housing prevents them from being able to start, or continue, to provide foster care.

Band 2 Need to move – Reasonable Preference plus Community Contribution and a local connection[10]	
	Summary of Criteria
Homeless Households owed a full homeless duty under section 193(2) or 195(2). Reasonable Preference categories s167(2) (b)	• People who are owed a duty under section 193 (2) 0r 195 (2) of the 1996 Act (or under section 65 (2) or 68(2) of the Housing Act 1985) -- This means households who are homeless or threatened with homelessness and in priority need • Note for cases owed a full homeless duty by any other Council they will receive a reduced preference for not having a local connection to Barnet Council (until they acquire a local connection with the borough).
Overcrowded by the Bedroom standard. Reasonable Preference category s167(2)(c)	Where a household is 2 bedrooms short of the bedroom standard outlined in Annex 2.
Applicants living in unsatisfactory housing lacking basic facilities. Reasonable Preference category s167(2)(c)	Applicants without access at all to any of the following facilities. No access to: • a bathroom or kitchen • an inside WC • hot or cold water supplies, electricity, gas or adequate heating Applicants who occupy a private property which is in disrepair or is unfit for occupation and is subject to a Prohibition Order and recovery of the premises is required in order to comply with the Order as defined by Section 33 of the Housing Act 2004. Applicants who only have access to shared facilities in shared accommodation will not qualify under these criteria.
Medical grounds Reasonable Preference category	Where an applicant's housing is unsuitable for severe medical reasons or due to their disability, but who are not

[10] As defined in paragraph 2.4 of this scheme

s167(2)(d)	housebound or whose life is not at risk due to their current housing, but whose housing conditions directly contribute to causing serious ill-health.
Hardship or welfare need to move for care or support Reasonable Preference category s167(2) (c) and (d)	Those who need to move to give or receive care that is substantial and ongoing. Those who need to access social services facilities, and are unable to travel across the Borough. Those who need to take up (or continue) employment, education or a training opportunity that is not available elsewhere and who do not live within reasonable commuting distance.
Housing need due to age Reasonable Preference category s167(2)(d)	Older or disabled applicants seeking Retirement or Extra Care or Sheltered Plus housing
Ready to move on from Council accredited supported care schemes Reasonable Preference category s167(2)(c)	An applicant is ready to move to independent settled housing on the recommendation of the support worker or equivalent. The applicant is in need of medium to long term rather than short term ongoing tenancy support. That support package has been assessed and is in place.
Move on from Care Reasonable Preference category s167(2)(c)	A care leaver is ready to move to independent settled housing and is genuinely prepared for a move to independent living. They possess the life skills to manage a tenancy including managing a rent account. The care leaver is in need of either a long term or medium term tenancy support. That support package has been assessed and is in place.
Discretionary Succession	Where the Council has agreed to grant a tenancy under clause 3.26 of this policy.
Existing Foster carers approved by the Council willing to provide care for an additional child Reasonable preference category 167(2) (d) or (e)	Where a Foster carer already providing a home for at least one foster child offers to provide care for an additional foster child

Band 3 : Need to move – Reasonable Preference BUT no Community Contribution and a local connection[11]
Summary of Criteria
Applicants in this Band will have the same element of housing need / Reasonable Preference as those applicants in Band 2 BUT will not have the Community Contribution or Working Household award as defined section 3 part 3 of the policy. Once a Community Contribution or Working Household award is given, the applicant will be moved into Band 2.

Band 4: Reduced Priority : Need to Move - Reasonable Preference but with Reduced Priority	
	Summary of Criteria
Applicants owed Reasonable Preference but who have been given reduced priority as they do not have a local connection but are owed, or are likely to be owed, the main homelessness duty under Housing Act 1996 Part VII) 193(2)	Customers in this band have reduced preference and are extremely unlikely to be offered social housing but may be helped to find a home in the private rented sector.

[11] As defined in paragraph 2.4 of this scheme

ANNEX 3

COMMUNITY CONTRIBUTION: HOW PRIORITY IS AWARDED

Community Contribution

People who play a part in making their neighbourhood strong, stable and healthy – those who help make it a good place to live, work and play – are valuable people. They are the backbone of their community, and the Council believes such people should be allocated social housing to continue contributing to sustaining local communities in the area where they contribute.

The Community Contribution priority scheme is a Barnet Council policy which gives the main applicant or partner increased priority for housing when they have reasonable preference and qualify under the community contribution criteria described below. These applicants will be placed in Band 2 by virtue of this award.

Community Contribution Awards – How they work in practice

Applicants must have a *current positive residence history* to qualify for a Community contribution award.

1. No on-going culpable involvement in anti-social behaviour or criminal activities.
2. No breaches of tenancy within the last 3 years
3. No outstanding lawfully recoverable housing-related debt over £100.
4. Not have an outstanding unspent conviction

Increased priority for housing is given to those applicants who demonstrate a commitment to contribute to the Borough's economic growth as working households or who make a contribution by their contribution within communities. Applicants can access increased priority for housing in five ways;

1. Working Households

This policy aims to support the economic growth of Barnet.

We want to encourage people who can, to work and want to raise levels of aspiration and ambition. We will offer increased priority to applicants who are working but are on a low income and will therefore find difficulty in accessing outright Home Ownership or Low cost low Ownership. Applicants who have reasonable preference can receive increased priority to Band 2 by virtue of their "working" status.

Definition of Working Households

Households where at least one adult household member is in employment. For the purposes of this Allocations Policy employment is described as having a permanent contract, working as a temporary member of staff or being self-employed. Applicants will only qualify if the worker has been employed for 6 out of the last 12 months. Verification will be sought at point of application as well as point of offer under the same terms. Applicants must provide payslips, P60, bank statements or a verifying letter on headed paper in order to qualify.

2. Volunteering

Volunteers must have been volunteering for a continuous period of at least 6 months up to the point of application and the same at point of offer. Volunteering must be for a not-for profit organisation that is registered with the Volunteer Centre Barnet or recognised by the Council, or a charity that is registered with the Charity Commission or is funded by the Council or another local authority or a faith based community group or organisation. Tenants and Residents Associations which are constituted are classified as not-for-profit organisation. They must be registered with Barnet Council or a Registered Social Landlord to qualify.

Volunteering must be for a minimum of 10 hours per month.

Evidence required for voluntary work.

A letter on the organisation's headed paper from the manager responsible for volunteers confirming the applicant's involvement in a minimum of 10 hours per month of voluntary work for at least 6 months. This person must not be related to the applicant in any way.

3. Training or Education

We want to encourage people to move closer to gaining paid employment by gaining employability skills and becoming job ready. This may be achieved by attending higher or further education or by accessing a longer vocational course of study or engaging in a programme of work-related training courses. In all cases the course of study must lead to achieving accredited qualifications and / or certification by a registered awarding body.

Study or training may be undertaken at a range of recognised institutions and organisations such as: Further Education College; registered Private Training Provider; registered Voluntary Sector Organisation or University.

To be eligible for the vocational training award a person must initially access a recognised Information, Advice and Guidance (IAG) service, such as *Next Steps* for Adults or *Connexions* for young people up to age 19 years to develop an agreed employment action plan and to be signposted to relevant training providers. Candidates must be working towards gaining employment in a vocational occupation.

A person must have been studying or training against the eligible criteria and definition outlined, for a continuous period of at least 6 months up to the point of application and the same at point of offer. Applicants eligible for out-of-work related benefits must also be registered with Job Centre Plus and accessing mainstream job brokerage provision, thus actively seeking work (this may not apply to full time students dependent on the hours they are studying). This training must be in addition to, or supplementary to any mandatory training required and may be undertaken in conjunction with volunteering to gain further knowledge and experience.

Some people undertaking training are not actively seeking work. Where the Benefits Agency can confirm that the applicant is not required to actively seek work because of their circumstances, for example they have caring responsibilities, their training can be recognised in this policy.

All training must be a minimum of 10 hours a month.

Evidence required for Training element

Further/higher education candidates must supply evidence of:

- letter from college or university confirming participation in course of study for period of 6 months

For vocational training award the following evidence must be provided:

- an agreed employment action plan developed through a recognised IAG service plus verification of steps taken towards achievement of action plan targets
- certificate or letter from a registered awarding body for the course or by a recognised training provider as evidence of gaining a recognised vocational qualification or successfully completing accredited work-related training (over a continuous period of at least 6 months)

4. Ex service personnel

Applicants who have served in the British Armed Forces and lived in Barnet for at least 6 months immediately prior to enlisting, will qualify for a community contribution award automatically, with the exception of those who have been dishonourably discharged. This includes people who have served in the Royal Navy, Royal Air Force and British Army.

Service with the armed forces will be confirmed with the Royal British Legion.

5. Registered Foster Carers

We recognise the contribution that Barnet foster carers make towards ensuring that children in Barnet's care receive a good service. In order to qualify for a community contribution award under this policy, applicants will require a letter from the council's Children's Service confirming that they have been approved as a Barnet foster carer and that they are in a position to take one or more placements.

6. Carers

Applicants who undertake formal care of dependents and are in receipt of DLA higher rate or carers allowance or care element DLA will qualify for the community contribution award under this policy.

7. People with disabilities and older residents

Whilst many older people and those with disabilities work or volunteer, there may be circumstances in which frailty or a disability prevents this, or means that the full eligibility criteria set out above can not be met. Housing Officers will consider such cases on an individual basis and use their discretion to award a community contribution where they consider this is appropriate.

8. Young people

Generally young people (applicants aged 25 and under) will be required to meet the full community contribution criteria outlined above. However housing needs officers will have discretion with regard to the length of time a young person has been in employment. In addition where a young person is able to participate in volunteering and is not in employment or training the number of hours per month required is 20 hours,

Young people referred by Children's Services

In some circumstances a young person in supported housing may not have a full current positive residence history. Where the scheme manager is satisfied that the young person is no longer in breech of their tenancy agreement or licence and is complying with the conditions of the tenancy Housing Officers will consider such cases on an individual basis and use their discretion to award a community contribution where they consider this is appropriate.

Where a young person has been referred by Children's Services the following will qualify for community contribution award:

- Firm offer and proof of acceptance onto formal study or training as set out in paragraph 3 above
- In employment
- Volunteering for 20 hours per month. Volunteering defined in paragraph 2 above

PROCEDURE FOR APPEALS AND REVIEWS

5.1 All applicants have the right to request general information about their application, including whether they are entitled to any preference for housing and whether and when suitable accommodation will be offered to them. Decisions made under this policy will be notified to applicants in writing and applicants are entitled to request information concerning the facts of their case that have been taken into account.

5.2 Applicants who are unhappy with a decision made under this policy should in the first instance contact the housing officer who has dealt with their case and explain why they think that the decision is not reasonable.

5.3 The applicant will be notified whether the decision still stands and the reasons for this usually within 48 hours

5.4 If an applicant wishes to take the matter further, they can make a request for a formal review of the decision within 21 days. In these cases the applicant will be invited to make a written submission stating the reasons for their request for a review and the Council will seek any further information it requires, including advice from medical and other specialist advisors. Formal reviews will be conducted by a team leader or manager within the Council's Housing Service with no previous involvement in the case who will notify the applicant of the outcome of the review including the reasons for their decision within 56 days.

5.5 Where an applicant wishes to appeal the suitability of an offer of accommodation under 5.1 of this policy, the property will be held available whilst the appeal is considered where this is not likely to lead to an unreasonable delay in letting the property.

5.6 Where an applicant requests a formal review concerning the suitability of accommodation under 5.3 of this policy, the property will not normally be held available whilst the appeal is considered.