Allocation of accommodation: guidance for local housing authorities in England - Consultation

A response from the
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This response to the Department for Communities & Local Government Consultation on the proposed *Code of Guidance Allocation of accommodation: guidance for local housing authorities in England* ("the Draft Code") is made by the team of specialist Housing Barristers based at Garden Court Chambers in London.

The Garden Court Housing Team contains more than 20 practising barristers including two QCs. This response has been prepared by Tim Baldwin, Liz Davies and Jan Luba QC and represents the collective view of the Housing Team.

Our response is informed by our day-to-day experience in: advising and representing consumers of social housing; helping with disputes over social housing allocation; addressing overcrowding and mobility issues; and advising social housing providers on issues such as the framing of allocation schemes. In short, our daily work engages almost all the subject areas covered by the Draft Code.

The Housing Team has a reputation for excellence in this field and is highly ranked, in the independent directories, for its legal work on Social Housing.

The Housing Team produces a free weekly *Housing Law Bulletin* for over 2400 subscribers and contributes articles and case reports to professional publications such as *Legal Action*.

Members of the team have also written or co-written key practitioner text books including most relevantly: *Housing Allocation and Homelessness* (Jordans), *Support for Asylum Seekers* (LAG), and the *Housing Law Handbook* (Law Society).

Between them the members of the Housing Team have decades of experience of dealing with the sharp end of issues relating to social housing allocation. The team comprises:

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1. Chapter 1: Scope of guidance and definition of allocation

Scope of the Guidance

1.1. We *welcome* this opportunity to respond to the Government's proposals for new guidance on allocation of social housing in England. Sadly, the majority of the consultation questions are not directed to the content of the Draft Code but to eliciting information from housing authorities about their current policies and practices.

1.2. We consider that it is more useful, given our expertise, to frame this response by reference to the actual content of (and omissions from) the Draft Code itself. Our response therefore adopts the same chapter headings as the Draft Code and offers commentary upon the content of each Chapter in the hope that at least some of our contributions may be used to improve the current draft before it is finally approved and published. Unless otherwise stated, paragraph references are to the Draft Code itself.

1.3. We *regret* that it has been decided not to communicate to local housing authorities and others the Government's intentions on commencement of the relevant provisions of the Localism Act 2011 which are at the heart of the Draft Code, whether as part of the consultation exercise - or in any other medium. It would have been helpful, and is now essential, that the maximum possible notice is given to local authorities and their partners as to the intended commencement date.

1.4. We *assume* that the commencement order (when made) will include transitional provisions explaining whether or not, and if so how, the 2011 Act and the new guidance will apply to applicants already being considered for allocations under current arrangements. As the transitional provisions are likely to be complex, the Draft Code should be amended to add reference to them and explanation of them.

1.5. We *welcome* the decision to produce a new stand-alone Code to replace all the current guidance on this subject: Draft Code para 1.2. It might be helpful for the Code to mention the fact that there is a separate code for Wales and to provide a link to it. Indeed, an exercise might usefully be undertaken to insert cross-references into the Draft Code so as to show the helpful advice and guidance of general application which is to be found in the Welsh Code.

1.6. As will become plain from the detail of our response, we consider that there are several important areas in which the Draft Code can be corrected,

strengthened and augmented. Our premise is that the Code should be as useful a working tool as possible for housing authorities and those advising them.

Definition of an "allocation"

1.7. This is addressed in Draft Code paras 1.4 - 1.5 and Annex 1. It is particularly helpful that a discrete list has been retained of those circumstances which *do not* count as an allocation. The text suggests (at para 1.11) that Annex 1 contains a "full list". It does not. It can only do so if the new items mentioned in para 1.11 are added-in. The headers in Annex 1 are inconsistent. The first should be re-styled "Primary Legislation Exemptions".

1.8. The opening rubric of the Secondary Legislation Exemptions section of Annex 1 needs re-writing to read: "3. The Allocation of Housing (England) Regulations 2002 (SI 2002/3264) as amended, Regulations 3 and 4, exempt the following allocations from Part 6:"

1.9. We would propose a third header in Annex 1 "Exemptions made by Other Legislation" in which the point could usefully be made that a vesting or other disposal made pursuant to an order under the Family Law Act 1996 Schedule 7 Part 2 does not count as an allocation. (This provision seems to have been missed in drafting section 160 of the Housing Act (HA)1996).

1.10. We have experienced real confusion among local housing authorities as to whether any reference at all should be made to these various non-allocation situations in the statutory allocation scheme that they are required to publish. That confusion will be heightened by the need (somewhere) to set out policies to deal with the very significant new class of non-priority transfer cases. The value of the Draft Code would be greatly enhanced if it explained how, if at all, these matters should be addressed - whether separately, or in the allocation scheme, or in some larger overall "Lettings Policy" document of which the statutory allocation scheme was only part.

Allocations to Existing Tenants

1.11. Our experience suggests that housing authorities are looking to the Draft Code for clear practical guidance on how: (1) to sift priority transfer applicants from non-priority transfer applicants; and (2) to organise, administer and prioritise a separate 'transfer list'. The current Draft Code gives very limited (and confusing) guidance.

1.12. On the first of those, clear guidance is needed as to whether the Government still considers (as it did in the guidance being replaced) that "under-occupation" can render a tenant's current housing 'unsatisfactory' and thus bring it within the reasonable preference rubric. It is not clear whether

the Draft Code is or is not suggesting that the scenario in para 1.10 (tenant facing a mandatory benefit cut in April 2013 because of under-occupation) would be in a reasonable preference category.

1.13. The obvious and expedient route to address the challenge faced by under-occupying benefit-reliant tenants would be for social landlords to identify them well before April 2013 and offer them management transfers to smaller accommodation. That would be pragmatic and cost-effective and avoid the whole 'reasonable preference or not' dilemma because the decision to move would have been made by the local authority rather than at the request of the tenant and so the offer can be made outside of the allocation scheme. But it is a course of action not even mentioned in the Draft Code as it stands.

2. Chapter 2: Overview of the amendments to Part 6 made by the Localism Act 2011

2.1. This Chapter gives a reasonably succinct summary of the changes made by the Localism Act and the policy reasons for them,

2.2. It is in this Chapter that it is crucial to spell out when these changes will come into force. That is doubly so because new allocation schemes are to be drawn up having regard to the content of tenancy strategies which local housing authorities have been given until 15 January 2013 to publish: Draft Code para 2.6.

2.3. In Draft Code para 2.8 the words "in every local authority area" should be inserted after the word "presumption". This would make it clear that the Government does not yet know whether any (and if so how many) local authorities will move towards most commonly discharging their homelessness duties by using private sector accommodation.

2.4. At present there is confusion across the sector about how the process of reviewing and revising allocation schemes is to be handled and timetabled in the light of the (yet to be commenced) Localism Act reforms. The confusion is the result of the early commencement in January 2012 of provisions enabling authorities to consult on replacement allocation schemes. Those authorities embarking on that process are unclear whether their proposed new scheme must take into account the current statutory guidance, the content of the Draft Code or the final Code once issued. This is a topic on which Chapter 2 could usefully provide guidance and clarification.

3. Chapter 3: Eligibility and qualification

3.1. We welcome the inclusion of the reminder in Draft Code para 3.4 that *eligibility* issues should be considered twice: at application and again pre-offer. The Draft Code could usefully explain (as did the previous guidance) that the former is essential to avoid applicants being given a false expectation.

3.2. However, the content of para 3.4 is not repeated again in the text dealing with *qualification* and if the intention is that the same approach should be taken that should be spelt-out.

Eligibility

3.3. We suggest that Draft Code para 3.8 should additionally include reference to the Immigration (European Economic Area) Regulations 2006, SI 2006/1006, which are relevant when dealing with EEA national cases and are referred to elsewhere as "the EEA Regulations". The current reference to the Eligibility Regulations should state that Regulation 3 of the Eligibility Regulations contains those persons subject to immigration control who are nevertheless eligible for an allocation and that Regulation 4 of the Eligibility Regulations contains those other persons from abroad who are prescribed as not being eligible for an allocation.

3.4. As regards the eligibility of other 'persons from abroad', the Code should make reference to the Immigration (European Economic Area) Regulations 2006 at this point. The Code should also make reference to EU rights of residence arising directly from, or derived from, Directive 2004/38/EC and other provisions of EU secondary legislation such as Regulation 492/2011, or from EU treaties such as the Treaty on the Functioning of the European Union, including those rights of residence that have been recognised in the case law of the Court of Justice of the European Union. Such rights of residence must be given effect in domestic law as directly applicable enforceable EU rights via section 2(1) of the European Communities Act 1972. Housing officers are obliged to give effect to these rights and need to know that they may arise and that they may need to obtain advice when an application is made by reference to one of these provisions. Annex 3, para 2 should also be adjusted accordingly.

3.5. It would be helpful if the Code defined the UK (England, Wales, Scotland and Northern Ireland) and the Common Travel Area (the UK, the Republic of Ireland, the Isle of Man and the Channel Islands).

3.6. Draft Code para 3.10 should include Irish citizens with a Common Travel Area entitlement as a separate category. Special provision is made for them in UK immigration law and they do not require leave to enter or remain in the UK.

3.7. Draft Code para 3.10(ii) should read as follows: "Certain Commonwealth citizens with a right of abode in the UK (including British subjects with the right of abode)." NB such persons are not to be confused with British citizens.

3.8. Draft Code para 3.13(ii) should have as its final sentence: "Exceptional leave to remain (which is granted at the Secretary of State's discretion outside the Immigration Rules) now takes the form of 'discretionary leave' or 'leave outside the rules'."

3.9. We would suggest that Draft Code paras 3.3 – 3.19 contain direct cross-referencing to the relevant Annexes.

3.10. Draft Code para 3.16 should include at (h) the ninth category at Regulation 4(2) (persons from abroad who are exempt from the habitual residence test): "a person who (i) arrived in Great Britain on or after 28 February 2009 but before 18 March 2011; (ii) immediately before arriving in Great Britain had been resident in Zimbabwe; and (iii) before leaving Zimbabwe, had accepted an offer, made by Her Majesty's Government, to assist that person to settle in the UK". It should be noted that whilst this category only encompasses people who arrived in the UK within a defined period (of just over two years), there is no time limit specified within which they must have made an application for an allocation

3.11. Where A2 Accession State nationals are referred to (Draft Code paras 3.16c and 3.17), it should be made clear that once Accession State nationals subject *to* worker authorisation have worked in the UK under the terms of an authorisation document for 12 months, they are to be treated like any other EEA national.

3.12. Draft Code para 3.18 should include a discrete list of other persons from abroad who are eligible for assistance on satisfaction of the habitual residence test.

3.13. See also the comments on Annex 3 and Annex 4 below.

Qualification

3.14. The introduction of *qualification* criteria is the flagship change introduced by the Localism Act and the crucial guidance the sector is waiting for is 'how to' frame an allocation scheme at local level so as to provide for classes of those qualified and/or those disqualified. Guidance is condensed in three short, and not particularly helpful, paragraphs pregnant with the need for further explanation and guidance: Draft Code paras 3.20-3.22. The answer to the first part of Question 5 must be a resounding "No". The answer to the second part of that question is given in the following paragraphs.

3.15. HA 1996 section 160ZA(8) gives the Secretary of State power to prescribe by regulation classes of people that are, or are not, to be treated as qualifying persons and to prescribe criteria that may not be used by local housing authorities in deciding what classes of persons are not qualifying persons. We are unclear from the content of the Draft Code whether the Secretary of State intends to use these powers or not. We would recommend that criteria are prescribed in Regulations, rather than in guidance, so as to allow for more clarity and transparency.

3.16. The passage in Draft Code para 3.21 "authorities will need to have regard to their duties under the equalities legislation" amounts to an abdication of the function of giving guidance. Local housing authorities need to know what duties are applicable and how to deal with them appropriately. The Code should remind authorities not only to have regard to their duties under the equalities legislation, but of the very specific prohibition on unlawful discrimination. A reference to the Equality Act Guidance for public sector bodies, published by the Equality and Human Rights Commission, would also be helpful.

3.17. The further suggestion in Draft Code para 3.21 that "authorities will need to have regard to …the requirement in s.166A(3) to give overall priority for an allocation to people in the reasonable preference categories" is simply a cause for puzzlement. If a person cannot qualify for an allocation under a particular local scheme how can that scheme give them a reasonable preference? Is it being suggested that those entitled to a reasonable preference cannot be disqualified? Local housing authorities could really use helpful guidance on these questions. Many want to introduce simple qualifying criteria (e.g. X years local residence) applicable to all applicants and enabling them to deal with applications without even considering particular housing needs or whether applicants who cannot meet the criteria fall into the reasonable preference categories. Can they do that or not? The Draft Code should make the position clear.

3.18. The Draft Code could be much clearer on the extent to which local authorities can or cannot include specific categories of qualifying persons. Should they have two lists of classes – those who qualify and those who do not, or only the former?

3.19. Draft Code para 3.22 suggests that the qualifying classes may be drawn so as to discriminate between current tenants and other applicants. But what is the advice on drawing further distinctions e.g. having particular qualifying criteria for particular parts of a local authority's area or particular types of its housing?

3.20. We acknowledge the policy of *local* decision-making contained in the Localism Act, but it may be helpful for the Code to provide at least some non-exhaustive lists of types of classes of people who a local housing authority might want to consider would not qualify.

3.21. We would also expect the new Code to distinguish between two potential types of non-qualifying persons:

3.21.1. those where the decision to disqualify is due to the applicant's own fault, referred to in Draft Code para 2.5 as "serious unacceptable behaviour";

3.21.2. those where the decision to disqualify refers to local criteria, such as residency requirements, and where reference to the prohibition of discrimination should be very clear.

3.22. We note the new legislative requirement not to disqualify members of the armed forces on residency grounds referred to at Draft Code para 3.32. Local authorities could also be encouraged not to disqualify other groups who may have difficulty in meeting residency requirements given their histories. Rough sleepers, former asylum-seekers, care-leavers, former hospital patients and ex-prisoners might be good examples.

3.23. Our experience of the queries being raised by local authorities on setting the new qualification criteria is that they need help and guidance on the following discrete practical issues:

(1) Has the description of a particular non-qualifying class to be drawn so as to exclude its application to exceptional cases?
We would expect the Code to contain guidance that there should always be a built-in flexibility to permit a person to qualify for an allocation, even if he or she apparently falls within a class of people specified as not qualifying, because of exceptional circumstances.

(2) Can the operation of the disqualification be time-limited so that present practices of 'suspending' applications can be made lawful?

(3) How can the authority's scheme reflect the fact that many of the Private Registered Providers to which they would nominate applicants have their own qualifying criteria under which they reject nominations?

4. Chapter 4: Framing an allocation scheme

4.1. We presume from the contents of Draft Code para 4.5 that the Government no longer has a policy that English local housing authorities should offer choice in their allocation schemes. If so, this should be explicitly stated.

4.2. In Draft Code para 4.7 the text at the third bullet should be revised to follow the pattern in the second. It should open with "although" and conclude with: ", housing authorities may take that course in framing their scheme if they wish."

4.3. The legal citation in Footnote 9 is insufficient and should be replaced with: *R (on the application of Ahmad) v London Borough of Newham* [2009] UKHL 14 (4 March 2009), [2009] HLR 31.

4.4. The exact definition of a 'restricted person' is at HA 1996 section 184(7) and we would suggest that it is quoted directly. It should be pointed out that HA 1996 section 166A(4) only applies where it is the presence of the restricted person in an applicant's household that gives the applicant a reasonable preference. If, for example, a household was overcrowded even without the presence of the restricted person, or there was a medical or welfare need to move without the presence of the restricted person, the applicant would be entitled to a reasonable preference.

4.5. At Draft Code para 4.10, it might be helpful to add these final sentences:

"The definition of 'homelessness' is at HA 1996 sections 175 – 177(1A) and that definition must be applied to this reasonable preference category. The definition can include people who have accommodation which is not reasonable to continue to occupy. Local housing authorities should remember that 'homelessness' as defined by HA 1996 is not the same as 'rooflessness' or 'rough sleeping'. Furthermore, it is not necessary for a person to have made an application for homelessness assistance, nor is it confined to situations where a person has made an application for homelessness assistance and the local housing authority has found that the main housing duty at HA 1996 section 193(2) is owed (that is dealt with by the second reasonable preference category)".

4.6. Draft Code para 4.11 and Questions 6-8, reflect the muddle that the Government now finds itself in when addressing 'overcrowding' as a result of its failure to review, revise and update the statutory overcrowding standard. If the Draft Code really intends to advocate use of a new non-statutory 'bedroom standard' it must give a lot more clarification than that set out in the four bullets at Draft Code para 4.11. The present text fails to address how individual children, or disabled people or carers are to be dealt with under the standard. It draws (without explaining why) the distinction between a child and an adult at 21 rather than the much more common 18. This is not a matter which should be left to each local authority to address without clear guidance. Too many have got into complete muddles with their own attempts to map

out all possible household variants and their consequent rating for both 'overcrowding' and eventual offer purposes.

4.7. The crucial question for the next several years about reasonable preference category (c) will be whether it does or does not embrace the circumstance of an existing tenant who has a home larger than they presently need and/or can reasonably afford (especially in the light of benefit restrictions). The position under the current guidance is that under occupation is a category (c) circumstance: current Code Annex 3. It is simply not good enough for that just to be taken out of the list as proposed in Draft Code Annex 2. Again, the distinction between transferees with or without reasonable preference is a major innovation of the Localism Act. Real guidance is needed on its practical application.

4.8. For the reasons given above, a reference to "severe overcrowding" in Draft Code para 4.18 is of no assistance at all in the absence of a definition or means of defining "overcrowding". The Government might consider a reference to care-leavers in the list of people with urgent housing needs to whom additional preference might be given.

4.9. In Draft Code para 4.20 the word "exclusive" should be replaced with "exhaustive"

4.10. The example given in Draft Code para 4.21 is a poor one. A homeowner in negative equity who can no longer afford their mortgage should hardly be given less priority on account of their financial resources. The reference to owner occupiers should be clarified or omitted.

4.11. Add to footnote 15 "at para [18]" and to footnote 16 "at para [55]"

4.12. Add to Draft Code para 4.24 the italicised words: "a person serving in the armed forces *or members of that person's household…*".

4.13. The present text of Draft Code paras 4.28 to 4.30 seems to suggest that the Government envisages 'local lettings policies' being drawn and consulted on as freestanding documents. The text should explain how, when and why such policies are not required to be included in the allocation scheme and in the consultation arrangements regarding that scheme.

4.14. The present text of Draft Code para 4.31 suggests that local authorities may dis-apply their qualifying criteria in respect of particular types of stock or in respect of void properties for which no interest had been expressed by qualifying applicants. If that is right it is important that reference is made to this earlier in the text when describing how qualifying criteria might be framed. Moreover, the Code could usefully explain exactly how such flexibility might be transposed into the actual wording of the description of a qualifying class.

4.15. The wrong subhead appears above Draft Code para 4.32. It should read "Matching applicants to offers" or similar. Crucially, and for obvious reasons,

the last word of the paragraph should be changed from "accepted" to "offered".

4.16. Draft Code para 4.33 provides an important opportunity to address equality issues about which authorities really would benefit from guidance. The present text simply summarises what the law is and contains no guidance. This is a wasted opportunity.

4.17. Tucked away in Draft Code para 4.40 there is a reference to a "quota of properties". This is not an apt way of giving guidance on the critical question of whether an allocation scheme may lawfully have general quotas (whether for those in or outside the reasonable preference criteria). That could usefully be spelt-out in freestanding text.

4.18. Rights, without knowledge of their existence, are worthless. An additional sentence needs to be added to Draft Code para 4.42 to make it clear that the Government expects applicants to be informed of the rights it describes.

5. Chapter 5: Allocation scheme management

5.1. In Draft Code para 5.2 the sentence "Housing authorities should be aware that they still have certain duties under s.106 of the Housing Act 1985" is of very limited assistance. We doubt most readers would have ready access to that provision. The text should explain what the duty is and give guidance as to how it might be met.

5.2. The last sentence of Draft Code para 5.11 is muddled and needs re-writing to deal with the part of the present text which presently reads: "for example, that allocation of units in a certain block of flats should not be let to older persons or to households including young children."

5.3. The repeated use of the term "any" in Draft Code para 5.13 misstates the scope of the statutory offences.

5.4. In Draft Code para 5.15 the text suggests that authorities may wish to ensure that more than one staff member is involved in an allocation to reduce instances of error and fraud. This is to be welcomed. The guidance should indicate that as this would be an aspect of the procedure for allocations, the allocation scheme will need to address which staff members would be involved.

5.5. Delete the first "the" in Draft Code para 5.16 (to give the text meaning).

5.6. In the paragraphs on *Information about decisions* (Draft Code paras 5.16-5.20) it would be helpful if the Code gave guidance about when decisions might reasonably be expected to be notified e.g. within 30 days of application – the period used in the guidance on determining homelessness applications.

5.7. We remain puzzled as to why the Draft Code suggests that every authority should draw up its *own* procedure for reviewing decisions. A good deal of time and effort would be saved if the Government was prepared to make regulations for a single national set of review arrangements using its present regulation-making powers: HA 1996 section 167(5).

5.8. If the regulation-making power is not to be exercised, and subject to the comments below, we take the view that Draft Code para 5.21 contains good practice guidance as to the conduct of a review useful to all the hundreds of authorities that will need to devise their own procedures.

5.9. The text in Draft Code para 5.21iii is out of context in its present location. It should be inserted as a second sentence in Draft Code para 5.18.

5.10. In Draft Code para 5.21iv the word "appeal" should be replaced by "review".

5.11. In Draft Code para 5.21v replace "council policy" with "the terms of the allocation scheme".

5.12. In Draft Code para 5.21vi the text should suggest a timescale for completion of the review (no longer than 8 weeks).

5.13. The text at Draft Code para 5.21vii is in the wrong place and should be located earlier in the paragraph, It refers to a non-existent "right" to make written representations and requires complete re-drafting.

5.14. In Draft Code para 5.21viii the guidance should make it clear whether a complaint about a council's functions in decision-making on allocations goes to the Local Government Ombudsman or the new (soon to be enhanced) Housing Ombudsman service.

5.15. Chapter 5 needs supplementing in respect of reviews - to deal with the procedure that should apply if a proper nomination is made by a council to a PRP but is refused. Likewise, it should explain (as should Chapter 6) whether the review function is one that can be contracted out. If it can be, 5.21iv requires rewording.

6. Chapter 6: Working with Private Registered Providers and contracting out

6.1. Draft Code para 6.3 completely ducks the crucial issue on which local authorities need guidance i.e. how to make nomination agreements legally binding so that their terms (for example about dispute resolution) can be enforced.

6.2. Absolutely clear guidance is needed about how housing authorities should approach the allocation of 'affordable rent' homes in their schemes. In a context where all allocation schemes are being revised it is unhelpful for Draft Code para 6.4 (the only paragraph dealing with this important new point) to refer to "existing letting arrangements". If affordable rent homes can be 'ring fenced' then the guidance should explain whether this will be achievable by local lettings policies or by qualifying criteria or both.

7. Annex 3: Rights to reside in the UK derived from EU Law

7.1. In place of the final sentence, draft Annex 3, para 2 should state that EU rights of residence may arise directly from, or derived from, Directive 2004/38/EC and other provisions of EU secondary legislation such as Regulation 492/2011 and from EU treaties such as the Treaty on the Functioning of the European Union, including those rights of residence that have been recognised in the case law of the Court of Justice of the European Union. Such rights of residence must be given effect in domestic law as directly applicable enforceable EU rights via section 2(1) of the European Communities Act 1972. Housing officers are obliged to give effect to these rights and need to know that they may arise and that they may need to obtain advice when an application is made by reference to one of these provisions.

7.2. As regards draft Annex 3, para 22, the Treaty on European Union and the Treaty on the Functioning of the European Union are two separate treaties. The correct reference in this paragraph should be to the latter.

7.3. As regards draft Annex 3, para 27, to be accurate the sentence should read: "By regulation 4(4) of the EEA Regulations, the resources of a person who is a self-sufficient person or a student (see below) and, where applicable, any family members, are to be regarded as sufficient if (a) they exceed the maximum level of resources which a UK national and his or her family members may possess if he or she is to become eligible for social assistance under the UK benefit system, or if (a) does not apply, (b) taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient."

8. Annex 4: Worker authorisation scheme

8.1 As regards draft Annex 4, para 9, this is not an accurate list of A2 nationals who are not required to obtain authorisation to work, see Reg 2 of the Accession (Immigration and Worker Authorisation) Regulations 2006.

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