Annex D

Commonly asked questions about 'Old scheme' rules

1 **What should I do when being pressured to give an assurance that 'old scheme' rules will be applied to a certain case?**

You are unable to make a decision or any declaration about the likely outcome of a future claim to benefit. This is particularly the case where the dwelling has not been acquired and the person therefore has not occupied it and where there can be no liability. LAs do not have power to make a decision on an award of HB in these circumstances. To do so would leave the authority open to litigation.

You have a responsibility to advise how the HB scheme works and when appropriate how the particular regulations may work in an individual's circumstances should a claim be made. You could give an indication of the likely outcome of a claim but this would have to be limited to known facts without any promises attached. You should therefore avoid the declaration that the 'old scheme' rules will apply to any subsequent liabilities, as maximum rent rules may later be applied to a subsequent award.

2 **What if the level of rent charged is in multiples of or significantly higher than the rent officer's determination of a claim related rent?**

It must be borne in mind that the Maximum rent rules, introduced by the same legislation as the 'Savings' provision, required that the eligible rent be restricted to the level of a rent officer's determination. This imposed a restriction on unreasonable rents to a market average, a market where profits are made.

In all situations where the rents are substantially higher than the rent officer's determination, you should request details of how the finance for the purchase of the relevant property has been arranged. A private landlord's rents are governed by what he can get in the local rental market. Therefore, where they have a mortgage, they will ensure that their repayments are the lowest they can find. Under normal circumstances, any loan for the purchase of the property would be expected to be of 20 to 25 years duration, or longer.

If the period over which the loan is due to be repaid is shorter than this, you should query the rationale for the shorter period. You should consider what factors or market forces are being brought to bear in determining the level of rent charged and the terms of the liability. If a major factor appears to be the constraints that are on LAs to limit the rent for those in prescribed groups with tenure types not readily available to new tenants in the private sector then HB regulation 9(1)(l) should be considered and the claim turned down.

HB regulation 9(1)(l) should not only be considered for those claims when it appears that the entire liability is seeking to take advantage of the HB scheme but also where the liability has been engineered to gain more HB than would otherwise be available or reasonable. This decision can be made regardless of whether the contrivance is due to the actions of the landlord or the claimant. (see Commissioner's decisions CH/58/2007 and CH/136/2007 at *Annex E* of this chapter).

LAs have told us of examples where the 'voluntary organisation' leases a property from a sister company or one with which it has a lease that inevitably results in a charge being made well above commercial levels. As with any consideration of a case with HB regulation 9(1) you must consider the dominant purpose behind the way that the liability is set up.

3 **Should I consider the accommodation needs of those who do not 'occupy' the dwelling when considering a rent restriction?**

'Old' regulation 13(3)(a) requires that the authority consider whether the claimant occupies a dwelling that is larger than is reasonably required by the claimant and others that occupy that dwelling. Within that same provision there is ability for the LA to consider a Rent Officer's determination as to whether the size of the property is reasonable having regard to suitable alternative accommodation occupied by a household of the same size.

Whether or not supported accommodation is excluded from referral, the Rent Officer's (Housing Benefits Functions) Order 1997, referred to in 'old' regulation 13(3)(a), contains a size criteria in schedule 2, which must be considered in all rent officers' determinations. It is reasonable to conclude therefore that the size criteria in the Rent Officer's Order should influence the size of property reasonably required by the claimant and others that occupy that dwelling. However, it is important to bear in mind that the size criteria applied by the rent officer are different from the test to be applied by the LA here. The test here is whether the dwelling is larger than the claimant reasonably needs, whereas the rent officer is simply applying a formula based on the number of occupants.

With regard to carers, there are various interpretations as to who can be said to occupy a home for the purposes of the Rent Officer referral. There is no explanation in the Housing Benefit regulations of who should be included. However, in paragraphs A4.1500 – A4.1549 of the HB/CTB Guidance Manual we give our opinion on who should be included in the referral to the Rent Officer as an occupier of the dwelling.

It is argued that the test of whether or not a person occupies the dwelling should be the same as that in regulation 7 of the Housing Benefit Regulations 2006. Unless a carer lives in the same dwelling as the claimant as their only home they cannot be said to 'occupy' the home for the purposes of 'old' regulation 13(3)(a).

When a carer occupies a room in a shared home, that room would not form part of the individual dwellings occupied by each of the tenants as they would have no access to it. Instead the cost of providing the room would be an element of the cost of providing care, support and supervision to those tenants.

4 **Are shared rooms in 'exempt accommodation' the same as communal rooms in 'sheltered accommodation'?**

An understanding of what is meant by 'sheltered accommodation' in paragraph 8 of schedule 1 to the HB regulations is critical to deciding if fuel and cleaning charges in respect of rooms within 'communal areas' are eligible for HB through paragraphs 1 and 5 of schedule 1. This area was looked at by Commissioner Levenson in CH/1116/2007; although not conclusive, the Commissioner made some useful comments in paragraph 5.

Help with the costs of fuel and cleaning for rooms in 'communal areas' are only eligible for those who live in sheltered accommodation. Otherwise help is only available for the costs of cleaning and heating areas of common access, excluding rooms.

While sheltered accommodation appears to commonly be a complex of self contained units with rooms such as lounges and dining areas of common access, the term 'sheltered accommodation' is not defined so it is the common meaning of the term that should be used.

However, you should also consider the context in which the term is used. In the time of schedule 1B there was a definition of 'supported accommodation' which was similar in structure to that of 'exempt accommodation'. The simultaneous existence of both terms 'supported' and 'sheltered' accommodation in HB legislation indicates that they are not necessarily the same thing.

Paragraph 5's effect is to make eligible a cost that is otherwise not eligible. Fuel charges are not usually eligible because in income-related benefits a person's applicable amount includes help with fuel charges for the home and to leave a charge for fuel in the rent would result in double provision. It is therefore reasonable to assume that the cost of fuel for rooms in communal areas is not one that is already met by the applicable amount. Therefore, as it is for communal areas, it follows that this extra help must be for areas that are additional to the person's actual dwelling.

While the tenants in shared homes would have communal/shared rooms, they arguably form part of their dwelling for HB purposes and are not living spaces additional to it. The context supports the argument that 'sheltered accommodation' for the purpose of paragraph 8 of schedule 1 to the HB regulations contains dwellings sufficient as such in themselves, arguably self contained, with additional communal rooms for which additional costs need to be met.

5 **How should I deal with a rent increase?**

Under old scheme rules as preserved for exempt accommodation, whether or not the authority refers the tenancy to the rent officer, any unreasonable rent increase is dealt with by HB regulation 13ZA, preserved for the purpose. It enables rent increases to be limited to once a year, if the LA considers that the increase has occurred unreasonably quickly following the last increase, and to a reasonable amount by comparison with increases for suitable alternative accommodation. It would only apply to rent increases during the period of the award once the original claim has been decided.

There is obviously a natural link between the term 'suitable alternative accommodation' in the saved forms of both HB Regulation 13 and 13ZA. However, the same factors as in regulation 13 for determining what suitable alternative accommodation is, do not have to be taken into account in regulation 13ZA. For example an authority would not have to consider whether a person should move, as that has already been decided at the point of claim or their first taking on the liability. Instead they are concerned with making a broad comparison with rents in the wider market. Arguably the provision envisages any increase in rent keeping track with the levels of increase for comparable dwellings, generally keeping in line with inflation or in line with changes in the market that have a recognisable cause.

6 **Can I help with charges for security services?**

As with any service charge, one for security services must first be treated as rent through HB regulation 12(1)(e) where it must be a condition of the right to occupy the dwelling. However, certain service charges are then made ineligible through HB regulation 12(3) and schedule 1. To be eligible these charges must effectively be connected with the provision of adequate accommodation as reflected in sub-paragraph 1(g) of schedule 1 to the HB regulations, which is for the LA to decide according to the facts of the claim.

There is no definition of adequate accommodation in the HB regulations; therefore it is the every day understanding of the phrase that should be used. The HB/CTB Guidance Manual, paragraph A4.174, points to the accommodation being adequate for any tenant rather than the particular tenant. An eligible service charge would therefore generally be one that relates directly to the fabric of the dwelling covered by the tenancy and not directly to the needs of the tenant in enabling them to live in it.

Neither HB regulation 12(3) nor schedule 1 is specific on the treatment of service charges for security services. It is therefore for an authority to draw its own conclusions as to whether a service is 'connected with the provision of adequate accommodation'. A distinction therefore needs to be made between the security of the individual within the dwelling and the security of the dwelling. Service charges connected with the former are not eligible while those for the latter arguably can be.

If a night security service is intended to protect the fabric of the premises from vandalism, arson and unauthorised entry by visitors, the service charge could arguably be connected with the provision of adequate accommodation. The argument being that without the provision of the night security service vandalism, broken windows and arson could result in the accommodation no longer being adequate for the residents to inhabit. This might be accepted as reasonable where the security services are not being delivered to the claimants personally.

It is thought that without these security services neither the residents' personal security or the structural integrity of the premises can be guaranteed. However, it is only the cost in proportion to the staff time spent in these activities that would be eligible for HB. You should therefore refuse to include in HB any service charges for services provided by the security services that relate to general counselling or support of the residents. For instance, if the security services assist the night worker in any of their duties for a few hours in each night, then the charge for that proportion of their services will not be eligible to be met by HB. The burden of demonstrating that all the service charges claimed as eligible service charges specifically relate to provision of adequate accommodation rests with the providers.

It is also important to note that it is not the cost of paying for certain staff that is eligible but the cost of the service they provide that is either eligible or not depending on whether the duty is connected with the provision of adequate accommodation. An authority should be satisfied what staff time is spent on what duty and how that has been costed.

The Commissioner's decision in CIS 1460/1995 is authority for the proposition that the individual needs of the residents are relevant to the question of what is adequate accommodation. Arguably the special needs and problems of the residents of the home cannot be ignored in relation to paragraph 1(g).

The Commissioner's decision in R(IS) 2/07 shows, in paragraph 28, how the providers must approach the calculation of the service charges for the night security service, and how the costs of these services should be apportioned between the Supporting People programme and HB.