

Housing Benefit and Council Tax Benefit Circular

Department for Work and Pensions

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ADJUDICATION AND OPERATIONS CIRCULAR

WHO SHOULD READ	All Housing Benefit (HB) and Council Tax Benefit (CTB) staff
ACTION	For information
SUBJECT	Guidance to Local Authorities on dealing with claims from those living in supported accommodation

Guidance Manual

The information in this circular does affect the content of the HB/CTB Guidance Manual. Please annotate this circular number against *Chapter A4, paragraph 4.1050 and Annex A*.

Queries

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Guidance to Local Authorities on dealing with claims from those living in supported accommodation

Introduction

- 1 This circular
 - adds to what is already in the *HB/CTB Guidance Manual*, in particular paragraphs A4.1000 to A4.1329
 - looks at issues
 - Local Authorities (LAs) have asked us about over recent years, and
 - raised by Social Security Commissioners decisions
- 2 This guidance has been developed in consultation with LAs and Supported Accommodation providers.

'Old Scheme' rules

- 3 The relevant rules were in the *Housing Benefit (General) Amendment Regulations 1995 (SI 1995 No. 1644, now revoked)* which originally introduced the Local Reference Rent (LRR) and the requirement to use the lowest of the rent officer determinations to decide the eligible rent for the majority of private sector tenants – the maximum rent.
- 4 These regulations included a 'saving' provision that protected existing awards and certain new awards by determining the eligible rent in specific circumstances under what has become known as the 'old' HB scheme rules. These old HB scheme rules can only apply to new benefit claims by those living in dwellings defined as 'exempt accommodation' within those regulations.
- 5 Since the consolidation of the HB and CTB regulations the definition of 'exempt accommodation' is to be found in sub-paragraph 4(10) of *schedule 3 (Transitional and Savings Provisions) to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006*, with the saved version of the *HB (General) Regulations 1987* in paragraph 5.

Exempt accommodation

- 6 'Exempt accommodation' is an individual dwelling for which a person is liable to make payments, that they occupy as their home and which is
- a resettlement place provided by persons to whom the Secretary of State has given assistance by way of grant pursuant to section 30 of the Jobseeker's Act 1995 (grants for resettlement places), or
 - provided by a non-metropolitan county council in England, a housing association, a registered charity or voluntary organisation where that body or a person acting on its behalf also provides the claimant with care, support or supervision
- 7 This provision was included following consultation with the Social Security Advisory Committee following their consultation exercise on the amending regulations. The purpose was to ensure that the rents of certain non profit making groups who are involved in providing specialist supported accommodation with care, support or supervision to residents were not subject to rent restriction under the maximum rent rules.
- 8 This is achieved through defining the housing provision as exempt accommodation and protecting it from the use of the maximum rent through the continued use of what has become known as 'old scheme' rules. The protection was designed to ensure that HB would continue to meet rents at levels that reflected the higher costs of providing this type of accommodation but is also balanced against the requirement to restrict rent levels by comparison with suitable alternatives.
- 9 However, since the early days of the Transitional Housing Benefit Scheme (April 2000 to March 2003), LAs have been telling us of a growing tendency in the supported accommodation market for the definition to effectively prescribe the form of housing provision in this sector, rather than merely reflect it, as landlords seemingly seek to satisfy the definition of 'exempt accommodation'.
- 10 Housing providers have also been unhappy that they are effectively forced to adopt what has become an outmoded model that continues to link the provision of accommodation with that of care and support. This link creates further potential difficulty in that it is similar to that in the Care Standards Act that requires the property to be registered as a care home where both accommodation and more intimate levels of personal care are provided. Those in residential accommodation (which includes accommodation provided in a care home) are treated as not liable to make payments in respect of a dwelling, and so are not eligible for HB. Further, with the advent of individual budgets, there is a strong move to separate the provision of accommodation from care and support.

- 11 There has, for some time, been considerable interest expressed in this area of legislation by LAs. More recently the rules have been examined by Social Security Commissioners in appeals coming before them. Coming out of their decisions concerns have been expressed by providers over implications for the provision of supported housing. While we are currently reviewing these provisions, it has become appropriate to expand on the original guidance in line with the emerging case law.
- 12 As an aid there is a Question and Answer section at *Appendix A* and a brief summary of the most significant Commissioners Decisions (CD) at *Appendix C*. This guidance will not cover the subject of resettlement places, which are also exempt accommodation.

Accommodation provider

- 13 To decide whether an individual dwelling meets the definition of 'exempt accommodation', the starting point is the accommodation provider, which must be
- a non-metropolitan county council in England (defined in section 1 of the Local Government Act 1972)
 - a housing association (defined in section 1(1) of the Housing Associations Act 1985)
 - a registered charity (within the meaning of charity in Part 1 of the Charities Act 2006), or
 - voluntary organization (defined in regulation 2(1) of the HB Regulations 2006)
- 14 It is clear from guidance issued at the time (see *Appendix D*) that the accommodation provider referred to in the legislation should be the landlord, in other words the person or organisation to whom the tenant is ultimately liable to pay their rent. This will be the person who holds either the freehold or the leasehold of the dwelling.
- 15 Therefore a landlord can **not** be a managing agent or an organisation that is only involved in arranging or facilitating the provision of accommodation along with the care, support or supervision (see *Appendix C*, Commissioner's decision *CH/3900/2005*).

Specific landlords

- 16 If the accommodation is provided by a
- **non-metropolitan county council** you should check the claimant's tenancy agreement, or contact the relevant county council, to ensure that the tenant is liable, or treated as liable when relevant, to pay rent to them
 - **registered charity** you should confirm the registered charitable status by reference to any correspondence from the landlord and checked using the Charity Commission's web site at www.charity-commission.gov.uk. Searches can be undertaken on the web site using either the registration number or the name of the charity. With few exceptions and exemptions, all charities are required to be registered with the Charity Commission, providing their gross annual income exceeds £5,000. Details of charities that are exempt from registration are provided in s3 of the Charities Act 1993, which applies to England and Wales only. If a charity claims to be exempt from registration, you should check to see that they meet the conditions for exemption outlined in the 1993 Act.

There are circumstances where organisations may not be registered as a charity because they have been established for purposes that are not exclusively charitable; or they do not satisfy the public benefit requirement because, for example, the section of the public they provide benefit to, is unreasonably restricted. For the purposes of these regulations they must be a registered charity.

- **Housing Association**, if they are a
 - **registered housing association or Registered Social Landlord**, you should check their registration details with the Housing Corporation. This can be checked using the Housing Corporation's website at www.housingcorp.gov.uk, in Wales at the Welsh Assembly Government website and in Scotland on the Communities Scotland website at www.communitiesscotland.gov.uk. Checks can be undertaken on the web site using either the name or registration number of the Registered Social Landlord.
 - **housing association which is not registered with the Housing Corporation**, you should confirm that they fall within the definition of a Housing Association under s1(1) of the Housing Associations Act 1985. This is defined as
 - '...a society, body of trustees or company -
 - (a) which is established for the purpose of, or amongst whose objects or powers are included those of, providing, constructing, improving or managing, or facilitating or encouraging the construction or improvement of, housing accommodation, and
 - (b) which does not trade for profit or whose constitution or rules prohibit the issue of capital with interest or dividend exceeding such rate as may be prescribed by the Treasury, whether with or without differentiation as between share and loan capital'

continued

To confirm an unregistered Housing Association's status, you should ask to see a copy of their constitution or the rules which govern their activities, an explanation of why they are unregistered, and, where appropriate, a summary of their accounts.

- **voluntary organisation**

The HB/CTB Regulations 2006 define a voluntary organisation as

'...a body, other than a public or local authority, the activities of which are carried on otherwise than for profit'

You should therefore ask to see a copy of their constitution or the rules that govern their activities and request a summary of their accounts to demonstrate their not-for-profit status. The common features of a voluntary organisation are that it

- is formally constituted
- does not formally or informally pay dividends or make profits from its operations or in selling, disposal or winding up of its assets or operations
- does not make payments to directors or any person, organisation or body connected to them which are quasi or disguised profits dividends from its operations or in selling, disposal or winding up of its assets or operations. Confirm these from their accounts
- does not have arrangements with any person, organisation or body, formally or informally to make payments or dividends, quasi dividends or disguised profits from its operations or in selling, disposal or winding up of its assets or operations
- that the objects of the organisation and its arrangements are such that it is not possible for any person, organisation or body to make a profit from its operations or in selling, disposal or winding up of its assets or operations

http://www.nao.org.uk/guidance/better_funding/AnnexA.htm

- 17 In some situations, a landlord may fall in more than one of these above categories (eg a Housing Association may also be a registered charity). In these situations, it is sufficient to verify that the accommodation is included within one of the above categories, not all of them.

Care, supervision or support provider

- 18 Having established the status of the landlord, you need to find out whether that body (or someone acting on their behalf) is providing care, support or supervision to the tenant. There is no definition within the HB/CTB Regulations of these terms, so they take their ordinary meanings.

- 19 The amount of care, support or supervision provided by the landlord can vary considerably but it must be more than minimal. It could be the case that the tenant has a very intensive package of care or it could be that the support is fairly minor, but, nevertheless goes beyond that which is normally provided by a housing provider (see *Commissioner's decisions CH/423/2006, CH/3811/2006 and CH/779/2007 etc. at Annex 3*).
- 20 We expect that for most cases funding will be available from either the Supporting People budget or the Care in the Community budget for the provision of care, support or supervision respectively and would cover a wide spectrum of need from low level to high dependency care or support. It would not be unreasonable for one or both to be in payment for someone in supported accommodation. When neither is in payment it would be reasonable to investigate the level of assistance being provided and whether funding is being received from other sources.
- 21 The *Social Security (Use of Information for Housing Benefit and Welfare Services Purposes) Regulations 2008* (SI 2008/2112) sets out when information can be shared between government departments and LAs and within LAs without the need for the client's consent. However, the exchange of information must meet one of the prescribed purposes of the regulations or the Welfare Reform Act 2007.
- 22 If there is no funding from either the Supporting People or the Care in the Community budgets you need to be satisfied that care, support or supervision is being provided, that it is more than minimal and determine how it is funded. If there is no separate identifiable funding stream a deduction may be made from the eligible rent sufficient to cover the cost of its provision.
- 23 As with the provision of accommodation it should be the landlord that has ultimate responsibility for providing care, support or supervision or provides a level of support that the authority is satisfied is more than minimal. It is not sufficient for the landlord to simply facilitate, co-ordinate or just be involved in the provision of care, support or supervision either on behalf of others, ie social services, the NHS or within a joint responsibility (see Commissioner's decisions *CH/423/2006, CH/3811/2006 and CH/779/2007 etc. at Annex 3*).
- 24 In paragraphs 51 and 52 of *CH/423/2006* Commissioner Turnbull argues that 'on behalf of' should be taken to mean that the care, support or supervision if not provided by the landlord should be provided for them. There should be 'some form of interposition' for the landlord in providing these services.
- 25 If the care, support or supervision is not **directly** provided by the landlord or by someone acting on their behalf, for example if all the care, support and supervision are independently commissioned by Social Services, then 'exempt accommodation' status will not apply.

- 26 In all cases, you should
- check whether the care, support or supervision is being funded locally, or by the landlord, and that it is provided to the tenant directly by the landlord (or someone acting on their behalf), and
 - check that there is a contractual responsibility for the landlord to supply this care, support or supervision itself (or to contract with someone else to act on its behalf) by reference to the tenancy agreement or separate contract. If not contained within the tenancy agreement you should ask for evidence of the formalised arrangements that are in place. However, Commissioner's decision *CH/3811/2006 (or R(H) 7/07)* confirmed that it is not necessary for a landlord who is providing care, support or supervision to be providing it pursuant to some statutory or contractual obligation
 - ask how this support has been accounted for in any breakdown of rent, so that this charge can be made ineligible for HB purposes, as charges for care support and supervision in exempt accommodation will also be ineligible service charges within paragraph 1 of schedule 1 to the HB Regulations 2006. In the case of some organisations (eg charities) there may be no separately identifiable charge, as this may be funded through fund-raising activities etc. In other cases, the cost of the care, support or supervision may be met through a Supporting People grant or another source of funding. Details of this should be requested, as mentioned above

- 27 If you are satisfied that
- the landlord falls within one of the prescribed categories, ie non-metropolitan county council in England, housing association, registered charity, or voluntary organization, and
 - the landlord or a person acting on its behalf is responsible for supplying care, support or supervision beyond the level of assistance that would be expected from any landlord to any tenant, and
 - that the tenant has an actual or potential need for the available support which must be connected with giving of advice and assistance to the claimant in coping with the practicalities of everyday life, and
 - the care, support or supervision is an obligation of the landlord, eg set out in the tenancy agreement, although this is not essential, and
 - there is an explanation about how much this ineligible service charge is, or how the cost of it is funded

then the accommodation should be accepted as '*exempt accommodation*' and eligible rent and HB entitlement should be assessed under the 'old' HB scheme rules. Otherwise the eligible rent will be calculated by the 'new' HB scheme rules including the maximum rent or the maximum rent (LHA).

Restrictions on unreasonable payments

- 28 It is for the LA to decide on any restriction to the rent under the 'old' HB scheme rules. They may do so 'by reference to' a rent officer determination. The rules on applying to the rent officer for a determination are the same whether the 'old' or 'new' HB scheme rules apply.
- 29 All rent allowance cases not subject to the maximum rent (LHA) are referred to the rent officer unless the tenancy is excluded from referral, see schedule 2 to the HB Regulations 2006. The tenancies of non registered housing associations, non-metropolitan county councils (in England), registered charities and voluntary organisations are not '*excluded tenancies*' through schedule 2 of the HB regulations so must all be referred to the rent officer.

Referring Registered Housing Association accommodation to the rent officer

- 30 If the landlord is a Registered Housing Association (ie registered with the Housing Corporation or Housing Corporation of Wales) there is no requirement to refer the case to the rent officer (see paragraph 3 of schedule 2) unless the
- accommodation is larger than *reasonably* required by the claimant and any others who occupy that dwelling, or
 - rent payable for the property is *unreasonably* high
- 31 The decision to refer a registered Housing Association case to the rent officer rests with the LA, but for the sake of transparency the LA should have a policy for determining whether a referral is appropriate as a high rent or a large property is not wholly determinative: the test is *unreasonably* high or larger than *reasonably* required (this was considered in some detail within *HB/CTB Circular A28/2002*).
- 32 Exempt accommodation provided by a registered housing association should be dealt with under the old scheme rules.

Referring exempt accommodation to the rent officer

- 33 With regard to exempt accommodation, under the old scheme rules a similar but slightly more generous test of whether the accommodation is unreasonably large or the rent unreasonably high applies. A comparison must be made with suitable alternative accommodation.

- 34 Although a rent officer determination is required for all types of exempt accommodation, but see paras 30-32 above, unlike the maximum rent rules the Rent Officer Determination (ROD) does not determine the maximum rent and thereby the eligible rent for exempt accommodation. However, a decision may be made by the LA to restrict the eligible rent in these cases by reference to the ROD or by other means. The ROD may influence any rent restriction the LA may make as it would reflect the market rents for similar sized local properties in the private profit making rented sector.
- 35 Additionally, as subsidy control is retained for HB expenditure on these cases, the ROD will determine the level of DWP subsidy LAs will receive on their HB expenditure. For those in the vulnerable groups subsidy is awarded at 60% on expenditure above the ROD and full subsidy on expenditure up to the ROD.
- 36 This therefore provides an incentive for LAs to restrict unreasonably high rents by reference to the rent officer determination. However LAs must not take the amount of subsidy payable into consideration when considering if accommodation is unreasonably large, or a rent unreasonably high.

Restrictions on unreasonable payments

(see *HB/CTB Guidance Manual paragraphs A4.1100- A4.1250*)

- 37 Under the 'old scheme' rules there are two tests for a LA considering whether a rent restriction is necessary. These are that the
- accommodation is not larger than *reasonably* required by the tenant and others who also occupy that dwelling, having regard in particular to suitable alternative accommodation occupied by a household of the same size, or
 - rent payable for the property is not *unreasonably* high, by comparison with the rent payable in respect of suitable alternative accommodation elsewhere
- 38 When considering who is a member of the claimant's household it is important to note that you should only include those who occupy the dwelling on the same basis as the claimant. Whether a person occupies a dwelling is explored in HB regulation 7. Therefore, any accommodation needs of a person who has a home elsewhere (ie visitors or care/support workers) should not be taken into account when considering the size of accommodation required.
- 39 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.

- 40 If it appears to the LA that the accommodation is larger than is reasonably required or that the rent is unreasonably high the authority must restrict the level of eligible rent by such amount as it considers appropriate taking into account, amongst other factors, the rent levels of suitable alternative accommodation in the area (see Commissioner's decision *CH 1992.2002* and *CH 3528/3560.2007* at Annex 3). It is not necessary to find a vacant property that a person can move to immediately, merely that a local market exists at the level of rent to which rent is restricted.
- 41 For this purpose the LA should collect evidence of comparable rental properties in the area in order to support the decision to restrict the claimant's eligible rent.
- 42 In deciding what is suitable alternative accommodation, when the claimant occupies an unreasonably large dwelling or pays an unreasonably high rent, an LA before making a deduction to the eligible rent must take into account the nature of the alternative accommodation and the facilities provided. In doing so you must bear in mind the age and state of health of the claimant and any members of their family. In particular when a claimant's present dwelling is occupied with security of tenure, the alternative accommodation cannot be regarded as suitable unless it will be occupied on terms which will provide security of tenure reasonably equivalent to that presently enjoyed by the claimant (see Commissioner's decision *CH 1992.2002*).

Vulnerable groups

- 43 When a claimant or a member of their family is in one of the specified vulnerable groups (see *Annex 2*) and when it appears to the LA that the dwelling is larger than reasonably required or that the rent is unreasonably high, no deduction shall be made to the claimant's eligible rent unless
- suitable cheaper alternative accommodation is available, and
 - the authority, taking into account the relevant factors, considers that it is reasonable to expect the claimant to move from their present accommodation
- 44 It is important with vulnerable groups to note that the suitable cheaper alternative accommodation must be available to the claimant. The question to ask is whether the claimant is in fact able to obtain the suitable alternative accommodation and not whether it is generally available.
- 45 In the case of the specified vulnerable groups, the LA must take into account the factors mentioned in paragraph 42 when deciding what is suitable alternative accommodation. Furthermore when deciding if it is reasonable to expect the claimant to move from their present accommodation, the relevant factors the LA must take into account are the effects of a move to alternative accommodation on the claimant's prospects of holding on to their employment and the effects on the education of any child or young person living in the same household if such a move were to result in a change of school.

- 46 Restricting the level of the eligible rent is explained in more detail within paragraphs A4.1000 to A4.1329 of the *HB/CTB Guidance Manual*.
- 47 The decision in Commissioner's decision *CH/1992/2002* is of particular interest where a person's disability only requires more superficial alterations to the property, such as those individuals with learning disabilities.

Contrived to take advantage

- 48 It is a common factor of all social security benefits that when an arrangement appears to be constructed in such a way as to create or increase an entitlement to benefit you should consider whether it is contrived to take advantage of the benefit scheme. In HB this would be under *HB regulation 9(1)(l)*.
- 49 As with any consideration under this provision the authority would need to make a judgement on the facts of the case and, in doing so, consider the dominant purpose behind the arrangement as it exists. This has so far been considered in two Commissioners decisions, see Commissioner's decisions *CH/58/2007* and *CH/136/2007* at *Annex 3*.
- 50 A number of situations have been brought to our attention that may be a relevant factor indicating that the dominant purpose of the arrangement might be to take advantage of the HB scheme. These factors may not be decisive on their own and must be considered among all the other facts of the case.
- If the landlord leases the property, ensure that the terms of the lease support the tenancy granted, especially where it is an assured tenancy.
 - If the landlord leases the property and is a voluntary organisation, in the form of a not for profit limited company, use companies house to find out whether the company which owns the property has connections to the voluntary organisation that is the landlord.
 - If care and support is alleged to be provided, ensure that the need has been assessed and agreed by a qualified person or organisation. A private sector voluntary organisation landlord providing support following their own assessment of need would not be acceptable.

Commonly asked questions

- 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 3*).

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.

Vulnerable groups

- 1 Certain additional conditions apply before the rent can be restricted under 'old scheme rules' (regulation 13) when the claimant, any member of their family or a relative of the claimant or his partner falls into one of the following categories
 - a has attained the qualifying age for state pension credit, or
 - b incapable of work, or
 - c treated as temporarily capable of work, but only because of a temporary disqualification from Incapacity Benefit (IB), or
 - d is responsible for a child or young person who lives in the same household

The rent may only be restricted if

- suitable cheaper alternative accommodation is available, and
- taking into account the relevant factors it is reasonable to expect the claimant to move from their present accommodation

- 2 Each of the above categories is explained in more detail below.

Qualifying age for state pension credit

- 3 To determine whether the claimant, a member of their family or a relative living with them is aged 60 or over, you should check and verify the dates of birth of the relevant person.

Incapable of work

- 4 To qualify as a person who is incapable of work, a claimant, a member of their family or a relative living with them should be
 - in receipt of IB, Employment and Support Allowance (ESA) or national insurance credits because of their incapacity, or
 - in receipt of Severe Disablement Allowance (SDA), or
 - entitled to Statutory Sick Pay (SSP), or
 - a pregnant woman, or one who has recently had a baby, and she is within a period beginning on the first day of the sixth week before the expected week of childbirth, or beginning with the actual date of childbirth if that is earlier, and ending with the 14th day after the date she has had the baby, or
 - treated as incapable of work (eg claimants who are not in receipt of IB or ESA but who would potentially qualify because of their incapacity). This is a decision that would have to be made by the Secretary of State (*according to Commissioner Jacob's decision in CH/4424/2004- R(H) 3/06*), rather than a decision maker in the LA.

- 5 It should be noted that the registration of the claimant as a blind person, the payment of Attendance Allowance (AA), entitlement to Disability Living Allowance (DLA), or the inclusion of a disability premium in IS/JSA(IB) does not automatically mean that the claimant is treated as incapable of work, unless one or more of the criteria detailed above have been met.

Temporarily capable of work due to temporary disqualification from IB

- 6 Some claimants may be restricted from receiving IB for a period of up to six weeks because the claimant has contributed to their incapacity (eg failed to follow a prescribed course of treatment, or failed to attend for medical treatment). In this situation, you should request information from the claimant about the reason why IB cannot be paid, or directly contact DWP to find out the details of the case.

Responsible for a child or young person who lives in the same household

- 7 To determine whether the claimant, a member of their family or a relative living with them is responsible for a child or young person who lives with them, you should check the ages of any dependant, confirm that Child Benefit (ChB) is in payment and that it is paid to either the claimant or their partner living at the property.

A summary of relevant Social Security Commissioner's decisions

CH/1992/2002 (particularly paragraphs 22 to 27)

This decision looks at what constitutes suitable alternative accommodation for the rental comparison. The Commissioner did not find the tribunal's decision unreasonable that a dwelling did not have to be suitably adapted to meet the individual tenant's needs in order to be considered as suitable alternative accommodation for the rental comparison. The Commissioner took a pragmatic approach that, as the full cost of housing the individuals would be met from the public purse one way or another, a broad approach could be taken as to what was suitable alternative accommodation. The Commissioner did not find it unreasonable for 'suitable alternative accommodation' to include properties which, though not immediately suitable, could be made suitable in a reasonable space of time.

CH/3900/2005 (particularly paragraphs 16 to 20)

The decision looks at what is meant by '*provided by*' when it comes to providing the accommodation within the definition of '*exempt accommodation*'. The Commissioner, rejecting a broad interpretation of provided by, decided that the accommodation could not be considered to be '*provided by*' the county council in this case just because it was instrumental in arranging the accommodation with a private landlord via a third party. He decided that it was not '*exempt accommodation*' as the prescribed non-metropolitan county council was not the landlord.

CH/423/2006 (particularly paragraphs 51 and 52)

[http://www.osspsc.gov.uk/judgmentfiles/j1988/R\(H\)_2-07_bvam.doc](http://www.osspsc.gov.uk/judgmentfiles/j1988/R(H)_2-07_bvam.doc)

The decision looks at what is meant by '*on behalf of*' when it comes to providing the care, support or supervision within the definition of '*exempt accommodation*'. The Commissioner decided that the care, support or supervision could not be considered to be provided '*on behalf of*' the landlord just because they are a party to arranging the accommodation/care/support package for the tenant. '*On behalf of*' required an interposition of the care/support provider for the landlord.

CH/3811/2006 (particularly paragraphs 29 and 32 to 34)

[http://www.osspsc.gov.uk/judgmentfiles/j2150/R\(H\)_7-07_bvam.doc](http://www.osspsc.gov.uk/judgmentfiles/j2150/R(H)_7-07_bvam.doc)

In this case where the landlord was a housing association, the Commissioner found that it was wrong to read in to the definition of exempt accommodation a requirement that the landlord be the main provider of care, support or supervision; nor was it possible to read into that definition a requirement that the care, support or supervision be provided pursuant to a statutory or contractual obligation on the part of the landlord. In order to satisfy the definition of exempt accommodation the care, support or supervision which the landlord provided must be more than minimal. On the facts of this case, the support provided by the landlord's tenant liaison officer to the claimant was minimal. In this case there was already a substantial care package in place negotiated between the local authority and the care provider.

CH/58/2007

In this appeal the circumstances of the tenancy had been re-arranged to create a landlord that is a *'voluntary organisation'* in place of one which was a private sector landlord, with the expectation that the dwelling would become *'exempt accommodation'*. The Commissioner did not find fault with the tribunal's decision that HB reg. 9(1)(l) did not apply in this case. He made the point that this regulation should not be applied where the landlord is taking advantage of the perceived shortcomings of the rent control mechanism in HB reg. 13. However, at paragraphs 36, 38, 41, 43 and 45 he accepted that these landlords could be motivated by profit making when making their commercially based decisions. The common factor of all the prescribed landlords being not for profit was not addressed by the Commissioner in his decision.

CH/136/2007 (particularly paragraphs 53, 59 to 65 and 72)

<http://www.osspsc.gov.uk/judgmentfiles/j2241/CH%20136%202007-00.doc>

The Commissioner did not find fault with the tribunal's decision but in this case that decision was that HB reg. 9(1)(l) did apply. The situation was one where the leaseholder/landlord charged high rents on that half of the property for which they were only liable for a peppercorn rent to the freehold owner under a lease. The situation involved a profit making head landlord leasing property to a *'voluntary organisation'*, which was the leaseholder/landlord, with which they had close links. The Commissioner confirmed that *'the Council could look behind the precise terms of the tenancy to the structure behind it to identify any abuse'*. One relevant factor was the insertion of an otherwise unnecessary intermediate landlord into the process (see para. 64).

CH/1246/2007 (particularly paragraphs 26 to 31)

<http://www.osspsc.gov.uk/judgmentfiles/j2510/CH%201246%202007-01.doc>

The Commissioner did not accept the argument put forward that the care and/or support provider need only act in some capacity on behalf of the landlord for it to be *'exempt accommodation'*. He confirmed that the care, support or supervision must specifically be provided by the landlord or on their behalf. He set aside the Tribunal's decision that the landlord did not provide care support or supervision but did not make a decision himself on this point leaving that to a joint Commissioner's hearing involving the same landlord with the appeals in CH 779.2007 and CH 2805.2007.

CH/1289/2007 (particularly paragraphs 27 to 29)

<http://www.osspsc.gov.uk/judgmentfiles/j2219/CH%201289%202007-00.doc>

The Commissioner made it clear that in a building containing more than one dwelling but with the same landlord, it could not be automatically assumed that all the dwellings are *'exempt accommodation'* just because the landlord provides support to tenants of the building. This is particularly the case where the need for support of individuals varies. It is the dwelling and not the building which is *'exempt accommodation'*. It is possible that the building contains some dwellings which are *'exempt accommodation'* while others are not, depending on the support needs of individual tenants. Furthermore a claimant's accommodation will not be exempt if no (or only minimal) care, support or supervision is provided to him by the landlord,

however much care, support or supervision may be provided to other tenants of the landlord.

CH/3528 - 3560/2007

<http://www.osspsc.gov.uk/judgmentfiles/j2367/CH%203528%202006-01.doc>

The Commissioner firstly decided that where a charge is described as a service charge but does not relate to providing a service it is appropriate to consider whether it should be added to the core rent. The charges were for voids and long term maintenance. He went on to look at what constitutes '*suitable alternative accommodation*' for each tenant. He said that there was an evidential burden on the local authority to show that the alternative accommodation they had found was able to meet the accommodation needs of the individual, rather than just being similar to what they already have. This had not been shown in all of the cases presented particularly those where particular accommodation needs could be identified from the substantial amount of information before the Commissioner. The decision requires an authority to have a detailed knowledge of a person's accommodation requirements and ensure that the accommodation identified as a suitable alternative meets those detailed needs, such as room sizes, wheelchair access etc.

R(IS) 2/07 CIS 2901/2004

[http://www.osspsc.gov.uk/judgmentfiles/j1767/R\(IS\)_2-07_bvam.doc](http://www.osspsc.gov.uk/judgmentfiles/j1767/R(IS)_2-07_bvam.doc)

This Commissioner's decision explored in great detail how the cost of staffing should be separated between accommodation and support/care related costs. While this is an Income Support decision the only difference in the facts of the case is that the person was a leaseholder in sheltered housing rather than tenant, otherwise the considerations are the same as help with service charges within the other income related benefits refers to the HB service charge rules. Essentially it is not the cost of paying for certain staff that is eligible or not, but the cost of the service they provide depending on whether the duty is connected with the provision of adequate accommodation. The cost is worked out by reference to the number of hours spent providing the accommodation-related services. An authority should be satisfied what staff time is spent on what duty and how that has been costed to arrive at a figure that forms the eligible element of any charge.

CH/779, 1246/7 and 2805/2007

<http://www.osspsc.gov.uk/judgmentfiles/j2511/CH%200779%202007-01.doc>

Commissioner Turnbull looked at these three sets of appeals together as they all involved the same landlord. The issue was whether the level of support provided by the landlord was more than minimal in line with CH 423.2006 (see above). In paragraphs 19-21 the Commissioner states that providing support could differ from the provision of care and supervision in that, while it would need to be available to the tenant in their dwelling, the tenant need not actually take advantage of it for it to be accepted as support. However, in paragraph 24 the Commissioner agrees that there must be a degree of likelihood that the tenant will need the support for it to be accepted as such and any decision should take account of other available sources of support. In paragraph 232 the Commissioner gives his opinion that 'the word support connotes the giving of advice and assistance to the claimant in coping with the

practicalities of everyday life'. However, that it did not extend 'to scrutinising the arrangements for the provision by some other body of care, support and supervision, with a view to remedying defects perceived by (the landlord), or to recommending improvements'.

Note: This extract is quoted as evidence of what was originally intended by the regulations.

Extract from HB/CTB Circular A7/96

Exempt accommodation

- 20 In addition to the above specific exemptions and protection some accommodation which caters for tenants' with special needs is exempt from the changes. The categories of exempt accommodation are outlined below. Tenants who live in this type of accommodation will be treated under the pre-January rules regardless of when the tenancy or occupation started. This exemption allows you to calculate the eligible rent for HB purposes in accordance with the pre-January rules, but it does not exempt from referral to the RO where referral is appropriate.
- 21 **Accommodation in respect of which a Government grant is given:** Generally this type of accommodation is provided by a voluntary organisation or a local authority and provides places in hostels for the homeless which are funded by the Resettlement Agency. For the accommodation to qualify the places provided must be funded by way of a grant in accordance with paragraph 4 of schedule 5 to the Supplementary Benefits Act. However, you should note that this particular schedule will be repealed by the Job Seekers Allowance Act. This Act comes into force in April 1996 and a similar provision to give grants to persons who provide resettlement places has been included in it. Regulations will come into force on 1 April 1996 to give effect to this provision and the new regulation will continue to allow accommodation providing resettlement places which are funded by the Government to be exempt from the January HB changes. You must be satisfied that a grant was made in respect of the accommodation and you should ask for evidence confirming that the grant was awarded.
- 22 **Accommodation provided by Housing Association, registered charity or voluntary organisations:** Accommodation provided by any of these organisations will be exempted from the changes but only where they are the landlord of the tenant and care, support or supervision is provided to the residents either by the landlord, or under arrangements made by that landlord to discharge their duty to provide it. In order, therefore, for claimants to be exempted both conditions must be fulfilled.
- 23 This exemption will not apply where the landlord of the accommodation is any other person or organisation than those specified. 'Housing Association' and 'registered charity' are defined in law. A Housing Association is defined in section 1(1) of the Housing Association Act 1985. Registered charities must state their charity number on letterheads and other correspondence. If you are in doubt as to the status of the charity you should seek advice from the Charity Commission. Regulation 2 of the HB (General) Regulations defines a voluntary organisation as a body, other than a public or local authority, the activities of which are carried on otherwise than for profit.

- 24 You have to judge whether care, support or supervision is provided. Generally the care, support or supervision will be provided by the HA or the registered charity or the voluntary organisation itself but in some cases the service may be bought in from an outside provider. If this is done you must be satisfied that the care, support or supervision is provided on the landlord's behalf. Care, support or supervision is not defined, the words should be given their usual everyday meaning. You do not have to judge the level of care, support or supervision which is given to the claimant or whether the care, support or supervision is eligible for HB. The essential point is that care, support or supervision must be routinely provided to occupants of the accommodation by, or on behalf of, the landlord who is such a body.