Response Form - Consultation on a Private Rented Sector Code of Practice for Landlords and Agents

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Question 1: Do you agree with the content of Section 1 - *Statutory Requirements: Before a tenancy*?

Yes	
No	☑

Do you have any other suggestions?

General

Section 40(1) of the Housing (Wales) Act 2014 states "The Welsh Ministers must issue a Code of Practice *setting standards relating to letting and managing rental properties*". A major problem with this section, like others in the code, is that it merely attempts to recite existing legislation: this cannot said to be "setting standards" as these matters are already obligatory in law. As we have argued in earlier submissions, the statutory requirement sections should be removed entirely from the code.

There is a general issue that arises throughout the Questions in relation to the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). We deal with this in answer to Question 11 but need to raise it here as well because of the specific reference in Question 1 to CPRs. Some aspects of the draft Code are interpretations of the CPRs and are in effect borrowed from the Competition and Markets Authority (CMA) Guidance on this topic. This gives rise to issues relevant at this stage:-

- This legislation, i.e. CPRs, only applies to landlords who are traders. The exact boundaries between who is and who is not a trader in the context of the

landlord and tenant relationship or the landlord and agent relationship has not yet been settled. Our view, which seems to gradually be gaining acceptance, is that only so called accidental landlords are to be treated as consumers and not traders. This has particular bearing on the landlord/agency relationship. Thus, if the draft Code seems to go beyond the scope of the definition of "consumer" applicable under EU legislation this would have to require the effect to require landlords to comply with the obligations not imposed on them by the general law as well as giving certain landlords protection vis a vis agents which does not exist under CPRs. Instead, BPRs apply to the landlord/agent relationship if landlord is a trader.
The CMA Guidance is predicated on all tenants being consumers and all landlords traders when dealing with the landlord/tenant relationship and all landlords being consumers when dealing with agents. This is manifestly logically inconsistent.

- The draft Code, by incorporating what is essentially the view of the CMA, is only at the moment based on what is an opinion which has not been tested in the Courts. This is because the CPRs import high level requirements based on what is set out in the EU Directive. The CMA has then tried to apply this to the day to day dealings in the private rented sector. Thus, currently the draft Code's approach is, in effect, one of elevating an opinion into a standard or a rule because by embodying this opinion in the code it is potentially putting someone's livelihood at risk if there is non compliance.

As indicated in Section 11 we must therefore question the incorporation of the principles of the CPR into the Code. Rather, CPRs and CMA Guidance should sit alongside the Code but outside it. The Code should not extend the ambit of the CMA Guidance by converting it into binding standards.

Appointment of an Agent

As regards the first paragraph which is expressed in mandatory terms, i.e. must, CPRs are only applicable where the recipient of the services is the consumer and the provider a trader or in the case of the BPRs where the relationship is between two persons who are traders.

Three of the topics listed under the bullet points in this paragraph, namely the UTCCRs, SGSA and UCTA, will be subsumed into new legislation when this comes into force. References will then become obsolete. The 2013 Consumer Contracts Regulations only apply if a landlord is a consumer.

Likewise, as regards the third paragraph this only applies to an agent dealing with a tenant who is a consumer; likewise, where the landlord is a consumer.

In the case of the fourth paragraph if this section is to remain in whatever form, then there should be a recommendation for the agent to specify details of how and in what circumstances a landlord client can terminate a management or lettings agreement.

As regards to the terms of an engagement it is said that these terms must be fair. We are concerned at this sentence because it seems to import a general concept of "fairness". We have particular concerns regarding a similar provision later on. What

this deceptively simple sentence is suggesting is that with all relationships between landlords and agents the terms of contract have to be "fair" whatever this means. We cannot for one moment believe that this is the intention of this provision since it appears to us that it is shorthand for saying that they must comply with the UTCCRs. If it goes beyond this then there will be a huge departure by importing some overarching concept of fairness. Surely this cannot be the intention. This raises important issues relating to freedom of contract. This provision should be re-drafted so that it is clear that it is shorthand for compliance with UTCRs where they apply.

The final paragraph on page 1 regarding signing the contract only applies if the landlord is a consumer.

Marketing and advertising

The second paragraph regarding agent's duties on checking consents imposes a significant burden on agents. It means that agents would be required to investigate title to ascertain joint ownership and identify those who are the lenders. Under the Property Misdescriptions Act, which the CPRs replaced, case law held that an agent was not require to check matters which were properly the role of a conveyancer. This provision therefore amounts to the imposition of a new legal requirement on agents. Likewise, it could involve checking leases to see what consents are required from the Superior Landlord/freeholder. At the very least it should be limited to the agent obtaining written confirmation from the landlord that any necessary consents had been obtained, without the agent having to carryout investigations of this kind. The Agent should only be obliged, in addition, to advise the landlord of requirements of this kind to obtain requisite consents.

In relation to the fourth paragraph there needs to be a definition of what constitutes "material information".

We question the reference to the property particulars containing the alphabetical standard to be stated as the regulations themselves actually refer to the numerical rating 18 being specified.

In the last paragraph of this section there is reference to "transactional decision". At the very least this needs to be defined in the glossary but we would prefer that such technical term be omitted altogether.

Viewings

We very much question the idea that "any other aspects which may not be immediately apparent with an initial viewing" must be disclosed. This is very wide ranging and in our view goes beyond the CMA Guidance on this subject. It introduces a significant element of uncertainty and could give rise to any number of complaints by tenants as regards non disclosure and therefore breaches of the code. This very much emphasises our point about our preference for the CPRs to run alongside this Code of Practice; rather than being incorporated in it. After all, breach of the CPRs in this context would be a breach of the law of landlord and tenant and therefore could be separately actionable as regards the fit and proper person status of any landlord or tenant. The danger here, as we point out elsewhere, is that this can be

seen to add to/go beyond the ambit of CPRs. In particular it applies CPR requirements to those who are not subject to them unnecessarily.

Question 2: Do you agree with the content of Section 2 - *Statutory Requirements: Setting up a tenancy*?

Yes ☐
No ☑

Do you have any other suggestions?

General

We refer you to the comments in response to question 1.

References and checks

The first paragraph goes beyond the scope of discrimination legislation. Age discrimination is permissible in the case of letting properties. In certain property types, such as property intended for retire,net purposes it is desirable and in some cases is a planning restriction. Likewise, there is no discrimination involved if one refuses to have children in the property. This paragraph needs to be recast accordingly.

As regards the second paragraph we consider a prospective tenant's consent must be obtained for carrying out a credit check at the very least. This is clearly required under Data Protection Legislation and is the subject of clear guidance from the Information Commissioner. It may not strictly be necessary always in the case of references in our view.

Agreeing the tenancy

This is an example where there is repetition. This appears both on page 7 and again on page 15. This would be eradicated in our view if the statutory requirements and best practice (although separately identified) were brought together under the same subject heading i.e. "Setting up a tenancy". – see our reply to Question 11

As regards holding deposits this ought to be a separate section in our view because it is something different to agreeing the tenancy. It is a preliminary step which precedes this particular stage.

Rental agreement

The final bullet point on page 7 regarding return of the deposit goes beyond the

scope of what is required by tenancy deposit schemes. They do not make a requirement for this to be incorporated in the tenancy agreement because it is covered by scheme rules, in effect. Introducing concepts of "reasonableness" where there are clear provisions in the scheme rules is confusing. The seventh bullet point in relation to tenancy agreements fails to make it clear whether fees which can be charged during the course of the tenancy, e.g. for call outs or dishonoured cheques, are within the scope of this provision since it merely refers to "letting". The next bullet point would appear to incorporate statutory increases effected under the provisions of Sections 13 and 14 of the Housing Act 1988. Since this is a statutory provision we question the need for this to be referred to.

As regards signatures of tenancy agreements it refers to the agreement being signed by both parties. It is frequently the case that agents sign, especially agents for the landlord. This should be permissible in accordance with current practice.

Supplementary documentation

Whilst there is a legal obligation to complete a fire risk assessment for certain properties, this is not the case for all, the statement is misleading and needs clarity.

Deposits held for assured shorthold tenancy agreements

The statutory timescale should be specified, i.e. 30 days, and likewise in relation to the next paragraph regarding the prescribed information.

As regards deposits in the case of the second sentence, CMA suggest that there is a mandatory obligation to make these matters clear before a deposit is taken. "Should" would appear to be inappropriate in the case of this sentence – see our general comments on appropriate terminology under Question 11.

As a general observation, it is also important to be platform neutral in a formal document. Under 'it must also include a clear description...', the reference 'satellite TV' should be replaced by 'pay TV services'.

Question 3: Do you agree with the content of Section 3 - *Statutory Requirements: Once a property is let to a tenant*?

Yes	☐
No	☑

Do you have any other suggestions?

General

We refer you to the comments in response to question 1.

Introducing a tenant at the beginning of a tenancy

We would suggest that an explanation is given that if this information is not given to the water supplier then the landlord becomes jointly and severally liable for the debt.

Contact details

There is reference to contact being made with a person "licensed to deal with any problems". We have had extensive correspondence already with the Welsh Government on the issue of the definition of "lettings work" as it affects the person such as tradesmen. Whilst we appreciate the provisions regarding management work are more tightly defined, does this reference to a person licensed to deal with the work exclude contact direct with tradespersons. Often emergency services are set by landlord or agent up so as to allow direct contact with retained contractors who can effect repairs in emergencies. This wording needs to be looked at again, in our view.

We also note that Section 48 of the Landlord and Tenant Act 1987 indicates: '...shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant...' The section of the Code should be modified accordingly to make it clear that an agent's address can be legally provided as the contact. This is important as agents that are given responsibility to manage will a property will be able to respond more quickly if contacted directly.

Property conditions

The second paragraph repeats/duplicates an equivalent provision under best practice and the two ought to be amalgamated into one. It needs to be made clear that HHSRS is a local authority enforcement tool and the legal obligation to comply results from the service of a local authority improvement or similar notice; not a general obligation imposed by law. We consider that the word "serious" ought to be omitted in front of "risk". By reason of category 2 hazards, HHSRS is not confined to so called serious risks. This part ought to read "a risk must be removed or mitigated".

In the case of the third paragraph we consider that the second sentence is erroneous. The liability under Section 11 of the Landlord and Tenant Act 1985 is that of the landlord; not that of the agent. We appreciate what this is trying to say namely that if day to day implementation/management is delegated to the agent then that must be returned to the landlord if the agent is unable to carry out this responsibility. Indeed, it needs to be made clear that if any kind of arrangement is included the responsibility is and remains that of the landlord contractually. We would suggest that the sentence should read "if an agent is responsible for carrying out the landlord's obligations then, in the event that the agent is unable to carry out these responsibilities for any reason, the landlord should be informed, including reasons why, so that the landlord can carry out these responsibilities for keeping the structure and exterior of the property in repair.

The fifth paragraph should read "The electrical wiring and installations…". In the seventh paragraph it should be stated as being that they must be in a safe condition at the outset of the tenancy as this is the requirement under the relevant regulations.

Question 4: Do you agree with the content of Section 4 - *Statutory Requirements: Ending a tenancy*?

Yes	
No	☑

Do you have any other suggestions?

We refer you to the comments in response to question 1
In the second paragraph regarding provision of evidence we would question whether there is a legal obligation as such to provide evidence and would suggest "should" should replace "must" on the second occasion where this word appears. On the other hand in the fourth paragraph "must" should replace "should" as this is a contractual obligation which we would classify as a legal obligation.

Question 5: Do you agree with the content of Section 5 – *Best Practice: Before a tenancy*?

Yes	
No	☑

Do you have any other suggestions?

Pre-letting

This provision is of fundamental concern in regard to reference to "fair" in particular but also similar concerns could focus on the use of "reasonable" in this context. To us this seems a deceptively innocuous provision but inclusion of the word it could be of fundamental importance, as we have alluded to in an earlier question. For example, could it be argued that it would not be "fair" to refuse a tenancy to a tenant who received housing benefit, or could it be said to be "fair" to decline a tenancy to be used as a tenancy extension. This needs very careful consideration particularly bearing in mind the concepts of the freedom of a landlord to contract as he/she sees fit, subject only to specific legal obligations, e.g. in relation to discrimination. In our view, there is a considerable danger of a tenant trying to enforce this provision and we would argue for the exclusion of both the words "fair" and "reasonable". This goes well beyond what cold be said to be "setting standards" under Section 40.

In any event it ought to be made clear that this requirement does not impinge on freedom of contract. A landlord should be free to choose who his/her tenants will be and whether or not to grant an extension of a tenancy, for example. This should not be within the scope of this Code.

Question 6: Do you agree with the content of Section 6 – *Best Practice: Setting up a tenancy*?

Yes	
No	☑

Do you have any other suggestions?

Agents should not be expected to give special consideration to prospective tenants that have a 'lack of knowledge' beyond the requirements of the CPRs; a prospective tenant should have a certain level consumer consciousness and amount of knowledge before putting themselves into a position to tenant a property. This provision flies in the face of the concept of the average consumer embodied in the CPRs. Furthermore, an agent or landlord should not be expected to make special considerations where they are not aware that a tenant is subject to something they consider to be a 'disadvantage'.

Reference and checks

We are concerned with the suggestion that there should be an obligation for a landlord to provide a reference. Generally speaking, a person is free to decide whether or not they will provide a reference. If such a provision is included in a Code of this kind then it would import an obligation on a landlord to give a reference. This, therefore, has implications especially around reference of potential liability, e.g. to the new landlord. This will give rise to the potential of claims by tenants against landlords not just for supposedly incorrect references but also for suggestions for loss of prospective new tenancies even though a reference is given. This is an issue which needs the most careful consideration. It would equate landlords and agents in the PRS to those such as employers in the financial services industry who are obliged to provide references. We doubt that this falls within the scope of setting standards relating to letting and management as provided for under Section 40.

Agreeing the tenancy

We made the point in answer to a previous question that holding deposits which preceded tenancies anyway should be dealt with as a separate paragraph and not included amongst the terms of the tenancy itself in the list.

The penultimate paragraph of this section contains a reference to "consumers". For all practical purposes we would accept that this would extend to tenants generally.

As regards pets, this should be qualified as regards the requirements of any obligations to which the landlord himself/herself is subject e.g. under the lease of a flat as well as the nature of the premises, e.g. where there is no garden. Any provision in the tenancy ought to extend to a right for the landlord to require the removal of a pet for good reason.

Rental agreement

The word "principles" appears to be superfluous. What is hard to prove in the case of a smaller contract is its "terms"; not "evidence" which is how you go about proving the terms".

Question 7: Do you agree with the content of Section 7 – *Best Practice: Once a property is let to a tenant*?

Yes ☐
No ☑

Do you have any other suggestions?

Introducing tenants to the new home at the beginning of the tenancy

The RLA believes that the recommendation to establish a written complaints procedure should go one step further by requesting that the landlord/agent outline details of how and by whom a dispute should be solved when both parties cannot agree at first instance.

It is vital to reduce the likelihood of disputes from going to court, and for mechanisms to be available for both parties to access mediation services. In the longer-term, we believe that the Residential Property Tribunal could have its remit extended so it can hear certain cases that cover a wider range of circumstances. This would ensure that disputes are dealt with more quickly and less formally in a manner which doesn't make the tenant-landlord relationship untenable. This issue has come to the fore during the progress of the Renting Homes Bill in the Assembly. A specimen complaints procedure is attached.

The requirement relating to utilities be qualified to make it clear that this applies unless it is the landlord's responsibility to pay for utilities, i.e. there is an inclusive rent. Water notification requirements should be repeated.

In the third paragraph there should be reference to refuse recycling as well as refuse collection. The position of the mains electricity switch should also be referred to.

As regards the last paragraph of this section if there is some obligation to point out risks the Welsh Government should provide an appropriate leaflet for this purpose.

Collecting the rent

The second paragraph should be confined to cases where payment is made in cash.

Contact details

We are concerned at the reference to "always being contacted". This is a very onerous burden for landlords especially small landlords who may self manage properties. We would therefore suggest the word "always" should be most certainly omitted.

As regards reporting repairs encouragement should be given to tenants to make written reports especially as email is readily available as a system of making reports. Grammatically this sentence does not read well.

Access to the property

We have concerns around the suggestion that access should only be requested at a time reasonable to the tenant. Just as important are considerations of what is reasonable to a contractor. Whilst we appreciate that it will not be reasonable except in an emergency to seek access late in the evening this needs to be reworded in our view to make it clear that access should be made available during normal working hours. Frequently landlords experience situations where tenants make it difficult for them to obtain access for their own reasons and the proposed wording in this regard in the Code of Practice would aid and abet such tenants. What is reasonable to such tenants is very subjective. This should be replaced by something much looser such as "due consideration being given where possible to tenants' and residents' convenience".

Property conditions

It is important that this aspect of the Code is carefully considered because it could inform a decision by a Court in particular circumstances as to what is reasonable when it comes down to the timescale for carrying out repairs.

Under the heading "Emergency Repairs" the words "at least" should precede the words "made safe" as an obligation because it is often unrealistic to carry out emergency repairs in the kind of timescale envisaged here. It may not be safe to do so, e.g. in high winds. We consider that the reference to the structure of the building should be omitted in the case of what is considered to be an emergency repair. If there is real danger to health etc it is covered by that limb. Otherwise it should be an urgent repair.

In the case of urgent repairs we believe that the period should be five working days instead of three. This is a more realistic timescale. In the case of windows and doors it should be made clear that this is confined to defects that impact adversely on the security of the property and that in the case of services adversely potentially affect the safety of the persons or property in order for them to be classified as urgent repairs. Likewise, in the case of heating and hot water it should be made clear that this should only extend to failures to provide the services; not minor inconveniences which are not adversely impacting on the provision of heating or hot water.

Under the heading "Other repairs" we are opposing the inclusion of the word "never". It is well known that there can be recurrent or intermittent problems which despite the best efforts of everybody concerned cannot be fixed within the timescale proposed. Instead the words "not normally" should replace the word "never".

Generally, you must realise that practicalities dictate timescale. If contractors or materials are not available these kinds of timescales are unachievable.

The pre-penultimate paragraph on page 17 should state simply "The Landlord or Agent should remind tenants…" to bring the wording into line with the "must/should" regime.

In the penultimate paragraph concerning retaliatory eviction in the first sentence the word "should" is not appropriate and under our proposal this should be replaced by

"ought not to" or, at the least, "must" as this must contravene the requirement of professional diligence under CPR.

In the final paragraph on page 17 "should always" is setting the bar too high. This may not be practicable and would in practice be dictated by the contractor's requirements. We would suggest that the words "wherever possible" replaces the word "always".

On page 18 in the first full paragraph regarding HHSRS this needs to be amalgamated with the earlier paragraph on page 11 so that there is a single section dealing with guidance on HHSRS. The fourth sentence should read "landlords and their agents should identify those …" as this could be considered to be best practice. However emphatically this should not be a legal requirement because as we pointed out HHSRS is an enforceable tool; not a standard.
"Spread of harm" is a technical term and at the least an explanation should be given in a glossary or better still this should be omitted and replaced with wording such as "increase the likely extent of the harm caused".

The next paragraph regarding inspections should address what is an appropriate interval. Importantly, the frequency of inspections should be linked to a realistic assessment by the landlord/agent as to the required frequency. If on first inspection the property is found to be in good order then this would suggest less frequent inspections are needed than in a situation where the tenant has been found to have damaged the property or there are circumstances which dictate the need for more frequent inspections.

There should be separate formal procedure laid out for tenants to report any damage or requests for repairs. This would ensure that requests are communicated to the appropriate person, and that a detailed record is held of anything being reported.

After the 'secure' heading on p.18, the statement should be just limited to 'unlawful intrusion' and the word 'unwanted' removed. 'Unwanted' may bring about a very subjective interpretation, and could give the impression that a tenant has the authority to object to entry by someone that they simply don't have the legal authority to *e.g.* stopping the boyfriend/girlfriend of another HMO tenant from entering the communal areas.

We are also concerned about the paragraph regarding warmth. In our experience some environmental health officers have particular opinions which they seek to enforce regarding gas being used as fuel instead of electricity. This is despite uncertainty about which will be cheaper in the long run. More and more electric installations are now significantly more efficient and they are safer as well as being much easier to maintain. We would therefore wish to see the addition of a provision that anything in this paragraph is not intended to suggest the particular type of fuel which should be provided for space heating so there is no required preference for gas over electricity.

We object to the suggestion that inspections for electrical installations should take place at five yearly intervals in the case of non HMO properties. This is too short a period unless specified by an electrician carrying out a test; otherwise ten years

should be the norm. With modern wiring, and installation of MCBs or RCDs being prevalent five years is simply too short an interval. After all this is an expensive test and it is unnecessary unless specifically recommended because of the condition of a particular installation.

As regards the last paragraph on page 19 again we object to the necessity to fit extractor fans where an openable window is provided. Again, this is costly and may not always be practicable in any event.

The RLA is very concerned about the paragraphs relating to the prevention of condensation. The sentence 'the property should be free from deficiencies which could lead to rising and penetrating damp', suggests that a landlord/agent can foresee every situation that may lead to damp or condensation; this is completely unrealistic. The paragraph simply doesn't demonstrate the legal responsibility that the tenant has to limit condensation, *e.g.* regularly ventilate the property and open windows.

Question 8: Do you agree with the content of Section 8 – *Best Practice: Tenancy renewals and changes*?

Yes	
No	☑

Do you have any other suggestions?

Fees is an issue which is addressed under the CMA Guide to the CPRS. Therefore we are not sure that this is appropriate in this context for reasons explained elsewhere

Question 9: Do you agree with the content of Section 9 – *Best Practice: Ending a tenancy*?

Yes	
No	☑

Do you have any other suggestions?

It would not always be possible for a landlord with multiple properties/agents to inspect a property within 24 hours of it being vacated. There should be relaxation for periods that are particularly busy for tenants vacating properties, *e.g.* June/July for those with student properties. Furthermore, it would be inappropriate for a tenant to attend a checkout: the person who undertakes the inspection needs to be free from any interference or interruption, in order to make the necessary judgements. When multiple tenants are vacating an HMO property on separate tenancies, there is also the issue of privacy, discussing one tenant's affairs in front of another.

In the last paragraph the word "follow" should be substituted for the word "seek". It seems strange to suggest that on each occasion the landlords/agents have to seek

guidance when in fact tenancy deposit schemes lay down general guide lines which are appropriate.

Question 10: Do you have any comments on the overall format of the Code of Practice?

Yes	☑
No	

Could the layout be improved?

In principle, the format of the document is fit for purpose but improvements could be made. Sometimes it may be appropriate for the landlord or agent to determine between themselves to whom the statement is applicable to in the circumstances. Cases where this option is appropriate should be identified.

Our first concern is about the separation of "statutory requirements" on the one hand and "best practice" on the other into two separate parts. This was originally proposed when the RICS Code was drawn up but subsequently changed, rightly in our view. Matters should be dealt with by reference to subject headings, e.g. access or repairs, with separate sub-sections under each such heading dealing with statutory requirements and best practice separately. The reader needs to see these matters in the same place so that a complete picture is obtained: rather than having to switch from one part to another. The second part could be overlooked by the casual reader.

Another advantage of putting matters relating to the same subject heading in one place is that it avoids repetition. We have detected a number of instances in the drafting where matters are unnecessarily dealt with twice and could and should be brought together, e.g. in relation to HHSRS. This is just one example.

We indicate in answer to Question 11 that the format should also make it clear to whom any duty or responsibility is owed, whether it be both landlord and tenant, or one or other, owing it just to the tenant or the landlord; or whether it is a responsibility just owed by an agent to a landlord.

There needs to be a glossary/definitions section. There needs to be definitions of key words such as "must" and "should", see reply to Question 11.

Some quite difficult terminology is included, e.g. references to "transactional decisions" which is a concept imported under the CPR. We do not think that its inclusion is necessary but if it were to be then, again, it should be included in a glossary.

Importantly, the Code needs to make it clear as to the different standing of the sections headed "Statutory requirements" and "Best practice" – see our reply to Question 11.

In our reply to Question 11 we raise a significant issue around the impact of the CPR

and their treatment under the Code. As we explain there, whilst we prefer omission of what is in effect the CMA interpretation of CPRs if this is to be included we feel that matters which a landlord or agent needs to be observe in order to comply with CPR should be separately identified but since these are derived from CPR then it seems sensible to include them in the "Statutory requirements" section but with different wording.

We support strongly arrangement by subject matter, e.g. access for repairs etc and also the idea of a "journey" through the tenancy. These need clarity and will enable the relevant provisions to be traced more readily.

However, to assist identifying relevant provisions there are also, in our view, to be an index. At the very least there needs to be a contents page.

Each paragraph should then be numbered to aid identification and for reference purposes.

Question 11: We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please let us know here:

We have attached a draft complaints procedure which could be supplied in the appendix of the code, for landlords to give to tenants.

The draft Code is broken down into two sections namely statutory requirements and best practice. It is, however, unclear as to what is the status of the "best practice" section. We have to bear in mind that non compliance with the Code can lead to the loss of a licence as compliance with the Code will be a licence condition. Therefore, will it be a breach of the Code, potentially leading to the loss of a licence, if a landlord or agent fails to comply with best practice. After all, Section 40 of the Act uses the word "standards" which suggest mandatory minimum requirements which, if they are not complied with, can lead to sanctions. This inter-relates with the issue surrounding compliance with matters which are derived from the Consumer Protection from Unfair Trading Practices Regulations (CPR), to which we refer in the next paragraph. The status of "best practice" is unclear and, in our view, this needs to be spelt out, although we consider it means what is says and does not seek to impose a legally binding obligation, so it cannot invoke loss of a licence.

We have already made general observations on the CPRs in answer to Question 1 but this is an underlying theme for every Section of the draft Code. As already pointed out, the difficulty with CPRs is that they lay down "high level" principles; not detailed requirements as to the way in which landlords and agents in the PRS must operate. As with the CMA Guide to the Regulations, all one can say with safety is that if you do things in a certain way then it is most unlikely that they will be guilty of an offence or open to other enforcement action. As such, however, they are not direct legal obligations in the same way as, for example, there is a legal requirement to carry out an annual gas safety check on appliances belonging to the landlord installed in a rental property. The policy issue therefore is whether they should now be elevated to possessing such a legal status, not withstanding that in certain cases

they will not otherwise be binding on a landlord who is not a trader (e.g. someone renting out their own home) or an agent dealing with landlords who should not be regarded as consumers. For this reason, we do not consider that they can be accurately classified as statutory requirements in a code which is currently split simply between statutory requirements and best practice. The issue is firstly whether they should appear in a code of practice at all as they already dealt with in the CMA Guidance which seeks to interpret and apply the CPRs and in turn the relevant EU Directive.

Leading on from the previous two paragraphs is the issue of the use of the expressions "must" and "should" which is in line with common practice in the case of codes of practice. The draft code fails to make it clear what "must" embraces. Clearly, on any account "must" will incorporate specific statutory obligations, derived either from Acts of Parliament, Acts of the Assembly, or statutory regulations. We have tended to take a much broader view that it not only incorporates statutory obligations of this kind but also common law rules, as well as contractual terms and the rules of redress or other similar schemes to which an agent must belong. Thus, contractual obligations arising under tenancy agreements, agency agreements or legally binding obligations to third parties, e.g. insurers or mortgage lenders would fall within the categorisation of "must" in our opinion. On the other hand, "should" is simply good practice but which does not attract any legal sanction or claim (e.g. for damages) in the event of non compliance.

If the Code is to incorporate matters which potentially derive their legal basis from the CPR we believe that these should be separately worded, since they are not as such specific obligations that have been determined by the Courts or spelt out in specific regulations. In some cases, specific statutory requirements actually replicate CPR obligations but this is very much the exception rather than the rule. An example of where they do would be in relation to threatening retaliatory eviction which is clearly an aggressive practice. This is not always so clear cut. In the light of this, we would therefore propose that in addition to the usual "must" and "should" dichotomy there should be a third category of "need to" or "ought not " for negative provisions. In other words, based on CMA Guidance if the Code is, this would be what a landlord or agent "needs to do" (or ought not to do) in order to escape the possibility of action for non compliance with the CPR. We are happy to identify those provisions of the draft Code which we consider should fall within this categorisation if this suggestion were to be adopted.

In one way, this may sound as legal pedantry but it is not. The reason for this is that a code of practice such as this undoubtedly carries great weight under EU jurisprudence when it comes to determining whether there has been a breach of the CPR. This is particularly true of the general obligation under CPR to exercise "professional diligence". A code of practice of this kind is taken as demonstrating what are considered generally to be the requisite standards of professional diligence. This could extend to matters of "best practice" but it should not do so, in our view, i.e. those classified as "should". Overall, they do not, however, fall within the same categorisation as "must"; hence the need for them to be differentiated, in our view.

As a statutory code, reinforced with the possibility of the loss of livelihood because of the loss of a licence, it is important, in our opinion, that there be precision and clarity

around the legal status of the various different proposed provisions of the Code. At the moment many of the provisions classified as "statutory responsibilities" duties are owed to tenants by both landlords and agents, whereas some are owed to landlords who are consumers by agents. These need to be differentiated.

This gives rise to a related policy issue as to whether this code is an appropriate vehicle for imposing duties on agents vis a vis landlords. Section 40 deals with the letting and management of properties; not necessarily governing contractual relationship between a landlord and an agent.

There are a number of potentially costly measures which are referred to, e.g. carrying out five yearly electrical checks or installing extractor fans. It is important therefore that an impact assessment be carried out. We can provide costings as appropriate. Furthermore, importantly, we strongly contend that by virtue of Section 40 there is no power to use this Code to require improvements to be carried out to a property. In other words there is no lawful authority under the legislation to stipulate in the Code of Practice that facilities or amenities should be provided or works, e.g. items of improvement, should be carried out in a property. Section 40 merely refers to "management". Based on a normal interpretation of this word, as well as the decision of the First Tier Tribunal in the case of Brown and Others v Hyndburn Borough Council, management does not extend to improvement. Management is about dealing with the state of affairs in a property as it is; not changing it. The First Tier Tribunal decision is under appeal and obviously what we say is subject to the outcome of this appeal which is due to be heard by the Upper Tribunal on the 2nd September 2015. During the course of the Bill through the Assembly the then Minister accepted this point.

Throughout the code there is a continual reference to providing supplementary written material, presumably this means printed material. The RLA believes that a landlord/agent should have the option to provide all material digitally if they choose to do so; if one followed the code rigidly, then it would be easy to envisage a situation whereby 120-150 pages needed to be printed for each new tenancy. This would not only cost the agent/landlord unnecessary expenditure, but also be a substantial environmental concern.

Longer-term fixed tenancies are currently are the agenda, but we consider it to be appropriate for the Code of Practice to be silent on this issue. We would be opposed to any suggestion that often a long term tenancy in appropriate cases should be regarded as "best practice". A landlord should not be under any obligation in our view compulsorily to offer tenancies of any particular length by virtue of any provision of the Code of Practice.

In conclusion, there are a number of points of principle and law which need to be resolved in our view before the draft proceeds further.

Appendix

COMPLAINTS PROCEDURE

Your right to complain

We endeavour to provide a good service to our tenants and residents. However, sometimes things do go wrong. This is why we operate a complaints procedure. We may be able to put things right but sometimes we may only be able to explain ourselves and apologise. We will treat complaints seriously and speedily.

What do I do if I have a complaint?

It is important that you let us know that you are unhappy and why so as to give us a chance to put things right. Please do not afraid to speak to us informally. Alternatively, you can follow our formal process.

How to make a formal complaint

Formal complaints should always be put in writing. You can write to us or send us an email. Please make it clear that you are raising a complaint and let us know what you are complaining about. Please explain why you are making the complaint.

How are complaints investigated

Your complaint will be investigated by [ ]. We may ask you for more information.

How long will it take to investigate a complaint

We will acknowledge your complaint within 5 working days. We aim to respond fully to your complaint within 15 working days. Sometimes however it may take longer in which case we will notify you of the date by which you can expect a response. Our reply will include an explanation of how we have come to the decision we have made. We will let you know whether or not we accept your complaint and if so what we will do about it.

What can we do if you are not satisfied with your response?

If you are not satisfied with our response then you can ask for your complaint and our initial reply to be reconsidered. Any such review will be carried out by [ ]. The same timescales and procedures as above apply in respect of any review of your complaint.

[As we are a sole operator there is no one else internally who is able to review the complaint. However, it can still be reconsidered in the light of any further comments you may wish to make].

External review of your complaint

By law we are required to advise you and inform you about any independent body which can provide alternative dispute resolution and this is [ ] whose website address is [ ]. We are not legally obliged to submit any dispute with you for resolution in this way [and we are not prepared to do so]. [but we are willing to do so and abide by the outcome].

Reporting repairs

This complaints procedure does not cover initial reports to us that repairs or other work are required at the property.

Repairs Reports

There is a separate reporting procedure which you need to follow. However, if after you have submitted a report, you consider that we are not dealing with it satisfactorily then you may resort to this complaints procedure.

REPAIRS REPORTING PROCEDURE

How to report a repair

Repairs must be reported in writing. You can do this by writing to us or by email.

Your report should have a date on it. It should say what repair or work is needed. Please make sure that you identify the room or other part of the property which is affected. You need to tell us as much as you can about the problem(s) which you are experiencing. If the repair is urgent please tell us why.

Acknowledging the report

We will acknowledge any report in writing as soon as possible and, in any event, within [ ] days. Hopefully when acknowledging the report we will be able to tell you what we propose to do. If not, we will tell you as quickly as we can.

Access for repairs

Under your tenancy agreement you are legally obliged to give us reasonable access to carry out the repairs. Unless it is an emergency we are required to give you at least 24 hours notice but you can, of course, agree to us having access without such notice.

Emergency arrangements

We operate the following emergency arrangements if repairs or work is required to your property:-

Please note these facilities should only be used if there is a genuine emergency.

What are we responsible for?

As landlord we are responsible for the repair of the structure and exterior of the property and for certain facilities within it namely water, gas, electricity and drainage, together with space heating and water heating. For full details of our responsibilities please see your tenancy agreement. If we consider that we are not responsible for a requested repair or work then we will notify you in writing.

Following up on requests for repairs

Any follow up enquiries regarding repairs must also be made in writing or by email. If you are not satisfied about the way in which we are handling a request for a repair or works you can follow our complaints procedure.

Responses to repairs

We aim to carry out repairs in the following timescales depending on the urgency and nature of the repairs or works which you request:-

For reasons outside our control we may not be able to adhere to these timescales in which case we will notify you of this and why.