

**Southwark Council**  
**160 Tooley Street**  
**London**  
**SE1 2TZ**

**14 September 2020**

**- OPEN LETTER -**

Dear Sirs,

**RE: SOUTHWARK COUNCIL'S POLICY AND PRACTICE ON OVERCROWDING**

1. We write in order to express our concerns about the council's policy and practice on overcrowding.
2. Having now represented and supported a number of families applying for social housing in the borough, it has come to our attention that the council's housing allocations policy fails to properly and fairly define its priority band and star system on overcrowding. Of particular concern is its definitions and application of 'Deliberate Act' and 'Deliberately Worsening of Circumstances', as well as its criteria for an applicant to be awarded Priority Star for statutory overcrowding.
3. This lack of clarity is leading to a difference in treatment in cases with similar facts, with housing officers being either unable or unwilling to fairly prioritise applicants. As applicants are not being provided with sufficient information, they are unable to properly understand how the scheme works in practice and to assess how their applications are likely to be treated under the scheme.<sup>1</sup>

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<sup>1</sup> HA 1996, s166A(9)(a)(i)

4. Overall, Southwark's housing allocations policy does do a good job at allocating housing according to housing need. However, its policies and practices on overcrowding have been undermining its otherwise effective housing allocations policy.
5. In this letter we outline how the Council has failed to operate its scheme and support families with a housing need and those facing hardship, in a fair, open and transparent manner.
6. Overcrowding and especially statutory overcrowding is a serious housing problem in the borough of Southwark as well as across the country. A recent report showed that [3.6 million people are living in overcrowded housing in England](#). BAME households face additional discrimination accessing housing shown in the disgraceful statistics that [while only 2% of White British households are overcrowded, 30% of Bangladeshi households and 15% of Black African households are](#). This housing crisis has been caused by welfare cuts, high private rents, and a desperate shortage of 3, 4, 5 bedroom high quality council homes. Housing allocations policies and their implementation should be framed to support these vulnerable families not to blame them.

### **Deliberate Act**

7. As the council is aware, Band 1 of the scheme includes those applicants who are statutorily overcrowded as defined by Part X of the 1985 Act and have not caused this statutory overcrowding by a 'deliberate act'.<sup>2</sup> The council refers to situations where overcrowding was not caused by a 'natural increase' i.e. due to the birth of a child.
8. The council's usual practice has been for all overcrowded households (both statutory overcrowded and non-statutory overcrowded) to be placed into Band 3. Families who are statutory overcrowded would then have to apply for Band 1 for statutory overcrowding and for a priority star for statutory overcrowding themselves. If statutory overcrowded families have been deemed to have caused their overcrowding by a 'deliberate act' because they could only access statutory overcrowded accommodation in the first instance, then they are told that they are not eligible for Band 1 and will remain in Band 3 but are awarded

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<sup>2</sup> London Borough of Southwark Housing Allocations Policy, at 6.2

a priority star for statutory overcrowding (to differentiate those families from those who are less overcrowded).

A standard decision letter would be sent to families as follows:

*At the start of your tenancy you was aware of your family composition and therefore we would consider moving into this property a deliberate act.*

*Based on this information we would not consider your household for inclusion in the priority band 1 category*

*Your household will remain in priority band 3 as a household residing in overcrowded conditions.*

9. We have two concerns about the Council's policy on 'deliberate act'; (i) that it has the effect of penalising households from low income backgrounds, particularly BAME and migrant households and (ii) that in some cases, families are wrongly being allocated to Band 4 rather than Band 3 of its scheme.

i. Penalising households from low income and BAME and migrant backgrounds

10. The council is seeking to penalise households from low income backgrounds who simply cannot afford or access less overcrowded accommodation and require support in order to relieve them of that overcrowding, by arguing that they have caused their overcrowding 'deliberately'. BAME and migrant households face additional barriers, reinforced by the government's racist Right to Rent policy, when it comes to accessing decent housing. Again, on a literal and common-sense reading of the scheme, it cannot be said that these families have caused their overcrowding by a 'deliberate act' and therefore they ought to be allocated to Band 1 of the scheme accordingly. Applying 'deliberate act' in this way (differentiating statutory overcrowded families between those whose statutory overcrowding is considered 'natural' and those whose is not by suggesting the latter have 'deliberately' put their families in severely overcrowded accommodation) is unfair, offensive and fails to appreciate the impossible circumstances families now find themselves in as a result of high private rents, low wages, benefit cuts, widespread discrimination in the private rented sector, and a desperate shortage of social housing.

### *Case Study A*

A lives in a studio flat with his partner and two children. The family are desperate for more suitable accommodation their overcrowding having a significant impact on their mental and physical health.

A had no other choice but to move into his current accommodation which is statutory overcrowded. All other landlords and agents had asked him to provide a year's worth of payslips demonstrating full-time work. This was impossible for A as he had only been working for 7 months and his wife had also only just started working. A was only able to move into his current accommodation with the help from his church; the pastor having persuaded the landlord to allow the family to rent the property with 1 month's deposit and 1 month's rent up front (other landlords had requested 5 months' rent upfront). A's current accommodation was also all he could afford. The family tried looking for two-bedroom flats, but the prices started at around £1,600 a month – which was way more than A could afford with his income at the time and after the family's outgoings, including the need to send a significant amount of money back to his elderly parents and his wife's sick mother. To therefore suggest that A 'deliberately' caused his family to live in overcrowded and unsuitable living conditions is therefore inaccurate. They moved into the only accommodation they could find when facing imminent eviction. As A explains:

*'it is inaccurate to say that we could have found suitable accommodation in November 2016 when we were evicted... we could barely afford one-bedroom properties, but most landlords and agents were not willing to rent them to entire families. They also asked for lots of rent up front and for extensive evidence of employment which we did not have. We had very little time and two children, so had to settle for whatever we could get. In no way would we have chosen such a small property in other circumstances: we had no choice at the time.'*<sup>3</sup>

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<sup>3</sup> Ibid, at para 45

A's 17-year-old daughter explains the impact of overcrowding on her:

*It affects our studies because the flat is too small. Because we have the beds and the kitchen next to each other and we just have a small table where we eat and do our homework. Whilst my mum is doing the food, I am trying to do my homework and it is really distracting and really stressful. My brother is playing too so it is hard to focus. Because everything is together in one room, there is the smell of food when I'm trying to sleep this means that it affects my studies as well because I cannot sleep well.*

*It is so stressful, my head cannot focus. I have to just go outside the flat to get some air to deal with the stress because the flat is too small, I cannot think in there. I don't have any privacy, to change my clothes I have to go to change in the toilet and it is really uncomfortable.*

*I can't bring my friends home because it is too small – my parents are there and my brother is there. My friends could not fit inside. So I have to go to the park to meet with them which is dangerous because it is dark at the moment.*

*I feel really bad because it is like the treatment of [by the council] us is racist, they are being really strict to us, they don't care about the family. Sometimes it feels like really embarrassing for us to apply for housing. We are immigrants so applying for housing makes us feel embarrassed, every time they say no to us, you cannot apply for housing. But we feel like Southwark is our home. I have my friends here, my church, I go to the gym to relax and get away from the flat. I do volunteering which makes me feel good.*

*It feels like we're treated like we have done a crime because of the way they have treated our case. They are asking us for so many documents about all our life.*

*The council need to know that it is important to think of the families of young people, they need to focus on young people, we see the problems of knife crime, because maybe these situations affect them. I have friends applying for housing and they feel bad and have bad influences, they are in a space where they don't do well and that is related to their housing.*

#### Case Study B

Another example of the inappropriate and harmful use of 'deliberate act' which in turn disproportionately affects BAME and migrant families can be seen in B's case.

B is living in a small bedsit with her husband and 2 young children. The severe overcrowding means that they meet the legal definition of statutory overcrowding. B originally moved into the bedsit as a single woman but as her family grew, they became overcrowded. She applied for band 1 for statutory overcrowding which would allow her family the urgent move they needed to a bigger council home.

B was distraught when she received a decision letter from the council saying that she had caused the overcrowding by 'deliberate act' when her husband returned to their family home. He had

been unlawfully deported by the Home Office years ago. The council deemed that when he returned back home to his family, this was a 'deliberate act' to cause statutory overcrowding and therefore they did not qualify for band 1. It is certainly one of the worst and most cruel and hurtful decisions we have seen. For B, the council was raising a past traumatic incident in order to deny her family decent housing. She explained: "I feel like they [the council] hate me." The family were being wrongly punished twice. Understandably, B almost wanted to give up challenging the council, but with the help of lawyers, she was able to overturn the decision. The council did not apologise for the distress they caused.

*ii. Allocating 'deliberate act' households to Band 4 (rather than Band 3)*

11. Notwithstanding our concerns above, even in accordance with the Council's policy, many applicants who are deemed to have caused their overcrowding by a 'deliberate act', are wrongly being allocated to Band 4, rather than Band 3.
12. As the council is aware, Band 3 includes those applicants who are overcrowded but who are not statutorily overcrowded as defined by Part X of the 1985 Act.<sup>4</sup> The Defendant's policy is silent on the circumstances in which an applicant is eligible for Band 3 on the basis of his or her overcrowding. Therefore, in accordance with the Council's policy, any applicants who are not placed in Band 1 as a result of the 'deliberate act' provision, ought to be allocated to Band 3.
13. We note that this is the council's official position. In the recent case of R (oao Flores) v London Borough of Southwark,<sup>5</sup> and in response to the most recent pre-action letter in the proposed claim of R (oao Milton Laines Roman) v London Borough of Southwark, the council whilst may have relied on the 'deliberate act' provision, allocated those households to Band 3 (though it is worth noting that in the latter case it took the threat of judicial review for the council to do so).
14. Not only is the council's approach to 'deliberate act' leading to differential treatment amongst applicants in similar situations (with some households being placed in Band 3 and others in Band 4), but it also leads to statutory overcrowded families being treated less favourably than other less overcrowded households who are placed in Band 3 but who came to be overcrowded for the very same reasons.

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<sup>4</sup> Ibid

<sup>5</sup> [2020] EWHC 1279 (Admin)

## Deliberately Worsening of Circumstances

15. The ‘deliberately worsening of circumstances’ provision which allows the council to reduce an applicant’s priority or prevent them from accessing the housing register altogether, is being wrongly applied in many cases. The council has been known to only overturn these decisions after a threat of judicial review proceedings (rather than through its internal reviews process).
16. The council’s policy is that where there is clear evidence and a conclusion can properly be drawn that an applicant has deliberately made worse their circumstances in order to achieve higher priority on the register or to qualify to join the housing register, then reduced priority will be given.<sup>6</sup> The Defendant’s policy includes ‘moving from a secure tenancy or settled accommodation to insecure or less settled or overcrowded accommodation’ and ‘deliberately overcrowding property by moving in friends and/or other family members who have never lived together previously and/or have not lived together for a long time, then requesting re-housing to larger accommodation.’
17. The wording of the policy is clear, and an applicant clearly needs to be in a position to properly understand the housing allocations policy in order to exploit it. In four years of supporting people with their housing register bidding accounts and helping them to understand Southwark council’s housing allocations policy, we have never seen anyone placed into Band 4 for worsening circumstances.
18. However, recently there has been a sudden change in decision making and the council appears to have developed a culture of refusal and has started to argue that families deliberately worsened their circumstances in order to gain an advantage on the housing register, in circumstances where those families:
  - i. Had no understanding of the scheme, overcrowding or statutory overcrowding. This is unsurprising given that many of the families affected are from migrant backgrounds and have difficulty speaking and understanding English. Indeed, understanding the complexities of the council’s allocations policy (which for the reasons set out above) is confusing and complicated enough even if you do speak

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<sup>6</sup> Ibid, at 5.24.1

English as your first language and like us advise on and support client's in challenging decisions in these areas;

- ii. Moved into *less* overcrowded accommodation than they were in previously, and therefore cannot be said to have *worsened* their circumstances; and/or
- iii. Moved into their overcrowded housing years before applying to join the council's housing register and were only made aware of their rights under the Scheme when finding out about and meeting with HASL.

19. A Freedom of Information request submitted in August 2019 and responded to in September 2019 shows that in the last 12 months 'less than 10' households have been placed in Band 4 for deliberately worsening circumstances. As a relatively small volunteer-led community group, we have encountered three of these decisions, some of which were only overturned when the council were threatened with legal action.

20. The council also regularly conflates the 'deliberately worsening of circumstances' with 'deliberate act' and this confusion is reflected in recent decision-making. Many of the families we have represented and supported who did not fit into Band 1 due to the council's application of 'deliberate act' were first allocated to Band 3 of the council's Scheme. The council then however placed those families in Band 4 and in so doing relied on them having been aware that their living conditions were overcrowded when they moved in (thereby causing his overcrowding by a 'deliberate act'.) The council therefore is in many cases relying on that *same* reasoning in order to reduce their priority from Band 1 and then again due to them allegedly having 'deliberately worsened their circumstances.'

21. The Council's practice is unfair and leads to irrational results because:

- a. Statutory overcrowded households from low income backgrounds who simply cannot afford suitable / less overcrowded accommodation are in effect being penalised *twice* on the same basis under the scheme (once preventing them from being allocated to Band 1, and again in reducing their priority further, to Band 4).
- b. It leads to statutory overcrowded families being treated less favourably than other less overcrowded households who are placed in Band 3 but who came to be overcrowded for the very same reasons, and in the same way as those who

understand how the scheme works and who have deliberately orchestrated their circumstances and moved into overcrowded housing with a clear intention of gaining advantage on the housing register (which is precisely the kind of situation that the ‘deliberately worsening of circumstances’ provision is designed to protect against). This latter example is an incredibly rare occurrence which we have never come across.

22. In the recent case of R (oao Flores) v London Borough of Southwark,<sup>7</sup> and in response to the most recent pre-action letter in the proposed claim of R (oao Milton Laines Roman) v London Borough of Southwark (albeit after the threat of judicial review proceedings), the council whilst may have relied on the ‘deliberate act’ provision, ultimately did not seek to use that same argument to suggest that those persons who move into overcrowded accommodation have by default deliberately worsened their circumstances in order to benefit under the scheme.

23. Whilst we therefore note that the council’s official position is that these families ought to be allocated to Band 3 rather than Band 4, in practice many families are still being allocated to Band 4 and are only placed in Band 3 after threat of judicial review action. It should not take this for families to be properly and fairly prioritised in accordance with the council’s scheme.

### **Priority Star System**

24. For the last four years, the council’s position has been that statutory overcrowded families who are not awarded Band 1 due to causing their overcrowding by what the council deems a ‘deliberate act’, and are placed in Band 3, are also awarded a priority star for statutory overcrowding to reflect their high housing need within that Band (this makes sense in order to prioritise statutory overcrowded families above those who are less overcrowded). However, since 2018 we have seen that in 7 cases those families are not being fairly prioritised as the council are refusing to award a priority star for statutory overcrowding relying twice on the family causing their overcrowding by a ‘deliberate act’.

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<sup>7</sup> [2020] EWHC 1279 (Admin)

25. However, the council's allocations policy clear that a priority star will be awarded to people who are occupying unsanitary or statutory overcrowded housing (as defined by Part X of the Housing Act 1985) or otherwise living in unsatisfactory housing conditions.<sup>8</sup> The priority star for statutory overcrowding has no additional qualifying criteria except being statutorily overcrowded.<sup>9</sup> Unlike in Band 1, there is no mention of an applicant being prevented from acquiring this star through a 'deliberate act.' In other words, in accordance with the Defendant's powers under s166A(3) of the 1996 Act, the priority star for statutory overcrowding is intended to give additional preference to all statutory overcrowded households as well as other households living in unsanitary or unsatisfactory housing conditions.
26. It is for this reason that in often lengthy decision letters, the council do not quote its policy when refusing to award a priority star for overcrowding.
27. We note from a recent decision that the council appears to have reverted back to its usual decision-making in this area, and are now correctly awarding a priority star for statutory overcrowding, including in cases where households do not meet the criteria for Band 1 (and are instead placed in Band 3).
28. However, the inconsistent and haphazard approach to decision making supports our feeling that the few refusals that we have seen are indicative of a practice adopted by some housing officers to unfairly and unlawfully reduce the priority of as many families as possible, which encourages others to follow suit. Something must be done to ensure that this does not happen again in the future.
29. Finally, while many overcrowded families are facing difficulties accessing the correct band and priority star, in the face of refusals and demotions to band 4, there are many overcrowded households who do not meet the council's 5 year local connection criteria and therefore cannot access the housing register at all. We urge the council to rethink their 5 year local connection criteria and return to the original 6 month local connection criteria in order to effectively tackle the issue of overcrowding in Southwark.

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<sup>8</sup> Ibid

<sup>9</sup> Ibid, at 5.2.2

## Action required

30. In light of the above, the council has failed to:

- a. Properly define its criteria and indicate how that criteria will/is likely to be applied in cases involving overcrowding.<sup>10</sup>
- b. Provide families with sufficient information regarding the Scheme, in order to enable them to properly understand how the scheme works in practice and to assess how their applications are likely to be treated under the scheme.<sup>11</sup>
- c. Treat all applications from overcrowded households in a fair and consistent way (and has instead unfairly blamed them for their overcrowding by arbitrarily demoting them to Band 4).
- d. Implement the allocations policy so as to ensure that statutory overcrowded households' high housing needs are reflected in their position on the housing register. These households should clearly qualify for Band 3 and a priority star for statutory overcrowding as a minimum reflecting their 'additional preference' due to their high housing need.

31. We therefore ask that in light of these failures the council:

- a. Removes the concept of 'deliberate act' from its policy, so as to support rather than penalise low income families;
- b. Confirms that in accordance with the allocations scheme, decisions will only be made that an applicant has deliberately worsened their circumstances, in the rare circumstance that an applicant has clearly and deliberately made worse their circumstances in order to gain an advantage on the housing register - sending a clear message to housing officers to that effect, and highlighting the issues with their current practice as noted at Para 17 of our letter when doing so; and
- c. In accordance with its allocations scheme, makes clear to its housing officers that a priority star must be awarded to all statutory overcrowded households.

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<sup>10</sup> R (Cali) v Waltham Forest London Borough Council [2006] EWHC 302 (Admin), [2007] HLR 1, Admin Ct at [31] and R (Lin) v Barnet London Borough Council [2007] EWCA Civ 132, [2007] HLR 30, CA

<sup>11</sup> HA 1996, s166A(9)(a)(i)

We ask that the Council amends its policies and practices as a matter of urgency to ensure that overcrowded and statutory overcrowded households are given the correct and fair banding and priority star according to their housing need instead of fuelling a culture of blame and refusal.

We ask that a substantive response to this letter is received no later than **28 September 2020**.

In the meantime, should you have any queries, please contact Ms Helen Mowatt and/or Housing Action Southwark and Lambeth by email to [Helen.mowatt@pilc.org.uk](mailto:Helen.mowatt@pilc.org.uk) / [haslcases@gmail.com](mailto:haslcases@gmail.com)

Yours faithfully,

**PILC and HASL**

35% Campaign

English for Action

Feminist Fightback

Focus E15

GT Stewart Solicitors

Haringey Housing Action Group

Labour Homelessness Campaign

Latin American Women's Rights Service (LAWRS) (Gisela Valle, Director)

Latin Elephant

Ledbury Action Group

New Economics Foundation

New City College Hackney (UCU Branch Committee)

New Covenant Church Bermondsey - Spanish Branch. Pastor Carlos Toledo Caldas

North East London Migrant Action (NELMA)

Our Future Now

Rainbow Collective

Save Nour

Social Housing Action Campaign

South Camberwell Mutual Aid

Southwark Group of Tenants Organisations (SGTO)

Southwark Law Centre

Streets Kitchen (Grassroots Homeless Group)

Unite (Housing Workers Branch)

Anela Anwar, CEO of Z2K (Zacchaeus 2000 Trust)

Dr Clare Andrews, Medact London

Gargi Bhattacharyya, Chair of UCU at University of East London and Trade Union Congress race relations committee.

Sean Rowlands, Vice president of City UCU

Dr Sita Balani, King's College London

Warren Lee, Southwark Day Centre for Asylum Seekers

William Flack, Assistant Solicitor at Morrison Spowart Solicitors